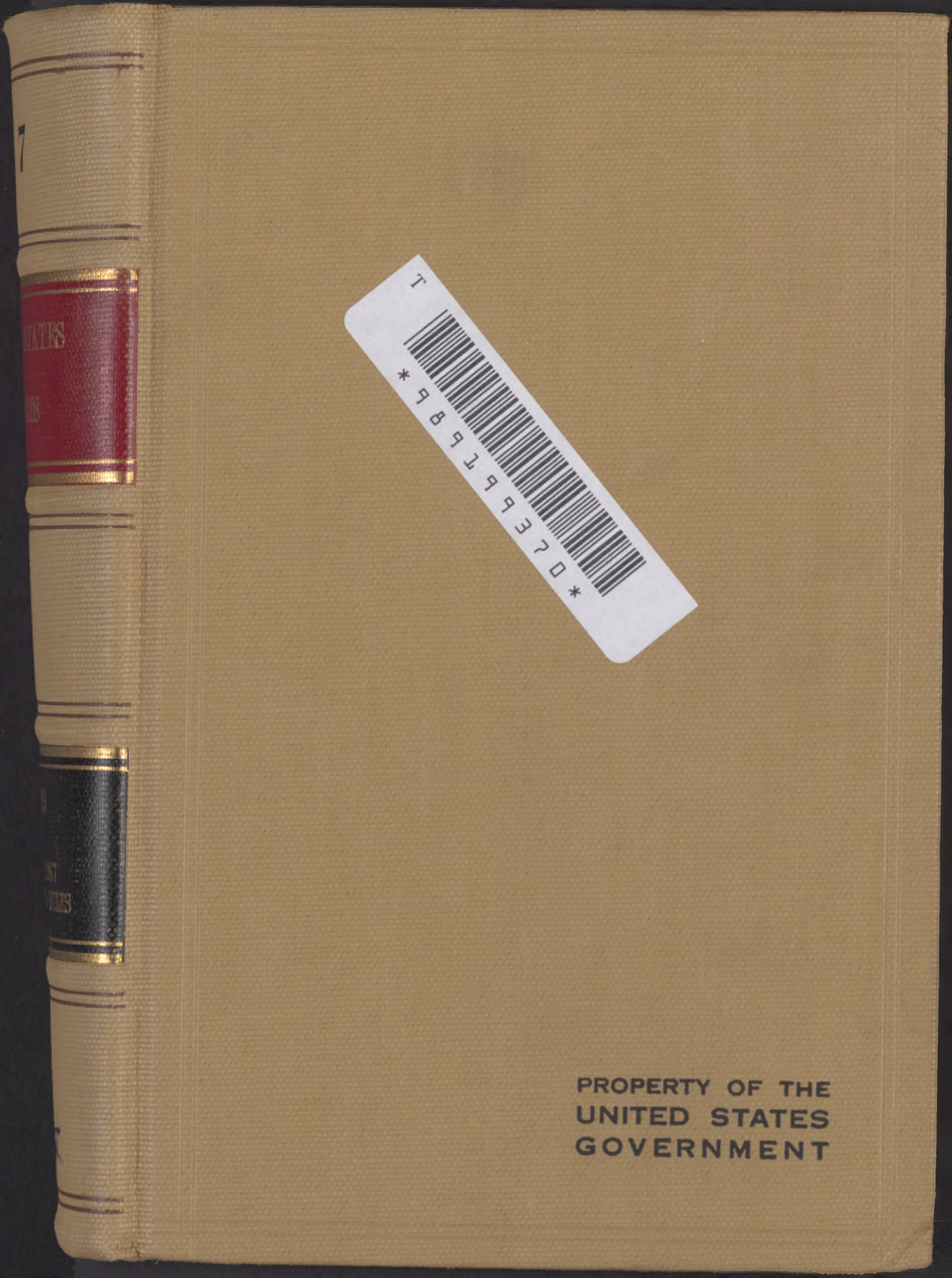
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UNITED STATES REPORTS

VOLUME 389

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1967

OCTOBER 2, 1967 (BEGINNING OF TERM)
THROUGH JANUARY 15, 1968

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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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.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ABE FORTAS, Associate Justice.
THURGOOD MARSHALL, Associate Justice.[1]

RETIRED.

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.[2]

RAMSEY CLARK, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.[3]
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

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* Notes on p. IV.

NOTES.

[1] THE HONORABLE THURGOOD MARSHALL, of New York, Solicitor General, was nominated by President Johnson on June 13, 1967, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on August 30, 1967; he was commissioned on the same date; he took the Constitutional Oath on September 1, 1967, and the Judicial Oath and his seat on October 2, 1967. See also *post*, p. VII.

[2] Mr. Justice Clark retired effective June 12, 1967. See also 388 U. S. v.

[3] The Honorable Erwin N. Griswold, of Massachusetts, was nominated by President Johnson to be Solicitor General on September 30, 1967; the nomination was confirmed by the Senate on October 12, 1967; he was commissioned on the same date, and took the oath on October 23, 1967. See also *post*, p. XI.

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, ABE FORTAS, 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, THURGOOD MARSHALL, 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 9, 1967.

(For next previous allotment, see 382 U. S., p. v.)

APPOINTMENT OF MR. JUSTICE MARSHALL.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 2, 1967.

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

THE CHIEF JUSTICE said:

The 1967 Term of the Supreme Court of the United States is now convened, and thankfully with a full Court.

As was announced on June 12, 1967, the last day of the 1966 Term, Justice Clark retired after 18 years of distinguished service on the Court. While we still feel the loss of his wisdom and companionship, the felicitous reason for his retirement compels us to forgo the regret which we would otherwise have.

Happily, during the summer recess, the President, with the advice and consent of the Senate, has appointed the Honorable Thurgood Marshall of New York an Associate Justice of the Supreme Court to succeed Justice Clark.

Justice Marshall has taken the Constitutional Oath administered by Mr. Justice Black. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal of the Court will escort him to his seat on the Bench.

The Clerk then read the commission as follows:

LYNDON B. JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Thurgood Marshall of New York, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Thurgood Marshall during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this thirtieth day of August, in the year of our Lord one thousand nine hundred and sixty-seven, and of the Independence of the United States of America the one hundred and ninety-second.

[SEAL] LYNDON B. JOHNSON

By the President:

RAMSEY CLARK

Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE MARSHALL was escorted by the Marshal to his seat on the Bench.

The oaths taken by MR. JUSTICE MARSHALL are in the following words, viz.:

I, Thurgood Marshall, do solemnly swear that I will support and defend the Constitution of the United States

against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

THURGOOD MARSHALL.

Subscribed and sworn to before me the 1st day of September, A. D. 1967.

HUGO L. BLACK,
Associate Justice.

I, Thurgood Marshall, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

So help me God.

THURGOOD MARSHALL.

Subscribed and sworn to before me this 2d day of October, A. D. 1967.

[SEAL] JOHN F. DAVIS,
Clerk of the Supreme Court of the United States.

PRESENTATION OF SOLICITOR GENERAL.

SUPREME COURT OF THE UNITED STATES.

MONDAY, NOVEMBER 6, 1967.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL.

Mr. Attorney General Clark presented the Honorable Erwin N. Griswold, of Massachusetts, Solicitor General of the United States.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important duty with which you are specially charged, the duty of representing the Government at the Bar of this Court in all cases in which it asserts an interest. Your commission will be recorded by the Clerk.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1967.

BOHANNAN *v.* ARIZONA EX REL. SMITH, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 204. Decided October 9, 1967.

101 Ariz. 520, 421 P. 2d 877, appeal dismissed.

John P. Frank for appellant.

Darrell F. Smith, Attorney General of Arizona, and *Gary K. Nelson,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dispense with printing the motion to dismiss is granted. The motion to dismiss is also granted and the appeal is dismissed for want of a properly presented federal question.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, dissenting.

Appellee applied in the court below for a writ of *quo warranto.* The petition asked that appellant be ousted "from the office he presently holds as Member of the State Board of Public Welfare of the State of Arizona, and [that] his office [be declared] vacant so that

a successor may be qualified as provided by law." Appellee referred in its petition and brief to Ariz. Rev. Stat. § 38–447, which provides that any official who violates the statutory prohibition against having an interest in contracts made by him in his official capacity "shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding any office in this state." Appellee, however, asked the court below only to require appellant "to show cause why his position as a Member of the State Board of Public Welfare should not be declared vacant and why he should not be found to unlawfully hold said office, so that a successor may be qualified as provided by law."

Appellant filed a motion to quash the application on the ground that under the statutory scheme removal from office could be imposed only upon one who had been found guilty in a criminal proceeding of violating the statutory provisions. That motion was denied. Appellant then answered the application, acknowledging that certain mortgage transactions between the Arizona Retirement Board and the Associated Mortgage and Investment Company took place while he was a member of the former and president and director of the latter. Oral argument was denied, the case being decided on the briefs.

Up to that point, therefore, the matter was presented as a question of state law—it was contended that the state statutes did not permit removal from office prior to a criminal conviction. The court, however, not only ruled that appellant should be excluded from his office as a Member of the State Board of Public Welfare but also "forever disqualified from holding any public office in the State of Arizona." To reach this conclu-

sion, the court construed the Arizona statutes to require a criminal conviction if a fine or imprisonment were to be imposed on the public official, but only a "judicial determination of the fact upon which the disqualification rests," if disqualification were the sanction to be imposed. The *quo warranto* proceeding before the court was held to offer a sufficient "judicial determination of the fact" to exclude appellant from the office he held and to bar him permanently from public office.

In his petition for rehearing appellant challenged on federal constitutional grounds the court's use of the civil *quo warranto* proceeding to disqualify him permanently from public office. He asserted that the statute, as construed by the court, permitted the permanent barring of a person from public office in a civil proceeding lacking vital elements of due process. Appellant also contended that the statute, as construed, constituted a bill of attainder since it operated to inflict punishment without the constitutional safeguards of a judicial trial.

It seems obvious that until the court had interpreted the statute in appellant's case to allow permanent disqualification in a *quo warranto* proceeding in which the petition asked only for a show-cause order and that appellant be discharged from his present office, appellant had, as a practical matter, no reason to raise the federal claims he presents to this Court. Appellee did not ask for a declaration of permanent disqualification in its petition for *quo warranto*. The Arizona statute that expressly provides for the judgment to be entered in a *quo warranto* case, Ariz. Rev. Stat. § 12–2045, does not mention permanent disqualification from office. That section provides only that "when a defendant is adjudged guilty of usurping or intruding into or unlawfully holding an office, franchise or privilege, judgment shall be given that the defendant be excluded from the office, franchise

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or privilege. The court may also impose upon defendant a fine not exceeding two thousand dollars, which, when collected, shall be paid into the state treasury."

If a federal question arises because of an unexpected construction of a state statute by the highest state court, the question is timely raised for purposes of review by this Court if it is presented in the petition for rehearing. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673.

A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not. Such a declaration sweeps broadly and may destroy the individual's right to a livelihood in the field of his greatest competence. The serious nature of any such holding demands that the rules of procedural due process be complied with strictly. I believe that the issues raised are substantial and were properly presented below. Probable jurisdiction should be noted, or at the very least we should take the case and hear it argued, postponing the question of jurisdiction to the merits.

BRENNER, COMMISSIONER OF PATENTS *v.* HOFSTETTER.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

No. 46. Decided October 9, 1967.

53 C. C. P. A. (Pat.) 1545, 362 F. 2d 293, vacated and remanded with directions to dismiss the appeal as moot.

Solicitor General Marshall, Assistant Attorney General Sanders and *Morton Hollander* for petitioner.

Paul N. Kokulis and *Lawrence A. Hymo* for respondent.

PER CURIAM.

Upon consideration of the respondent's suggestion of mootness the judgment is vacated and the case is remanded to the United States Court of Customs and Patent Appeals with directions to dismiss the appeal to that court as moot.

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

KELLY *v.* LANE, WARDEN.

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

No. 256, Misc. Decided October 9, 1967.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed for want of jurisdiction.

TV PIX, INC., ET AL. *v.* ALLARD ET AL., COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF NEVADA.

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

No. 79. Decided October 9, 1967.

Vacated and remanded.

George M. McMillan and *Paul A. Richards* for appellants.

Harvey Dickerson, Attorney General of Nevada, for appellees.

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court to give that court an opportunity to consider the appellants' motion to file a supplemental complaint based upon changes in the relevant Nevada law.

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

STRICKLAND *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 269, Misc. Decided October 9, 1967.

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.

PETRONIA ET AL. *v.* ALASKA.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 108. Decided October 9, 1967.

69 Wash. 2d 460, 418 P. 2d 755, appeal dismissed.

J. Duane Vance for appellants.

Edgar Paul Boyko, Attorney General of Alaska, for appellee.

PER CURIAM.

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

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

MORGAN ET AL., DBA M & T GUM MACHINE CO. *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 170. Decided October 9, 1967.

280 Ala. 414, 194 So. 2d 820, appeal dismissed and certiorari denied.

Robert B. Stewart for appellants.

MacDonald Gallion, Attorney General of Alabama, and *Willard W. Livingston* and *William H. Burton,* Assistant Attorneys 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.

LATTIMER *v.* CRYSTAL CLEAR, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 235. Decided October 9, 1967.

Appeal dismissed and certiorari denied.

Leonard P. Henderson for appellant.

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.

NEW JERSEY CHAPTER, AMERICAN INSTITUTE OF PLANNERS, ET AL. *v.* NEW JERSEY STATE BOARD OF PROFESSIONAL PLANNERS ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 273. Decided October 9, 1967.

48 N. J. 581, 227 A. 2d 313, appeal dismissed and certiorari denied.

Roberts B. Owen and *John W. Douglas* for appellants.

Arthur J. Sills, Attorney General of New Jersey, and *Elias Abelson,* Deputy Attorney General, for New Jersey State Board of Professional Planners, and *Adrian M. Foley, Jr.,* for Goodkind et al., 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.

NELLES *v.* BARTLETT, SUPERINTENDENT OF PUBLIC INSTRUCTION OF MICHIGAN, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 327. Decided October 9, 1967.

Appeal dismissed and certiorari denied.

S. James Clarkson for appellant.

Frank J. Kelley, Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Eugene Krasicky,* Assistant Attorney General, 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.

WATSON, DBA MAINE-WIDE ADJUSTERS *v.* STATE OF MAINE COMMISSIONER OF BANKING.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE.

No. 332. Decided October 9, 1967.

223 A. 2d 834, appeal dismissed.

Sanford Jay Rosen, Marvin Karpatkin, Melvin L. Wulf and *Malcolm S. Stevenson* for appellant.

James S. Erwin, Attorney General of Maine, *George C. West,* Deputy Attorney General, and *Jerome S. Matus,* 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.

HAMRICK *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 345. Decided October 9, 1967.

281 Ala. 150, 199 So. 2d 849, appeal dismissed.

William B. McCollough, Jr., for appellant.

MacDonald Gallion, Attorney General of Alabama, and *Robert P. Bradley* and *Walter S. Turner*, Assistant Attorneys General, for appellee.

PER CURIAM.

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

SMITH *v.* ARIZONA.

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

No. 26, Misc. Decided October 9, 1967.

Certiorari granted; 98 Ariz. 45, 401 P. 2d 739, vacated and remanded.

Darrell F. Smith, Attorney General of Arizona, and *Carl Waag*, 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 Arizona in light of *Anders* v. *California*, 386 U. S. 738.

MR. JUSTICE BLACK and MR. JUSTICE STEWART dissent.

RHOADES ET AL. *v.* SCHOOL DISTRICT OF ABINGTON TOWNSHIP ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 225. Decided October 9, 1967.

424 Pa. 202, 226 A. 2d 53, appeal dismissed.

Franklin C. Salisbury for appellants.

William C. Sennett, Attorney General of Pennsylvania, *John P. McCord,* Deputy Attorney General, and *Edward Friedman* for the Commonwealth of Pennsylvania, and *William B. Ball* for Paul et al., appellees.

PER CURIAM.

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

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

HOHENSEE ET AL. *v.* MINEAR.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 190, Misc. Decided October 9, 1967.

Appeal dismissed and certiorari denied.

Jo V. Morgan, Jr., 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.

COBB *v.* GEORGIA.

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

No. 51, Misc. Decided October 9, 1967.

Certiorari granted; 222 Ga. 733, 152 S. E. 2d 403, reversed.

Jack Greenberg, James M. Nabrit III, Michael Meltsner and *Howard Moore, Jr.*, for petitioner.

Arthur K. Bolton, Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, *Marion O. Gordon,* Assistant Attorney General, and *George D. Lawrence,* Solicitor 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 reversed. *Whitus* v. *Georgia,* 385 U. S. 545.

PHILLIPS *v.* INDIANA.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 288, Misc. Decided October 9, 1967.

— Ind. —, 222 N. E. 2d 821, appeal dismissed.

William C. Erbecker for appellant.

PER CURIAM.

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

TROUTT *v.* CARL K. WILSON CO. ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 57, Misc. Decided October 9, 1967.

219 Tenn. 400, 410 S. W. 2d 177, appeal dismissed and certiorari denied.

Thomas F. Turley, Jr., for appellant.

W. L. Moore and *W. D. Dodson* for appellee Burson, Commissioner of Employment Security for the State of Tennessee.

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.

GARVIN *v.* MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 74, Misc. Decided October 9, 1967.

351 Mass. 661, 223 N. E. 2d 396, 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.

PRICE, DBA HOWARD PRICE & CO. *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY.

No. 176. Decided October 9, 1967.*

Appeals dismissed and certiorari denied.

Carney M. Layne and *Charles W. Yeager* for appellants in both cases.

C. Donald Robertson, Attorney General of West Virginia, and *George H. Mitchell,* Assistant Attorney General, for appellees in both cases.

PER CURIAM.

The motions to dismiss are 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.

THE CHIEF JUSTICE and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.

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*Together with No. 177, *Wetherall et al.* v. *State Road Commission of West Virginia et al.,* also on appeal from the same court.

BITTER *v.* UNITED STATES.

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

No. 201. Decided October 16, 1967.

Because of a single incident of tardiness, the trial judge ordered petitioner into custody for the duration of his criminal trial. The order, made without warning, hearing, or explanation, resulted in the retention of petitioner in custody for the balance of the trial in a jail 40 miles from the courtroom. Petitioner contended that the incarceration was unjustified, that it significantly interfered with his right to counsel, and that it severely impeded his defense. The Court of Appeals affirmed petitioner's conviction. *Held:* The trial court's order was punitive; because the procedures for inflicting punishment had not been followed and because the order could not be justified as having been made in order to facilitate the trial, the order placed an unjustified burden on the defense.

Certiorari granted; 374 F. 2d 744, reversed.

Ray T. McCann for petitioner.

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

PER CURIAM.

Petitioner was tried on 18 counts of violating the mail fraud statute, 18 U. S. C. § 1341, and one count of using an assumed name, a violation of 18 U. S. C. § 1342. On the third day of trial, the Government rested its case. This was earlier than it had announced or than petitioner had anticipated. At recess time petitioner sought leave of the court to go to his office in order to gather additional evidence for the defense. Permission for this was granted. Forty-five minutes were allotted for the recess.

Petitioner, who had previously appeared promptly at every session of the trial, was this time tardy by 37 minutes in returning to court. Without warning, hearing, or explanation, the trial judge ordered petitioner into custody for the balance of the trial. Attempts by petitioner's counsel to offer explanations for petitioner's lateness were to no avail.

Defense counsel was then advised that petitioner would be kept in custody in a county jail located some 18 miles from the court. In fact, petitioner was taken about 40 miles distant, to a different jail. Counsel's endeavors throughout the trial to obtain petitioner's release proved fruitless. Petitioner remained in custody for the duration of the trial. He was convicted on seven counts of mail fraud and given a sentence of one year and one day on each count, the sentences to run concurrently. He was also fined a total of $3,500.

Petitioner contended that his incarceration was unjustified and that it materially interfered with his right to counsel and severely impeded his defense. The Court of Appeals for the Seventh Circuit affirmed the conviction. 374 F. 2d 744 (1967). We grant certiorari and reverse.

A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial.* See *Fernandez* v. *United States,* 81 S. Ct. 642 (1961) (memo-

*It does not appear whether defendant was at large on bail at the time of the order remitting him to custody. But the same principle would apply if he had been at liberty on his own recognizance. Cf. Bail Reform Act of 1966, 18 U. S. C. § 3146 (1964 ed., Supp. II).

randum of MR. JUSTICE HARLAN in chambers); *Carbo* v. *United States,* 288 F. 2d 282 (C. A. 9th Cir. 1961); *Christoffel* v. *United States,* 89 U. S. App. D. C. 341, 196 F. 2d 560 (1951).

The record in this case shows only a single, brief incident of tardiness, resulting in commitment of the defendant to custody for the balance of the trial in a jail 40 miles distant from the courtroom. In these circumstances, the trial judge's order of commitment, made without hearing or statement of reasons, had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial. Punishment may not be so inflicted. Cf. Rule 42 of Fed. Rules Crim. Proc. (governing the contempt power). We therefore hold that the order was unjustified and that it constituted an unwarranted burden upon defendant and his counsel in the conduct of the case.

Accordingly, we grant certiorari and reverse the judgment.

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

ROBERTS *v.* UNITED STATES.

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

No. 330. Decided October 16, 1967.

Court of Appeals *held* to have erred in denying petitioner's alternative motion for an evidentiary hearing in the District Court to determine whether he was prejudiced by monitoring where it had granted his co-defendant, following this Court's remand in *Levine* v. *United States,* 383 U. S. 265, a new trial based on the Government's disclosure that the FBI after the indictment had monitored conversations between the co-defendant and the latter's attorney.

Certiorari granted; 376 F. 2d 993, vacated and remanded.

Thomas F. Call for petitioner.

Acting Solicitor General Spritzer, Assistant Attorney General Vinson and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for certiorari is granted. Petitioner's conviction is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

In proceedings before the Court of Appeals pursuant to our previous remand, *Levine* v. *United States,* 383 U. S. 265, the Court of Appeals granted petitioner's co-defendant Levine a new trial based upon a disclosure by the Government that, after the return of the indictment, agents of the Federal Bureau of Investigation monitored conversations between Levine and Levine's attorney. But the Court of Appeals denied petitioner's motion for the same relief or, alternatively, for a remand to the District Court for an evidentiary hearing to deter-

mine whether he was prejudiced by the monitoring; the Court of Appeals stated, however, that the motion was denied "without prejudice to such application by him to the District Court as may be appropriate." In the circumstances of this case, and in light of the acknowledgment of the Solicitor General in his brief in opposition that "the F. B. I. logs pertaining to the monitored conversations" are available, we think the Court of Appeals erred in denying petitioner's alternative motion for an evidentiary hearing in the District Court. We therefore vacate petitioner's conviction and remand to the District Court with direction to afford petitioner such an evidentiary hearing. Depending upon its findings, the District Court will either reinstate the conviction or order a new trial, as may be appropriate. See *United States* v. *Wade,* 388 U. S. 218, 242.

Vacated and remanded.

MR. JUSTICE BLACK dissents.

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

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WOOD *v.* UNITED STATES.

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

No. 27, Misc. Decided October 16, 1967.

Petitioner before trial filed an affidavit requesting the District Court to assign counsel pursuant to the Criminal Justice Act but the court, without adequate inquiry into petitioner's financial ability to retain counsel, disapproved the request. The Court of Appeals, after granting leave to appeal *in forma pauperis*, affirmed. *Held:* The trial court should have explored the possibility that petitioner could afford only partial payment for the services of trial counsel and that counsel be appointed on that basis as permitted by the Act.

Certiorari granted; 373 F. 2d 894, vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

Petitioner was found guilty by the United States District Court for the Northern District of Georgia of refusing to report for civilian employment, in violation of § 12 of the Universal Military Training and Service Act, 62 Stat. 622, 50 U. S. C. App. § 462. Before trial he filed an affidavit with the court requesting assigned counsel pursuant to the Criminal Justice Act, 18 U. S. C. § 3006A. The court considered the affidavit, questioned petitioner and disapproved the request. The Court of Appeals for the Fifth Circuit granted leave to appeal *in forma pauperis,* assigned counsel to assist petitioner in his appeal and affirmed the conviction. Petitioner seeks a writ of certiorari.

Before this Court the Solicitor General has conceded that the record does not convincingly show that there

was adequate inquiry into the question of petitioner's financial ability to retain counsel, in that "the trial court should have explored the possibility that petitioner could afford only partial payment for the services of trial counsel and that counsel be appointed on that basis, as the Criminal Justice Act permits (see 18 U. S. C. § 3006(A) (c) and (f))." The Solicitor General urges, however, that there is no basis for believing that petitioner suffered prejudice from the District Court's error, an argument we find unpersuasive.

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 Court of Appeals for the Fifth Circuit for reconsideration in light of the Solicitor General's Memorandum and the relevant criteria of the Criminal Justice Act.

MR. JUSTICE BLACK dissents.

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

COLEMAN *v.* ALABAMA.

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

No. 162, Misc. Decided October 16, 1967.

In an evidentiary hearing, following remand, it appeared that until petitioner's trial, no Negro had ever served on a grand jury panel and few, if any, on petit jury panels in the county, and that no Negroes served on the grand jury which indicted petitioner or the petit jury which convicted him. The State presented no rebuttal evidence, and the State Supreme Court's statement that the acknowledged disparity "can be explained by a number of other factors," *viz.*, by Negroes moving out of the county, and some disqualifications for felony convictions, *held* not to rebut petitioner's prima facie case of denial of equal protection of the laws.

Certiorari granted; 280 Ala. 509, 195 So. 2d 800, reversed and remanded.

Jack Greenberg, Michael Meltsner and *Orzell Billingsley* for petitioner.

MacDonald Gallion, Attorney General of Alabama, and *Leslie Hall,* 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.

On our previous remand, we held that petitioner was entitled to "his day in court on his allegations of systematic exclusion of Negroes from the grand and petit juries sitting in his case." 377 U. S. 129, 133. Petitioner was thereupon afforded an evidentiary hearing on his allegations. Although the evidence was in dispute regarding the inclusion of Negroes in the grand and petit jury venires in the county in which petitioner was indicted and tried, it appeared that no Negro served on

the grand jury which indicted or the petit jury which convicted petitioner. It further appeared that up to the time of petitioner's trial, no Negro had ever served on a grand jury panel and few, if any, Negroes had served on petit jury panels. This "testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees." *Norris* v. *Alabama,* 294 U. S. 587, 591. In the absence of evidence adduced by the State adequate to rebut the prima facie case, petitioner was therefore entitled to have his conviction reversed. *Arnold* v. *North Carolina,* 376 U. S. 773; *Eubanks* v. *Louisiana,* 356 U. S. 584; *Reece* v. *Georgia,* 350 U. S. 85, 87–88; *Hernandez* v. *Texas,* 347 U. S. 475, 481; *Hill* v. *Texas,* 316 U. S. 400, 406; *Norris* v. *Alabama, supra.*

On our independent examination of the record, we are unable to discover any evidence adduced by the State adequate to rebut petitioner's prima facie case. The Alabama Supreme Court, in affirming the trial court's denial of relief, acknowledged that the evidence indicated "a disparity" and stated only that "that disparity can be explained by a number of other factors." 280 Ala. 509, 512, 195 So. 2d 800, 802. The only factors mentioned, however, were that Negroes had moved away from the county and that some may have been under the statutory disqualification of having suffered a felony conviction. In the circumstances of this case these factors were not in our view sufficient to rebut petitioner's prima facie case.

The judgment of the Alabama Supreme Court is therefore reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JONES *v.* GEORGIA.

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

No. 174, Misc. Decided October 16, 1967.

Petitioner appealed his murder conviction on the ground, among others, that the evidence of systematic exclusion of Negroes from grand and petit juries established a prima facie case of discrimination under *Whitus* v. *Georgia,* 385 U. S. 545. The Georgia Supreme Court affirmed because "public officers are presumed to have discharged their sworn official duties," and "we can not assume that the jury commissioners did not eliminate prospective jurors on the basis of their competency to serve, rather than because of racial discrimination." *Held:* The State's burden to explain the "disparity between the percentage of Negroes on the tax digest and those on the venires" was not met by reliance on the stated presumptions.

Certiorari granted; 223 Ga. 157, 154 S. E. 2d 228, reversed and remanded.

Wilbur D. Owens, Jr., for petitioner.

Arthur K. Bolton, Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, and *Marion O. Gordon,* 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.

Petitioner appealed his conviction for murder to the Georgia Supreme Court where he sought reversal on the ground, among others, that the evidence relevant to his claim of systematic exclusion of Negroes from the grand and petit juries drawn in the county established a prima facie case of the denial of equal protection within our

decision in *Whitus* v. *Georgia,* 385 U. S. 545.* The Georgia Supreme Court affirmed the conviction stating that *Whitus* was distinguishable because "public officers are presumed to have discharged their sworn official duties. . . . Under the testimony in this case we can not assume that the jury commissioners did not eliminate prospective jurors on the basis of their competency to serve, rather than because of racial discrimination." 223 Ga. 157, 162, 154 S. E. 2d 228, 232.

We hold that the burden upon the State to explain "the disparity between the percentage of Negroes on the tax digest and those on the venires," *Whitus, supra,* at 552, was not met by the Georgia Supreme Court's reliance on the stated presumptions. See *Arnold* v. *North Carolina,* 376 U. S. 773; *Eubanks* v. *Louisiana,* 356 U. S. 584; *Williams* v. *Georgia,* 349 U. S. 375; *Avery* v. *Georgia,* 345 U. S. 559; *Cassell* v. *Texas,* 339 U. S. 282; *Norris* v. *Alabama,* 294 U. S. 587. We therefore reverse the judgment of the Georgia Supreme Court and remand for further proceedings not inconsistent with our opinion.

It is so ordered.

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*The record supports the following comparison of the salient facts in *Whitus* and in petitioner's case:

	Whitus	*Petitioner's case*
Over 21 population	42.6% Negro men	30.7% Negro
Jury Commissioners	White (apparently)	White
Source of juror names	Tax Digests separated and identified as to race	3 Tax Digests, two of which separated and identified as to race
Taxpayers	27.1% Negro	19.7% Negro
Negro jurors	9.1% grand jury venire 7.8% petit jury venire	5.0% of jury list and box (1 Negro was on the grand jury which indicted petitioner)
Rebuttal evidence by State	None	None

SKOLNICK *v.* BOARD OF COMMISSIONERS OF COOK COUNTY ET AL.

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

No. 91, Misc. Decided October 16, 1967.

Vacated and remanded.

William G. Clark, Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for appellees.

PER CURIAM.

The judgment of the District Court is vacated and the cause is remanded in order that the District Court may enter a fresh decree from which appellant may, if he wishes, perfect a timely appeal to the Court of Appeals. *Moody* v. *Flowers,* 387 U. S. 97.

RAYMOND *v.* TOFFANY, COMMISSIONER OF MOTOR VEHICLES OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 572, Misc. Decided October 16, 1967.

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.

UNITED STATES *v.* MERCANTILE TRUST CO. NATIONAL ASSOCIATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 87. Decided October 16, 1967.

263 F. Supp. 340, reversed and remanded.

Solicitor General Marshall and *Assistant Attorney General Turner* for the United States.

James M. Douglas and *William G. Guerri* for appellee Mercantile Trust Co. National Association.

PER CURIAM.

The judgment is reversed and the case is remanded for further proceedings consistent with the opinion of this Court in *United States* v. *First City National Bank of Houston,* 386 U. S. 361.

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

ASSOCIATED PRESS *v.* WALKER.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 306. Decided October 16, 1967.

Certiorari granted; 191 So. 2d 727, reversed and remanded.

William P. Rogers, Leo P. Larkin, Jr., Stanley Godofsky, Arthur Moynihan, Earl T. Thomas, John T. Guyton and *Billy R. Pesnell* for petitioner.

W. Scott Wilkinson and *Clyde J. Watts* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is reversed and the case is remanded for further proceedings not inconsistent with *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurs in the result for the reasons stated in MR. JUSTICE BLACK's separate opinion in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 170.

LORDI, DIRECTOR OF DIVISION OF ALCOHOLIC BEVERAGE CONTROL, DEPARTMENT OF LAW AND PUBLIC SAFETY OF NEW JERSEY *v.* EPSTEIN ET AL., TRADING AS STRATFORD INTERNATIONAL TOBACCO CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 322. Decided October 16, 1967.

261 F. Supp. 921, affirmed.

Arthur J. Sills, Attorney General of New Jersey, and *Joseph A. Hoffman,* Assistant Attorney General, for appellant.

Charles H. Tuttle for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. Cf. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would note probable jurisdiction and set the case for oral argument.

LESTER C. NEWTON TRUCKING CO. *v.* UNITED STATES ET AL.

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

No. 328. Decided October 16, 1967.

264 F. Supp. 869, affirmed.

H. Charles Ephraim for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *John E. Faulk* for the United States et al.

PER CURIAM.

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

MR. JUSTICE HARLAN and MR. JUSTICE WHITE would note probable jurisdiction and set the case for oral argument.

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

PINTO, PRISON FARM SUPERINTENDENT *v.* PIERCE.

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

No. 284. Decided October 23, 1967.

The Federal District Court granted respondent's petition for a writ of habeas corpus, holding that a hearing of testimony by the state trial court, in the jury's presence, regarding the voluntariness of an incriminating statement sought to be introduced by the prosecution, violated respondent's constitutional rights. The Court of Appeals affirmed. Respondent had not objected to the procedure, and after the evidence regarding voluntariness had been heard, the court had ruled the statement voluntary. *Held:* Previous cases in this Court have not determined that voluntariness hearings must necessarily be held out of the jury's presence, and where, as here, respondent's counsel consented to the procedure used, and the judge found the statement voluntary, respondent was deprived of no constitutional right.

Certiorari granted; 374 F. 2d 472, reversed and remanded.

Thomas P. Ford, Jr., for petitioner.

PER CURIAM.

Respondent was indicted by the grand jury of Essex County, New Jersey, on July 2, 1959, for the crime of robbery while armed. Following a plea of not guilty, he was tried before a jury, convicted and sentenced to a term of from 16 to 23 years in the New Jersey State Prison. On June 6, 1966, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. The District Judge determined from the transcript of respondent's trial that the trial court had heard in the presence of the jury testimony regarding the voluntariness of an incriminating statement sought to be introduced by the prosecution, held that under prior decisions of this Court this procedure violated respondent's constitutional rights and

granted the writ. The Court of Appeals for the Third Circuit affirmed, and petitioner, the Superintendent of the New Jersey State Prison Farm, seeks a writ of certiorari.

The petition for certiorari is granted and the judgment is reversed. This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. *Jackson* v. *Denno,* 378 U. S. 368 (1964), held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury.[1] In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury. In addition, there is no claim that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent.[2]

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[1] The New Jersey Supreme Court has recently announced that from September 11, 1967, hearings on admissibility shall be outside the presence of the jury if the defendant so requests. See *State* v. *Broxton,* 49 N. J. 373, 386, n. 2, 230 A. 2d 489, 496, n. 2 (1967).

[2] In *United States* v. *Carignan,* 342 U. S. 36 (1951), relied upon by the trial court, reversal of a conviction was affirmed because the trial judge, after hearing some evidence concerning voluntariness with the jury present, refused to permit the defendant to testify on the subject.

The other cases cited by the District Court granted writs of habeas corpus in cases in which trial judges had made no independent determination of voluntariness. See, for the citations to those cases, *United States ex rel. Pierce* v. *Pinto,* 259 F. Supp. 729, 731 (D. C. N. J. 1966).

Finally, it is clear that the respondent in this case did not object to having the voluntariness of his admission considered in the presence of the jury. At his trial the court asked defense counsel whether there was any objection to the testimony being taken in the presence of the jury. Defense counsel replied, "None whatsoever." The court continued, "As you know, it can be taken in their presence or outside of their presence, and that is a matter of discretion with the Court but I am inquiring of you if you have any objections. If you did I would hear you but I assume you have none." Again counsel replied, "I have none." The evidence regarding voluntariness, which included testimony by respondent, was then taken, after which the court ruled that the statement was voluntary.

Since trial counsel consented to the evidence on voluntariness being taken in the presence of the jury, and the judge found the statement voluntary, respondent was deprived of no constitutional right. The motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is reversed and the case is remanded to the District Court with instructions to dismiss the writ of habeas corpus.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FORTAS, concurring in the result.

I concur in the result because of trial counsel's consent to the taking of evidence on voluntariness in the presence of the jury. Otherwise, I disagree. The rule of *Jackson* v. *Denno,* 378 U. S. 368 (1964), should be more than ritual. It was not intended to assure a determination by the judge at the cost of diluting the jury's role in the determination of voluntariness and the weight to be given to admissions. "Just as questions of admissibility of evidence are traditionally for the court, questions of credi-

bility, whether of a witness or a confession, are for the jury." *Id.*, at 386, n. 13. See also *id.*, at 378, n. 8, and cf. *id.*, at 404 (separate opinion of BLACK, J.).

Jackson v. *Denno* means that the judge and the jury must each make an independent judgment of voluntariness of an admission, the judge for purposes of admissibility and the jury for evidentiary acceptability, credibility, and weight. A telescoped hearing before judge and jury, in which the judge finds voluntariness for purposes of admissibility, in reality reduces the jury function to an echo. Hearing the evidence simultaneously with the judge, the jury is not apt to approach disagreement with him. I believe that the procedure here sanctioned, by reducing the effectiveness of the jury, gravely impairs the constitutional principle of excluding involuntary confessions which *Jackson* v. *Denno* sought to serve.

The jury is the traditional and preferred arbiter of facts. The procedure countenanced here, by dicta, sanctions, in effect, a direction to the jury to accept and give full credence to the admission—because the judge, hearing the same testimony, has ruled that the admission is voluntary.

BEECHER *v.* ALABAMA.

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

No. 92, Misc. Decided October 23, 1967.

Petitioner, already wounded by Tennessee police, confessed to a rape-murder under gunpoint threat to do so or be killed. Five days later, with "no break in the stream of events," *Clewis* v. *Texas,* 386 U. S. 707, 710, when still in pain in a prison hospital and under the influence of drugs, he was directed to tell Alabama investigators "what they wanted to know." He thereupon signed confessions, which were admitted into evidence over his objections at his trial. He was convicted and the Alabama Supreme Court affirmed. *Held:* The use of petitioner's confessions, the product of gross coercion, violated the Due Process Clause of the Fourteenth Amendment.

Certiorari granted; 280 Ala. 283, 193 So. 2d 505, reversed.

Jack Greenberg, James M. Nabrit III and *Michael Meltsner* for petitioner.

MacDonald Gallion, Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent.

PER CURIAM.

On the morning of June 15, 1964, the petitioner, a Negro convict in a state prison, escaped from a road gang in Camp Scottsboro, Alabama. On June 16, a woman's lifeless body was found not more than a mile from the prison camp. The next day, the petitioner was captured in Tennessee; he was then returned to Jackson County, Alabama, where he was indicted, tried, and convicted on a charge of first degree murder. The jury fixed his punishment at death. After the Supreme Court of Alabama affirmed his conviction, he filed this petition for certiorari, contending that a coerced confession was used

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as evidence at his trial, in violation of the Due Process Clause of the Fourteenth Amendment.[1]

The uncontradicted facts of record are these. Tennessee police officers saw the petitioner as he fled into an open field and fired a bullet into his right leg. He fell, and the local Chief of Police pressed a loaded gun to his face while another officer pointed a rifle against the side of his head. The Police Chief asked him whether he had raped and killed a white woman. When he said that he had not, the Chief called him a liar and said, "If you don't tell the truth I am going to kill you." The other officer then fired his rifle next to the petitioner's ear, and the petitioner immediately confessed.[2] Later the same day he received an injection to ease the pain in his leg. He signed something the Chief of Police described as "extradition papers" after the officers told him that "it would be best . . . to sign the papers before the gang of people came there and killed" him. He was then taken by ambulance from Tennessee to Kilby Prison in Montgomery, Alabama. By June 22, the petitioner's right leg, which was later amputated, had become so swollen and his wound so painful that he required an injection of morphine every four hours. Less than an hour after one of these injections, two Alabama investigators visited him in the prison hospital. The medical assistant in charge told the petitioner to "cooperate" and, in the petitioner's presence, he asked the investigators to inform him if the petitioner did not "tell them what they wanted to know." The medical assistant then left the petitioner alone with the State's investigators. In the course of a 90-minute "conversation," the investi-

[1] The petitioner also makes other Fourteenth Amendment claims. In light of our disposition of this case, we do not reach them.

[2] Although this confession was not introduced at trial, its existence is of course vitally relevant to the voluntariness of petitioner's later statements. See *United States* v. *Bayer*, 331 U. S. 532, 540–541.

gators prepared two detailed statements similar to the confession the petitioner had given five days earlier at gunpoint in Tennessee. Still in a "kind of slumber" from his last morphine injection, feverish, and in intense pain, the petitioner signed the written confessions thus prepared for him.

These confessions were admitted in evidence over the petitioner's objection.[3] Although there is some dispute as to precisely what occurred in the petitioner's room at the prison hospital,[4] we need not resolve this evidentiary

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[3] Because part of the evidence bearing on the voluntariness of the confessions was introduced in a hearing on the petitioner's motion for new trial, the State suggests that "[h]is complaint that the confession was improperly admitted now comes too late." That suggestion is clearly untenable. The petitioner objected when the confessions were first introduced; having overruled the objection, the trial court rejected the State's claim that the issue could not be reviewed on a new trial motion; and the Supreme Court of Alabama found no state procedural bar to reaching the merits of the voluntariness claim and deciding it on the complete record. There can thus be no doubt here that the issue was raised "in [an] appropriate manner," *Brown* v. *Mississippi,* 297 U. S. 278, 286–287. In any event, since the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate and independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 98.

[4] The investigators claimed at trial that they had told the petitioner, during their 90-minute talk with him, that he was under no obligation to speak and that anything he said could be used against him. One of the investigators stated that he had asked the petitioner whether he wanted an attorney, and had received a negative reply. Although the prepared statements that the petitioner signed refer to no such warnings, and although the conversation in question took place on the date of this Court's decision in *Escobedo* v. *Illinois,* 378 U. S. 478, the state courts accepted the investigators' accounts of that conversation and rejected the petitioner's contrary testimony as "not at all persuasive."

conflict, for even if we accept as accurate the State's version of what transpired there, the uncontradicted facts set forth above lead to the inescapable conclusion that the petitioner's confessions were involuntary. See *Davis* v. *North Carolina,* 384 U. S. 737, 741–742.

The petitioner, already wounded by the police, was ordered at gunpoint to speak his guilt or be killed. From that time until he was directed five days later to tell Alabama investigators "what they wanted to know," there was "no break in the stream of events," *Clewis* v. *Texas,* 386 U. S. 707, 710. For he was then still in pain, under the influence of drugs, and at the complete mercy of the prison hospital authorities. Compare *Reck* v. *Pate,* 367 U. S. 433.

The State says that the facts in this case differ in some respects from those in previous cases where we have held confessions to be involuntary. But constitutional inquiry into the issue of voluntariness "requires more than a mere color-matching of cases," *Reck* v. *Pate,* 367 U. S. 433, 442. A realistic appraisal of the circumstances of *this* case compels the conclusion that this petitioner's confessions were the product of gross coercion. Under the Due Process Clause of the Fourteenth Amendment, no conviction tainted by a confession so obtained can stand.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted and the judgment is reversed.

MR. JUSTICE BLACK concurs in the judgment of the Court reversing the conviction in this case but does so exclusively on the ground that the confession of the petitioner was taken from him in violation of the Self-Incrimination Clause of the Fifth Amendment to the Constitution of the United States, which Amendment was made applicable to the States by the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U. S. 1 (1964).

MR. JUSTICE BRENNAN, whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join.

I concur in the judgment of reversal. This confession was taken after our decision in *Malloy* v. *Hogan,* 378 U. S. 1. Under the test of admissibility stated in *Malloy,* the facts plainly compel the Court's conclusion that the petitioner's confession was inadmissible because involuntary. We said in *Malloy,* at 7:

> ". . . the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram* v. *United States,* 168 U. S. 532, the Court held that '[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself." ' *Id.,* at 542. Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .' *Id.,* at 542–543; see also *Hardy* v. *United States,* 186 U. S. 224, 229; *Wan* v. *United States,* 266 U. S. 1, 14; *Smith* v. *United States,* 348 U. S. 147, 150."

ROBERTS *v.* LaVALLEE, WARDEN.

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

No. 193, Misc. Decided October 23, 1967.

Petitioner, an indigent, was charged in the New York courts with robbery, larceny, and assault. His request for a free copy of a preliminary hearing transcript was denied. A New York statute provides for the furnishing of such a transcript for a fee. Petitioner was convicted, his conviction was affirmed, the New York Court of Appeals denied review, and this Court denied certiorari. At each proceeding petitioner raised the constitutional issue involving denial of the transcript. His subsequent petition for habeas corpus was denied by the District Court. Thereafter, in *People* v. *Montgomery*, 18 N. Y. 2d 993, 224 N. E. 2d 730 (1966), the New York Court of Appeals held that the statutory requirement of payment for a transcript, as applied to an indigent, constituted a denial of equal protection. The Court of Appeals for the Second Circuit held that, in these circumstances, petitioner should return to the state courts for relief under the *Montgomery* doctrine. *Held:*

1. The New York statute results in a difference in access to instruments needed to vindicate legal rights; this difference, based upon a defendant's financial situation, is contrary to the Equal Protection Clause of the Fourteenth Amendment.

2. Petitioner had already exhausted his state remedies; no substantial state interest would be served by requiring him to resubmit to the state courts an issue the resolution of which is predetermined by established federal principles.

Certiorari granted; 373 F. 2d 49, vacated and remanded.

Warren H. Greene, Jr., for petitioner.

Leon B. Polsky for the Legal Aid Society of New York, as *amicus curiae*, in support of the petition.

PER CURIAM.

Petitioner is an indigent. He was charged with robbery, larceny, and assault in New York. When his case

was called for trial, petitioner asked that the court furnish him, at state expense, with the minutes of a prior preliminary hearing, at which the major state witnesses had testified. A New York statute provided that a transcript of the hearing would be furnished "on payment of . . . fees at the rate of five cents for every hundred words." N. Y. Code Crim. Proc. § 206. The trial court denied the request for a free transcript.

Petitioner was convicted of the crimes charged and sentenced to a term of 15–20 years in prison. His conviction was affirmed by the Appellate Division of the New York Supreme Court. The New York Court of Appeals denied leave to appeal. We denied a petition for certiorari. The issue under the Federal Constitution of the denial of the preliminary hearing transcript was raised by petitioner at each stage of these proceedings.

Petitioner next applied for habeas corpus in the Northern District of New York. His petition was denied, the court believing that petitioner had no federal constitutional right to a free transcript of his preliminary hearing. Thereafter, the New York Court of Appeals decided *People* v. *Montgomery,* 18 N. Y. 2d 993, 224 N. E. 2d 730 (1966). That case holds that the statutory requirement of payment for a preliminary hearing transcript, as applied to an indigent, is a denial of equal protection and unconstitutional, under both the Federal and State Constitutions.

On petitioner's appeal from the District Court, the Court of Appeals for the Second Circuit determined that petitioner should apply to the state courts for relief under the doctrine of *Montgomery.* The court acknowledged that petitioner had already exhausted his state remedies. But it thought the "constitutional necessity for federal court intervention" was "open to doubt" and that "the question ought to be decided in favor of permitting a state court determination in the first instance."

Accordingly, it dismissed the petition for habeas corpus without prejudice to renewal of the questions presented by petitioner after further proceedings in the courts of New York.

Petitioner sought certiorari. We grant the writ, and we vacate the judgment below.

Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, *e. g., Draper* v. *Washington,* 372 U. S. 487 (1963); *Griffin* v. *Illinois,* 351 U. S. 12 (1956). Only last Term, in *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966), we reiterated the statement first made in *Smith* v. *Bennett,* 365 U. S. 708, 709 (1961), that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." We have no doubt that the New York statute struck down by the New York Court of Appeals in *Montgomery,* as applied to deny a free transcript to an indigent, could not meet the test of our prior decisions.

Nor do we believe there can be any doubt that petitioner adequately made known his desire to obtain the minutes of his preliminary hearing. We agree with Judge Medina, dissenting in the Court of Appeals, that the demand was "clear and unequivocal."

In *Brown* v. *Allen,* 344 U. S. 443 (1953), we considered the statutory requirement, under 28 U. S. C. § 2254, that a petitioner exhaust his state remedies before applying for federal habeas corpus relief. We concluded that Congress had not intended "to require repetitious applications to state courts." 344 U. S., at 449, n. 3. We declined to rule that the mere possibility of a successful application to the state courts was sufficient to bar federal

relief. Such a rule would severely limit the scope of the federal habeas corpus statute.

The observations made in the *Brown* case apply here. Petitioner has already thoroughly exhausted his state remedies, as the Court of Appeals recognized. Still more state litigation would be both unnecessarily time-consuming and otherwise burdensome. This is not a case in which there is any substantial state interest in ruling once again on petitioner's case. We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles.

The motion for leave to proceed *in forma pauperis* and the writ of certiorari are granted, the judgment is vacated, and the case is remanded to the Court of Appeals for proceedings consistent with this opinion.

MR. JUSTICE HARLAN, dissenting.

As the Court states, petitioner was told that if he wished a transcript of his preliminary hearing he would have to pay for it. The Court fails to add, however, that petitioner and his counsel were both present at the preliminary hearing, that they were furnished a free transcript of the grand jury testimony of the state witness in question but made no use of this transcript at trial, and that at no time has petitioner suggested any use to which the preliminary hearing transcript could have been put, although he is in a position to know what it contains.

The decisions cited in the majority opinion fall far short of declaring that any document related to the criminal process, no matter how demonstrably trivial its significance, must be supplied free to indigents simply because the State is willing to make it available to others able to pay for it. Rather than formulate such an undiscriminating rule, a rule that predictably may lead to a narrowing of the availability of documents that a State

is not constitutionally required to furnish to any criminal defendant, I would at least undertake to examine the importance of the particular document in question.

This examination is not necessary in the present case, however, for, as the Court's opinion recognizes, there exists an adequate basis under state law for affording petitioner the relief that he seeks here. Believing, as did the Court of Appeals, that federal courts should not unnecessarily interfere with the administration of justice in state courts, particularly when this involves reaching federal constitutional questions unnecessarily, see *Harrison* v. *NAACP,* 360 U. S. 167, I would affirm the decision below.

In addition, in the circumstances depicted by this record, I consider the Court's disposition of this case improvident even under the postulates of its opinion. I understand the Court to require the issuance of a writ of habeas corpus, and hence the setting aside of the state conviction, without any further investigation of whether the constitutional error now found to have been committed by the state courts actually prejudiced this defendant. Since there appears every likelihood that further examination would reveal that the denial of a preliminary hearing transcript to this petitioner was "harmless beyond a reasonable doubt," *Chapman* v. *California,* 386 U. S. 18, at 24, the case should have been sent back to the Court of Appeals with instruction to remand to the District Court for a hearing to determine the possibility of prejudice. Cf. *Roberts* v. *United States, ante,* p. 18. Due respect for state criminal processes requires at least this much.

BEATTY *v.* UNITED STATES.

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

No. 338. Decided October 23, 1967.

Certiorari granted; 377 F. 2d 181, reversed.

Robert S. Vance for petitioner.

Acting Solicitor General Spritzer, Assistant Attorney General Vinson and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Massiah* v. *United States,* 377 U. S. 201.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

SAYLES *v.* WIEGAND, PRESIDENT, BOARD OF DIRECTORS OF METROPOLIS BUILDING ASSOCIATION, ET AL.

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

No. 491. Decided October 23, 1967.

Appeal dismissed.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The appeal is dismissed for want of jurisdiction.

MERCER ET AL. *v.* HEMMINGS ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 406. Decided October 23, 1967.

194 So. 2d 579, 587, appeal dismissed.

Bruce Bromley, John H. Pickering, John R. Hupper, Hervey Yancey and *Victor M. Earle III* for appellants.

Chester Bedell for appellees.

PER CURIAM.

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

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted and the case assigned for oral argument.

BENNETT *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 460. Decided October 23, 1967.

197 So. 2d 886, appeal dismissed and certiorari denied.

Hardy Lott and *R. Cunliffe McBee* 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.

POTOMAC NEWS CO. *v.* UNITED STATES.

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

No. 164. Decided October 23, 1967.

Certiorari granted; 373 F. 2d 635, reversed.

Stanley M. Dietz for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson and *Jerome M. Feit* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN concurs in the judgment of reversal upon the premises stated in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, 457.

THE CHIEF JUSTICE dissents.

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

CONNER *v.* CITY OF HAMMOND.

ON PETITION FOR WRIT OF CERTIORARI TO THE TWENTY-FIRST JUDICIAL DISTRICT COURT, LOUISIANA, PARISH OF TANGIPAHOA.

No. 259. Decided October 23, 1967.

Certiorari granted; reversed.

Leonard B. Levy and *Stanley Fleishman* for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Twenty-first Judicial District Court for the Parish of Tangipahoa, Louisiana, is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN would affirm the judgment of the state court upon the premises stated in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455.

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

UNITED STATES *v.* ALUMINUM CO. OF AMERICA ET AL.

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

No. 271. Decided October 23, 1967.

Vacated and remanded.

Solicitor General Marshall, Ralph S. Spritzer, Assistant Attorney General Turner, Robert A. Hammond III and *Howard E. Shapiro* for the United States.

Herbert A. Bergson, Howard Adler, Jr., Donald L. Hardison and *William K. Unverzagt* for appellees.

PER CURIAM.

Upon consideration of the joint suggestion of mootness and motion to vacate, the judgment of the District Court of January 20, 1967, is vacated as moot and the case is remanded for further proceedings.

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

CENTRAL MAGAZINE SALES, LTD. *v.* UNITED STATES.

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

No. 368. Decided October 23, 1967.

Certiorari granted; 373 F. 2d 633, reversed.

Richard Lipsitz for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson and *Jerome M. Feit* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN concurs in the judgment of reversal upon the premises stated in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, 457.

THE CHIEF JUSTICE believes this case is controlled by *Roth* v. *United States,* 354 U. S. 476, and the judgment should be affirmed in accordance with the principles enunciated in the opinion of the Court in that case.

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

GARBER *v.* KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 393. Decided October 23, 1967.

197 Kan. 567, 419 P. 2d 896, appeal dismissed and certiorari denied.

Marvin M. Karpatkin, E. Dexter Galloway and *Melvin L. Wulf* for appellant.

Robert C. Londerholm, Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for appellee.

Leo Pfeffer for the National Committee for Amish Religious Freedom, as *amicus curiae,* in support of appellant.

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.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS are of the opinion that probable jurisdiction should be noted.

276-943 O - 68 - 11

CARP ET AL. *v.* TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 481. Decided October 23, 1967.

412 S. W. 2d 307, appeal dismissed and certiorari denied.

Thurman Arnold, Robert E. Herzstein, Douglas E. Bergman, Quentin Keith and *Price Daniel* for appellants.

Crawford C. Martin, Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *J. C. Davis* and *John Reeves,* Assistant Attorneys General, *Will Garwood* and *Tom Gee,* Special Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for appellee Texas State Board of Examiners in Optometry, and *Ellis Lyons, Bennett Boskey, Charles M. Babb* and *Mark Martin* for other 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.

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

KIRK *v.* WYOMING.

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

No. 50, Misc. Decided October 23, 1967.

Certiorari granted; 421 P. 2d 487, reversed and remanded.

Bernard Roazen and *Lawrence Speiser* for petitioner.

James E. Barrett, Attorney General of Wyoming, *Sterling A. Case,* Assistant Attorney General, *Lawrence E. Johnson,* Chief Special Assistant Attorney General, and *Don Empfield,* Special 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 reversed. *Jackson* v. *Denno,* 378 U. S. 368; *Sims* v. *Georgia,* 385 U. S. 538. The case is remanded for further proceedings not inconsistent with the opinions in those cases. *Jackson* v. *Denno,* 378 U. S., at 394–396; *Sims* v. *Georgia,* 385 U. S., at 544.

MR. JUSTICE BLACK dissents.

WHITEHILL *v.* ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL.

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

No. 25. Argued October 16, 1967.—Decided November 6, 1967.

Appellant, who had been offered a University of Maryland teaching position, brought this suit for declaratory relief challenging the constitutionality of a state "loyalty oath," which he refused to take. The oath, drafted by the Attorney General and approved by the Board of Regents, contains a certification that an applicant for public employment is not "engaged in one way or another in the attempt to overthrow the Government . . . by force or violence." Section 11 of the Ober Act authorizes state agencies to fix procedures to ascertain that a prospective employee is not a "subversive person," a term which, as defined in §§ 1 and 13, reaches one who is a member of a subversive organization which would alter, overthrow, or destroy the Government by revolution, force, or violence. A three-judge District Court dismissed the complaint. *Held:*

1. Since the authority to prescribe oaths is provided by § 11 of the Ober Act, which is tied to §§ 1 and 13, the oath here must be considered, not in isolation, but with reference to §§ 1 and 13. Pp. 56–57.

2. Sections 1 and 13 violate due process requirements of the Fourteenth Amendment, since they are unconstitutionally vague and overbroad by not distinctly delineating between permissible and impermissible conduct in the sensitive and important area of academic freedom. Pp. 57–62.

(a) In *Gerende* v. *Election Board,* 341 U. S. 56, which involved application of an oath to candidates in Maryland for public office, this Court did not reach the question now presented. P. 58.

(b) In the light of the gloss placed upon the Act by the Maryland courts, it is uncertain whether only those members of a "subversive" group are barred who seek to overthrow or destroy the Government by force or violence. Thus, a prospective employee could not know, save as he risked a perjury prosecution,

whether as a member of a group aiming through violence to overthrow the Government he would "in one way or another" be engaged in an attempt at violent overthrow even though he was ignorant of the group's real aims. Pp. 57–62.

258 F. Supp. 589, reversed.

Sanford Jay Rosen argued the cause for appellant. With him on the brief were *Elsbeth Levy Bothe* and *Joseph S. Kaufman.*

Loring E. Hawes, Assistant Attorney General of Maryland, argued the cause for appellees. With him on the brief was *Francis B. Burch,* Attorney General.

Bernard Wolfman and *Herman I. Orentlicher* filed a brief for the American Association of University Professors, as *amicus curiae,* in support of appellant.

Edward C. Mackie filed a brief for the Baltimore Metropolitan Chapter of Americans for Constitutional Action, as *amicus curiae,* urging affirmance.

Mr. Justice Douglas delivered the opinion of the Court.

This suit for declaratory relief that a Maryland teacher's oath required of appellant was unconstitutional was heard by a three-judge court and dismissed. 258 F. Supp. 589. We noted probable jurisdiction. 386 U. S. 906.

Appellant, who was offered a teaching position with the University of Maryland, refused to take the following oath:

> "I, ————————, do hereby (Print Name—including middle initial) certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

The question is whether the oath is to be read in isolation or in connection with the Ober Act (Art. 85A, Md. Ann. Code, 1957) which by §§ 1 and 13 defines a "subversive" as ". . . any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or *alter,* or to assist in the overthrow, destruction or *alteration* of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, *by revolution, force, or violence;* or who is a *member of a subversive organization* or a foreign subversive organization, as more fully defined in this article." (Italics supplied.) Section 1 defines the latter terms: "subversive organization" meaning a group that would, *inter alia,* "alter" the form of government "by revolution, force, or violence"; "foreign subversive organization" is such a group directed, dominated, or controlled by a foreign government which engages in such activities.

The oath was prepared by the Attorney General and approved by the Board of Regents that has exclusive management of the university. It is conceded that the Board had authority to provide an oath, as § 11 of the Act directs every agency of the State which appoints, employs, or supervises officials or employees to establish procedures designed to ascertain before a person is appointed or employed that he or she "is not a subversive person." And that term is, as noted, defined by §§ 1 and 13. Our conclusion is that, since the authority to prescribe oaths is provided by § 11 of the Act and since it is in turn tied to §§ 1 and 13, we must consider the

oath with reference to §§ 1 and 13, not in isolation. Nor can we assume that the Board of Regents meant to encompass less than the Ober Act, as construed, sought to cover.

If the Federal Constitution is our guide, a person who might wish to "alter" our form of government may not be cast into the outer darkness. For the Constitution prescribes the method of "alteration" by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered. Moreover, the First Amendment, which protects a controversial as well as a conventional dialogue (*Terminiello* v. *Chicago,* 337 U. S. 1), is as applicable to the States as it is to the Federal Government; and it extends to petitions for redress of grievances (*Edwards* v. *South Carolina,* 372 U. S. 229, 235) as well as to advocacy and debate. So if §§ 1 and 13 of the Ober Act are the frame of reference in which the challenged oath is to be adjudged, we have important questions to resolve.

We are asked to treat §§ 1 and 13 as if they barred only those who seek to overthrow or destroy the Government by force or violence. Reference is made to *Gerende* v. *Election Board,* 341 U. S. 56, where, in considering the definition of "subversive" person applicable to § 15 of the Act, governing candidates for office, we accepted the representation of the Attorney General that he would advise the proper authorities in Maryland to take and adopt the narrower version of the term "subversive." The Court of Appeals of Maryland had indicated in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332, that the purpose of the Act was to reach that group, and that the words "revolution, force, or violence" in § 1 did not include a peaceful revolution but one accomplished by force or violence. *Id.,* at 190–191, 76 A. 2d, at 337–338. In that view the "alteration" defined would be an altera-

tion by force and violence. That construction had not yet been fashioned into an oath or certificate when *Gerende* reached us. That case involved an attempt by a candidate for public office in Maryland to require the election officials to dispense with an oath that incorporated the statutory language. The Court of Appeals refused the relief asked. We referred to the narrow construction of §§ 1 and 15 given in the *Shub* case saying:

> "We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt. [196] Md. at [192], 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed." 341 U. S., at 56–57.

As we said in *Baggett* v. *Bullitt,* 377 U. S. 360, 368, n. 7, we did not pass upon or approve the statutory definition of a "subversive" person in the *Gerende* case. Rather we accepted the narrowing construction tendered by the Attorney General during oral argument so as to avoid the constitutional issue that was argued.

It is, however, urged that § 18 of the Act which contains a severability clause makes it possible for the Maryland Attorney General and for us to separate the wheat from the chaff that may be in §§ 1 and 13. The District Court found merit in the point. 258 F. Supp., at 596. But our difficulty goes deeper. As we have said in like situations, the oath required must not be so

vague and broad as to make men of common intelligence speculate at their peril on its meaning. *Baggett* v. *Bullitt, supra; Elfbrandt* v. *Russell,* 384 U. S. 11; *Keyishian* v. *Board of Regents,* 385 U. S. 589. And so we are faced with the kind of problem which we thought we had avoided in *Gerende.*

As we have seen, §§ 1 and 13 reach (1) those who would "alter" the form of government "by revolution, force, or violence" and (2) those who are members of a subversive organization or a foreign subversive organization.

The prescribed oath requires, under threat of perjury, a statement that the applicant is not engaged "in one way or another" in an attempt to overthrow the Government by force or violence. Though we assume *arguendo* that the Attorney General and the Board of Regents were authorized so to construe the Act as to prescribe a narrow oath (1) that excluded "alteration" of the Government by peaceful "revolution" and (2) that excluded all specific reference to membership in subversive groups, we still are beset with difficulties. Would a member of a group that was out to overthrow the Government by force or violence be engaged in that attempt "in one way or another" within the meaning of the oath, even though he was ignorant of the real aims of the group and wholly innocent of any illicit purpose? We do not know; nor could a prospective employee know, save as he risked a prosecution for perjury.

We are in the First Amendment field. The continuing surveillance [1] which this type of law places on teachers is

[1] There is not only the provision for perjury prescribed in § 11, but also § 14 which provides in part that "Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this article, shall be cause for discharge" of the employee. See *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 175, n. 1 (concurring opinion).

hostile to academic freedom. As we said in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The restraints on conscientious teachers are obvious. As we noted in the *Elfbrandt* case, even attendance at an international conference might be a trap for the innocent if that conference were predominantly composed of those who would overthrow the Government by force or violence. 384 U. S., at 16–17. "Juries might convict though the teacher did not subscribe to the wrongful aims of the organization." *Id.,* at 17.

In sum, we read the oath as an integral part of the Ober Act; and we undertake to read §§ 1 and 13 of that Act in light of the gloss that the Maryland courts have placed on it. We know that the *Shub* case says that "[a] person who *advocates* the overthrow of the Government of the United States . . . through force or violence could scarcely in good faith, take the constitutional oath of office . . . ." 196 Md., at 190, 76 A. 2d, at 337. (Italics supplied.) Yet that case does little more than

afford the basis for argument that membership in a subversive organization means that the member must advocate a violent overthrow. This, however, is speculation, not certainty. Another Maryland case bearing on the question is *Character Committee* v. *Mandras,* 233 Md. 285, 196 A. 2d 630. There an applicant for admission to the Maryland bar answered "No" to the question "Are you now or have you ever been a subversive person as defined by the [Ober Act]?" He had apparently at one time been a member of the Communist Party. At a hearing he testified he had joined the party because he was interested in the candidacy of Henry Wallace and in the cause of civil liberties; but he denied he had been a subversive person or that he had advocated violent overthrow of the Government. The Court of Appeals affirmed the Board of Law Examiners, finding that the applicant was not a subversive person. So it can be argued that passive membership as a matter of Maryland law does not make a person a subversive. Yet, as we read §§ 1 and 13 of the Ober Act, the alteration clause and membership clause are still befogged.[2] The

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[2] Art. 15, § 11, of the Maryland Constitution reads:

"No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the Government of or in the administration of the business of this State or of any county, municipality or other political subdivision of this State."

Shub tells us that the Ober Act was enacted pursuant to this state constitutional provision. 196 Md., at 192, 76 A. 2d, at 338. Our attention is not drawn to, nor have we found, any severability clause applicable to this constitutional provision. It is certainly dubious, then, whether the severability clause of the Ober Act can operate to "sever" the membership clause in the definition of subversive person so that it reads more narrowly than the constitutional provision upon which the Ober Act rests.

lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context (*NAACP* v. *Button,* 371 U. S. 415, 432–433), may deter the flowering of academic freedom as much as successive suits for perjury.

Like the other oath cases mentioned, we have another classic example of the need for "narrowly drawn" legislation (*Cantwell* v. *Connecticut,* 310 U. S. 296, 311) in this sensitive and important First Amendment area.

Reversed.

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

Maryland will doubtless be surprised to learn that its meticulous efforts to conform the state "loyalty oath" to the requirements of *Gerende* v. *Election Board,* 341 U. S. 56, have been to no avail. It will also be entitled to feel baffled by an opinion which, while recognizing the continuing authority of *Gerende,* undertakes to bypass that decision by a process of reasoning that defies analysis.

Appellant Whitehill was denied employment in the state university as a temporary lecturer by reason of his refusal to sign an oath that more than meets the requirements of *Gerende.* He was asked only whether he is *now,* in one way or another *engaged in* an attempt to overthrow the Government *by force or violence.*[1] References to international conferences, controversial discussions, support of minority candidates, academic freedom and the like cannot disguise the fact that Whitehill was asked simply to disclaim actual, present activity,

[1] The oath did not even include the limited sort of "membership" clause also approved in *Gerende.* See the Court's opinion, *ante,* at 55–56, 57–58.

amounting in effect to treasonable conduct. Allusions to the constitutional amending process cannot obscure the fact that this oath makes no reference to "alteration" of our form of government or to "believing in" or "being a member of" anything whatsoever. The oath itself, then, in no way violates, jeopardizes, or beclouds appellant's freedom of speech or of association. So much, indeed, the Court's opinion appears to concede.

The Court concludes, however, that the oath must be read "in connection with" certain sections of the Ober Law because, as a state matter, the authority of the Board of Regents to require an oath derives from that law. The Court does not pause to tell us what the "connection" is or to explain how it serves to invalidate the unambiguous oath required of this appellant. On the one hand, it is plain, as the Court artistically avoids conceding, that the only effect of the law on this appellant is to deny him state employment if he refuses to sign an oath which, in itself, he can have no constitutional objection to signing. On the other hand, nowhere does the Court suggest that the character of the oath itself is altered by any language in the statute authorizing the Regents to impose it. The oath does not refer to the statute [2] or otherwise incorporate it by reference. It contains no terms that are further defined in the statute. In short, the oath must be judged on its own bottom.

The only thing that does shine through the opinion of the majority is that its members do not like loyalty oaths. Believing that it is not within the province of this Court to pass upon the wisdom or unwisdom of Maryland's policy in this regard, and finding nothing *unconstitutional* about the oath tendered to this appellant, I would affirm the judgment of the court below.

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[2] The document submitted to appellant for his signature did contain the notation customary to government documents of the authority under which it was promulgated.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291 *v.* PHILADELPHIA MARINE TRADE ASSOCIATION.

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

No. 34. Argued October 12 and 16, 1967.—
Decided November 6, 1967.*

A dispute between petitioner longshoremen's union and respondent, an employers' association, over the interpretation of a "set-back," or postponement of hours of work, provision in a collective bargaining agreement, was submitted to arbitration as provided in the agreement. On June 11, 1965, the arbitrator ruled that respondent's interpretation was correct. Respondent sought orders from the District Court enforcing the arbitrator's award, following work stoppages in July and September 1965 by stevedores who disputed the meaning of the set-back provision. The court expressed no opinion on the union's contentions that the later disputes were distinguishable from the one involved in the arbitrator's award, but on September 15 merely entered a decree requiring that the award "be specifically enforced," and ordering the union "to comply with and to abide by the said Award." Although the union's counsel noted that the award contained only an abstract proposition and no command capable of "enforcement," counsel's request for clarification of the court's order was unavailing. When further set-back disputes disrupted work in February 1966, the court issued a rule to show cause why the union and its officers should not be held in contempt for violating the September 15 order. Without explaining precisely what acts violated the order, the judge held the February strike "illegal . . . under the circumstances," found the union in civil contempt, and fined the union $100,000 per day. The Court of Appeals affirmed the original decree and the contempt order. *Held:* Since the District Court's decree, which was an "order granting an injunction" within the meaning of Fed. Rule Civ. Proc. 65 (d), did not

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*Together with No. 78, *International Longshoremen's Association, Local 1291, et al.* v. *Philadelphia Marine Trade Association,* also on certiorari to the same court.

comply with the Rule's requirement that it state in specific terms the acts that it commands or prohibits, neither it nor the decision holding the union in contempt can stand. Pp. 74–76.

365 F. 2d 295, 368 F. 2d 932, reversed.

Abraham E. Freedman argued the cause for petitioners in both cases. With him on the briefs was *Martin J. Vigderman.*

Francis A. Scanlan argued the cause and filed a brief for respondent in both cases.

Edward Silver and *George G. Gallantz* filed a brief for the Maritime Service Committee, Inc., et al., as *amici curiae,* urging affirmance in both cases.

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases arise from a series of strikes along the Philadelphia waterfront. The petitioner union, representing the longshoremen involved in those strikes, had entered into a collective bargaining agreement in 1959 with the respondent, an association of employers in the Port of Philadelphia. The agreement included provisions for compensating longshoremen who are told after they report for duty that they will not be needed until the afternoon.[1] The union construed those "set-back" provi-

[1] The 1959 agreement provided in Article 9 (a) that "Men employed from Monday to Sunday, inclusive, shall be guaranteed four (4) hours' pay for the period between 8:00 A. M. and 12:00 Noon, regardless of any condition." Article 9 (h) provided that "If a ship is knocked off on account of inclement weather by the Ship's Master or his authorized representative, the men will be paid the applicable guarantee, but in the event the men knock off themselves, they will be paid only for the time worked, regardless of guarantee provided for in this Agreement."

A Memorandum of Settlement, effective October 1, 1964, provided in Article 10 (5) that "[f]or work commencing at 8 AM on Monday or at 8 AM on the day following a holiday," employers

sions to mean that, at least in some situations, longshoremen whose employment was postponed because of unfavorable weather conditions were entitled to four hours' pay; the association interpreted the provisions to guarantee no more than one hour's pay under such circumstances.

In April 1965, when this disagreement first became apparent, the parties followed the grievance procedure established by their collective bargaining contract and submitted the matter to an arbitrator for binding settlement.[2] On June 11 the arbitrator ruled that the

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would "have the right because of non-arrival of a vessel in port to cancel the gangs by 7:30 A. M." Article 10 (6) then stated: "Gangs ordered for an 8 AM start Monday through Friday can be set back at 7:30 AM on the day of work to commence at 1 PM at which time a four hour guarantee shall apply. A one hour guarantee shall apply for the morning period unless employed during the morning period."

Article 16 of the Memorandum of Settlement adopted the provisions of the 1959 agreement by reference, with the proviso that, in cases of conflict, "the provisions of [the Memorandum] shall prevail."

[2] Article 28 of the 1959 agreement, unchanged by the Memorandum of Settlement, provided:

"All disputes and grievances of any kind or nature whatsoever arising under the terms and conditions of this agreement, and all questions involving the interpretation of this agreement other than any disputes or grievances arising under the terms and conditions of paragraph 13 (d) hereof, shall be referred to a Grievance Committee, which shall consist of two members selected by the Employers and two members selected by the Union. . . . Should the Grievance Committee be unable to resolve the issue submitted and should neither party request an immediate decision from the Arbitrator, then the grievance or dispute shall be submitted to a Joint Grievance Panel consisting of three representatives of the Association and three representatives of the Union. To the end that there shall be no work interruptions and to the end that there shall be limited necessity for arbitration, the Panel shall make every effort to resolve all grievances or disputes which could not be resolved by the Grievance Committee. . . . Should the Panel be unable to resolve

association's reading of the set-back provisions was correct.[3] In July, however, a group of union members refused to unload a ship unless their employer would promise four hours' pay for having set back their starting

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a grievance or dispute which arose in the previous two weeks, or be unable to resolve a grievance or dispute anticipated in the ensuing two weeks, the dispute or grievance, including matters of interpretation of the contract, shall be referred to an Impartial Arbitrator who shall be selected to serve for a period of one year from a panel of five arbitrators to be submitted by the American Arbitration Association. . . . The Arbitrator thus selected shall conduct his hearings and procedures in accordance with the Rules of the American Arbitration Association, except that he shall be obliged to render his decision within forty-eight hours of the conclusion of his hearings or procedures. . . . Should the terms and conditions of this agreement fail to specifically provide for an issue in dispute, or should a provision of this agreement be the subject of disputed interpretation, the Arbitrator shall consider port practice in resolving the issue before him. If the Arbitrator determines that there is no port practice to assist him in determining an issue not specifically provided for in the collective bargaining agreement, or no port practice to assist him in resolving an interpretation of the agreement, the issue shall become the subject of negotiation between the parties. There shall be no strike and no lock-out during the pendency of any dispute or issue while before the Grievance Committee, the Joint Panel, or the Arbitrator."

[3] The text of the arbitrator's award was this:

"The contention of the Employer, the Philadelphia Marine Trade Association, is hereby sustained and it is the Arbitrator's determination that Section 10 (6) of the Memorandum of Settlement dated February 11, 1965, providing gangs 'ordered for an 8 AM start Monday through Friday can be set back at 7:30 AM on the day of work to commence at 1 PM, at which time a 4 hour guarantee shall apply. A 1 hour guarantee shall apply for the morning period unless employed during the morning period,' may be invoked by the Employer without qualification.

"The contention of the Union, the International Longshoremen's Association, Local No. 1291, that Section 10 (6) of the Memorandum of Settlement dated February 11, 1965, referred to above, can only be invoked by the Employer because of non-arrival of a vessel in port, is denied."

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time from 8 a. m. to 1 p. m. The union sought to arbitrate the matter, but the association viewed the original arbitrator's decision as controlling and instituted proceedings in the District Court to enforce it. The complaint alleged that the union had refused "to abide by the terms of the Arbitrator's Award . . . resulting in serious loss and damage to [the] Employer . . . and to the Port of Philadelphia." This refusal, the complaint charged, constituted "a breach of the applicable provisions of the current Collective Bargaining Agreement between the P. M. T. A. and the Union." The complaint concluded with a prayer "that the Court set an immediate hearing and enter an order enforcing the Arbitrator's Award, and that plaintiff may have such other and further relief as may be justified."

Before the court could take any action, the employer had met the union's demands and the men had returned to work. The District Court heard evidence in order to "put the facts on record" but concluded that the case was "moot at the moment" and decided simply to "keep the matter in hand as a judge [and] take jurisdiction . . . [i]f anything arises." A similar situation did in fact arise—this time in September. Again, before the District Court could act, the work stoppage ended. The association nonetheless requested

> "an order . . . to make it perfectly clear to the [union] that it is required to comply with the Arbitrator's award because we cannot operate in this port if we are going to be continually harassed by the Union in taking the position that they are not going to abide by an Arbitrator's award . . . ."

Counsel for the union rejected that characterization of its position. He submitted that the set-back disputes of July and September were distinguishable from the one which occurred in April, and that the arbitrator's deci-

sion of June 11, 1965, resolving the April controversy, was not controlling.[4] The District Court expressed no opinion on any of these contentions but simply entered a decree, dated September 15, 1965, requiring that the arbitrator's award "issued on June 11, 1965, be specifically enforced." The decree ordered the union "to comply with and to abide by the said Award." It contained no other command.[5]

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[4] The union's position in this regard was twofold. It maintained, first, that even if the July and September disputes had been factually identical to that of April, it was "quite clear . . . from past practice and from the agreement itself that . . . the award as to [any given] dispute relates only to that dispute and is not controlling so far as any future dispute is concerned." The union contended, second, that the disputes were factually different in at least one crucial respect: In the later disputes, the longshoremen were not notified of the set-back by 7:30 a. m., as required by Article 10 of the Memorandum of Settlement. The arbitrator's award, by its own terms, dealt only with situations in which longshoremen were "set back at 7:30 a. m." Counsel for the association seemingly agreed that the question of notice thus presented an independently arbitrable issue. He said: "[T]he factual issues as far as whether or not there was notice . . . should be brought up under the grievance procedure which is in the contract." "The question of notification," he agreed, "was not a matter in the arbitrator's award." He stated that the time and method of notification had not changed from April to September but he conceded that the problem "was never brought to [the arbitrator's] attention by the parties." On this basis, counsel for the union said that his adversary had "admitted on the stand that this situation goes beyond the arbitrator's award." The District Judge thought otherwise: "You have added words to his mouth, my dear boy, and that you can't do."

[5] The full text of the decree was this:

"ORDER—September 15, 1965

"And Now to Wit, This 15th day of September, 1965, after hearing, it is hereby ordered, adjudged and decreed that the Arbitrator's Award in the matter of arbitration between the Philadelphia Marine Trade Association and International Longshoremen's Association Local 1291, issued on June 11, 1965, be specifically enforced by

When the District Court first indicated that it would issue such a decree, counsel for the union asked the court for clarification:

> "Mr. Freedman: Well, what does it mean, Your Honor?
>
> "The Court: That you will have to determine, what it means.
>
> "Mr. Freedman: Well, I am asking. I have to give my client advice and I don't know what it means. I am asking Your Honor to tell me what it means. It doesn't—
>
> "The Court: You handled the case. You know about it. . . .
>
> "Mr. Freedman: I am telling you very frankly now I don't know what this order means, this proposed order. It says, 'Enforcement of the award.' Now, just what does it mean? . . . The arbitration . . . involved an interpretation of the contract under a specific set of facts . . . . Now, how do you enforce it? That case is over and done with. These are new cases. Your Honor is changing the contract of the parties when you foreclose them from going to arbitration on this point again."
>
> "The Court: The Court has acted. This is the order.
>
> "Mr. Freedman: Well, won't Your Honor tell me what it means?
>
> "The Court: You read the English language and I do."

Although the association had expressly told the District Court that it was "not seeking to enjoin work stop-

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defendant, International Longshoremen's Association Local 1291, and the said defendant is hereby ordered to comply with and to abide by the said Award.

"By the Court.

"Ralph C. Body, J."

pages," counsel for the union asked whether the decree might nonetheless have that effect:

> "Mr. Freedman: . . . Does this mean that the union cannot engage in a strike or refuse to work or picket?
>
> "The Court: You know what the arbitration was about. You know the result of the arbitration.
>
> . . . . .
>
> "I have signed the order. Anything else to come before us?
>
> "Mr. Freedman: I know, but Your Honor is leaving me in the sky. I don't know what to say to my client.
>
> "Mr. Scanlan: No, I have nothing further, Your Honor.
>
> "The Court: The hearing is closed."

Thus, despite counsel's repeated requests, the District Judge steadfastly refused to explain the meaning of the order.

When further set-back disputes disrupted work throughout the Port of Philadelphia in late February 1966, the District Court issued a rule to show cause why the union and its officers should not be held in contempt for violating the order of September 15. Throughout the contempt hearing held on March 1, 1966, counsel for the union sought without success to determine precisely what acts by the union, its officers, or its members were alleged to have violated the court's order. "We have a right to know," he said, "what it is that we are being accused of . . . ." The District Judge refused to comment.[6]

[6] At the hearing following the July work stoppage, the District Judge had agreed that, as to factual situations going "beyond the arbitrator's award, the union is not bound." The union thus attempted to prove at the contempt hearing on March 1 that the February disputes, like those of the previous July and September, went beyond the arbitrator's award in that they raised a separate

At some points in the proceedings, it appeared that the alleged violation consisted of the work stoppage during the last few days of February; but at other times the inquiry focused upon the union's request for a grievance meeting on February 28 to discuss the latest set-back problem. "Why," counsel for the association asked, did the union seek "to rearbitrate the award . . . ?" As the contempt hearing drew to a close, counsel for the association suggested yet another possibility—that union officials violated the District Court's decree when they "castigated" the arbitrator's award and failed to "tell [the men] that their work stoppage was unauthorized" under the award entered some eight months earlier. "[I]n failing to do that," counsel said, "they have shown that they do not intend to abide by the arbitrator's award which was the essence of the order which Your Honor issued . . . ."

Invited to make a closing argument, counsel for the union said:

> "I really don't know what to address myself to because I don't know what it is we are being charged with. Are we being charged because we want to arbitrate or because we asked to invoke the provisions or are we being charged for something else? . . .
>
> "I may say to Your Honor that we have been shooting in the dark here now, trying to guess at what may be an issue . . . ."

But the District Judge evidently felt no need for explanation. After a short recess, the court announced that the dock strike was "illegal . . . under the circumstances," and that the union had "violated the order of this Court and therefore shall be adjudged in civil contempt."

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question of notice. Cf. n. 4, *supra*. The District Judge did not comment upon this aspect of the case in holding the union guilty of contempt.

After extending the contempt holding to "the officers and the men who participated," the court fined the union $100,000 per day, retroactive to 2 p. m., March 1, 1966, when the contempt hearing began, and every day thereafter "as long as the order of this Court is violated." The Court of Appeals affirmed both the original decree of the District Court and its subsequent contempt order,[7] and we granted certiorari to consider the questions presented by these two judgments.[8]

Much of the argument in the Court of Appeals and in this Court has centered upon the District Court's power to issue the order of September 15, 1965.[9] The union maintains that the order was an injunction against work stoppages and points out that in *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, we held that, because of the Norris-LaGuardia Act, a federal court cannot enjoin a work stoppage even when the applicable collective bargaining agreement contains a no-strike clause. The association, on the other hand, argues that the order no more than enforced an arbitrator's award, and points out that in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, we held that, under § 301 of the Labor Management Relations Act, a federal court may grant equitable relief to enforce an agreement to arbitrate. The parties have strenuously argued the applicability of *Sinclair* and *Lincoln Mills* to the facts before us. We do not, however, reach the underlying questions of federal labor law these arguments present. For whatever power the District Court might have possessed under the circumstances disclosed by this record, the conclusion is inescapable that the decree which the court in fact entered was too vague

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[7] 365 F. 2d 295, 368 F. 2d 932.

[8] 386 U. S. 907, 387 U. S. 916.

[9] Other issues have been argued as well. In light of our disposition of these cases, we do not reach them.

to be sustained as a valid exercise of federal judicial authority.

On its face, the decree appears merely to enforce an arbitrator's award. But that award contains only an abstract conclusion of law, not an operative command capable of "enforcement." When counsel for the union noted this difficulty and sought to ascertain the District Court's meaning, he received no response. Even at the contempt hearing on March 1, the union was not told how it had failed to "comply with and . . . abide by the [Arbitrator's] Award," in accordance with the District Court's original order. That court did express the view on March 1 that the February walkouts had been "illegal . . . under the circumstances." But such strikes would have been "illegal"—in the sense that they would have been violative of the collective bargaining agreement—even if the District Court had entered no order at all, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, and the record does not reveal what further "circumstances" the court deemed relevant to the conclusion that the union had violated its decree. Thus the September 15 decree, even when illuminated by subsequent events, left entirely unclear what it demanded.

Rule 65 (d) of the Federal Rules of Civil Procedure was designed to prevent precisely the sort of confusion with which this District Court clouded its command. That rule provides:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in

active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Whether or not the District Court's order was an "injunction" within the meaning of the Norris-LaGuardia Act, it was an equitable decree compelling obedience under the threat of contempt and was therefore an "order granting an injunction" within the meaning of Rule 65 (d). Viewing the decree as "specifically enforcing" the arbitrator's award would not alter this conclusion. We have previously employed the term "mandatory injunction" to describe an order compelling parties to abide by an agreement to arbitrate,[10] and there is no reason to suppose that Rule 65 (d) employed the injunction concept more narrowly. That rule is the successor of § 19 of the Clayton Act.[11] Section 19 was intended to be "of general application," to the end that "[d]efendants . . . never be left to guess at what they are forbidden to do . . . ." [12] Consistent with the spirit and purpose of its statutory predecessor, we have applied Rule 65 (d) in reviewing a judgment enforcing an order of the National Labor Relations Board,[13] and the courts of appeals have applied the rule not only to prohibitory injunctions but to enforcement orders and affirmative decrees as well.[14] We have no doubt, therefore, that the

[10] *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, upheld federal judicial power to issue such an enforcement order. In *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, we described "the equitable relief granted in" *Lincoln Mills* as "a mandatory injunction to carry out an agreement to arbitrate." *Id.,* at 212.

[11] 38 Stat. 738, 28 U. S. C. § 383 (1940 ed.).

[12] H. R. Rep. No. 627, 63d Cong., 2d Sess., 26 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 21 (1914).

[13] *Regal Knitwear Co.* v. *Board,* 324 U. S. 9, 13–15.

[14] See, *e. g., International Brotherhood* v. *Keystone F. Lines,* 123 F. 2d 326, 330 (C. A. 10th Cir.); *NLRB* v. *Birdsall-Stockdale Motor Co.,* 208 F. 2d 234, 236–237 (C. A. 10th Cir.); *English* v. *Cun-*

District Court's decree, however it might be characterized for other purposes, was an "order granting an injunction" for purposes of Rule 65 (d).

The order in this case clearly failed to comply with that rule, for it did not state in "specific . . . terms" the acts that it required or prohibited. The Court of Appeals viewed this error as "minor and in no way decisional." [15] We consider it both serious and decisive.

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. Because the decree of this District Court was not so framed, it cannot stand. And with it must fall the District Court's decision holding the union in contempt. We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

Reversed.

MR. JUSTICE BRENNAN, concurring in result.

I concur in the result. But, like my Brother DOUGLAS, I emphasize that today's disposition in no way implies that *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195,

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ningham, 106 U. S. App. D. C. 70, 77–78, 269 F. 2d 517, 524–525. Cf. *Brumby Metals, Inc.* v. *Bargen,* 275 F. 2d 46, 48–50 (C. A. 7th Cir.); *Miami Beach Federal Savings & Loan Assn.* v. *Callander,* 256 F. 2d 410, 415 (C. A. 5th Cir.).

[15] 365 F. 2d 295, 301.

determines the applicability of the Norris-LaGuardia Act to an equitable decree carefully fashioned to enforce the award of an arbitrator authorized by the parties to make final and binding interpretations of the collective bargaining agreement.

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

I would reverse in No. 78 and in No. 34 remand the case to the District Court for further proceedings.

If the order of the District Court is an "injunction" within the meaning of Rule 65 (d), then I fail to see why it is not an "injunction" within the meaning of the Norris-LaGuardia Act. Legal minds possess an inventive genius as great as that of those who work in the physical sciences. Perhaps a form of words could be worked out which would employ the science of semantics to distinguish the Norris-LaGuardia Act problem from the present one. I for one see no distinction; and since I feel strongly that *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, caused a severe dislocation in the federal scheme of arbitration of labor disputes, I think we should not set our feet on a path that may well lead to the eventual reaffirmation of the principles of that case. My Brother STEWART expressly reserves the question whether the present order is an injunction prohibited by the Norris-LaGuardia Act. Despite this qualification, once we have held that the order constitutes an "injunction," the District Court on remand would likely consider *Sinclair,* which is not overruled, controlling and apply it to preclude the issuance of another order.

We held in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, that a failure to arbitrate was not part and parcel of the abuses against which the Norris-LaGuardia Act was aimed. We noted that Congress, in fashioning § 301 of the Labor Management Relations Act, was seek-

ing to encourage collective bargaining agreements in which the parties agree to refrain from unilateral disruptive action, such as a strike, with respect to disputes arbitrable by the agreement. Hence, if unions could break such agreements with impunity, the congressional purpose might well be frustrated. Although § 301 does not in terms address itself to the question of remedies, it commands the District Court to hold the parties to their contractual scheme for arbitration—the "favored process for settlement," as my Brother BRENNAN said in dissent in *Sinclair,* 370 U. S., at 216. I agree with his opinion that there must be an accommodation between the Norris-LaGuardia Act and all the other legislation on the books dealing with labor relations. We have had such an accommodation in the case of railroad disputes. See *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30. With respect to § 301, "Accommodation requires only that the anti-injunction policy of Norris-LaGuardia not intrude into areas, not vital to its ends, where injunctive relief is vital to a purpose of § 301; it does not require unconditional surrender." 370 U. S., at 225.

It would be possible, of course, to distinguish *Sinclair* from the instant cases. In these cases, the relief sought was a mandate against repetition of strikes over causes covered by the arbitrator's award. The complaint below alleged that the union's "refusal to comply with the terms of the Arbitrator's Award constitutes a breach of the applicable provisions of the current Collective Bargaining Agreement . . . ." Respondent asked that the court "enter an order enforcing the Arbitrator's Award, and that plaintiff may have such other and further relief as may be justified." We do not review here, as in *Sinclair,* a refusal to enter an order prohibiting unilateral disruptive action on the part of a union before that union has submitted its grievances to the arbitration procedure

provided by the collective bargaining agreement. Rather, the union in fact submitted to the arbitration procedure established by the collective bargaining agreement but, if the allegations are believed, totally frustrated the process by refusing to abide by the arbitrator's decision. Such a "heads I win, tails you lose," attitude plays fast and loose with the desire of Congress to encourage the peaceful and orderly settlement of labor disputes.

The union, of course, may have acted in good faith, for the new dispute may have been factually different from the one which precipitated the award. Whether or not it was, we do not know. To make the accommodation which the *Textile Workers* case visualizes as necessary between the policy of encouraging arbitration on the one hand and the Norris-LaGuardia restrictions on the other, the basic case must go back for further and more precise findings and the contempt case must obviously be reversed. See *Sinclair,* 370 U. S., at 228–229 (dissenting opinion).

UMANS *v.* UNITED STATES.

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

No. 41. Argued October 11, 1967.—Decided November 6, 1967.

368 F. 2d 725, certiorari dismissed as improvidently granted.

Edward Brodsky argued the cause for petitioner. With him on the briefs was *William Esbitt.*

Sidney M. Glazer argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE HARLAN would affirm the judgment of the Court of Appeals substantially for the reasons stated in Judge Waterman's opinion for that court in *United States* v. *Umans,* 368 F. 2d 725.

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

BECKLEY NEWSPAPERS CORP. *v.* HANKS.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WEST VIRGINIA, WYOMING COUNTY.

No. 467. Decided November 6, 1967.

Respondent brought this action in a West Virginia circuit court alleging that three editorials in petitioner's newspaper criticizing his official conduct as court clerk had libeled him. The jury had been instructed in part that it could find for respondent if it were shown that petitioner had published the editorials "with bad or corrupt motive," or "from personal spite, ill will or a desire to injure plaintiff." Respondent contended that there was sufficient proof for the jury to find that petitioner published the statements with reckless disregard of whether they were false or not. The jury awarded respondent damages and the State Supreme Court of Appeals denied appellate review. *Held:* The Court's independent examination of the whole record does not reveal that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not. Cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 287–288 (1964).

Certiorari granted; reversed and remanded.

Thurman Arnold and *Jack A. Mann* for petitioner.

Harry G. Camper, Jr., for respondent.

PER CURIAM.

The petition for certiorari is granted.

Respondent Hanks is the elected Clerk of the Criminal and Circuit Courts of Raleigh County, West Virginia. He brought this libel action in the West Virginia Circuit Court, Wyoming County, alleging that during his reelection campaign he was libeled by three editorials, highly critical of his official conduct, which appeared in petitioner's morning newspaper. The jury returned a verdict for respondent and awarded him $5,000 damages.

The State Supreme Court of Appeals denied petitioner's application for appellate review.

Although this action was tried subsequent to the decisions of this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *Garrison* v. *Louisiana,* 379 U. S. 64 (1964); *Henry* v. *Collins,* 380 U. S. 356 (1965); and *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966), and despite the fact that it was recognized at trial that the principles of *New York Times* were applicable, the case went to the jury on instructions which were clearly impermissible. The jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials "with bad or corrupt motive," or "from personal spite, ill will or a desire to injure plaintiff." Because petitioner failed to object to this erroneous interpretation of *New York Times* at trial, and in fact offered instructions which were themselves inadequate, the issue of these instructions is not before us. However, since it is clear that the jury verdict was rendered upon instructions which misstated the law and since petitioner has properly challenged the sufficiency of the evidence, we have undertaken an independent examination of the record as a whole "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan, supra,* at 285. See *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 156–159 (1967) (opinion of MR. JUSTICE HARLAN); *id.,* at 168–170 (opinion of THE CHIEF JUSTICE).

In *New York Times* we held that the Constitution forbids recovery of damages in a civil libel action by a public official, such as respondent, "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless

disregard of whether it was false or not." 376 U. S., at 279–280. Our examination of the whole record satisfies us that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . . ." 376 U. S., at 285–286.

We put aside the question whether the proofs show that the allegedly libelous statements were false. If false, respondent did not and does not contend that petitioner published the statements with knowledge of their falsity. His contention was and is that the proofs were sufficient for the jury to find that petitioner published the statements with reckless disregard of whether they were false or not. However, virtually the only evidence we find bearing on that question relates to one of the editorials critical of the opposition of respondent and another public official, Mrs. Elinor Hurt, president of the county board of health, to fluoridation of the local water supply. That editorial, captioned "The Fluoridation Situation Remains Unchanged," was directed primarily at Mrs. Hurt's opposition* but also included the following:

> "Here, again, [Mrs. Hurt] seems to want to follow in the footsteps of Hanks. For it was Hanks who ordered over the telephone once that he did not want his name to appear in the Beckley Post-Herald again. He backed up this order with an inexplicit threat—one merely intended to frighten those who are easily intimidated.
>
> "The only conclusion to which we can come is that either Hanks and Mrs. Hurt have been in league toward the fanatic end, believing all the wild-eyed

*When asked whether she had ever brought suit against petitioner for these or other statements, Mrs. Hurt replied, "No, sir, I have big broad shoulders." (Tr. 49.)

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ravings against fluoridation despite decades of experience to disprove them, or that *perhaps his blustering threats were able to intimidate the lady.*" (Emphasis added.)

Respondent's argument is that since both he and Mrs. Hurt testified and denied any threats or intimidation, the following testimony of petitioner's president and general manager on cross-examination provides "convincing proof" of the absence of prior investigation which entitled the jury to find that the "offending charges" were published with reckless disregard of whether they were false or true:

"Q. But you can't tell this jury that any specific investigation was made before this man was attacked in any of these articles, can you?

. . . . . .

"A. We watch the activities of the public servant. You don't have to make an investigation. His whole life is out in front of everybody.

"Q. Those editorials were not written by anybody who wanted to find out whether or not he threatened Mrs. Hurt, were they?

"A. There was cause on their part to feel there was that possibility.

"Q. That possibility?

"A. That's right. 'Perhaps,' they said.

. . . . . .

"A. It was our opinion that that was as near the facts and truth as we could get." (Tr. 121–122.)

We reject respondent's contention. Neither this passage nor anything else in the record reveals "the high degree of awareness of . . . probable falsity demanded by *New York Times* . . . ." *Garrison* v. *Louisiana,* 379 U. S. 64, 74; it cannot be said on this record that any failure of petitioner to make a prior investigation consti-

tuted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not. Cf. *New York Times Co.* v. *Sullivan, supra,* at 287–288; *Time, Inc.* v. *Hill,* 385 U. S. 374, 388–389 (1967). See also *Curtis Publishing Co.* v. *Butts, supra,* at 153–154 (opinion of MR. JUSTICE HARLAN).

The judgment is reversed, and the case remanded to the Circuit Court of West Virginia, Wyoming County, for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS joins, concurs in the result for the reasons stated in his concurring opinions in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293, and *Garrison* v. *Louisiana,* 379 U. S. 64, 79.

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

GARNER *v.* YEAGER, WARDEN, ET AL.

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

No. 704. Decided November 6, 1967.

Petitioner's request for federal habeas corpus, on the ground that the prosecution concealed the existence of a promise to recommend a specific sentence or leniency for an accomplice who testified for the State against petitioner, was rejected by the District Court and the Court of Appeals. Thereafter, the New Jersey Supreme Court granted petitioner's co-defendant a new trial after a court hearing on similar allegations. *Held:* The case, in light of the State Supreme Court's action, is remanded to the District Court for reconsideration, which may include whether petitioner must first exhaust any available state remedies.

Vacated and remanded.

PER CURIAM.

Certiorari was granted in this case on October 9, 1967. The judgment of the Court of Appeals for the Third Circuit is vacated and the case is remanded to the District Court of New Jersey for further proceedings consistent with this opinion.

Petitioner sought federal habeas corpus on the ground, among others, that prior to his state trial, the assistant prosecutor who handled the prosecution concealed the existence of a promise or agreement to recommend a specific sentence or leniency for an accomplice who testified as a State's witness against petitioner. The District Court rejected the claim without a hearing and upon its examination of the trial record, the record upon a motion for new trial, and the decision of the Supreme Court of New Jersey at 43 N. J. 209, 203 A. 2d 177. However, subsequent to the entry of the judgment of the Court of Appeals on April 7, 1967, the Supreme Court of New Jersey, on July 5, 1967, in a state post-conviction pro-

ceeding brought by petitioner's co-defendant Taylor, under N. J. Rev. R. 3:10A, granted Taylor a new trial after a trial court hearing on similar allegations. *State* v. *Taylor,* 49 N. J. 440, 231 A. 2d 212. In that circumstance the judgment of the Court of Appeals is vacated and the case is remanded to the District Court for reconsideration of petitioner's claim in light of the action of the Supreme Court of New Jersey in *State* v. *Taylor.* The District Court's reconsideration may include whether petitioner should be required first to exhaust any remedy which may be available in the state courts.

It is so ordered.

BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 539. Decided November 6, 1967.

279 F. Supp. 270, affirmed.

John H. Gobel for appellants.

Acting Solicitor General Spritzer, Assistant Attorney General Turner, Robert W. Ginnane and *Nahum Litt* for the United States et al., and *Don McDevitt* for Atchison, Topeka & Santa Fe et al., appellees.

PER CURIAM.

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

CHANCE *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO.

No. 306, Misc. Decided November 6, 1967.

Certiorari granted; judgment reversed.

Marshall W. Krause for petitioner.

Thomas C. Lynch, Attorney General of California, and *Robert R. Granucci* and *Michael J. Phelan,* Deputy Attorneys General, for respondent.

PER CURIAM.

The motion to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN would affirm for the reasons set forth in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, 500–503, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455.

WILL, U. S. DISTRICT JUDGE *v.* UNITED STATES.

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

No. 36. Argued October 17–18, 1967.—Decided November 13, 1967.

Petitioner, a federal district judge, ordered the Government to supply certain information requested by the defendant in a bill of particulars in a criminal case. The prosecutor refused to comply on the ground that the request constituted a demand for a list of prosecution witnesses, the production of which petitioner lacked power to compel under Fed. Rule Crim. Proc. 7 (f). Petitioner thereupon indicated his intention to dismiss the indictments against the defendant. The Government petitioned the Court of Appeals for a writ of mandamus to compel petitioner to strike the request for information from his bill of particulars order. On the basis of briefs filed, that court initially denied the Government's petition but, without new briefs or oral argument, and without opinion, reversed itself and issued a writ of mandamus directing petitioner to vacate his order. The Government contends that absent compelling considerations a trial court may not order the Government to produce a list of its witnesses before trial, and thereby offend the informant's privilege. *Held:* The record in this case discloses no proper justification for the Court of Appeals to have invoked the extraordinary writ of mandamus to review the trial court's interlocutory order. Pp. 95–107.

(a) The writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). P. 95.

(b) Appellate review should ordinarily be postponed until after the trial court renders final judgment. This is especially important in criminal cases, where a defendant is entitled to a speedy trial and may not be subjected to double jeopardy. P. 96.

(c) Appeals by the Government in federal criminal cases are not favored, and mandamus may not be used as a substitute for an interlocutory appeal. Pp. 96–97.

(d) Fed. Rule Crim. Proc. 7 (f) specifically empowers the trial court to direct the filing of a bill of particulars, and that court

has broad discretion to rule upon a request for such a bill. Pp. 98–99.

(e) The request here did not call for a list of prosecution witnesses and the record in this case does not support the Government's assertion that petitioner, contrary to federal rules for pretrial criminal discovery, followed a uniform rule of requiring the Government in criminal cases to furnish the defense, on motion for a bill of particulars, with a list of potential witnesses. Pp. 99–104.

(f) Petitioner had manifested his willingness to narrow the disclosure order upon a showing that the safety of individuals or the Government's ability to produce its evidence so required, but the Government made no such showing. P. 101.

(g) The lack of an opinion by the Court of Appeals precludes any proper appraisal of the basis for its invocation of the extraordinary writ. Pp. 104–107.

Vacated and remanded.

Harvey M. Silets argued the cause and filed briefs for petitioner.

Richard A. Posner argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Joseph M. Howard.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The question in this case is the propriety of a writ of mandamus issued by the Court of Appeals for the Seventh Circuit to compel the petitioner, a United States District Judge, to vacate a portion of a pretrial order in a criminal case.

Simmie Horwitz, the defendant in a criminal tax evasion case pending before petitioner in the Northern District of Illinois, filed a motion for a bill of particulars, which contained thirty requests for information. The Government resisted a number of the requests, and over the course of several hearings most of these objections

were either withdrawn by the Government or satisfied by an appropriate narrowing of the scope of the bill of particulars by petitioner. Ultimately the dispute centered solely on defendant's request number 25. This request sought certain information concerning any oral statements of the defendant relied upon by the Government to support the charge in the indictment. It asked the names and addresses of the persons to whom such statements were made, the times and places at which they were made, whether the witnesses to the statements were government agents and whether any transcripts or memoranda of the statements had been prepared by the witnesses and given to the Government.[1] After considerable discussion with counsel for both sides, petitioner ordered the Government to furnish the information. The United States Attorney declined to comply with the order on the grounds that request number 25 constituted a de-

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[1] Request number 25 originally read:

"25. If [the Government relies upon any oral statements of the defendant], state with respect to each such statement, if there was more than one:

"a. The name and address of the person to whom the statement was made;

"b. The date on which the statement was made;

"c. The place where it was made;

"d. The substance of the statement;

"e. Whether the person to whom the statement was made was a Government Agent at the time of the statement;

"f. The names and addresses of any other persons present at the time the statement was made; and

"g. Whether a written memorandum or verbatim transcript of the oral statement was made, and, if so, whether the Government has possession of the memorandum or transcript."

The Government objected, *inter alia,* to compliance with part "d" on work-product grounds. At first petitioner sustained this objection and struck part "d" altogether; however, he later ordered the Government to reveal the substance of statements made to government agents, but not of those made to private parties.

mand for a list of prosecution witnesses and that petitioner had no power under Rule 7 (f) of the Federal Rules of Criminal Procedure to require the Government to produce such a list.

Petitioner indicated his intention to dismiss the indictments against Horwitz because of the Government's refusal to comply with his order for a bill of particulars. Before the order of dismissal was entered, however, the Government sought and obtained *ex parte* from the Seventh Circuit a stay of all proceedings in the case. The Court of Appeals also granted the Government leave to file a petition for a writ of mandamus and issued a rule to show cause why such a writ should not issue to compel petitioner to strike request number 25 from his bill of particulars order. This case was submitted on the briefs, and the Court of Appeals at first denied the writ.[2] The

[2] The order of the Court of Appeals denying the writ read, in its entirety:

"This is a petition by the government for writ of mandamus to compel respondent, a district court judge, to vacate his order which effectually directs the government in a criminal cause to give the defendant names and addresses of persons to whom defendant in said cause made oral statements to support the charges in the indictments. Briefs have been filed in this court by both parties. The court has considered the briefs and is fully informed of the points made and the positions of the parties with respect to the issue, and

"The court finds that the order subject of the petition is not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal cases, *Cobbledick* v. *United States*, 309 U. S. 323; that mandamus may not be used as a means of reviewing the non-appealable order, *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; that federal courts use mandamus for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper jurisdiction, *Roche* v. *Evaporated Milk Association;* that the district judge's order upon the government to furnish names and addresses of witnesses to a defendant may be erroneous, a question we do not decide, but the ruling itself was within the court's jurisdiction, *Roche* v. *Evaporated Milk Association;* that the ruling can be reviewed on

Government petitioned for reconsideration, however, and the Court of Appeals, without taking new briefs or hearing oral argument, reversed itself and without opinion issued a writ of mandamus directing petitioner "to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars." [3] We

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appeal from a final judgment; and that there is no question here that the district judge refused to exercise his proper jurisdiction.

"It Is Therefore Ordered that the petition for writ of mandamus be and it is hereby denied."

[3] The original order denying the writ was entered on July 12, 1966. On August 16, 1966, the court granted the Government's petition for reconsideration, remarking only that:

"The court finds that in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply;

"It is therefore ordered that the order of this court of July 12, 1966, be and it is hereby vacated, and the cause is taken by the court upon the petition for the writ, the briefs of both parties and the record."

Subsequently, on October 4, 1966, the Court of Appeals granted the writ. Its entire order reads as follows:

"This cause came on to be heard upon the Government's petition for writ of mandamus ordering respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars, which question sought, among other things, the names and addresses of persons to whom defendant made oral statements supporting the indictment charging wilful evasion of income tax, and which statements the Government would rely upon at the trial; upon the rule issued upon respondent to show cause why the writ should not issue; upon the brief of respondent answering the rule, and the brief of the Government; and upon the record.

"And the Court having on August 16, 1966 vacated its July 12, 1966 order denying the writ, and having reconsidered the question,

"It Is Ordered that a writ of mandamus issue as prayed in the Government's petition directing respondent to vacate his order directing the Government to answer question 25 in defendant's motion for bill of particulars."

granted certiorari, 386 U. S. 955 (1967), because of the wide implications of the decision below for the orderly administration of criminal justice in the federal courts. We vacate the writ and remand the case to the Court of Appeals for further proceedings.

Both parties have devoted substantial argument in this Court to the propriety of petitioner's order. In our view of the case, however, it is unnecessary to reach this question.[4] The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy. *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212, 217 (1945). Thus the writ has been invoked where unwarranted judicial action threatened "to embarrass the executive arm of the Government in conducting foreign relations," *Ex parte Peru,* 318 U. S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland* v. *Soper,* 270 U. S. 9 (1926), where it was necessary to confine a lower court

[4] It is likewise unnecessary for us to reach the question whether the writ in the circumstances of this case may be said to issue in aid of an exercise of the Court of Appeals' appellate jurisdiction. See 28 U. S. C. § 1651; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943). Compare *In re United States,* 348 F. 2d 624 (C. A. 1st Cir. 1965), with *United States* v. *Bondy,* 171 F. 2d 642 (C. A. 2d Cir. 1948). In our view, even assuming that the possible future appeal in this case would support the Court of Appeals' mandamus jurisdiction, it was an abuse of discretion for the court to act as it did in the circumstances of this case.

to the terms of an appellate tribunal's mandate, *United States* v. *United States Dist. Court,* 334 U. S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957); see *McCullough* v. *Cosgrave,* 309 U. S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U. S. 701, 706, 707 (1927) (dictum). And the party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 384 (1953); see *United States* v. *Duell,* 172 U. S. 576, 582 (1899).

We also approach this case with an awareness of additional considerations which flow from the fact that the underlying proceeding is a criminal prosecution. All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court. See, *e. g.,* Judiciary Act of 1789, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85; *Cobbledick* v. *United States,* 309 U. S. 323, 326 (1940); *McLish* v. *Roff,* 141 U. S. 661 (1891). This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him. *DiBella* v. *United States,* 369 U. S. 121, 126 (1962). Moreover, "in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored," *Carroll* v. *United States,* 354 U. S. 394, 400 (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition, cf. *Fong Foo* v. *United States,* 369 U. S. 141 (1962). Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U. S. C. § 3731, and the Criminal Appeals Act is strictly

construed against the Government's right of appeal, *Carroll* v. *United States,* 354 U. S. 394, 399–400 (1957). Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies. *E. g., Fong Foo* v. *United States,* 369 U. S. 141 (1962); *Parr* v. *United States,* 351 U. S. 513, 520–521 (1956); *Bank of Columbia* v. *Sweeny,* 1 Pet. 567, 569 (1828). Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal "made less compelling . . . by the fact that the Government has no later right to appeal." *DiBella* v. *United States,* 369 U. S. 121, 130 (1962).[5] This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States,* 287 U. S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful

[5] Thus it is irrelevant, and we do not decide, whether the Government could appeal in the event petitioner dismissed the Horwitz indictments because of its refusal to comply with his bill of particulars order. Both parties agree that it is highly doubtful that it could appeal. See *United States* v. *Apex Distrib. Co.,* 270 F. 2d 747 (C. A. 9th Cir. 1959). The Government argues that it is unseemly to force it to defy the court in order to seek review of its order, and doubly so because it may secure review with certainty only if the United States Attorney is cited for contempt, compare *Bowman Dairy Co.* v. *United States,* 341 U. S. 214 (1951), in view of the doubtful status of its right to appeal a dismissal. But this misses the mark. Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions. This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold. *Carroll* v. *United States,* 354 U. S. 394, 407–408 (1957). We may assume for purposes of this decision that there may be no other way for the Government to seek review of individual orders directing it to file bills of particulars.

fruits of a valid conviction, *Ex parte United States,* 242 U. S. 27 (1916). But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense.

In light of these considerations and criteria, neither the record before us nor the cryptic order of the Court of Appeals justifies the invocation of the extraordinary writ in this case.

We do not understand the Government to argue that petitioner was in any sense without "jurisdiction" to order it to file a bill of particulars.[6] Suffice it to note that Rule 7 (f) of the Federal Rules of Criminal Procedure specifically empowers the trial court to "direct the filing of a bill of particulars," [7] and that federal trial

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[6] Nor do we understand the Government to argue that a judge has no "power" to enter an erroneous order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders. Neither "jurisdiction" nor "power" can be said to "run the gauntlet of reversible errors." *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 382 (1953). Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable." *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212, 223, 225 (1945) (dissenting opinion of Mr. Justice Douglas).

[7] It should be noted that Rule 7 (f) was amended, effective July 1, 1966, to eliminate the requirement that a defendant seeking a bill

courts have always had very broad discretion in ruling upon requests for such bills, compare *Wong Tai* v. *United States,* 273 U. S. 77, 82 (1927). Furthermore, it is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial. See, *e. g., United States* v. *White,* 370 F. 2d 559 (C. A. 7th Cir. 1966). See also *United States* v. *Debrow,* 346 U. S. 374, 378 (1953).

The Government seeks instead to justify the employment of the writ in this instance on the ground that petitioner's conduct displays a "pattern of manifest noncompliance with the rules governing federal criminal trials." [8] It argues that the federal rules place settled limitations upon pretrial discovery in criminal cases, and that a trial court may not, in the absence of compelling justification, order the Government to produce a list of its witnesses in advance of trial. It argues further that in only one category of cases, *i. e.,* prosecutions for treason and other capital offenses, is the Government required to turn over to the defense such a list of its witnesses. A general policy of requiring such disclosure without a particularized showing of need would, it is contended, offend the informant's privilege. Petitioner, according to the Government, adopted "a uniform rule in his courtroom requiring the government in a criminal case to furnish the defense, on motion for a bill of particulars, a list of potential witnesses." [9] The Government concludes

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of particulars make a showing of "cause." The Government argues that this amendment was not designed "to transform the bill of particulars into an instrument of broad discovery." Brief for United States, p. 15, n. 5. We intimate no view regarding the construction of the amendment. Petitioner's order was entered before the amendment was promulgated. The impact of the amendment on the present proceeding will, of course, be a question open upon remand.

[8] Brief for United States, p. 24.

[9] Brief for United States, p. 11.

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that since petitioner obviously had no power to adopt such a rule, mandamus will lie under this Court's decision in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957), to correct this studied disregard of the limitations placed upon the district courts by the federal rules.[10]

The action of the Court of Appeals cannot, on the record before us, bear the weight of this justification. There is absolutely no foundation in this record for the Government's assertions concerning petitioner's practice. The legal proposition that mandamus will lie in appropriate cases to correct willful disobedience of the rules laid down by this Court is not controverted. But the position of the Government rests on two central factual premises: (1) that petitioner in effect ordered it to produce a list of witnesses in advance of trial; and (2) that petitioner took this action pursuant to a deliberately adopted policy in disregard of the rules of criminal procedure. Neither of these premises finds support in the record.

Petitioner repeatedly and, we think, correctly emphasized that request number 25 did not call for a list of government witnesses. He carefully noted that it was utterly immaterial under the terms of request number 25 whether the Government planned to call any of the individuals whose names were sought to the witness stand during the trial. Furthermore, it is clear as a practical

[10] We note in passing that *La Buy* and the other decisions of this Court approving the use of mandamus as a means of policing compliance with the procedural rules were civil cases. See *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U. S. 701, 706, 707 (1927) (dictum). We have pointed out that the fact this case involves a criminal prosecution has contextual relevance. See *supra*, at 96–98. In view of our reading of the record, however, we need not venture an abstract pronouncement on the question whether this fact imposes a more stringent standard for the invocation of mandamus by the Government where the allegation is that a district judge has deviated from the federal rules.

matter that the Government's proof in this case, as in any prosecution of this complex nature, will extend far beyond mere damaging admissions of the defendant, and that witnesses will in all probability be called who have never heard Horwitz make any incriminating statements. Nor, if the list of people who have allegedly heard Horwitz make damaging admissions is long, is it likely that they will all be called to testify for the Government. Thus while the two categories have a clear probable overlap, they are not co-extensive. And, as petitioner stated in the opinion accompanying his original order to the Government to file a bill of particulars:

> "The reason for requiring disclosure of their names . . . is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense."

Indeed, petitioner excused the Government from answering request number 29 (a), which was so broad as to constitute in effect a demand for a list of prosecution witnesses. Finally, it should be noted that in the opinion accompanying the original order, petitioner averred his willingness to narrow the order of disclosure upon a showing by the Government "that such disclosure will involve physical risk to the individuals or prejudice the government in its ability to produce its evidence." He repeated this offer numerous times in the subsequent hearings on the Government's objections to the bill, but the United States Attorney never suggested that such a showing could be made in this case.[11]

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[11] Petitioner at one point stated to government counsel:

"I told you that any time you made a representation with any foundation in support of it that the disclosure of the name of an individual would either jeopardize him physically or jeopardize the government's proof in the case and that his testimony might be altered or effort might be made to persuade him not to testify, or something else, I am prepared to say under those circumstances

The record is equally devoid of support for the notion that petitioner had adopted a deliberate policy in open defiance of the federal rules in matters of pretrial criminal discovery. The extended colloquy between petitioner and government counsel reveals at most that petitioner took a generally liberal view of the discovery rights of criminal defendants.[12] But petitioner was careful never

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of that showing we don't risk people's lives or their security, their physical well-being, and we don't encourage any possible circumstances in which testimony can be suppressed. That is consistent, it seems to me, with my general philosophy that you shouldn't be suppressing things; and if there is a threat of suppression then I will take the lesser suppression to prevent the greater."

Earlier, after government counsel suggested that the danger of fabricated defenses justified a policy against the disclosure of the names of potential government witnesses, petitioner replied:

"Now any evidence of a fabrication, believe me, we will deal with it. The laws of perjury—we have had convictions for perjury here, and we will have them again, I have no doubt, arising out of criminal cases, but I am not prepared to say to a defendant that you may not have the information which it seems to me you reasonably require to prepare your defense because I am afraid you or somebody helping you will lie and we won't be able to do anything about it."

Upon further inquiry, the United States Attorney made no suggestion that there was a particular danger that disclosure of the names sought by request number 25 would result in subornation of perjury.

[12] Petitioner remarked at one stage:

"You know, I have great concern that in a civil case we require both sides to submit their witnesses to maximum deposition when all that is involved is money. In a criminal case, the government doesn't even want to disclose the name of a person so the other side can go out and interview him when what is concerned is life or liberty. To me this is a very strange aberration of the processes of justice as between civil and criminal cases. When all that is involved is money, we say put your cards on the table. Where life and liberty are involved, we say to the prosecution you don't have to tell him a thing."

The Government seeks to make much of an exchange in which petitioner remarked that he would "go further" than what the

to divorce his ruling from his view of the legitimate needs of the defendant in the case before him, and there is no indication that he considered the case to be governed by a uniform and inflexible rule of disclosure.[13] Thus the

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United States Attorney referred to as "the proposed new rules of discovery under the criminal rules by the American Bar Association." The reference, according to the Government, is to the amendments to the Federal Rules of Criminal Procedure, which were pending in this Court at the time, and the exchange reveals petitioner's determination to require broad criminal discovery despite the limitations of the rules. We cannot accept this argument. In the first place, the colloquy clearly reveals that petitioner considered the proposed rules irrelevant to the question before him. In the second place, petitioner made it plain that he thought his position could in any event be rested on a reading of the proposed rules:

"The Court: . . . I would go further than they go, but they certainly go a lot further than you—a lot further.

"Mr. Schultz [United States Attorney]: They would not require the answers to these questions.

"The Court: I don't agree with that. They would not require the giving of a list of witnesses, and I don't conceive that I am . . . ."

[13] After his initial ruling that the defendant was entitled to the information sought by request number 25 because he needed it to prepare his defense adequately, petitioner continually asserted a willingness to consider any factors peculiar to the case which militated against disclosure of this information and to narrow his order in light of any such considerations. See n. 11, *supra*. Moreover, on several occasions it was petitioner who sought to narrow the focus of the discussion to the particular instance by insisting that the United States Attorney relate his generalized policy objections to the facts of the particular case:

"Mr. Schultz: We are not only talking about this very case, your Honor.

"The Court: Well, I am talking about this case. That is what I am ruling on. That is what I ruled on last week or earlier this week. That is what you are asking me to reconsider, to vacate."

And again:

"Why shouldn't they have an opportunity to interview the witnesses? Why should they put them on cold at the time, or why

most that can be claimed on this record is that petitioner may have erred in ruling on matters within his jurisdiction. See *Parr* v. *United States,* 351 U. S. 513, 520 (1956). But "[t]he extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals." *Id.,* at 520–521. Mandamus, it must be remembered, does not "run the gauntlet of reversible errors." *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 382 (1953). Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. *Id.,* at 383. Thus the record before us simply fails to demonstrate the necessity for the drastic remedy employed by the Court of Appeals.

Even more important in our view, however, than these deficiencies in the record is the failure of the Court of Appeals to attempt to supply any reasoned justification of its action. Had the Government in fact shown that petitioner adopted a policy in deliberate disregard of the criminal discovery rules and that this policy had proved seriously disruptive of the efficient administration of criminal justice in the Northern District of Illinois, it would have raised serious questions under this Court's decision in *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957).[14] In *La Buy,* however, we specifically relied upon

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should I have to recess then while they go and interview the witnesses to see what their testimony would be?

"I don't understand it, Mr. Schultz. I just don't understand in this situation—I can understand a lot of situations, but in this situation. We are not talking about some other case, but in this case, this case in which you say that there were incriminating admissions made."

[14] The Government also places reliance on *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964), arguing that it "reaffirmed" *La Buy.* Insofar as it did so, the case does not help the Government here, since we have no quarrel with *La Buy,* which is simply inapposite where there is no showing of a persistent disregard of the federal rules. And it

evidence in the record which showed a pattern of improper references of cases to special masters by the District Judge. 352 U. S., at 258. There is no evidence in this record concerning petitioner's practice in other cases, aside from his own remark that the Government was generally dissatisfied with it,[15] and his statements do not reveal any intent to evade or disregard the rules. We do not know what he ordered the Government to reveal under what circumstances in other cases. This state of the record renders the silence of the Court of Appeals all the more critical. We recognized in *La Buy* that the familiarity of a court of appeals with the practice of the individual district courts within its circuit was relevant to an assessment of the need for mandamus as a corrective measure. See 352 U. S., at 258. But without an

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cannot be contended that *Schlagenhauf* on its facts supports an invocation of mandamus in this case. The Court there did note that the various questions concerning the construction of Rule 35 were new and substantial, but it rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination.

[15] Petitioner stated that

"it is no secret that the government is disturbed that I am making available to defendants the identity of people who are alleged to have been present when transactions took place, which the government contends are illegal. . . .

". . . I have never required them to disclose their evidence, but I have required them to identify the people with whom the defendant is supposed to have participated in an illegal act but who were present."

We note merely that petitioner was careful to distinguish his practice from requiring the Government to produce its evidence or a list of witnesses. In any event, petitioner's passing remarks concerning a running dispute with the Government are insufficient to support an invocation of *La Buy*, absent some evidence concerning petitioner's actions in other cases, or at the very least some illumination of this dialogue flowing from the Court of Appeals' experience with petitioner's general practice and its reading of Rule 7 (f).

opinion from the Court of Appeals we do not know what role, if any, this factor played in the decision below. In fact, we are in the dark with respect to the position of the Court of Appeals on all the issues crucial to an informed exercise of our power of review. We do not know: (1) what the Court of Appeals found petitioner to have done; (2) what it objected to in petitioner's course of conduct—whether it was the order in this particular case or some general practice adopted by petitioner in this and other cases; [16] (3) what it thought was the proper scope of a bill of particulars under Rule 7 (f) and what limitations it thought the criminal rules placed upon the particular or generalized discretion of a district court to order the Government to file such a bill; or (4) what relevance, if any, it attached to the fact that this order was entered in a criminal case, in assessing the availability of mandamus. We cannot properly identify the questions for decision in the case before us without illumination of this unclear record by the measured and exposed reflection of the Court of Appeals.

Due regard, not merely for the reviewing functions of this Court, but for the "drastic and extraordinary" nature of the mandamus remedy, *Ex parte Fahey,* 332 U. S.

[16] Another puzzling aspect of the action of the Court of Appeals is what it did not do. Requests 7, 14, 19, 21, 23, 25, 27, and 29 called for the disclosure of the names of persons who might conceivably be called as witnesses by the Government at Horwitz' trial. The Government objected to being required to answer requests 7, 14, 25, and 29. Ultimately petitioner excused the Government from answering request number 29, which was very broadly cast and did in effect call for a list of all potential witnesses. The Government for its part answered all the remaining requests, except number 25. The mandamus petition only placed the latter in issue, but nothing in the record indicates why either the Government or the Court of Appeals might have thought that it was within petitioner's judicial discretion under Rule 7 (f) to order the disclosure of the names sought by the other requests, but not the revelation of those sought by request number 25.

258, 259 (1947), and for the extremely awkward position in which it places the District Judge, *id.*, at 260, demands that a court issuing the writ give a reasoned exposition of the basis for its action.

Mandamus is not a punitive remedy. The entire thrust of the Government's justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. While these aims lay at the core of this Court's decisions in *La Buy* and *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964), we fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below.

The peremptory common-law writs are among the most potent weapons in the judicial arsenal. "As extraordinary remedies, they are reserved for really extraordinary causes." *Ex parte Fahey,* 332 U. S. 258, 260 (1947). There is nothing in the record here to demonstrate that this case falls into that category, and thus the judgment below cannot stand. What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say. Hence the writ is vacated and the cause is remanded to the Court of Appeals for the Seventh Circuit for further proceedings not inconsistent with this opinion.

It is so ordered.

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

MR. JUSTICE BLACK, concurring.

I concur in the Court's judgment to vacate and agree substantially with its opinion, but would like to add a

few words, which I do not understand to be in conflict with what the Court says, concerning the writ of mandamus. I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means "final" and thus appealable under federal statutes. Finality, then, while relevant to the right of appeal, is not determinative of the question when to issue mandamus. Rather than hinging on this abstruse and infinitely uncertain term, the issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order. In the present case it is conceivable that there are valid reasons why the Government should not be forced to turn over the requested names and that compliance with the order would inflict irreparable damage on its conduct of the case. The trouble here, as I see it, is that neither of the courts below gave proper consideration to the possible existence of exceptional facts which might justify the Government's refusal to disclose the names. Having no doubt as to the appropriateness of mandamus, if the circumstances exist to justify it, I would vacate the judgment below and remand the case to the Court of Appeals for further deliberation on whether there are special circumstances calling for the issuance of mandamus.

BURGETT *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 53. Argued October 18, 1967.—Decided November 13, 1967.

Petitioner was charged in a five-count indictment, which was read to the jury at the beginning of the trial, and convicted of "assault with malice aforethought with intent to murder; repetition of offense." The first count charged the assault. The other counts, pursuant to the Texas recidivist statutes, alleged prior felony convictions, one in Texas for burglary, and three in Tennessee for forgery, which, if proved, would have made petitioner subject to life imprisonment upon his being convicted under count one. In the jury's presence the prosecution offered evidence of two differing certified copies of one of the Tennessee convictions and a certified copy of the indictment in the prior Texas prosecution. The court admitted the Texas conviction into evidence but later sustained petitioner's objection as to that judgment and struck it from the evidence. The court upheld petitioner's objection to the first version of the Tennessee conviction on the ground that the judgment showed on its face that petitioner was not represented by counsel in violation of the Sixth Amendment made applicable to the States by the Fourteenth Amendment. It overruled his objection on the same ground to the second version, which stated that petitioner had appeared "in proper person" but did not add (as did the first version) "without counsel." There was no explanation of the discrepancy between the two versions. Reference was also made in the second version to the jury's having retired to consider its verdict after "argument of counsel," but with no indication whether the word was being used in the singular or plural. After testimony was heard on the substantive offense, the court instructed the jury not to consider the prior offenses for any purpose whatsoever in arriving at its verdict. Petitioner was convicted and appealed, urging error in the reading to the jury of the indictment containing the prior felony conviction counts and in the failure to sustain his objection to the admission into evidence of the second version of the Tennessee conviction. The appellate court upheld the conviction, holding that there had been no error since the trial court had instructed the jury to dis-

regard the prior offenses and petitioner had not received the enhanced punishment prescribed by the recidivist statutes. *Held:*

1. The certified records of the Tennessee conviction raise a presumption that petitioner was denied his right to counsel in that proceeding and that the conviction was void under *Gideon* v. *Wainwright,* 372 U. S. 335. To permit a conviction obtained in violation of *Gideon* to be used either to support guilt or enhance punishment for another offense would erode the principle of that case and allow an unconstitutional procedure to injure a defendant twice. Pp. 114–115.

2. The admission into evidence of a constitutionally invalid prior conviction is inherently prejudicial and it cannot be said that instructions to disregard such error made it "harmless beyond a reasonable doubt," within the meaning of *Chapman* v. *California,* 386 U. S. 18. *Spencer* v. *Texas,* 385 U. S. 554, distinguished. Pp. 115–116.

397 S. W. 2d 79, reversed.

Gordon Gooch, by appointment of the Court, 386 U. S. 953, argued the cause and filed briefs for petitioner.

Leon Douglas argued the cause for respondent. With him on the brief were *Crawford Martin,* Attorney General of Texas, *George Cowden,* First Assistant Attorney General, *A. J. Carubbi* and *R. L. Lattimore.*

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted of "assault with malice aforethought with intent to murder; repetition of offense." The jury fixed the punishment at 10 years in the Texas State Penitentiary.[1] On appeal, the Texas Court of Criminal Appeals affirmed petitioner's conviction.[2] We granted certiorari, 386 U. S. 931.

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[1] The maximum penalty for a first conviction of assault with intent to murder is 25 years; the minimum penalty is two years. Tex. Pen. Code, Art. 1160 (Supp. 1966).

[2] *Burgett* v. *State,* 397 S. W. 2d 79 (1965).

Petitioner was charged in a five-count indictment. In the first count the State alleged that he had cut one Bradley with a knife and had stabbed at Bradley's throat with intent to kill. Pursuant to the Texas recidivist statutes,[3] the remaining counts of the indictment consisted of allegations that petitioner had incurred four previous felony convictions: a Texas conviction for burglary, and three Tennessee convictions for forgery. If these allegations were found to be true, petitioner would be subject to a term of life imprisonment upon conviction of the offense charged in count one.[4]

Petitioner's counsel filed a pretrial motion to quash the four counts of the indictment referring to the prior convictions for failure to apprise the defense of what the State would attempt to prove.[5] The record is silent as to the court's action on this motion. But when the indictment was read to the jury at the beginning of the trial, before any evidence was introduced, the four counts relating to the prior convictions were included.

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[3] The statutes involved here are Articles 62 and 63 of the Tex. Pen. Code (1952).

Article 62 provides: "If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 63 provides: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

[4] Tex. Pen. Code, Art. 63 (1952).

[5] In petitioner's amended motion for a new trial, which was denied by the court, he explained that the purpose of the pretrial motion was "so that defendant could establish their [the previous convictions alleged for enhancement] admissibility before they were read into the record in the presence of the jury; same reading into the record in the presence of the jury was prejudicial to defendant herein."

During the course of the trial, while the jury was present, the State offered into evidence a certified copy of one of the Tennessee convictions. The conviction read in part, "Came the Assistant Attorney-General for the State and the Defendant in proper person and without Counsel." Petitioner's counsel objected to the introduction of the record on the ground that the judgment on its face showed that petitioner was not represented by counsel in violation of the Fourteenth Amendment. There was no indication in the record that counsel had been waived. The court stated that it would reserve ruling on the objection, apparently to give the State an opportunity to offer any of the other convictions into evidence. The State then offered a second version of the same Tennessee conviction which stated that petitioner had appeared "in proper person" but did not contain the additional words "without counsel." This second version also stated that "After said jury had heard the evidence, argument of counsel, and the charge of the Court, they retired to consider of their verdict." It is not clear, however, whether "counsel" was being used in the singular or plural, and in any event no explanation was offered for the discrepancy between the two records. Petitioner's counsel objected to this second version on the same ground. The court again reserved its ruling.

The State then offered into evidence a certified copy of the indictment in the prior Texas case. Petitioner's counsel indicated he had no objection, and that record was received into evidence. Thereafter, testimony was offered concerning the judgment and sentence in the prior Texas case. After some testimony had been given, the jury was excused and the hearing continued out of its presence. At the conclusion of the hearing, petitioner's attorney objected that the Texas judgment was void on its face under state law. The court sustained that ob-

jection, and the record of the Texas conviction was stricken from evidence. At the same time, the court sustained petitioner's objection to the first version of the Tennessee conviction; but overruled the objection to the second version of the same conviction. The jury was then recalled and testimony was heard on the substantive offense charged. The next reference to the prior convictions was when the court instructed the jury not to consider the prior offenses [6] for any purpose whatsoever in arriving at the verdict.

Petitioner's motion for a new trial was denied. In the Court of Criminal Appeals, petitioner argued, *inter alia,* that the court erred in permitting counts two through five of the indictment to be read to the jury at the beginning of the trial, and in failing to sustain petitioner's objection to the admission into evidence of the second version of the Tennessee conviction. The Court of Criminal Appeals held that since petitioner had not suffered the enhanced punishment provided by the recidivist statutes, and since the instruction to disregard the prior offenses had been given, no error was presented.

We do not sit as a court of criminal appeals to review state cases. The States are free to provide such pro-

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[6] The court apparently withdrew consideration of the prior convictions from the jury since only the record of the one prior Tennessee conviction for forgery had been accepted. Thus, Article 63 could not be applied to petitioner. Further, since forgery could not be considered as an offense of the "same nature" as assault with intent to murder, Article 62 would not be applicable. See n. 3, *supra.*

The State apparently did not attempt to introduce the records of the other two Tennessee convictions for forgery because the indictment showed that all of the convictions occurred on the same date. To invoke the provisions of Article 63, each succeeding conviction must be subsequent in time to the previous conviction—both with respect to commission of the offense and to conviction. *Cowan* v. *State,* 172 Tex. Cr. R. 183, 355 S. W. 2d 521 (1962).

cedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution. The recent right-to-counsel cases, starting with *Gideon* v. *Wainwright,* 372 U. S. 335, are illustrative of the limitations which the Constitution places on state criminal procedures. Those limitations sometimes touch rules of evidence.

The exclusion of coerced confessions is one example. *Chambers* v. *Florida,* 309 U. S. 227.

The exclusion of evidence seized in violation of the Fourth and Fourteenth Amendments is another. *Mapp* v. *Ohio,* 367 U. S. 643.

Still another is illustrated by *Pointer* v. *Texas,* 380 U. S. 400. In that case we held that a transcript of a preliminary hearing had to be excluded from a state criminal trial because the defendant had no lawyer at that hearing, and did not, therefore, have the opportunity to cross-examine the principal witness against him who since that time had left the State. The exclusionary rule that we fashioned was designed to protect the privilege of confrontation guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth.

The same result must follow here. *Gideon* v. *Wainwright* established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one. And that ruling was not limited to prospective applications. See *Doughty* v. *Maxwell,* 376 U. S. 202; *Pickelsimer* v. *Wainwright,* 375 U. S. 2. In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from

a silent record is impermissible. *Carnley* v. *Cochran,* 369 U. S. 506. To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer* v. *Beto,* 384 U. S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it [7] made the constitutional error "harmless beyond a reasonable doubt" within the meaning of *Chapman* v. *California,* 386 U. S. 18.

Our decision last Term in *Spencer* v. *Texas,* 385 U. S. 554, is not relevant to our present problem. In *Spencer* the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudiced by the introduction of the evidence of prior crimes. As the Court noted, "[i]n the procedures before us . . . no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general 'fairness' approach." *Id.,* at

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[7] See, *e. g., Boyd* v. *United States,* 142 U. S. 450; *United States* v. *Clarke,* 343 F. 2d 90 (C. A. 3d Cir. 1965). Cf. *Waldron* v. *Waldron,* 156 U. S. 361, 383; *Throckmorton* v. *Holt,* 180 U. S. 552; *Lawrence* v. *United States,* 357 F. 2d 434 (C. A. 10th Cir. 1966); *United States* v. *DeDominicis,* 332 F. 2d 207 (C. A. 2d Cir. 1964).

What Mr. Justice Jackson said in *Krulewitch* v. *United States,* 336 U. S. 440, 445, 453 (concurring opinion), in the sensitive area of conspiracy is equally applicable in this sensitive area of repetitive crimes, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

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565. In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless *Gideon* v. *Wainwright* is to suffer serious erosion.

Reversed.

MR. CHIEF JUSTICE WARREN, concurring.

I am in full agreement with the opinion of the Court and the reasons stated therein for reversing the conviction in this case. However, in view of the terse dissent entered by my Brother HARLAN, I feel constrained to add some observations of my own.

The dissent refers to the Court's decision in *Spencer* v. *Texas*, 385 U. S. 554, and the entire thrust of the dissent is reminiscent of that decision of last Term which placed this Court's stamp of approval on the Texas recidivist procedures from which this case evolves. The dissent reminds us that "[w]e do not sit as a court of errors and appeals in state cases." I would not disagree with that statement as an abstract proposition. But we are not dealing with abstracts in this case. We are dealing with a very real denial of a state criminal defendant's rights as guaranteed by the Federal Constitution. We are also told by the dissent that "this case shows no prosecutorial bad faith or intentional misconduct." But this misses the mark. We are not limited in our review of constitutional errors in state criminal proceedings to those errors which flow from "prosecutorial bad faith or intentional misconduct." [1] Our concern is with the effect

[1] Prosecutorial bad faith, of course, is not an irrelevant element in our review of state criminal convictions. It can often make even more intolerable errors which demand correction in this Court. See, *e. g.*, *Miller* v. *Pate*, 386 U. S. 1; *Napue* v. *Illinois*, 360 U. S. 264; *Mooney* v. *Holohan*, 294 U. S. 103.

of those errors, whether well-intentioned or not,[2] on the constitutionally protected right of a criminal defendant to a fair and impartial trial.

This case is a classic example of how a rule eroding the procedural rights of a criminal defendant on trial for his life or liberty can assume avalanche proportions, burying beneath it the integrity of the fact-finding process. In *Spencer,* the Court approved a procedure whereby a State, for the sole purpose of enhancing punishment, includes in the indictment allegations of prior crimes which are read to the jury and enters evidence at trial of those prior crimes, no matter how unrelated they might be to the charge on which the defendant is being tried. The rule adopted in *Spencer* went so far as to allow the State to enter evidence on the prior crimes even though a defendant might be willing to stipulate the earlier convictions. In this case, that harsh rule was expanded to a degree close to barbarism.

In addition to charging the petitioner with the principal crime of "assault with malice aforethought with intent to murder," the indictment alleged four prior convictions, one in Texas and three in Tennessee. Despite the efforts of the petitioner's attorney to quash those portions of the indictment referring to the prior crimes, the entire indictment was read to the jury at the start

[2] The dissent is not alone in viewing this case solely in terms of the prosecutor's good or bad faith. The Texas Court of Criminal Appeals disposed of the petitioner's objection to the use of the prior void convictions at trial with the cryptic observation that "[t]here is no showing of bad faith on the part of the state in alleging or attempting to prove the prior convictions." Boswell tells us that Dr. Johnson once observed that "Hell is paved with good intentions." Boswell, Life of Samuel Johnson 257 (Great Books ed. 1952). If the good-faith view of this case should prevail, then surely this petitioner's road to prison would be paved with the same good intentions.

of the petitioner's one-day trial. The prosecutor then proceeded to offer evidence of the prior convictions. The petitioner's attorney objected to evidence of one Tennessee conviction because a certified copy of that conviction showed that the petitioner had not been represented by counsel. The trial judge reserved his ruling on the objection. The prosecution next offered a second version of that same Tennessee conviction which omitted any reference to the absence of counsel but which did not show a waiver of counsel. The petitioner's attorney again objected and the trial judge again reserved his ruling. The prosecutor then offered into evidence a certified copy of the indictment in the prior Texas case, and it was received without objection. All this occurred in the presence of the jury. However, when the petitioner's attorney objected to evidence concerning the judgment and sentence in the prior Texas case, the jury was excused and testimony was taken out of the presence of the jury. At the close of that evidence and before the jury returned, the trial judge ruled that the prior Texas conviction was void under state law. In addition, the trial judge sustained the objection to the first version of the Tennessee conviction but overruled the objection to the second version of the same conviction.[3] The jury then returned and the trial continued. The next the jury was to hear of the prior convictions was a brief instruction from the trial judge advising the jurors not to consider the prior crimes for any purpose. The jury was never told, however, that two of the prior convictions charged were void and that the prosecution had failed

[3] The record is silent concerning the second and third Tennessee convictions alleged in the indictment, and the prosecution apparently did not offer any evidence on those convictions. However, the jury had been made aware of those prior crimes when the indictment was read at the start of the trial.

to offer testimony on the validity of the other prior crimes charged in the indictment.

Thus, the jury went into its deliberations knowing that the petitioner had been convicted and imprisoned for four prior felonies, although not one had been proven at the trial. To expect that the jury could wipe this from its memory and decide the petitioner's guilt only on the basis of the evidence of assault is to place too much faith in a jury's ability to detach itself from reality. This is particularly true since the trial judge gave the jurors not the slightest clue as to why matters which consumed so much time at trial were suddenly being removed from their consideration.

To suggest that such a procedure accords a man charged with a crime due process is beyond belief. This Court has reversed convictions in other cases based on unfair influences on juries which must be deemed minor when compared to the pervasive prejudice in this case. Not long ago we ruled that a defendant was denied due process when a court bailiff remarked in the presence of the jurors, "Oh that wicked fellow, he is guilty"; and, "If there is anything wrong [in the verdict] the Supreme Court will correct it." *Parker* v. *Gladden,* 385 U. S. 363. We also reversed a murder conviction because two prosecution witnesses were deputy sheriffs who had been assigned to accompany the jury while it was sequestered. *Turner* v. *Louisiana,* 379 U. S. 466.[4] If these transgressions offend constitutional standards of fairness, can it be doubted that the petitioner's trial was stripped of all

[4] I do not mean to express any disapproval of our decisions in *Parker* and *Turner.* I joined both of those opinions and I have no doubt the practices condemned in those cases were at odds with settled principles of due process of law. However, it follows *a fortiori* from those decisions that we are presented in this case with a violation of due process.

vestiges of due process when the jurors were told of his prior void convictions and the error was not explained to them?

This case is the frightful progeny of *Spencer* and of that decision's unjustified deviation from settled principles of fairness. Today we have placed a needed limitation on the *Spencer* rule, but nothing except an outright rejection would truly serve the cause of justice.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK and MR. JUSTICE WHITE join, dissenting.

The record in this case shows no prosecutorial bad faith or intentional misconduct. To the extent that the prosecutor contemplated the use of prior convictions in a one-stage recidivist trial, his right to do so is of course established by *Spencer* v. *Texas,* 385 U. S. 554, decided only last Term. The fact that the prior convictions turned out to be inadmissible for other reasons involves at the most a later corrected trial error in the admission of evidence. We do not sit as a court of errors and appeals in state cases, and I would affirm the judgment of the state court.

UNITED STATES *v.* RANDS ET UX.

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

No. 54. Argued October 18, 1967.—Decided November 13, 1967.

Respondents owned land along the Columbia River in Oregon which the United States condemned in connection with a lock and dam project. In the condemnation action the trial court allowed compensation for sand, gravel, and agricultural purposes, but not for the land's special value as a port site. The Court of Appeals reversed, holding that exclusion of the port-site value of respondents' land contravened the Fifth Amendment as well as the policy of the Submerged Lands Act. *Held:*

1. The interests of riparian owners are subject to the Government's power to control navigable waters and the proper exercise of that power is not compensable under the Fifth Amendment. *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), followed. Pp. 122–127.

2. The Submerged Lands Act merely confirmed and vested in the States title to lands beneath navigable waters within their boundaries but expressly reserved to the United States its dominant navigational servitude. P. 127.

367 F. 2d 186, reversed and remanded.

Robert S. Rifkind argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *A. Donald Mileur.*

Alex L. Parks argued the cause for respondents. With him on the brief were *Sidney Teiser* and *Robert B. Abrams.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case the Court is asked to decide whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site. Respondents owned land

along the Columbia River in the State of Oregon. They leased the land to the State with an option to purchase, it apparently being contemplated that the State would use the land as an industrial park, part of which would function as a port. The option was never exercised, for the land was taken by the United States in connection with the John Day Lock and Dam Project, authorized by Congress as part of a comprehensive plan for the development of the Columbia River. Pursuant to statute [1] the United States then conveyed the land to the State of Oregon at a price considerably less than the option price at which respondents had hoped to sell. In the condemnation action, the trial judge determined that the compensable value of the land taken was limited to its value for sand, gravel, and agricultural purposes and that its special value as a port site could not be considered. The ultimate award was about one-fifth the claimed value of the land if used as a port. The Court of Appeals for the Ninth Circuit reversed, apparently holding that the Government had taken from respondents a compensable right of access to navigable waters and concluding that "port site value should be compensable under the Fifth Amendment." 367 F. 2d 186, 191 (1966). We granted certiorari, 386 U. S. 989, because of a seeming conflict between the decision below and *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956). We reverse the judgment of the Court of Appeals because the principles underlying *Twin City* govern this case and the Court of Appeals erred in failing to follow them.

The Commerce Clause confers a unique position upon the Government in connection with navigable waters. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all

[1] 74 Stat. 486, 33 U. S. C. § 578.

the navigable waters of the United States . . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia,* 3 Wall. 713, 724–725 (1866). This power to regulate navigation confers upon the United States a "dominant servitude," *FPC* v. *Niagara Mohawk Power Corp.,* 347 U. S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596–597 (1941); *Gibson* v. *United States,* 166 U. S. 269, 275–276 (1897). Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, *South Carolina* v. *Georgia,* 93 U. S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, *Gibson* v. *United States,* 166 U. S. 269 (1897); *Scranton* v. *Wheeler,* 179 U. S. 141 (1900); *United States* v. *Commodore Park, Inc.,* 324 U. S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished.

The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid. But "just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, . . . it also permits the Government to disregard the value arising from this same fact of riparian location in compensating

the owner when fast lands are appropriated." *United States* v. *Virginia Elec. & Power Co.*, 365 U. S. 624, 629 (1961). Specifically, the Court has held that the Government is not required to give compensation for "water power" when it takes the riparian lands of a private power company using the stream to generate power. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 73–74 (1913). Nor must it compensate the company for the value of its uplands as a power plant site. *Id.*, at 76. Such value does not "inhere in these parcels as upland," but depends on use of the water to which the company has no right as against the United States: "The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." *Ibid.*

All this was made unmistakably clear in *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956). The United States condemned a promising site for a hydroelectric power plant and was held to be under no obligation to pay for any special value which the fast lands had for power generating purposes. The value of the land attributable to its location on the stream was "due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account." 350 U. S., at 226.

We are asked to distinguish between the value of land as a power site and its value as a port site. In the power cases, the stream is used as a source of power to generate electricity. In this case, for the property to have value as a port, vessels must be able to arrive and depart by water, meanwhile using the waterside facilities of the port. In both cases, special value arises from access to,

and use of, navigable waters. With regard to the constitutional duty to compensate a riparian owner, no distinction can be drawn. It is irrelevant that the licensing authority presently being exercised over hydroelectric projects may be different from, or even more stringent than, the licensing of port sites. We are dealing with the constitutional power of Congress completely to regulate navigable streams to the total exclusion of private power companies or port owners. As was true in *Twin City,* if the owner of the fast lands can demand port site value as part of his compensation, "he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. . . . To require the United States to pay for this . . . value would be to create private claims in the public domain." 350 U. S., at 228.

Respondents and the Court of Appeals alike have found *Twin City* inconsistent with the holding in *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411 (1926). In that case, the Government took waterfront property to widen and improve the navigable channel of the Rouge River. By reason of the improvements, other portions of the riparian owner's property became more valuable because they were afforded direct access to the stream for the building of docks and other purposes related to navigation. Pursuant to § 6 of the Rivers and Harbors Act of 1918,[2] the compensation award for the part of the property taken by the Government was reduced by the value of the special and direct benefits to the remainder of the land. The argument here seems to be that if the enhancement in value flowing from a riparian location is real enough to reduce the award for another part of the same owner's property, consistency demands that these same values be recognized in the award when any riparian property is taken by the Gov-

[2] 40 Stat. 911, 33 U. S. C. § 595.

ernment. There is no inconsistency. *Twin City* and its predecessors do not deny that access to navigable waters may enhance the market value of riparian property. See *United States* v. *Commodore Park, Inc.*, 324 U. S., at 388, 390. And, in *River Rouge,* it was recognized that state law may give the riparian owner valuable rights of access to navigable waters good against other riparian owners or against the State itself. 269 U. S., at 418–419. But under *Twin City* and like cases, these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. Thus, when only part of the property is taken and the market value of the remainder is enhanced by reason of the improvement to navigable waters, reducing the award by the amount of the increase in value simply applies in another context the principle that special values arising from access to a navigable stream are allocable to the public, and not to private interest. Otherwise the private owner would receive a windfall to which he is not entitled.

Our attention is also directed to *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312 (1893), where it was held that the Government had to pay the going-concern value of a toll lock and dam built at the implied invitation of the Government, and to the portion of the opinion in *Chandler-Dunbar* approving an award requiring the Government to pay for the value of fast lands as a site for a canal and lock to bypass the falls and rapids of the river. *Monongahela* is not in point, however, for the Court has since read it as resting "primarily upon the doctrine of estoppel . . . ." *Omnia Commercial Co., Inc.* v. *United States,* 261 U. S. 502, 513–514 (1923). The portion of *Chandler-Dunbar* relied on by respondents was duly noted and dealt with in *Twin City* itself, 350 U. S. 222, 226, n. (1956). That aspect of the decision

has been confined to its special facts, and, in any event, if it is at all inconsistent with *Twin City*, it is only the latter which survives.

Finally, respondents urge that the Government's position subverts the policy of the Submerged Lands Act,[3] which confirmed and vested in the States title to the lands beneath navigable waters within their boundaries and to natural resources within such lands and waters, together with the right and power to manage, develop, and use such lands and natural resources. However, reliance on that Act is misplaced, for it expressly recognized that the United States retained "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership . . . ." [4] Nothing in the Act was to be construed "as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power." [5] The Act left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them.

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the case remanded with direction to reinstate the judgment of the District Court.

Reversed and remanded.

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

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[3] 67 Stat. 29, 43 U. S. C. §§ 1301–1343.

[4] 67 Stat. 32, 43 U. S. C. § 1314.

[5] 67 Stat. 31, 43 U. S. C. § 1311 (d).

MEMPA *v.* RHAY, PENITENTIARY SUPERINTENDENT.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 16. Argued October 11–12, 1967.—Decided November 13, 1967.*

Petitioner in No. 16 pleaded guilty with the advice of court-appointed counsel to the offense of "joyriding" and was placed on probation for two years. The imposition of sentence was deferred under Washington State law. On the ground that petitioner had thereafter been involved in a burglary, the prosecutor about four months later moved to have petitioner's probation revoked. At the revocation hearing petitioner was not represented by counsel, was not asked about his previous court-appointed counsel, or if he wanted counsel. He acknowledged his involvement in the alleged burglary. A probation officer testified without cross-examination that according to his information petitioner had been involved in the burglary and had previously denied participation. The court without further questioning petitioner thereupon revoked his probation and in accordance with state law imposed the maximum sentence of 10 years, but stated that it would recommend to the parole board that he serve only one year. Six years later petitioner sought a writ of habeas corpus in the State Supreme Court claiming that he had been denied the right to counsel at the proceeding at which his probation was revoked and sentence imposed. The court denied the petition. In No. 22, petitioner was convicted of second degree burglary following his guilty plea entered with the advice of his retained counsel, and was placed on probation for three years, imposition of sentence being deferred. Over a year later he was arrested for forgery and grand larceny allegedly committed while he was on probation. At the expiration of a week's continuance of the probation revocation hearing granted to enable petitioner to retain counsel, petitioner appeared without counsel and informed the court that he had retained an attorney who was supposed to be present. After a short wait the court proceeded with the hearing in the absence of counsel and without offering

*Together with No. 22, *Walkling* v. *Washington State Board of Prison Terms and Paroles,* also on certiorari to the same court.

to appoint counsel. The probation officer gave hearsay testimony that petitioner had committed the acts of forgery and grand larceny, whereupon the court revoked probation and imposed the maximum sentence of 15 years on the previous second degree burglary conviction. A year later petitioner filed a habeas corpus petition with the State Supreme Court, claiming a denial of the right to counsel at the combined probation revocation and sentencing proceeding. The court denied the petition. *Held:* The Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment requires that counsel be afforded to a felony defendant in a post-trial proceeding for revocation of his probation and imposition of deferred sentencing. Pp. 133–137.

(a) The time of sentencing is a critical stage in a criminal case and counsel's presence is necessary to ensure that the conviction and sentence are not based on misinformation or a misreading of court records. *Townsend* v. *Burke,* 334 U. S. 736 (1948); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). Pp. 133–134.

(b) Though in the State of Washington the trial judge is required at the time of sentencing to impose the maximum term, the actual length of that term to be served being determined by the parole board, the judge and prosecutor are required to recommend the length of time to be served and to supply the board with information about the crime and the defendant; and the marshaling of facts in connection with these functions requires the aid of counsel. P. 135.

(c) The services of counsel at the deferred sentencing stage are necessary to ensure that certain rights, such as that of appeal, are seasonably asserted and to afford the defendant the substantial assistance which may be necessary in various other situations at that stage. Pp. 135–136.

No. 16, 68 Wash. 2d 882, 416 P. 2d 104; No. 22, reversed and remanded.

Evan L. Schwab, by appointment of the Court, 386 U. S. 953, argued the cause and filed a brief for petitioners in both cases.

Stephen C. Way, Assistant Attorney General of Washington, argued the cause for respondents in both cases. With him on the brief was *John J. O'Connell,* Attorney General; joined by *MacDonald Gallion* of Alabama,

Arthur K. Bolton of Georgia, *Allan G. Shepard* of Idaho, *James S. Erwin* of Maine, and *Helgi Johanneson* of North Dakota, Attorneys General for their respective States, and by *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, as *amici curiae.*

Patrick J. Hughes, Jr., filed a brief for the National Legal Aid and Defender Association, as *amicus curiae,* urging reversal. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, filed a brief for the State of Florida, as *amicus curiae,* joined and supported by *Allan G. Shepard,* Attorney General of Idaho.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These consolidated cases raise the question of the extent of the right to counsel at the time of sentencing where the sentencing has been deferred subject to probation.

Petitioner Jerry Douglas Mempa was convicted in the Spokane County Superior Court on June 17, 1959, of the offense of "joyriding," Wash. Rev. Code § 9.54.020. This conviction was based on his plea of guilty entered with the advice of court-appointed counsel. He was then placed on probation for two years on the condition, *inter alia,* that he first spend 30 days in the county jail, and the imposition of sentence was deferred pursuant to Wash. Rev. Code §§ 9.95.200, 9.95.210.[1]

About four months later the Spokane County prosecuting attorney moved to have petitioner's probation

[1] The State suggests that the Supreme Court of Washington was in error in stating that Mempa received a deferred rather than a suspended sentence, but we accept that court's characterization of the sentence as supported by the record.

revoked on the ground that he had been involved in a burglary on September 15, 1959. A hearing was held in the Spokane County Superior Court on October 23, 1959. Petitioner Mempa, who was 17 years old at the time, was accompanied to the hearing by his stepfather. He was not represented by counsel and was not asked whether he wished to have counsel appointed for him. Nor was any inquiry made concerning the appointed counsel who had previously represented him.

At the hearing Mempa was asked if it was true that he had been involved in the alleged burglary and he answered in the affirmative. A probation officer testified without cross-examination that according to his information petitioner had been involved in the burglary and had previously denied participation in it. Without asking petitioner if he had anything to say or any evidence to supply, the court immediately entered an order revoking petitioner's probation and then sentenced him to 10 years in the penitentiary, but stated that it would recommend to the parole board that Mempa be required to serve only a year.[2]

In 1965 Mempa filed a *pro se* petition for a writ of habeas corpus with the Washington Supreme Court, claiming that he had been deprived of his right to counsel at the proceeding at which his probation was revoked and sentence imposed. The Washington Supreme Court denied the petition on June 23, 1966, by a vote of six

[2] Under Washington procedure the trial judge is required by statute to impose the maximum sentence provided by law for the offense, Wash. Rev. Code § 9.95.010, but is also required, along with the prosecuting attorney, to make a recommendation to the parole board of the time that the defendant should serve accompanied by a statement of the facts concerning the crime and any other information about the defendant deemed relevant. Wash. Rev. Code § 9.95.030. However, it is the parole board that actually determines the time to be served. Wash. Rev. Code § 9.95.040. See *infra*, at 135.

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to three. *Mempa* v. *Rhay,* 68 Wash. 2d 882, 416 P. 2d 104. We granted certiorari to consider the questions raised. 386 U. S. 907 (1967).

Petitioner William Earl Walkling was convicted in the Thurston County Superior Court on October 29, 1962, of burglary in the second degree on the basis of his plea of guilty entered with the advice of his retained counsel. He was placed on probation for three years and the imposition of sentence was deferred. As conditions of his probation he was required to serve 90 days in the county jail and make restitution. On May 2, 1963, a bench warrant for his arrest was issued based on a report that he had violated the terms of his probation and had left the State.

On February 24, 1964, Walkling was arrested and charged with forgery and grand larceny. After being transferred back to Thurston County he was brought before the court on May 12, 1964, for a hearing on the petition by the prosecuting attorney to revoke his probation. Petitioner then requested a continuance to enable him to retain counsel and was granted a week. On May 18, 1964, the hearing was called and Walkling appeared without a lawyer. He informed the court that he had retained an attorney who was supposed to be present. After waiting for 15 minutes the court went ahead with the hearing in the absence of petitioner's counsel. He was not offered appointed counsel and would not have had counsel appointed for him had he requested it. Whether he made such a request does not appear from the record.

At the hearing a probation officer presented hearsay testimony to the effect that petitioner had committed the acts alleged in the 14 separate counts of forgery and 14 separate counts of grand larceny that had been charged against petitioner previously at the time of his arrest.

The court thereupon revoked probation and imposed the maximum sentence of 15 years on Walkling on his prior second degree burglary conviction. Because of the failure of the State to keep a record of the proceeding, nothing is known as to whether Walkling was advised of his right to appeal. He did not, however, take an appeal.

In May 1966 Walkling filed a habeas corpus petition with the Washington Supreme Court, claiming denial of his right to counsel at the combined probation revocation and sentencing proceeding. The petition was denied on the authority of the prior decision in *Mempa* v. *Rhay, supra.* We granted certiorari, 386 U. S. 907 (1967), and the cases were consolidated for argument.

In 1948 this Court held in *Townsend* v. *Burke,* 334 U. S. 736, that the absence of counsel during sentencing after a plea of guilty coupled with "assumptions concerning his criminal record which were materially untrue" deprived the defendant in that case of due process. Mr. Justice Jackson there stated in conclusion, "In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." *Id.,* at 741. Then in *Moore* v. *Michigan,* 355 U. S. 155 (1957), where a denial of due process was found when the defendant did not intelligently and understandingly waive counsel before entering a plea of guilty, this Court emphasized the prejudice stemming from the absence of counsel at the hearing on the degree of the crime following entry of the guilty plea and stated, "The right to counsel is not a right confined to representation during the trial on the merits." *Id.,* at 160.

In *Hamilton* v. *Alabama,* 368 U. S. 52 (1961), it was held that failure to appoint counsel at arraignment de-

prived the petitioner of due process, notwithstanding the fact that he simply pleaded not guilty at that time, because under Alabama law certain defenses had to be raised then or be abandoned. See also *Reece* v. *Georgia,* 350 U. S. 85 (1955), and *White* v. *Maryland,* 373 U. S. 59 (1963).

All the foregoing cases, with the exception of *White,* were decided during the reign of *Betts* v. *Brady,* 316 U. S. 455 (1942), and accordingly relied on various "special circumstances" to make the right to counsel applicable. In *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), however, *Betts* was overruled and this Court held that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment was applicable to the States and, accordingly, that there was an absolute right to appointment of counsel in felony cases.

There was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required, but *Townsend, Moore,* and *Hamilton,* when the *Betts* requirement of special circumstances is stripped away by *Gideon,* clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. In particular, *Townsend* v. *Burke, supra,* illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing.[3] Many lower courts have concluded that the Sixth Amendment right to counsel extends to sentencing in federal cases.[4]

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[3] See Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 806 (1961).

[4] *E. g., Martin* v. *United States,* 182 F. 2d 225 (C. A. 5th Cir. 1950); *McKinney* v. *United States,* 93 U. S. App. D. C. 222, 208 F. 2d 844 (1953); *Nunley* v. *United States,* 283 F. 2d 651 (C. A. 10th Cir. 1960).

The State, however, argues that the petitioners were sentenced at the time they were originally placed on probation and that the imposition of sentence following probation revocation is, in effect, a mere formality constituting part of the probation revocation proceeding. It is true that sentencing in Washington offers fewer opportunities for the exercise of judicial discretion than in many other jurisdictions. The applicable statute requires the trial judge in all cases to sentence the convicted person to the maximum term provided by law for the offense of which he was convicted. Wash. Rev. Code § 9.95.010. The actual determination of the length of time to be served is to be made by the Board of Prison Terms and Paroles within six months after the convicted person is admitted to prison. Wash. Rev. Code § 9.95.040.

On the other hand, the sentencing judge is required by statute, together with the prosecutor, to furnish the Board with a recommendation as to the length of time that the person should serve, in addition to supplying it with various information about the circumstances of the crime and the character of the individual. Wash. Rev. Code § 9.95.030. We were informed during oral argument that the Board places considerable weight on these recommendations, although it is in no way bound by them. Obviously to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.

Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage. For one, Washington law provides that an appeal in a case involving a plea of guilty followed by probation can only be taken after sentence is imposed following revocation of probation. *State* v. *Farmer,* 39

Wash. 2d 675, 237 P. 2d 734 (1951).[5] Therefore in a case where an accused agreed to plead guilty, although he had a valid defense, because he was offered probation, absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal. While ordinarily appeals from a plea of guilty are less frequent than those following a trial on the merits, the incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as *de minimis*. See, *e. g., United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244 (D. C. S. D. N. Y. 1966). Cf. *Machibroda* v. *United States,* 368 U. S. 487 (1962).[6]

Likewise the Washington statutes provide that a plea of guilty can be withdrawn at any time prior to the imposition of sentence, Wash. Rev. Code § 10.40.175, *State* v. *Farmer, supra,* if the trial judge in his discretion finds that the ends of justice will be served, *State* v. *Shannon,* 60 Wash. 2d 883, 376 P. 2d 646 (1962). Without undertaking to catalog the various situations in which a lawyer could be of substantial assistance to a defendant in such a case, it can be reiterated that a plea of guilty might well be improperly obtained by the promise to have a defendant placed on the very probation the revocation of which furnishes the occasion for desiring to withdraw the plea. An uncounseled defendant might very likely be unaware of this opportunity.

The two foregoing factors assume increased significance when it is considered that, as happened in these

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[5] *State* v. *Proctor,* 68 Wash. 2d 817, 415 P. 2d 634 (1966), modified the *Farmer* rule only to permit an appeal following placement on probation in cases involving (1) a contested trial and (2) the imposition of a jail term or fine as a condition of probation.

[6] See generally Newman, Conviction—The Determination of Guilt or Innocence Without Trial (1966); Enker, "Perspectives on Plea Bargaining," in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108–119 (1967).

two cases, the eventual imposition of sentence on the prior plea of guilty is based on the alleged commission of offenses for which the accused is never tried.

In sum, we do not question the authority of the State of Washington to provide for a deferred sentencing procedure coupled with its probation provisions. Indeed, it appears to be an enlightened step forward. All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing. We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding.

The judgments below are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WHITNEY *v.* FLORIDA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 68. Argued October 19, 1967.—Decided November 13, 1967.

184 So. 2d 207, certiorari dismissed as improvidently granted.

Richard Kanner argued the cause and filed a brief for petitioner.

James T. Carlisle, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Earl Faircloth,* Attorney General.

PER CURIAM.

The writ is dismissed as improvidently granted without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court.

MR. JUSTICE DOUGLAS, dissenting.

The question presented here is whether Florida has deprived petitioner of equal protection or due process of law by summarily dismissing his collateral attack on a state criminal conviction without conducting an evidentiary hearing. Because of the increasing tide of habeas corpus petitions brought by prisoners (see *Price* v. *Johnston,* 334 U. S. 266, 293)—many of whom find they must turn to federal courts to obtain a hearing—the question is of considerable importance.

I assume that the Federal Constitution does not compel the States to provide any remedy for collateral attack of criminal convictions. Cf. *Townsend* v. *Sain,* 372 U. S. 293, 313, n. 9; *Griffin* v. *Illinois,* 351 U. S. 12, 18. But when a State makes available a means for review, it is held to a "constitutional requirement of substantial equality and fair process." *Anders* v. *California,* 386

U. S. 738, 744. It may not discriminate arbitrarily between persons applying for relief (*e. g., Burns* v. *Ohio,* 360 U. S. 252), and it must adhere to the requirements of due process. *Swenson* v. *Bosler,* 386 U. S. 258, 260. Though these rules were primarily developed with reference to appellate review, we have held them applicable with equal force to state post-conviction proceedings. *Smith* v. *Bennett,* 365 U. S. 708.

By Rule 1 of the Florida Rules of Criminal Procedure, Florida has provided a means of collateral attack.

In his application petitioner alleged that extensive pretrial publicity—including television broadcasts of confessions given by him—prevented selection of a fair and impartial jury. Petitioner further alleged that he asked his trial counsel to request a change of venue, but counsel refused to do so. The Florida District Court of Appeal held that no evidentiary hearing was necessary because venue objections could only be raised at trial and because venue was *res judicata* under the judgment in a prior collateral attack by petitioner (see *Whitney* v. *Cochran,* 152 So. 2d 727, 730 (Fla.)) that representation by trial counsel was adequate and not a farce or sham.

But this characterization and disposition of petitioner's allegations avoid the basic issue presented. Under *Entsminger* v. *Iowa,* 386 U. S. 748, a defendant who specifically asked his attorney to take a plenary appeal was denied a constitutional right when the attorney took only a truncated appeal. The allegations of petitioner here clearly constitute a prima facie case of violation of this principle.

My Brother HARLAN characterizes this crime as "a particularly brutal murder"—and so it was. But that does not alter the underlying constitutional question whether the atmosphere of the community had been so saturated by adverse publicity as to deprive the state trial of the

constitutional requirement of due process. *Sheppard* v. *Maxwell,* 384 U. S. 333. My Brother HARLAN states that from this record it is "inescapable" that petitioner's trial counsel "deliberately" chose to try the case before a jury that may have been exposed to petitioner's televised confessions. But with all respect, that is no answer to the present constitutional claim. Until we know the extent and degree of saturation of the public mind with the TV films, it is impossible to say whether or not counsel's failure to obtain a change of venue was harmless error under the ruling of *Chapman* v. *California,* 386 U. S. 18. Far more than mere trial tactics and strategy is involved. In such a case the denial of the defendant's rights is not cured by outstanding representation by counsel during the balance of proceedings. It is no answer for the Florida courts to say counsel never moved at trial for a transfer to a county not saturated with pretrial publicity; for this failure of counsel is the very heart of the wrong allegedly done to petitioner. Nor are *res judicata* principles applicable, for as I read *Whitney* v. *Cochran* the *Entsminger* right-to-counsel issue was neither raised nor decided.

I would vacate the judgment and remand to the Florida courts so that the State may give petitioner the evidentiary hearing to which he is entitled. We needlessly burden the federal regime* when we do not insist that Florida, which has provided a remedy, have the evidentiary hearing which will determine the nature and extent of the pretrial publicity and whether it was trivial or potentially damaging.

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*Habeas corpus petitions and petitions under 28 U. S. C. § 2255 in the *federal courts* increased from 598 in 1941 to 2,314 in 1961 (Annual Rep. Adm. Off. U. S. Courts 1964, p. 155) and to 9,697 in the 1967 fiscal year. Annual Rep. 1967, p. II-56. *Of these, 5,948 were habeas corpus cases brought by state prisoners. Ibid.*

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

I would affirm the judgment of the state court. I can find no sound basis for this Court's not reaching the merits of the questions brought here for review, even though I believe that the writ should not have issued in the first place. Nor do I believe that a federal habeas corpus proceeding should be encouraged, which is the implicit effect of the Court's "without prejudice" dismissal, or, as my Brother DOUGLAS suggests, that the case should be remanded to the state court for a hearing.

Petitioner was convicted of a particularly brutal murder, committed in the course of an armed robbery. At trial, with advice of counsel, he entered into a written stipulation conceded to be the virtual equivalent of a guilty plea, confessing the murder. Consequently, the only question argued to the jury by counsel was whether it would recommend mercy; the jury declined to do so, and a sentence of death was imposed.

Prior to his trial, petitioner had confessed to five other homicides and one attempted homicide. These confessions were not referred to at trial. They were, however, allegedly given wide publicity by television and radio stations in the area where trial occurred. Contending that this publicity had deprived him of the right to trial before an impartial jury, petitioner brought this collateral proceeding in the state courts.

The Florida District Court of Appeal, rejecting the argument that petitioner's claim was foreclosed by his failure to raise it in prior proceedings, held that as a matter of state law the principle of *res judicata* is applicable, in criminal cases, "only to those items *actually* raised in the prior proceedings." *Whitney* v. *State,* 184 So. 2d 207, at 209 (Fla.). (Emphasis in original.) On the merits the court rejected petitioner's claim, relying heavily on the fact that trial counsel had made no motion for a

change of venue, and had not even undertaken to exercise all of his peremptory challenges. Cf. *Beck* v. *Washington,* 369 U. S. 541, 557–558. The record also reveals that counsel conducted a vigorous *voir dire* during which, although for obvious reasons no mention of other crimes was made, each juror represented that he could and would judge the case solely on the basis of what was presented in court. The conclusion that trial counsel deliberately chose to risk the mercy of a local jury, rather than court more imponderable hazards elsewhere, seems inescapable.

After trial, new counsel sought to depict this perfectly understandable piece of strategy as but the product of incompetence so gross as to give rise to a constitutional claim that the petitioner was deprived of the effective assistance of counsel. In light of the record, and particularly defense counsel's extensive summation, which clearly evinces an effort to make the best of a hopeless case by trying to save defendant from the death penalty, the claim now made is little short of frivolous.

I can find in this straightforward train of events no room for questioning the validity of this state conviction from a federal constitutional standpoint, or for further prolonging the case.

HACKIN *v.* ARIZONA ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 523. Decided November 13, 1967.

102 Ariz. 218, 427 P. 2d 910, appeal dismissed.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, dissenting.

Appellant, who is not a licensed attorney, appeared in a state court habeas corpus proceeding on behalf of an indigent prisoner. The indigent prisoner was being held for extradition to Oklahoma, where he had been convicted of murder and had escaped from custody. Appellant had previously attempted to secure for the prisoner appointed counsel to argue in court the prisoner's contention that his Oklahoma conviction was invalid due to denial of certain constitutional rights. But in Arizona an indigent has no right to appointed counsel at habeas corpus proceedings [1] (*e. g., Palmer* v. *State,* 99 Ariz. 93,

[1] Appellant's conviction for unauthorized practice of law would seem to be the result of Arizona's restrictive reading of *Gideon* v. *Wainwright,* 372 U. S. 335. In *State* v. *Bost,* 2 Ariz. App. 431, 409 P. 2d 590, the court held *Gideon* inapplicable to extradition proceedings because they were ministerial rather than judicial in nature. Some members of this Court have expressed doubt whether pigeonholing criminal proceedings into categories such as felony, misdemeanor, habeas corpus, etc., is a proper means for the States to develop the full scope of the *Gideon* rule. See *DeJoseph* v. *Connecticut,* 385 U. S. 982, and *Winters* v. *Beck,* 385 U. S. 907 (dissenting opinions of MR. JUSTICE STEWART). Had Arizona courts approached the problem in that light rather than selecting between the labels "ministerial" and "judicial," they might have concluded that indigents in the position of the prisoner whom appellant aided here are entitled to counsel under *Gideon.*

407 P. 2d 64) including habeas corpus proceedings that are part of the extradition process (*Applications of Oppenheimer,* 95 Ariz. 292, 389 P. 2d 696). Unable to obtain counsel for the indigent, appellant chose to represent him himself and was convicted of a misdemeanor for violation of an Arizona statute providing that "No person shall practice law in this state unless he is an active member of the state bar in good standing . . . ." (*Hackin* v. *State,* 102 Ariz. 218, 427 P. 2d 910, quoting Ariz. Rev. Stat. Ann. § 32–261 A.)

Appellant contends that this statute suffers from overbreadth and vagueness and is unconstitutional on its face because it interferes with the rights of the destitute and ignorant—those who cannot acquire the services of counsel—to obtain redress under the law for wrongs done to them. He also alleges the statute is unconstitutional as applied here, where appellant acted on behalf of the indigent prisoner only after exhaustive efforts to obtain appointed counsel. Appellant is no stranger to the law. He graduated from an unaccredited law school but was refused admission to the Arizona Bar. See *Hackin* v. *Lockwood,* 361 F. 2d 499 (C. A. 9th Cir.), cert. denied, 385 U. S. 960.

The claim that the statute deters constitutionally protected activity is not frivolous. Whether a State, under guise of protecting its citizens from legal quacks and charlatans, can make criminals of those who, in good faith and for no personal profit, assist the indigent to assert their constitutional rights is a substantial question this Court should answer.

Rights protected by the First Amendment include advocacy and petition for redress of grievances (*NAACP* v. *Button,* 371 U. S. 415, 429; *Edwards* v. *South Carolina,* 372 U. S. 229, 235), and the Fourteenth Amendment ensures equal justice for the poor in both criminal and civil actions (see *Williams* v. *Shaffer,* 385

U. S. 1037 (dissenting opinion)). But to millions of Americans who are indigent and ignorant—and often members of minority groups—these rights are meaningless. They are helpless to assert their rights under the law without assistance. They suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments, and endure domestic strife without hope of the legal remedies of divorce, maintenance, or child custody decrees.[2]

If true equal protection of the laws is to be realized, an indigent must be able to obtain assistance when he suffers a denial of his rights. Today, this goal is only a goal. Outside the area of criminal proceedings covered by our decisions in *Gideon* v. *Wainwright,* 372 U. S.

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[2] See *Williams* v. *Shaffer,* 385 U. S. 1037, 1040 (dissenting opinion); *In re Community Legal Services,* Court of Common Pleas of Philadelphia County (No. 4968, March Term, 1966; decided May 10, 1967). See also Pye, The Role of Legal Services in the Anti-poverty Program, 31 Law & Contemp. Prob. 211, 216–217 (1966): "The poor man because of his lack of education and social status, may need representation in matters such as a dispute with a high school principal over the dismissal of a child, or the assertion of a complaint for a violation of the health or building code by a landlord under circumstances where the better educated citizen could speak for himself." For broad discussion of the many and varied areas where the poor need assistance, see Symposium on Law of the Poor, 54 Calif. L. Rev. 319 *et seq.* (1966); Dorsen, ed., Poverty, Civil Liberties, and Civil Rights: A Symposium, 41 N. Y. U. L. Rev. 328 (1966); Cahn & Cahn, The War on Poverty: A Civilian Perspective, 73 Yale L. J. 1317 (1964); McCalpin, A Revolution in the Law Practice?, 15 Clev.-Mar. L. Rev. 203 (1966); Carlin & Howard, Legal Representation and Class Justice, 12 U. C. L. A. L. Rev. 381 (1965); Sparer, Thorkelson & Weiss, The Lay Advocate, 43 U. Det. L. J. 493 (1966); Levi, Problems Relating to Real Property, in National Conference on Law and Poverty Proceedings 1 (1965); Dunham, Consumer Credit Problems of the Poor—Legal Assistance as an Aid in Law Reform, *id.,* at 9; Polier, Problems Involving Family and Child, *id.,* at 14.

335, and *Douglas* v. *California,* 372 U. S. 353, counsel is seldom available to the indigent. As this Court has recognized, there is a dearth of lawyers who are willing, voluntarily, to take on unprofitable and unpopular causes. *NAACP* v. *Button,* 371 U. S., at 443. See also *Johnson* v. *Avery,* 252 F. Supp. 783, 784 (D. C. M. D. Tenn.).

Some States, aware of the acute shortage of lawyers to help the indigent, have utilized the abilities of qualified law students to advise indigents and even to represent them in court in limited circumstances.[3] But where this practice is not sanctioned by law, the student advocate for the poor may be subjected to criminal penalty under broadly drafted statutes prohibiting unauthorized practice of law.

There is emerging, particularly in the ghetto areas of our cities, a type of organization styled to bring a new brand of legal assistance to the indigent. These groups, funded in part by the federal Office of Economic Opportunity, characteristically establish neighborhood offices where the poor can come for assistance. They attempt to dispense services on a comprehensive integrated scale, using lawyers, social workers, members of health professions, and other nonlawyer aides.[4] These

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[3] See, *e. g., Matter of Legal Aid Society of the City of Albany,* 27 App. Div. 2d 687, 277 N. Y. S. 2d 632; *Matter of Cornell Legal Aid Clinic,* 26 App. Div. 2d 790, 273 N. Y. S. 2d 444; Monaghan, Gideon's Army: Student Soldiers, 45 B. U. L. Rev. 445 (1965); Broden, A Role for Law Schools in OEO's Legal Services Program, 41 Notre Dame Law. 898 (1966); Cleary, Law Students in Criminal Law Practice, 16 DePaul L. Rev. 1 (1966); Note, 12 Wayne L. Rev. 519 (1966).

[4] See generally Cahn & Cahn, *supra,* n. 2, at 1334–1352; Carlin & Howard, *supra,* n. 2, at 432–436; Rosenblum, Controlling the Bureaucracy of the Antipoverty Program, 31 Law & Contemp. Prob. 187, 208 (1966); Note, Ethical Problems Raised by the Neighborhood Law Office, 41 Notre Dame Law. 961 (1966); Paulsen, Law

new and flexible approaches to giving legal aid to the poor recognize that the problems of indigents—although of the type for which an attorney has traditionally been consulted—are too immense to be solved solely by members of the bar. The supply of lawyer manpower is not nearly large enough.[5] But the necessary involvement of lay persons in these programs threatens their success. Lay involvement was recently cited by New York's

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Schools and the War on Poverty, in National Conference on Law and Poverty Proceedings 77 (1965).

The O. E. O. Guidelines for Legal Services Programs states that the programs are expected to be a component of a community action agency run, in part, by representatives of labor, business, religion, minority groups, and the poor. (P. 5.) Residents of the depressed area served by the legal office are expected to participate directly in the legal services program. (P. 10.) "The poor must be represented on the board or policy-making committee of the program to provide legal services, just as they are represented on the policy-making body of the community action agency." (P. 11.) "Whenever possible, the board of the legal services program should include at least one representative from each of the areas or neighborhoods with a substantial population to be served." (P. 12.) The staff of the neighborhood legal office may utilize the talents of law schools (p. 24) and "may include a person trained in the field of social work" (p. 29) plus "interviewers, investigators, law students, neighborhood aides, and trained personnel from other disciplines." (P. 31.)

[5] See Cahn & Cahn, What Price Justice: The Civilian Perspective Revisited, 41 Notre Dame Law. 927 (1966). "Finally, with respect to manpower, we have created an artificial shortage by refusing to learn from the medical and other professions and to develop technicians, nonprofessionals and lawyer-aides—manpower roles to carry out such functions as: informal advocate, technician, counsellor, sympathetic listener, investigator, researcher, form writer, etc." (P. 934.) "[T]he possibility of advancing the cause of justice through increasing lay involvement in fact finding, adjudication and arbitration, should not be sacrificed a priori out of fear of abuse." (P. 951.) See also Ginsberg & Shiffman, Manpower and Training Problems in Combating Poverty, 31 Law & Contemp. Prob. 159 (1966).

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Appellate Division as one ground for denying the application of a proposed corporate aid-to-indigent program for New York City. *Matter of Action for Legal Services,* 26 App. Div. 2d 354, 274 N. Y. S. 2d 779; contra, *In re Community Legal Services,* Court of Common Pleas of Philadelphia County, No. 4968, March Term, 1966 (decided May 10, 1967).[6]

The so-called "legal" problem of the poor is often an unidentified strand in a complex of social, economic, psychological, and psychiatric problems. Identification of the "legal" problem at times is for the expert. But even a "lay" person can often perform that function and mark the path that leads to the school board, the school principal, the welfare agency, the Veterans Administration, the police review board, or the urban renewal agency.[7] If he neither solicits nor obtains a fee for his

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[6] Zimroth, Group Legal Services and the Constitution, 76 Yale L. J. 966, 968 (1967), reports that the O. E. O. legal services programs involving lay persons have also survived challenges in Houston, Texas, and Modesto, California.

[7] See Frankel, Experiments in Serving the Indigent, in National Conference on Law and Poverty Proceedings 69, 75–76 (1965): "[W]e lawyers must certainly confront constructively the idea that what we have traditionally regarded as legal business cannot permanently be so regarded. The needs of the poor for services in matters that are somehow legal appear pretty clearly to be enormous. Among those needs are many kinds of matters that are narrow, that are specialized, and can be routinized. Matters related to housing, to workmen's compensation, to consumer problems are a few that one could name. . . . [W]e should attempt to create a class of legal technicians who can handle, under lawyers' supervision, some of the problems that have thus far seemed to us to be exclusively the province of the lawyer. I think we have an important creative function to perform in trying to mark out these areas where lawyers are not really needed."

See Paulsen, The Law Schools and the War on Poverty, in National Conference on Law and Poverty Proceedings 77, 81 (1965): "Services to the poor will undoubtedly call for advocacy

services, why should he not be free to act? Full-fledged representation in a battle before a court or agency requires professional skills that laymen lack; and therefore the client suffers, perhaps grievously, if he is not represented by a lawyer. But in the intermediate zone where the local pastor, the social worker, or best friend [8] commonly operates, is there not room for accommodation? Dean Charles E. Ares recently said:

> ". . . [T]he *structure* of the legal profession is middle class in its assumptions. We assume that the lawyer can sit quietly in his office awaiting the knock on the door by a client who has discovered that he has a legal problem and has found the way to

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and advice by lay persons as well as lawyers. A lawyer's time is costly. Not every problem thrown up by legal arrangements requires the skill and costly time of a law-trained person. We can, perhaps, expect the creation of advice centers operated by laymen not unlike Britain's Citizen's Advice Bureaus."

[8] In habeas corpus proceedings, "the practice of a next friend applying for a writ is ancient and fully accepted." *United States* v. *Houston,* 273 F. 915, 916 (C. A. 2d Cir.). It rests on the premise that "[w]ithout some assistance, their right to habeas corpus in many instances becomes empty and meaningless." *Johnson* v. *Avery,* 252 F. Supp. 783, 784 (D. C. M. D. Tenn.). The next-friend doctrine was recognized at common law and is given effect in most jurisdictions today, either by statute or by court decision. See *Collins* v. *Traeger,* 27 F. 2d 842, 843 (C. A. 9th Cir.); *Ex parte Dostal,* 243 F. 664, 668 (D. C. N. D. Ohio); *State* v. *Fabisinski,* 111 Fla. 454, 461, 152 So. 207, 209; *In re Nowack,* 274 Mich. 544, 549, 265 N. W. 459, 461; *In re Nahl* v. *Delmore,* 49 Wash. 2d 318, 301 P. 2d 161; 28 U. S. C. § 2242.

An Arizona statute provides that application for habeas corpus may be made by the person detained "or by some person in his behalf . . . ." Ariz. Rev. Stat. Ann. § 13–2002. The court below recognized that this statute precluded prosecution of appellant for writing and filing the writ application on behalf of the indigent prisoner. *Hackin* v. *State,* 102 Ariz., at 219, 427 P. 2d, at 911. But the statute was held not to authorize appellant to argue the matter in court. *Id.,* at 220, 427 P. 2d, at 912.

> the lawyer's office. . . . This assumption is not valid for the great mass of people who live in poverty in the United States. . . . The ways in which this structure can be changed open exciting and interesting prospects." Poverty, Civil Liberties, and Civil Rights: A Symposium, 41 N. Y. U. L. Rev. 328, 346 (1966).

Moreover, what the poor need, as much as our corporate grants, is protection before they get into trouble and confront a crisis. This means "political leadership" for the "minority poor." *Id.*, at 351. Lawyers will play a role in that movement; but so will laymen. The line that marks the area into which the layman may not step except at his peril is not clear. I am by no means sure the line was properly drawn by the court below where no lawyer could be found and this layman apparently served without a fee.

Legal representation connotes a magic it often does not possess—as for example, the commitment procedure in Texas, where, by one report, 66 seconds are given to a case, the lawyer usually not even knowing his client and earning a nice fee for passive participation. Weihofen, Mental Health Services for the Poor, 54 Calif. L. Rev. 920, 938–939 (1966). If justice is the goal, why need a layman be barred here?

Broadly phrased unauthorized-practice-of-law statutes such as that at issue here could make criminal many of the activities regularly done by social workers who assist the poor in obtaining welfare and attempt to help them solve domestic problems.[9] Such statutes would also tend

[9] "Social workers in public assistance may already be *required* to practice law as substantially as if they were in a courtroom. In making an initial determination of an applicant's eligibility, the public assistance worker must complete the applicant's financial statement. 'Every question, or nearly every question, on the financial statement, is a legal question. When the social worker advises,

to deter programs in which experienced welfare recipients represent other, less articulate, recipients before local welfare departments.[10]

As this Court's decisions in *NAACP* v. *Button, supra,* and *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1, indicate, state provisions regulating the legal profession will not be permitted to act as obstacles to the rights of persons to petition the courts and other legal agencies for redress. Yet statutes with the broad sweep of the Arizona provision now before this Court would appear to have the potential to "freeze out" the imaginative new attempts to assist indigents realize equal justice, merely because lay persons participate.[11] Cf. *NAACP* v. *Button,* 371 U. S., at 436. As we said in *Button,* the threat of sanctions may deter as forcefully as the imposition of the sanctions. *Id.,* at 433. In such circumstances, "the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock,* 361 U. S. 516, 524. Certainly the States have a strong interest in preventing legally untrained shysters who pose as attorneys from milking the public

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or even discusses the questions or answers, he may very likely be giving legal advice.' The private social worker who advises an applicant that he should apply, how to apply, what to answer and how to appeal if the application is rejected is also giving 'legal' advice. When he argues with the public worker on behalf of the applicant, he is giving representation. When and if he goes to a hearing on behalf of the applicant, he is surely engaging in advocacy." Sparer, Thorkelson & Weiss, *supra,* n. 2, at 499–500. See also McRae & Linde, An Emerging Joint Venture: Lawyers and Social Workers, 48 J. Am. Jud. Soc. 231 (1965); Rosenblum, *supra,* n. 4, at 208.

[10] Sparer, Thorkelson & Weiss, *supra,* n. 2, at 507.

[11] Such statutes have also been utilized for attack on attorneys themselves who defend locally unpopular causes, such as civil rights. See Washington Post, Sept. 20, 1967, § A, at 10, col. 1, reporting a Louisiana prosecution of a civil rights lawyer for "unauthorized practice." Cf. *NAACP* v. *Button,* 371 U. S. 415.

for pecuniary gain. Cf. *NAACP* v. *Button,* at 441. But it is arguable whether this policy should support a prohibition against charitable efforts of nonlawyers to help the poor. Cf. *Opinion of the Justices to the Senate,* 289 Mass. 607, 615, 194 N. E. 313, 317–318. It may well be that until the goal of free *legal* assistance to the indigent in all areas of the law is achieved, the poor are not harmed by well-meaning, charitable assistance of laymen. On the contrary, for the majority of indigents, who are not so fortunate to be served by neighborhood legal offices, lay assistance may be the only hope for achieving equal justice at this time.

In sum, I find the questions posed in this appeal both timely and troublesome; and it would appear that appellant has standing to raise the indigent's First Amendment rights of advocacy and petition of redress and of equal justice. See *NAACP* v. *Button, supra,* at 428; *Griswold* v. *Connecticut,* 381 U. S. 479, 481. Since the very nature of the inequity suffered by the poor precludes them from asserting their rights to legal assistance in court, why should the layman who steps up to speak for them not be held to be asserting their constitutional rights? *Johnson* v. *Avery, supra,* at 786. Cf. *Barrows* v. *Jackson,* 346 U. S. 249, 257. Accordingly, I would hear this appeal.

MODERN LIFE INSURANCE CO. *v.* WOLFMAN.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 574. Decided November 13, 1967.

352 Mass. 356, 225 N. E. 2d 598, appeal dismissed.

John M. Hall, William E. Kelly and *Preben Jenson* for appellant.

Arthur V. Getchell for appellee.

PER CURIAM.

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

MR. JUSTICE HARLAN would dismiss the appeal for want of jurisdiction. 28 U. S. C. § 1257.

IN RE EPSTEIN ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. 649, Misc. Decided November 13, 1967.

Motion denied.

Wesley R. Asinof on the motion.

Arthur K. Bolton, Attorney General of Georgia, and *Harold N. Hill, Jr.,* Assistant Attorney General, for Maddox, Governor of Georgia, et al., in opposition.

PER CURIAM.

The motion for leave to file a petition for writ of mandamus is denied. See *Schackman* v. *Arnebergh,* 387 U. S. 427.

GREGOIRE *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 35, Misc. Decided November 13, 1967.

249 La. 890, 192 So. 2d 114, appeal dismissed and certiorari denied.

Allen B. Pierson, Jr., for appellant.

Jack P. F. Gremillion, Attorney General of Louisiana, *William Schuler,* Assistant Attorney General, *Duncan S. Kemp* and *Leonard E. Yokum* 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.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

NIELSEN *v.* NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 503, Misc. Decided November 13, 1967.

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.

UNITED STATES *v.* LOUISIANA ET AL.

BILL OF COMPLAINT.

No. 9, Orig. Argued October 9, 1967.—Decided December 4, 1967.

The Submerged Lands Act, which unconditionally permits each coastal State to claim a seaward boundary three geographical miles from its coastline, allows a State bordering on the Gulf of Mexico to claim its seaward "boundary as it existed at the time such State became a member of the Union." The latter grant, which is thus conditioned on a State's prior history, is subject to a three-league maximum limitation. In *United States* v. *Louisiana,* 363 U. S. 1 (1960), this Court held that the State of Texas qualified for the three-league grant but did not determine the coastline from which the grant was to be measured. Texas now makes the claim, which is disputed by the United States, that, for purposes of the three-league grant, its coastline extends to the seaward edge of artificial jetties in the Gulf and that consequently it owns certain submerged lands lying more than three leagues from its natural shoreline. *Held:* Texas' claim under the three-league grant must be measured by the boundary which existed in 1845, when Texas entered the Union, and cannot be measured from artificial jetties built long thereafter. Pp. 157–161.

Louis F. Claiborne argued the cause for the United States. On the brief were *Solicitor General Marshall, Assistant Attorney General Weisl, Richard A. Posner* and *George S. Swarth.*

Victor A. Sachse, Special Assistant Attorney General of Louisiana, argued the cause for defendant State of Louisiana. With him on the brief were *Jack P. F. Gremillion,* Attorney General, *John L. Madden,* Assistant Attorney General, and *Paul M. Hebert, Thomas W. Leigh, W. Scott Wilkinson, J. B. Miller, Oliver P. Stockwell, J. J. Davidson* and *Frederick W. Ellis,* Special Assistant Attorneys General.

Crawford C. Martin, Attorney General of Texas, and *Houghton Brownlee, Jr.,* Assistant Attorney General,

argued the cause for defendant State of Texas. With them on the brief were *George Cowden,* First Assistant Attorney General, *J. Arthur Sandlin,* Assistant Attorney General, *A. J. Carrubi, Jr.,* and *Price Daniel.*

Mr. Justice Black delivered the opinion of the Court.

In *United States* v. *California* (the first *California* case), 332 U. S. 19 (1947), we held that the States did not own the submerged lands off their coastlines and that the United States had paramount rights in these lands. Some States violently objected to this decision claiming that they had historically owned at least out to a distance of three geographical miles from their coastlines; others asserted a historical claim out to three marine leagues from their coastlines. Responding to these objections, Congress in 1953 passed the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. §§ 1301–1315, which makes two entirely separate types of grants of submerged land to the States. The first is an *unconditional* grant allowing each coastal State to claim a seaward boundary out to a line three geographical miles distant from its "coast line." The second is a grant *conditioned* upon a State's prior history. It allows those States bordering on the Gulf of Mexico, which at the time of their entry into the Union had a seaward boundary beyond three miles, to claim this historical boundary "as it existed at the time such State became a member of the Union," but with the maximum limitation that no State may claim more than "three marine leagues" (approximately nine miles). In *United States* v. *Louisiana,* 363 U. S. 1 (1960), we held that Texas qualified for this conditional three-league grant. We did not decide, however, what is the "coast line" from which this three-league grant is measured. That question was specifi-

cally reserved.[1] Texas now claims that, for purposes of the three-league grant, its coastline extends to the seaward edge of artificial jetties constructed by it in the Gulf of Mexico and that it is entitled to lease certain submerged lands, portions of which lie more than three leagues from any part of the natural shoreline of Texas, but within three leagues of these jetties. The United States claims these portions for itself and invokes our original jurisdiction for a supplemental decree to that effect. The question we must decide is whether Congress intended that this grant, based as it is on the historical boundaries of the State, be measured from artificial jetties constructed many years after the State's entry into the Union. For reasons to be stated we reject Texas' contention and hold, as the Act clearly says, that its three-league claim must be measured to "such boundary as it existed at the time such State became a member of the Union."

Texas relies heavily on this Court's prior decision in the second *California* case, *United States* v. *California*, 381 U. S. 139 (1965). Our opinion there, however, dealt, not with the conditional statutory grant we have here, but with the other unconditional grant—the congressional creation of a new and standard three-mile seaward boundary for all coastal States. While some States in the past had claimed three-mile seaward boundaries—a claim explicitly rejected by this Court in the first *California* case, *supra*—Congress made it clear by the following wording in § 4 of the Submerged Lands Act that it was

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[1] Louisiana was the only State to raise the question and our answer was as follows: "We decide now only that Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, *wherever those lines may ultimately be shown to be.*" 363 U. S., at 79. (Emphasis added.)

establishing a new standard boundary for all coastal States: "Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line . . . ." 67 Stat. 31, 43 U. S. C. § 1312. The decision in the second *California* case, *supra,* held that Congress had left it up to this Court to define the "coast line" from which the standard three-mile grant was to be measured. The Court then borrowed the international definition of coastline in the Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U. S. T. (Pt. 2) 1607, T. I. A. S. No. 5639, used by the United States in its foreign relations with other countries, reasoning that "[t]his establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations . . . . Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." *United States* v. *California,* 381 U. S. 139, 165 (1965).

Article 8 of this Convention makes the following provision for artificially constructed extensions into the sea: "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." [1964] 15 U. S. T. (Pt. 2) 1607, 1609. Thus, it is clear that in the case of the three-mile unconditional grant artificial jetties are a part of the coastline for measurement purposes, and if Texas were claiming under the standard three-mile grant, its argument regarding the jetties would be far more persuasive.

Texas has not claimed the standard three-mile grant, however, but has asserted ownership over three marine leagues or approximately nine miles of submerged land, and this Court has sustained that claim. *United States*

v. *Louisiana, supra.* This it was allowed to do under that part of the Act providing the special conditional historical grant. There is a critical distinction, however, between this historical grant and the unconditional three-mile grant. The three-mile grant involved in the second *California* case is not keyed to the State's boundary as of any particular date, but the three-league grant is keyed to a State's boundary as of the date it entered the Union. This is clear from the words of § 2 (a) of the Act which state that the historical grant extends "to the boundary line of each such State where in any case such boundary *as it existed at the time such State became a member of the Union* . . . extends seaward (or into the Gulf of Mexico) beyond three geographical miles . . . ." 67 Stat. 29, 43 U. S. C. § 1301. (Emphasis added.) This meaning is reinforced by the wording of § 4 which states that "[n]othing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws *prior to or at the time such State became a member of the Union* . . . ." 43 U. S. C. § 1312. (Emphasis added.) This historical grant of three marine leagues is, through § 2 (b) of the Act, made to apply only to those States bordering the Gulf of Mexico. 43 U. S. C. § 1301.

In effect what Congress has done is to take into consideration the special historical situations of a few Gulf States and provide that where they can prove ownership to submerged lands in excess of three miles at the time they entered the Union, these historical lands will be granted to them up to a limitation of three marine leagues. No new state boundary is being created, but a State which qualifies simply is being given the same area it had when it entered the Union. Unlike the three-mile grant where this Court held that Congress left

boundary definitions up to it, here Congress granted land the boundaries of which are determined by fixed historical facts. This is clear from the wording of the statute itself. In making the three-mile grant Congress speaks in terms of "three geographical miles *distant from its coast line.*" 43 U. S. C. § 1312. (Emphasis added.) In the three-league grant, however, the term "coast line" is omitted and in its place the word "boundary" is used with the following express qualification: "as it existed at the time such State became a member of the Union . . . ." No definitions are required by this Court and there is no need to resort to international law; Texas has simply been given that amount of submerged land it owned when it entered the Union.

Thus, the State of Texas, which has been allowed by the United States to claim a larger portion of submerged lands because of its historical situation, is limited in its claim by fixed historical boundaries. It may not combine the best features of both grants in order to carve out the largest possible area for itself. If it wishes to take advantage of the present three-mile grant then it may use its present coastline as defined by Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, *supra,* to include artificial jetties. But if Texas wishes to take under the more expansive historical grant, it must use boundaries as they existed in 1845 when Texas was admitted to the Union. At that time there were no artificial jetties in existence so obviously they are not considered.

It cannot be ignored that the application of the Convention to Texas here would allow Texas, unlike all other States except Florida,[2] to expand its own state bound-

[2] In *United States* v. *Florida,* 363 U. S. 121 (1960), we held that Florida also was entitled to the historical three-league grant. Since historical claims by the other Gulf States of Louisiana, Mississippi,

aries beyond the congressional limitation simply because of a rule governing the relationships between maritime nations of the world. This is a domestic dispute which must be governed by the congressional grant. There is no reason why an international treaty should be applied when it simply works to take away land from the United States in order to give to Texas more land than it ever claimed historically. We cannot believe that Congress intended such a result.

Thus, we hold today that the congressional grant to Texas of three marine leagues of submerged land is measured by the historical state boundaries "as they existed" in 1845 when Texas was admitted into the Union. The United States is entitled to a supplemental decree to this effect, and we grant 60 days to each of the parties in which to submit proposed supplemental decrees for our consideration.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, concurring in the result.

The Submerged Lands Act in § 3 (a) grants to the States "ownership of the lands beneath navigable waters within the boundaries of the respective States . . . ." 67 Stat. 30, 43 U. S. C. § 1311. The critical term "boundaries" is given three alternative definitions in § 2 (b) of the Act:

1. "boundaries . . . as they existed at the time such State became a member of the Union," or
2. "boundaries . . . as heretofore approved by the Congress," or

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and Alabama were rejected in *United States* v. *Louisiana*, 363 U. S. 1 (1960), Texas and Florida are the only two States which qualify for the expansive grant of three marine leagues instead of the grant of three miles.

3. "boundaries . . . as extended or confirmed pursuant to section 4," *i. e.*, "three geographical miles distant from [the State's] coast line . . . ." [1]

We deal here with the first of these three alternative definitions of "boundaries" in § 2 (b). In *United States* v. *Louisiana,* 363 U. S. 1, this Court upheld Texas' claim to a historic boundary based on the Republic of Texas Boundary Act of 1836, which was in effect at the time of the Annexation Resolution of 1845. That Act described Texas' boundary in the Gulf of Mexico as running "three leagues from land."

Texas now contends that the location of its historic boundary is to be determined by measuring out three leagues from harbor jetties constructed sometime after 1845. This seemingly anomalous result is required, Texas argues, by the second *California* case, *United States* v. *California,* 381 U. S. 139. I cannot agree. The second *California* case dealt with a single issue: the meaning of the term "coast line" for purposes of the third alternative definition of "boundaries" in § 2 (b).[2] But Texas does not claim a boundary under that definition, and the term "coast line" simply does not appear in the definition of "boundaries" under which Texas does assert its claim. The second *California* case is, therefore, basically irrelevant.

My Brother HARLAN reaches the result urged by Texas but for very different reasons. He construes the statu-

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[1] A proviso to § 2 (b) establishes a maximum for any of the three boundary definitions: "[I]n no event shall the term 'boundaries' . . . be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico . . . ."

[2] Presumably the construction there adopted would also apply to the term "coast line" in the maximum proviso of § 2 (b), n. 1, *supra,* but the United States does not contend that Texas' claim exceeds the § 2 (b) maximum.

tory phrase "boundaries as they existed" as referring to the "three leagues from land" formula of the Texas Boundary Act, and then applies this 1845 formula to present Texas shore conditions. The Court, on the other hand, construes "boundaries as they existed" as referring, not to the 1845 formula, but to a particular line—the line resulting from the application of the 1845 formula to 1845 conditions.

The difference between majority and dissent thus turns on a narrow question: whether the word "boundaries" in the first alternative definition in § 2 (b) refers to an operative definition or to a line. I adopt the latter construction because I think the former plays havoc with the ordinary understanding of the word "boundaries" and because the legislative history does not persuade me that Congress meant to use that word in an unusual sense. It is, of course, true that boundaries may shift when a constant operative definition is applied to changing conditions. But the ordinary understanding of the word "boundaries" is the resultant line, not the operative definition. Finally, when the phrase "as they existed" is appended to the word "boundaries," it simply does not make semantic sense to interpret "boundaries" as a general definition rather than a particular line.

For these reasons, I concur in the conclusions of the Court in this case.

MR. JUSTICE HARLAN, dissenting.

At the outset, it is worth remarking that this case is but an epilogue to our decision in *United States* v. *Louisiana,* 363 U. S. 1, and arises out of the reservation of jurisdiction in this Court's decree in that proceeding. It is not a new case in its own right. Had the Court paused to remind itself of that fact it might have been less ready to cut loose from basic things that were decided there. For reasons stated in this opinion, I believe that

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the decision upon the issue now in dispute should be in favor of the Texas position.

The question in this proceeding is whether artificial jetties, constituting permanent harbor works, are to be reckoned as part of the base line in calculating the three-league grant of submerged lands in the Gulf of Mexico to which we have already held Texas is entitled under the Submerged Lands Act. The opinions of the majority declare that they may not be, by a beguilingly simple process of reasoning that boils down to this syllogism: the outward limit of Texas' three-league grant is determined under the Act by the location of its maritime boundary "as it existed" in 1845, when it was admitted to the Union; these harbor works were not in existence at that time; therefore, these works play no part in fixing the location of the boundary. Our decision in *United States* v. *California,* 381 U. S. 139, wherein we held that similar harbor works were includable in calculating the outward limit of California's submerged lands grant, has no application, it is said, because California's grant was not dependent upon its "admission" boundary.

The major premise of the majority's reasoning is, I believe, demonstrably wrong. The assumption that the statutory term "as it existed" was intended to freeze Texas' seaward boundary (and hence the extent of the Act's grant) as of 1845 is fundamentally inconsistent with the basis on which we held in the initial stage of this case that Texas was entitled to a three-league grant at all. The Court's prior opinion upheld the claims of Texas only because Texas *now has* a valid state boundary "three leagues from land." [1] This present boundary is entirely independent of the Submerged Lands Act, which neither created it nor affected its location. The question before the Court at this time is not where that boundary was in 1845, but where it is now.

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[1] See *infra,* at 171.

The words "as it existed" were fully and carefully interpreted in the Court's earlier opinion, and they were held to serve a purpose different from and irrelevant to the determination of the *location* of any state boundary. Contrary to the impression left by today's opinion, the language of the grant made in the Submerged Lands Act does not contain these words. The operative section of the Act simply grants to every coastal State "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters." [2] To take under this language, a State may either prove an existing boundary, subject to a limitation of three leagues in the Gulf of Mexico and of three miles in the Atlantic or Pacific Ocean, or establish a new boundary three miles from its coastline pursuant to a separate section of the Act.[3] The State must, however, presently have some boundary in order to take anything. The term "boundaries" is defined elsewhere in the Act to include boundaries "as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress." [4] The purpose of this section, we held, was simply to restrict claims to boundaries that had, at one time or another, been approved by Congress.[5]

On the basis of this understanding of the term "as it existed," we held in our prior opinion that the present maritime boundary of the State of Texas is defined by the Republic of Texas Boundary Act of 1836,[6] because that Act was approved by Congress pursuant to its 1845 Resolution of Annexation of Texas.[7] That

[2] 67 Stat. 30, 43 U. S. C. § 1311 (a).

[3] 67 Stat. 31, 43 U. S. C. § 1312.

[4] 67 Stat. 29, 43 U. S. C. § 1301 (b).

[5] 363 U. S., at 26–28.

[6] 1 Laws, Republic of Texas 133 (1836).

[7] 363 U. S., at 36–65.

Act claimed for Texas a boundary "three leagues from land." As the United States here concedes, maritime boundaries defined by reference to the shore are inherently mobile with changes in the configuration of the shoreline. Hence the present location of the boundary line drawn in 1836 is not necessarily the same as its location in 1836 or 1845. Below, after presenting in some detail the argument that the limit of the Submerged Lands Act grant is the *present* location of the historical boundary of the State of Texas, I shall consider the question whether these artificial jetties are to be included in determining that location.

I.

The Court's opinion in *United States* v. *Louisiana, supra,* makes it abundantly clear that the question now before us is the present location of the Texas boundary that was acknowledged in 1845, and that the words "as it existed" were not intended to answer that question.

A. The Use of Present Boundaries.

As the earlier opinion explained, the congressional assumption that some States have existing historic boundaries was based on the history of this Court's treatment of submerged lands.[8] The Court had early held that the States owned the land beneath their inland navigable waters. *Pollard's Lessee* v. *Hagan,* 3 How. 212. Following that case it was widely believed that the same rule would apply to the marginal sea, that is, that the States owned the land beneath the waters of the sea within their boundaries.[9] This belief was based on two assumptions neither of which was authoritatively tested until the 1940's: first, that at least some States had valid boundaries in the sea, and second, that the States owned sub-

[8] 363 U. S., at 16–18.

[9] See 363 U. S., at 16.

merged land within them. In a series of cases beginning in 1947, the *second* assumption was destroyed by this Court: the United States was held to have paramount rights in offshore lands as an attribute of national sovereignty.[10] The *first* assumption, however, was explicitly left standing by those decisions:

> ". . . The question here is not the power of a State to use the marginal sea or to regulate its use in absence of a conflicting federal policy . . . .
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> . . . . .
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> ". . . We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis à vis* persons other than the United States . . . . *The matter of State boundaries has no bearing on the present problem.*" [11] (Emphasis added.)

As we held in the earlier phase of the present case, Congress' purpose in the Submerged Lands Act was to restore the situation to what it had assumed it to be prior to 1947, and its method of doing this was to "quitclaim" back to the States the "paramount rights" that this Court had found to be an attribute of national sovereignty.[12] This quitclaim, like the cases that led to

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[10] *United States* v. *California,* 332 U. S. 19; *United States* v. *Louisiana,* 339 U. S. 699; *United States* v. *Texas,* 339 U. S. 707.

[11] The quotation is from the opinion of MR. JUSTICE DOUGLAS, for the Court, in *United States* v. *Louisiana,* 339 U. S. 699, at 704, 705 (1950). The quoted statement is then explicitly relied upon in the subsequent case involving Texas, *United States* v. *Texas,* 339 U. S. 707, at 720. In these cases, the two States had asserted that they had historic boundaries in the sea and were therefore not subject to the rule of the first *California* case that the United States had paramount rights in the marginal sea. This Court ruled against the state claims, holding that the existence and location of state boundaries were irrelevant.

[12] 363 U. S., at 17–20, 24–29.

it, had nothing to do with the validity or location of state maritime boundaries. As Senator Cordon, the Acting Chairman of the Committee on Interior and Insular Affairs and the bill's chief exponent in the Senate, put the matter,

> "The States of the United States *have* legal boundaries. It is not a part of the power or the duty of Congress to make determination with reference to those boundaries, or *where those boundaries should lie.* It is a matter for the courts to determine, or for the United States . . . and . . . the several States, to reach an agreement upon. The pending bill does not seek to invade either province. . . . Whenever a question arises as to a boundary, it will be determined exactly as any other question in law is determined, and the boundary will be established.
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> ". . . It is not within the province of Congress to change the *present* boundaries of Texas without the consent of the State of Texas." 99 Cong. Rec. 2620. (Emphasis added.)

In the Court's prior opinion in this litigation we expressly adopted this construction of the Act. We accepted the *then* contention of the United States that the "Act did not purport to determine, fix, or change the boundary of any State, but left it to the courts to ascertain whether a particular State had a seaward boundary." [13] We went on to say,

> "[W]e find a clear understanding by Congress that the question of rights beyond three miles turned on the existence of an expressly defined state boundary beyond three miles. Congress was aware that several States claimed such a boundary. Texas throughout repeatedly asserted its claim that when an independent republic its statutes established a

[13] 363 U. S., at 11.

three-league maritime boundary, and that the United States ratified that boundary when Texas was admitted to the Union . . . .

"It was recognized [by Congress] that if the legal existence of such boundaries could be established, they would clearly entitle the respective States to submerged land rights to that distance under an application of the *Pollard* rule to the marginal sea. Hence . . . the right of the Gulf States to prove boundaries in excess of three miles was preserved." [14]

B. THE WORDS "AS THEY EXISTED."

In the first phase of this case, the problem was which, if any, of the five Gulf States had boundaries that were cognizable for purposes of the Submerged Lands Act grant. Congress had limited boundaries so cognizable to boundaries "as they existed" at admission or "as heretofore approved" by Congress. The Court's decision at that time therefore turned entirely on the meaning of those two terms, which were consequently subjected to exacting analysis. We at that time rejected a contention made on behalf of the States, but apparently now adopted by the Court, that the words "as they existed" referred simply to the location of state boundaries at the time of admission; [15] we held, quite to the contrary,

[14] 363 U. S., at 24–25.

[15] The argument of the States was that the words "as they existed" included boundaries unilaterally declared prior to admission. 363 U. S., at 13, 15. The theory appears to have been that the words had merely a "locating" function. Finding that the purpose of these words was not clearly revealed by the Act on its face, 363 U. S., at 16, we turned to the legislative history and concluded that the words were instead meant to require congressional approval of the State's boundary claim at the time of admission or later. 363 U. S., at 16–30. Our view was that the Act granted land out to whatever present boundaries should prove to be valid, subject to the three-league limitation in the Gulf, but that only those that had been approved by Congress at or after admission could be considered valid for purposes of this grant.

that the purpose of these words was not to affect the location of present state boundaries but to single out those boundary claims that had at one time or another been approved by Congress as the only ones cognizable under the Act. We reasoned as follows:

> "The earlier 'quitclaim' bills defined the grant in terms of *presently existing* boundaries, since such boundaries would have circumscribed the lands owned by the States under an application of *Pollard* to the marginal sea. . . . Some suggestions were made, however, that States might by their own action have effectively extended, or be able to extend, their boundaries subsequent to admission. To exclude the possibility that States might be able to establish present boundaries based on extravagant unilateral extensions, . . . subsequent drafts of the bill introduced the twofold test of the present Act—boundaries which existed at the time of admission and boundaries heretofore approved by Congress. *It is apparent that the purpose of the change was not to alter the basic theory of the grant, but to assure that the determination of boundaries would be made in accordance with that theory—that the States should be 'restored' to the ownership of submerged lands within their present boundaries, determined, however, by the historic action taken with respect to them jointly by Congress and the State.*" [16] (Emphasis added.)

It was on this theory that we held that the words "as they existed" should properly be read to refer to the "moment of admission" rather than to preadmission claims, because Congress' purpose had been to allow only claims that it had approved.[17]

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[16] 363 U. S., at 26–28.

[17] My Brother BLACK partially dissented from that opinion; it was his view that the words "as they existed" could not be read, as the

Having defined the term "as they existed" to mean "as acknowledged by Congress at the moment of admission," the Court in the prior litigation went on to hold that the Resolution of Annexation of 1845 [18] had, indirectly, been a congressional acknowledgment of the boundary established by the Republic of Texas Boundary Act of 1836, and that this Act therefore defines Texas' present boundary.[19] The Act reads, in relevant part, as follows:

> "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico *three leagues from land,* to the mouth of the Rio Grande . . . ." 1 Laws, Republic of Texas 133. (Emphasis in the Court's prior opinion.[20])

The problem before us here—where the boundary of Texas is—must be answered by determining where "three leagues from land" now is, for Texas has no historic boundary claim at all unless it is to "three leagues from land." The question is one that the Court does not even reach: should the words "from land" be taken, today, to refer to the shoreline in 1836, or 1845, or to the present shoreline, and, if to the last of these, should "land" include artificial accretions built upon the land? It is to that question that I now turn.

II.

Texas' historic claim, by which the location of its present boundary must be determined, was to "three leagues from land." As the United States concedes, a boundary measured by the location of the edge of a

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Court read them, to refer simply to a "legally accepted" boundary. 363 U. S., at 85, 89.

[18] 9 Stat. 108.

[19] 363 U. S., at 46–65.

[20] The passage is quoted at 363 U. S., at 36.

body of water is inherently ambulatory. In its brief here, the United States put the matter this way:

> ". . . Where a waterline is a boundary, the boundary follows the waterline through all its gradual, natural changes (*Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178, 189; *Banks* v. *Ogden,* 2 Wall. 57, 67; *Jones* v. *Johnston,* 18 How. 150; *New Orleans* v. *United States,* 10 Pet. 662, 717) . . . .
>
> ". . . The location of the boundary changes, but it is the same, not a new, boundary." [21]

At the very least, then, the present boundary of Texas must be measured from its present shoreline, which may have suffered accretion or erosion since 1836, and not from its 1845 shoreline.

The next question is whether the "land" whose present location is the base line from which to measure Texas' historic claim to "three leagues" includes artificial extensions of land such as the jetties that are at issue in this case. There can be no doubt, as the Court's opinion recognizes, that any maritime boundary established today would be taken to incorporate existing artificial structures of the kind built on the Texas coast and to be ambulatory with any such future artificial accretions. In *United States* v. *California,* 381 U. S. 139, 176, we specifically held that the three-mile boundary established by the Submerged Lands Act for States without historic boundaries would be measured from existing artificial structures and from future artificial structures as they might be built. We based our decision on the conclusion that Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, quoted in the Court's opinion, *ante,* at 158, reflected a national

[21] Brief for the United States in Support of Motion for Injunctive Relief and Supplemental Decree as to the State of Texas 17, 16 (filed July 13, 1967).

and international view on this matter which should be taken to be incorporated within the three-mile-boundary section of the Submerged Lands Act.[22]

At the time of this *California* decision the argument was made that it would be undesirable to allow a State to extend its territory unilaterally by building onto the shoreline. We rejected that argument, finding a sufficient answer in the fact that the navigational servitude possessed by the United States gives it plenary power to forbid or regulate the construction of artificial extensions of the coastline.[23] Furthermore, under the principle of the Convention only "permanent harbour works" forming an "integral part of the harbour system" count as part of the shore for measuring purposes, so no trifling construction will have the effect of moving a boundary.

The parties here have stipulated that the jetties in question fall within the Convention's definition of "permanent harbour works." In other words, were these jetties on the coast of California, they would be treated as part of the "coast line" in determining the extent of California's statutory grant of submerged lands within three miles of its "coast line." The precise issue before us is whether the Convention principle should now be taken to be incorporated into the claim of "three leagues from land" in the Republic of Texas Boundary Act as it was incorporated into the term "coast line" used in the Submerged Lands Act.

The Court appears to conclude that a different result should be reached in the case of Texas because "[u]nlike

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[22] We reached this result despite the fact that the Act preceded by five years the adoption of the international Convention, which consequently was not in any literal sense incorporated by the Act. We found, rather, that the Convention afforded the "best and most workable definition" of the statutory term "inland waters" and, derivatively, the statutory term "coast line." 381 U. S., at 161–165.

[23] 381 U. S., at 177.

the three-mile grant where this Court held that Congress left boundary definitions up to it, here Congress granted land the boundaries of which are determined by fixed historical facts." *Ante,* at 159–160. This statement in itself is correct, but the result does not follow. In the case of California, we were dealing with Congress' term "coast line" and we held that Congress had left us considerable latitude in interpreting it. In the case of Texas, to which Congress has granted land out to its "boundaries," the question left to this Court is narrower: we must determine whether the Texas Act defining those boundaries should be interpreted as of today to include artificial extensions of the shoreline in the base line for measuring those boundaries. That Congress referred us to an ancient boundary claim hardly justifies our assuming that that claim is self-explanatory.

Whether the words "three leagues from land," written in 1836, should now be held to mean "three leagues from the natural shore" or "three leagues from the coast line" as that phrase would be interpreted today is of course not an easy question. So far as we know, Texas had no artificial extensions of its coast in 1836 or 1845, and there is every reason to assume that it gave no thought to the present problem. Nor does it appear that any other sovereign in the 19th century had occasion to consider the question.

We are thus constrained, as one writer would have it, to guess what the Texas Legislature "would have intended on a point not present to its mind, if the point had been present." [24] Since Congress in effect left the interpretation of the Republic of Texas Boundary Act to us, that exercise involves no speculation as to how Congress interpreted or would have interpreted that Texas Act. The soundest principle of interpretation, it

[24] Gray, The Nature and Sources of the Law 173 (1963 ed.).

seems to me, is to assume that Texas would have come to the same conclusion that was reached by every nation that discussed the issue when it did arise. That conclusion, which was not only unanimous but also obvious and natural, was that maritime boundaries move as the shoreline on the sea is extended.

The question apparently first arose in the 1920's. The Preparatory Committee for the League of Nations Conference for the Codification of International Law, to be held at The Hague in 1930, submitted to the various nations the question "how the base line for measuring the breadth of territorial waters is to be fixed in front of ports." [25] Great Britain and several other nations responded, "In front of ports, the base line from which the territorial waters are measured passes across the entrance from the outermost point or harbour work on one side to the outermost point or harbour work on the other side." [26] The United States quickly adopted the British suggestion.[27] Several nations, although not, like Great Britain, expressing the principle in the present tense as an existing rule, said that much the same principle "should be" the rule.[28] All together, of 18 responses received by the Preparatory Committee, none favored a different base line.[29] The Committee then formulated the principle that "territorial waters are measured from

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[25] League of Nations Doc. No. C.74.M.39.1929.V, League of Nations Conference for the Codification of International Law: Bases of Discussion: Vol. II—Territorial Waters, p. 45 [hereinafter cited as "Bases of Discussion"].

[26] *Id.*, at 46.

[27] See League of Nations Doc. No. C.351 (b).M.145 (b).1930.V, Acts of the Conference for the Codification of International Law: Meetings of the Committees; Vol. III—Minutes of the Second Committee: Territorial Waters, p. 200 [hereinafter cited as "Acts of Conference"].

[28] Bases of Discussion 46.

[29] *Id.*, at 45–47.

a line drawn between the outermost permanent harbour works," and commented that "agreement exists" on this principle.[30]

Because of disagreement over unrelated matters, the Hague Conference produced no treaty on territorial waters.[31] The matter was raised again, however, beginning in 1952, and the International Law Commission drafted the document that became, in 1958, Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, *ante,* at 158. The ILC's comment was "This article is consistent with the positive law now in force." [32] The ILC draft was presented to the UN Conference on the Law of the Sea, where M. Francois, the Expert to the Secretariat of the Conference, commented that "States had long regarded harbour works such as jetties as part of their land territory and that practice should be universally recognized as unchallengeable." [33] The principle was adopted by the Conference, after discussion and without dissent, and became Article 8.

The United States here contends that because the outermost harbor-works principle had not been articulated in 1836 or 1845, it should not now be a basis for interpreting the Republic of Texas Boundary Act. The premise of this contention is sound: an ancient statute should ordinarily be interpreted in light of the doctrines prevailing at the time it was passed, rather than of subsequent changes in governing principles. But the conclusion drawn from this premise by no means follows in this instance. The outermost permanent harbor-works principle was not a new rule substituted for an older,

[30] *Id.,* at 47.

[31] See Acts of Conference 211.

[32] 1954 I. L. C. Yearbook 155.

[33] U. N. Doc. No. A/Conf. 13/39, United Nations Conference on the Law of the Sea, Official Records, Volume III: First Committee (Territorial Sea and Contiguous Zone) 142.

conflicting one. It was simply the first answer to a problem that had not arisen before. The unanimity of nations in 1930 strongly suggests that Texas, had it considered the problem in 1836, would have reached the same conclusion.

The conclusion that the Texas Boundary Act should be read today in light of the outermost harbor-works principle is fortified by the fact that the result to which this reading leads is eminently sensible. Considerations of history aside, there is no good reason (and certainly there is no suggestion in the Submerged Lands Act or its legislative history) why the principles governing measurement of the present-day boundary of the State of Texas should be different from those that govern both the measurement of the boundary of California and the measurement of the boundary of the United States in the Gulf of Mexico opposite Texas. Furthermore, the various practical considerations that led the nations of the world to agree unanimously on the principle of Article 8 should surely have considerable force here. The Court's rule, maintaining the boundary of Texas immobile at its 1845 location, seems highly unworkable even if it now proves possible to determine that location at all; [34] for the result of such a rule is that at some future time not only artificial but natural extensions of the land mass might prove to be outside of "Texas." The alternative, suggested by the United States here but rejected by the United States for international purposes, would be to make the boundary mobile with re-

[34] No geodetic survey indicating the 1845 location of Texas' shoreline exists. At oral argument, both sides were at a loss to suggest any means by which the 1845 location of the boundary could be ascertained, except by agreement between the United States and Texas. This problem is, of course, typical of the difficulties that dictate the principle that maritime boundaries are inherently mobile.

spect to natural, but immobile with respect to artificial, changes. Such a rule involves obvious difficulties: the construction of harbor works may affect the configuration of the entire shoreline, making it soon impossible to determine where the "natural" change ends and the "artificial" change begins. The outermost permanent harbor-works principle, then, seems almost inevitable.

Believing that the limit of Texas' submerged land grant is its present boundary, that that boundary is defined by the Republic of Texas Boundary Act of 1836, and that that Act defines a boundary that should now be measured from the outermost points of the jetties in question, I respectfully dissent from the Court's determination of the issue before us.

Syllabus.

FEDERAL TRADE COMMISSION *v.* FLOTILL PRODUCTS, INC.

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

No. 20. Argued October 16, 1967.—Decided December 4, 1967.

All five members of the Federal Trade Commission (FTC) heard oral argument in this case involving alleged violations by respondent of § 2 (c) and § 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act. Two Commissioners resigned before the FTC rendered its decision and a new Commissioner taking office in the interim declined to participate. The three participating Commissioners concurred that respondent had violated § 2 (d) but only two agreed that it had violated § 2 (c). A three-judge panel of the Court of Appeals upheld the FTC's cease-and-desist order relating to the § 2 (d) violation but refused to enforce the order relating to the § 2 (c) violation, holding that, absent contrary statutory authority, three members of a five-member commission had to concur before their order could bind the commission. The court *en banc* sustained the panel decision. The Federal Trade Commission Act does not specify the number of Commissioners who may constitute a quorum. An FTC rule provides for a quorum of three Commissioners. *Held:*

1. Absent a contrary statutory provision the common-law rule applies: a majority of a quorum which constitutes a simple majority of a collective body may act for the body. Pp. 183–184.

2. The FTC is empowered to follow the common-law rule since the Federal Trade Commission Act neither expressly nor impliedly reflects a contrary declaration and none is to be inferred by other congressional action. Pp. 185–190.

358 F. 2d 224, 234, reversed in part and remanded.

Howard E. Shapiro argued the cause for petitioner. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner* and *James McI. Henderson.*

William Simon argued the cause for respondent. With him on the brief were *John Bodner, Jr.,* and *Jefferson E. Peyser.*

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether an enforceable cease-and-desist order of the Federal Trade Commission requires the concurrence of a majority of the full Commission, or only of a majority of the quorum that participated in the decision to issue the order.

The Commission has five Commissioners, 15 U. S. C. § 41.[1] A full Commission heard oral argument in this case involving a complaint that respondent made payments in lieu of brokerage in violation of § 2 (c) of the Robinson-Patman Act and granted promotional allowances in violation of § 2 (d) of that Act. 15 U. S. C. §§ 13 (c) and (d). Two Commissioners retired before the Commission rendered its decision. Although one vacancy was filled in the interim, only three Commissioners participated in the decision because the new Commissioner, not having heard the oral argument, declined to participate. All three participating Commissioners concurred that respondent granted promotional allowances in violation of § 2 (d). However, only two of the three concurred that respondent also made payments in lieu of brokerage in violation of § 2 (c). On petition for review under 15 U. S. C. §§ 21 (c) and 45 (c), a three-judge panel of the Court of Appeals for the Ninth Circuit enforced the Commission's cease-and-desist order as it related to the § 2 (d) violation but refused to enforce the order, one judge dissenting, as it related to the § 2 (c) violation. In refusing to enforce the § 2 (c) part of the order, the Court of Appeals held that "absent statutory authority or instruction to the

[1] The FTC is one of the oldest federal regulatory agencies. Act of September 26, 1914, c. 311, § 1, 38 Stat. 717, as amended, 15 U. S. C. § 41. See generally Cushman, The Independent Regulatory Commissions 177–228 (1941); Henderson, The Federal Trade Commission (1924).

contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission." 358 F. 2d 224, 228.[2] On rehearing *en banc* the full court sustained the panel decision five to four. 358 F. 2d, at 234. Because of a conflict with decisions of other courts of appeals, see *Atlantic Refining Co.* v. *FTC,* 344 F. 2d 599 (C. A. 6th Cir.), *LaPeyre* v. *FTC,* 366 F. 2d 117 (C. A. 5th Cir.), we granted certiorari, 386 U. S. 1003. We reverse.

The Federal Trade Commission Act does not specify the number of Commissioners who may constitute a quorum.[3] A quorum of three Commissioners is provided for by a rule of the Commission first promulgated in 1915; in its current version it is Rule 1.7.[4] No challenge

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[2] The FTC had denied a petition for reconsideration filed by respondent urging, among other things, the invalidity of the § 2 (c) order on this ground. See 1963–1965 CCH Trade Reg. Rep. Transfer Binder ¶ 17,046.

[3] We do not regard the provision in 15 U. S. C. § 41 for the exercise of powers by "the remaining commissioners" in the case of "a vacancy" as regulating the matter of a quorum. In contrast, except for the 1934 Act creating the Securities and Exchange Commission, 15 U. S. C. § 78d, which is also silent, the acts creating other major federal regulatory agencies expressly provide how many members shall constitute a quorum. See, *e. g.,* 42 U. S. C. § 2031 (Atomic Energy Commission); 49 U. S. C. § 1321 (c) (Civil Aeronautics Board); 47 U. S. C. § 154 (h) (Federal Communications Commission); 16 U. S. C. § 792 (Federal Power Commission); 46 U. S. C. § 1111, as amended (Federal Maritime Commission); 49 U. S. C. § 17 (3) (Interstate Commerce Commission); 29 U. S. C. § 153 (b) (National Labor Relations Board); 50 U. S. C. App. § 1217 (b) (Renegotiation Board); 19 U. S. C. § 1330 (c) (United States Tariff Commission).

[4] "A majority of the members of the Commission constitutes a quorum for the transaction of business." Rule 1.7, Procedures and Rules of Practice for the Federal Trade Commission, as amended, 16 CFR § 1.7 (1967) (now § 6 of Statement of Organization of the FTC, 32 Fed. Reg. 8442). Although § 6 superseded Rule 1.7 as of

to the authority of FTC to promulgate Rule 1.7 is made in this case; indeed, the Court of Appeals expressly disclaimed any ". . . doubt as to the validity of the Commission's practice of conducting hearings before less than the full membership," 358 F. 2d, at 230. Before us for review, therefore, is only the holding of the Court of Appeals which follows that disclaimer: "We say only that an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few." *Ibid.*

The rationale of the Court of Appeals was that the FTC could act only on the concurrence of a majority of the full Commission "absent statutory authority or instruction to the contrary." 358 F. 2d, at 228. The court cited no authority affirmatively supporting that proposition; the court simply rejected—on the ground that it is inapplicable to "a statutorily created administrative tribunal like the Federal Trade Commission," 358 F. 2d, at 229—the rule stated by the Court of Customs and Patent Appeals in *Frischer & Co.* v. *Bakelite Corp.*, 39 F. 2d 247, 255, that ". . . in collective bodies other than courts, even though they may exercise judicial

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July 1, 1967, it is identical in wording; we shall refer to the ruling as Rule 1.7, as it was cited in the proceedings to date.

In its original version the quorum provision was stated: "Three members of the Commission shall constitute a quorum for the transaction of business." 1 F. T. C. 595 (Rule adopted June 17, 1915). See also Henderson, *supra*, n. 1, at 71: "The case is then set for oral argument before the full Commission (or at least a quorum of three members) . . . ."

Three courts of appeals have expressed approval of the rule. See *Drath* v. *FTC*, 99 U. S. App. D. C. 289, 239 F. 2d 452; *Atlantic Refining Co.* v. *FTC*, 344 F. 2d 599 (C. A. 6th Cir.); *LaPeyre* v. *FTC*, 366 F. 2d 117 (C. A. 5th Cir.). However, both the Fifth and Sixth Circuit decisions erroneously read the rule as providing, of itself, "for decision by the majority of panels of three members." 366 F. 2d, at 122; 344 F. 2d, at 607.

authority, a majority of a quorum is sufficient to perform the function of the body." [5] Further, the court rejected as "a bare conclusion" the holding of the Court of Appeals for the Sixth Circuit in *Atlantic Refining Co.* v. *FTC, supra,* that a majority of a panel of three Commissioners could act for the Commission.

Insofar as the Court of Appeals' holding implies that the proposition stated by it is the common-law rule, the court was manifestly in error. The almost universally accepted common-law rule is the precise converse—that is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.[6] Where the enabling statute is silent on the question,

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[5] The question in *Frischer* was whether the United States Tariff Commission might act on majority vote of a quorum. The enabling act contained nothing on the subject of a quorum. 39 Stat. 795–798. The present statute provides that a majority of the Commissioners constitutes a quorum. 19 U. S. C. § 1330 (c).

[6] See, *e. g., Missouri Pac. R. Co.* v. *Kansas,* 248 U. S. 276 (1919); *United States* v. *Ballin,* 144 U. S. 1 (1892); *Brown* v. *District of Columbia,* 127 U. S. 579 (1888); *Mountain States Tel. & Tel. Co.* v. *People ex rel.,* 68 Colo. 487, 499–500, 190 P. 513, 517–518 (1920); *Martin* v. *Lemon,* 26 Conn. 192 (1857); *Kaiser* v. *Real Estate Comm'n,* 155 A. 2d 715 (D. C. Mun. Ct. App. 1959); *Davidson* v. *State,* —— Ind. ——, 221 N. E. 2d 814 (1966); *Louisville & Jefferson County Planning & Zoning Comm'n* v. *Ogden,* 307 Ky. 362, 210 S. W. 2d 771 (1948); *Codman* v. *Crocker,* 203 Mass. 146, 89 N. E. 177 (1909); *Oakland* v. *Board of Conservation & Dev.,* 98 N. J. L. 806, 122 A. 311 (1923); *Hill* v. *Ponder,* 221 N. C. 58, 62, 19 S. E. 2d 5, 8 (1942); *Slavens* v. *State Bd. of Real Estate Examiners,* 166 Ohio St. 285, 141 N. E. 2d 887 (1957); *Green* v. *Edmondson,* 23 Ohio Dec. 85 (Common Pleas 1912); *Bray* v. *Barry,* 91 R. I. 34, 41–42, 160 A. 2d 577, 581 (1960); *E. C. Olsen Co.* v. *State Tax Comm'n,* 109 Utah 563, 570–571, 168 P. 2d 324, 328 (1946); 80 Harv. L. Rev. 1589–1590 (1967); 42 N. Y. U. L. Rev. 135, 136–138 (1967). See also *Snider* v. *Rinehart,* 18 Colo. 18, 23–24, 31 P. 716, 718 (1892); Constitution, Jefferson's Manual and Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., §§ 52–57, 409, 508–510.

the body is justified in adhering to that common-law rule.

Respondent does not undertake to support the Court of Appeals' proposition as stated. Rather respondent concedes that the common-law rule is as we have stated it to be but argues that an exception allegedly recognized at common law in the case of courts should be applied to an agency like the FTC exercising quasi-judicial functions; respondent cites the statement in *Frischer, supra,* at 255, that "[w]here courts are concerned, it has been uniformly held, so far as we can ascertain, that a clear majority of all the legally constituted members thereof shall concur or no valid judgment may be entered except such as may follow no decision." But even on the doubtful premise that there is an exception in the case of courts,[7] *Frischer* itself recognized, as we have seen, that

[7] The authorities cited in *Frischer* as supporting the exception fail with one exception to do so. Four of the decisions cited dealt simply with the rule in cases where a court is equally divided in its vote. *Madlem's Appeal,* 103 Pa. 584 (1883); *Putnam* v. *Rees,* 12 Ohio 21 (1843); *Northern R. Co.* v. *Concord R. Co.,* 50 N. H. 166 (1870); *Ayres* v. *Bensley,* 32 Cal. 632 (1867). Another, in addition to dealing with the question of an equally divided court, involved a constitutional provision for the concurrence of a majority of the judges *sitting*. *Mugge* v. *Tate, Jones & Co.,* 51 Fla. 255, 41 So. 603 (1906). The others are likewise not in point. *Deglow* v. *Kruse,* 57 Ohio St. 434, 49 N. E. 477 (1898) (two of three constitutes quorum, both must concur); *Denver & R. G. R. Co.* v. *Burchard,* 35 Colo. 539, 558, 86 P. 749, 755 (1906) (constitutional requirement that three of seven judges concur). The whole of the court's discussion in the only decision in point, *Johnson* v. *State,* 1 Ga. 271 (1846), was "[t]he law, organizing the Inferior Court, constitutes five justices the court. We hold the concurrence of a majority of the whole number necessary to the validity of their action." *Id.,* at 274. No authority was cited for this holding.

In addition, respondent cites *Paine* v. *Foster,* 9 Okla. 213, 53 P. 109 (1896), 9 Okla. 257, 59 P. 252 (1899). Its holding was, however, predicated on a *statutory* requirement that three judges of a

the exception does not apply to administrative agencies with quasi-judicial functions. *Ibid.*[8] It follows that the FTC is not inhibited from following the common-law rule unless Congress has declared otherwise. Since that declaration is not expressed in the Trade Commission Act, our task is narrowed to determining whether it may be read in by implication.

The Court of Appeals' opinion may be read as having found an implicit contrary declaration because Congress wrote the common-law rule into later statutes creating other agencies: "... when Congress wanted to authorize the exercise of the powers of an administrative body by less than the full body in other situations, it did not lack the words to do so expressly. Cf. National Labor Relations Board, 29 U. S. C. § 153 (b); Interstate Commerce Commission, 49 U. S. C. § 17 (1) [*sic*]; Federal Power Commission, 16 U. S. C. § 792," 358 F. 2d, at 229.[9] How-

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five-judge court must concur in order to reverse a lower court judgment. See 9 Okla. 257, 259, 260, 60 P. 24 (dissenting opinion).

Congress has prescribed a quorum of six Justices for this Court but has not provided how many of the quorum can act for the Court. 28 U. S. C. § 1. Congress has, however, dealt expressly with the latter matter in the statutes concerning the courts of appeals, 28 U. S. C. § 46 (d); the Court of Claims, 28 U. S. C. § 175 (f) (1964 ed., Supp. II); and the Court of Customs and Patent Appeals, 28 U. S. C. § 215.

[8] Accord, *Martin* v. *Lemon; Kaiser* v. *Real Estate Comm'n; Louisville & Jefferson County Planning & Zoning Comm'n* v. *Ogden; Oakland* v. *Board of Conservation & Dev.; Slavens* v. *State Bd. of Real Estate Examiners; Bray* v. *Barry; E. C. Olsen Co.* v. *State Tax Comm'n,* all *supra,* n. 6.

[9] In fact, of the three agencies cited only the ICC and NLRB have express authority to act through a majority of a quorum; the FPC statute simply stipulates that three of five commissioners constitute a quorum, a statutory equivalent of the FTC rule sanctioned by the Court of Appeals.

The Atomic Energy Commission, 42 U. S. C. § 2031, and the Renegotiation Board, 50 U. S. C. App. § 1217 (b), also are expressly

ever, in another statute, reorganizing the Federal Maritime Commission, Congress enacted not the common-law rule but a unanimous concurrence provision, Reorganization Plan No. 7 of 1961, 75 Stat. 840; the reasoning of the Court of Appeals thus would equally justify an inference that Congress sanctioned the FTC's adherence to the common-law rule, since Congress has not lacked the words to *abrogate* such a practice expressly. This diversity in congressional treatment of the problem clearly forecloses reliance upon a particular choice in one statute as the basis for an inference of a contrary choice in another which says nothing on the matter.

The Court of Appeals seems also to have been of the view that there is a basis for inferring a contrary

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authorized to act on the majority vote of a quorum. The Federal Maritime Commission, 46 U. S. C. § 1111, as amended by Reorganization Plan No. 7 of 1961, on the other hand may act only on the unanimous vote of a quorum. Like the act creating the FTC, the acts creating the Civil Aeronautics Board, 49 U. S. C. § 1321 (c), the Federal Communications Commission, 47 U. S. C. § 154 (h), the Federal Power Commission, 16 U. S. C. § 792, the Securities and Exchange Commission, 15 U. S. C. § 78d, and the Tariff Commission, 19 U. S. C. § 1330 (c), say nothing on the subject. These latter agencies nonetheless act on the majority vote of a quorum and in the cases of the CAB, the FCC, the SEC, and the Tariff Commission, the practice has been judicially approved. *Braniff Airways, Inc.* v. *CAB*, — U. S. App. D. C. —, —, 379 F. 2d 453, 460 (dictum); *WIBC, Inc.* v. *FCC*, 104 U. S. App. D. C. 126, 128, 259 F. 2d 941, 943 (dictum); *Gearhart & Otis, Inc.* v. *SEC*, 121 U. S. App. D. C. 186, 189, 348 F. 2d 798, 801 (dictum); *Frischer & Co.* v. *Bakelite Corp., supra* (Tariff Commission). In the case of the FTC, the practice has been judicially approved in *Atlantic Refining Co.* v. *FTC, supra*, and *LaPeyre* v. *FTC, supra*. The earliest FTC decision noting the practice is apparently *Luria Bros.*, 62 F. T. C. 243, 646, 655, decided in 1963. The first court challenge to the practice seems to have been that in 1965 in *Atlantic Refining Co.* v. *FTC, supra*. Cf. *Forster Mfg. Co.* v. *FTC*, 361 F. 2d 340 (C. A. 1st Cir.). See generally 35 Geo. Wash. L. Rev. 398 (1966); 80 Harv. L. Rev. 1589 (1967).

declaration from within the four corners of the Trade Commission Act itself. "[I]t is difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation." 358 F. 2d, at 229. This argument stresses the structural characteristics of the Commission—that it is a multi-membered body whose members serve long, staggered terms, and no more than three of whom may belong to the same political party. But the argument fails to take into account the fact that these features are common to almost all federal regulatory agencies, whose enabling acts, where they deal at all with the question of how many of a quorum may act for the agency, deal with it diversely. Nothing in the structure of the FTC, therefore, commands the inference that Congress intended to restrict the Commission to voting requirements not normally imposed on or adhered to by similarly structured agencies.

Respondent's final argument is that there is a basis for the inference in the action of Congress in 1961 in not disapproving the Reorganization Plan for the Commission submitted by President Kennedy.[10] Under this plan the FTC was granted "authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter . . . ." The plan further pro-

[10] Reorganization Plan No. 4 of 1961, 75 Stat. 837, 15 U. S. C. § 41. Under the Reorganization Act, 5 U. S. C. §§ 133z–1 to 133z–15, the plan became operative when not disapproved by Congress within 60 days of its submission by the President. Resolutions to disapprove Plan No. 4 failed to pass in both the House and the Senate. 107 Cong. Rec. 10844–10856 (House); *id.*, at 11721–11740 (Senate).

vided that "the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner . . ." and that "the vote of a majority of the Commission less one member thereof shall be sufficient to bring any such action before the Commission for review." Reorganization Plan No. 4, §§ 1 (a), (b). The Commission did not purport to act pursuant to Plan No. 4 in this proceeding. Nevertheless, respondent argues that the provision assuring a minority of the Commission a means to compel review by the full Commission is a congressional expression that Commission action shall be valid only when concurred in by a majority of the full membership. This argument is not persuasive, however. The provisions of Plan No. 4 were common to most of the reorganization plans submitted for other agencies at or about the same time.[11] As we have noted, the enabling acts creating those agencies treat differently the problem of the number of a quorum authorized to act for the agency, which makes it highly improbable that the similarly phrased review procedures set forth in the plans manifest the implicit principle for which respondent contends. Indeed, it is quite clear—both from the language of the plans and the discussions in Congress—that Plan No. 4 and those like it were concerned with establishing the authority and procedure for *delegation* of functions so as to enable the respective agencies to operate more efficiently.[12] There can be little question of the desirability of the FTC's

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[11] See Plan No. 1, H. R. Doc. No. 146, 87th Cong., 1st Sess. (1961) (SEC); Plan No. 2, H. R. Doc. No. 147 (FCC); Plan No. 3, H. R. Doc. No. 152 (CAB); Plan No. 4, H. R. Doc. No. 159 (FTC); Plan No. 5, H. R. Doc. No. 172 (NLRB); Plan No. 7, H. R. Doc. No. 187 (FMC). Plans 1, 2, and 5 were disapproved by Congress, 107 Cong. Rec. 10463 (No. 2); *id.*, at 11003 (No. 1); *id.*, at 13078 (No. 5). Plans 3, 4, and 7 became effective. See 75 Stat. 837, 840.

[12] See nn. 10–11, *supra*.

judicious use of this authority, but the case before us is not one in which there was a delegation. This was a proceeding originally heard by a full Commission and the problem of a quorum decision arose only when fortuitous circumstances reduced to three the number of Commissioners available to render a decision. Clearly, it is not a decision covered by the 1961 Plan.

The inconsistency in congressional treatment of quorum voting—sometimes allowing agency action on the concurrence of a majority of the quorum, in other cases requiring unanimous concurrence, and in several statutes saying nothing at all—refutes any suggestion that Congress has regarded the problem to be such as to justify a single rule for federal regulatory agencies. Surely, if Congress at any time has regarded the case of the FTC as specially calling for unanimity in quorum voting, we might expect that Congress would have at some time addressed itself to the question during the more than half century of the Commission's existence.[13] Thus, if any conclusion is to be drawn, it is that Congress has

[13] It is true that the Commission's first "official" acknowledgment of its practice of rendering two-to-one decisions apparently did not come until 1963. See *Luria Bros., supra,* n. 9. Nevertheless, from the beginning the Commission has periodically had unfilled vacancies for significant lengths of time, vacancies which Congress of course had to know about. Thus between June 1, 1918, and January 16, 1919, there were two simultaneous vacancies; and there have been several single vacancies of some duration—*e. g.,* September 1921 to June 1922, July 1934 to August 1935, October 1949 to October 1950. If, as respondent suggests, the prospect of the Commission acting through the split decision of three Commissioners should be so inconsistent with the nature of the Commission, it is indeed strange that Congressmen conversant with rules of parliamentary procedure governing voting, see Jefferson's Manual, *supra,* n. 6, as well as the methodology of judicial decision making should not in all these years have taken steps to prevent a Commission—reduced to three by a double vacancy or by a single vacancy plus an abstention—from rendering such a decision.

been and is content to acquiesce in the Commission's practice of following the long-established common-law rule.

We therefore reverse the judgment of the Court of Appeals insofar as the matter of the Commission's § 2 (c) order was "remanded to the FTC for further proceedings to determine whether a majority of the Commission join in the section 2 (c) findings," and remand to that court with direction to proceed to judgment on the merits of respondent's petition to review and set aside that order.

It is so ordered.

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

Syllabus.

WYANDOTTE TRANSPORTATION CO. ET AL. *v.* UNITED STATES.

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

No. 31. Argued October 16–17, 1967.—Decided December 4, 1967.

This case involves two libels arising out of the allegedly negligent sinking of vessels in navigable waterways of the United States. In *United States* v. *Cargill, Inc.*, the Government, after being notified of the sinking and abandonment of two barges, sought a decree that the parties responsible for the allegedly negligent sinking be declared responsible for removing the impediment to navigation which the wrecks constituted. In *United States* v. *Wyandotte Transportation Co.*, the Government claimed that a barge had been negligently sunk and demanded that the wreck be removed. When this demand was rejected, the Government removed the sunken barge and cargo and brought suit *in rem* against the barge and its cargo and *in personam* against the barge owner and others to effect reimbursement for the substantial costs of removal. The District Court consolidated the actions and granted summary judgment in each instance against the United States, holding that the Government has no *in personam* rights against those responsible for having negligently sunk a vessel but that it is limited to an *in rem* right against the vessel and its cargo. The Court of Appeals reversed and remanded the case to the District Court for trial on the issue of negligence. It held that under the Rivers and Harbors Act of 1899, as amended, the Government may assert *in personam* rights against those responsible for the negligent sinking of a vessel. Section 15 of the Act makes it unlawful to "carelessly sink, or permit or cause to be sunk a vessel in navigable waters." Petitioners contend that the Act's specific remedies, which include criminal penalties, are exclusive and preclude the Government from obtaining the relief it has sought in the two libels. They note that, under the Act, failure to remove a vessel is considered an abandonment and subjects a craft to removal by the Government, which may retain the proceeds of the sale of a wreck. *Held:* The remedies and procedures for the enforcement of § 15 are not exclusive and do not foreclose *in personam* relief against a party who negligently sinks a vessel in a navigable waterway. Pp. 200–210.

(a) The Government is a principal beneficiary of the Act, which was obviously intended to prevent obstructions in the Nation's waterways. P. 201.

(b) The general rule that the United States may sue to protect its interest is not necessarily inapplicable when the interest sought to be protected is expressed in a statute containing criminal penalties for its violation. Pp. 201–202.

(c) The criminal penalties of the Act and the Government's *in rem* rights would not adequately reimburse the Government for removal expenses. P. 202.

(d) The principles of *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (1960), where the Government was allowed injunctive relief to compel removal of an obstruction in a waterway even though such relief was nowhere specifically authorized in the Act, are applicable, by analogy, to the issues here. Pp. 202–203.

(e) The availability to the Government of declaratory relief in the form of an order that a negligent party is responsible for rectifying the wrong done to maritime commerce by a violation of § 15 is inferable from the prohibition contained in that section. P. 204.

(f) The exercise by the Government of the right of removal provided by the statute does not relieve negligent parties of the responsibility for making restitution for the removal. P. 205.

(g) Petitioners err in believing that the abandonment portions of the Act confer an absolute right upon a shipowner to abandon his sunken craft with no *in personam* liability. Those provisions merely grant a right of removal to the Government, and do not negate the Government's rights to declaratory relief or to recover removal expenses. Pp. 206–207.

(h) There is no support in the statute, in the legislative history, or in nonstatutory law, for the rule that a shipowner who has negligently sunk a vessel may abandon it and be insulated from all but *in rem* liability. Pp. 208–209.

367 F. 2d 971, affirmed.

Lucian Y. Ray argued the cause for petitioners. With him on the briefs were *Benjamin W. Yancey, George B. Matthews, Tom F. Phillips* and *J. Barbee Winston.*

Alan S. Rosenthal argued the cause for the United States. With him on the brief were *Acting Solicitor*

General Spritzer and *Acting Assistant Attorney General Eardley.*

E. D. Vickery, Alexander B. Hawes and *Scott H. Elder* filed a brief for the American Waterways Operators, Inc., et al., as *amici curiae,* urging reversal.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Two cases, consolidated by the trial court and raising related issues, are here involved. In *United States* v. *Cargill, Inc.,* the Government asked that parties responsible for the allegedly negligent sinking of a vessel in an inland waterway be declared responsible for removing the impediment to navigation thus created. In *United States* v. *Wyandotte Transportation Co.* the United States had itself removed a sunken vessel; claiming that the vessel had been negligently sunk, it sought reimbursement for the costs of removal. The question now before us for decision is whether the relief requested in these cases is available to the United States.

The United States District Court for the Eastern District of Louisiana concluded that such relief is not available. After the cases were consolidated, that court granted summary judgment against the United States in each instance. The court decided that the Government has no *in personam* rights against those responsible for having negligently sunk a vessel. In its view, the United States is limited to an *in rem* right against the cargo of the negligently sunk vessel and against the vessel itself. *United States* v. *Cargill, Inc.,* 1964 A. M. C. 1742.

The Court of Appeals for the Fifth Circuit reversed. It held that under the Rivers and Harbors Act of 1899, 30 Stat. 1151 *et seq.,* as amended, 33 U. S. C. § 401 *et seq.,* the United States may assert *in personam* rights—to injunctive or declaratory relief or damages—against those responsible for the negligent sinking of a vessel. *United*

States v. *Cargill, Inc.*, 367 F. 2d 971 (1966). Because of a conflict among the circuits and because of the important question regarding interpretation of a statute of the United States, we granted certiorari. 386 U. S. 906 (1967). We affirm the judgment below.

The crucial facts of both cases occurred in March 1961. The *Cargill* libel alleges that, at that time, a supertanker bound up the Mississippi for Baton Rouge, Louisiana, collided with two barges moored by a tug. The barges were owned by petitioner Cargo Carriers, Inc., and petitioner Jeffersonville Boat and Machine Co., respectively. The Government was notified immediately after the accident that the two barges had sunk. A few days later, it was served with notice that the barges were being abandoned. The United States refused, however, to accept abandonment or to assume responsibility for removing the wrecks. In December 1962, it brought suit against the owners, managers, charterers, and insurers of the two barges, seeking a decree that the respondents were responsible for removing the sunken vessels. The Government charged that negligence in the equipping, manning, and mooring of the barges had caused the sinking. To this date, the barges involved in this case remain in the Mississippi.

The *Wyandotte* libel is founded on facts more dramatic. A barge loaded with 2,200,000 pounds of liquid chlorine sank while being pushed in the Mississippi near Vidalia, Louisiana. Wyandotte, the owner of the barge, at first made some attempts to locate and raise the wreck. But then, in November 1961, Wyandotte informed the Army Corps of Engineers that it believed further efforts to raise the barge would be unsuccessful. Wyandotte stated that it was abandoning the vessel. The Government began a study of the danger posed by such a substantial load of chlorine at the bottom of the Mississippi. It was feared that if any chlorine escaped it would be

in the form of lethal chlorine gas, which might cause a large number of casualties. The Government demanded that Wyandotte remove the barge. Wyandotte refused to do this.[1]

The United States then moved to avert a catastrophe by locating and raising the barge and its deadly cargo. In October 1962, the President proclaimed the presence of the barge to be a major disaster under the Disaster Relief Act, 64 Stat. 1109, 42 U. S. C. §§ 1855–1855g. Safety precautions on a grand scale were taken, and a team of experienced divers sought gingerly to raise Wyandotte's barge. These operations, costing the United States some $3,081,000, proved successful.

The United States demanded that the owners and operators of the barge reimburse the Government for its expenses. This demand was rejected. In January 1963, the Government brought suit, *in rem* against the barge and her cargo,[2] and *in personam* against the owner of the barge, the owner of the boat that had been pushing the barge when it sank, and the owner of the chlorine cargo.[3] The libel charged these parties with negligence

[1] There is some dispute as to whether the United States ever agreed to remove the owner's barge. The Court of Appeals was cognizant of this issue but concluded that its resolution of the cases made a decision on this point unnecessary. We agree. We therefore do not pass on the questions whether the United States asserted the right to remove Wyandotte's barge or whether the Government, once it has asserted such a right, is precluded from seeking declaratory relief.

[2] Upon motion of the United States, the District Court ordered that the chlorine and its containers be sold and that the proceeds be paid into court pending final disposition of the litigation. The proceeds of this sale were $85,000. Petitioners do not dispute the right of the United States to this sum. See n. 12, *infra*.

[3] On petition for rehearing, the Court of Appeals affirmed the summary judgment entered in favor of Union Carbide Co., the owner of the chlorine, on the ground that there was no allegation or proof of negligence on its part. That decision is not now before us.

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and fault in the design, towing, manning, mooring, and equipping of the barge. The Government sought a decree for the costs it incurred in removing the wreck.[4]

I.

Although the Government has advanced several discrete grounds for affirmance, we do not pause to examine each of them.[5] We agree that § 15 of the Rivers and

[4] Of the expenses incurred by the United States, approximately $1,565,000 was for engineering costs; the remainder, some $1,516,000, was for public health and safety measures, including allegedly necessary precautions against a possible rupture of the chlorine containers during salvage operations. We do not, of course, pass on the questions whether all of these expenses were necessary to remove the barge or whether the Government may recover all of them.

[5] Thus, we intimate no view as to whether a negligently sunk vessel may be an "obstruction . . . to the navigable capacity of any of the waters of the United States," prohibited by § 10 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 403. This was the ground upon which the Court of Appeals rested its decision. We do not assess any of the Court of Appeals' conclusions, nor do we decide whether petitioners may be subject to the criminal and other remedies of § 12 of the Act, 33 U. S. C. § 406, which applies to violations of § 10.

Nor, finally, do we decide whether nonstatutory public nuisance law may form a basis for the relief here sought by the Government. See, *e. g., Mayor of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, 97 (1838); *United States* v. *Hall*, 63 F. 472, 474 (C. A. 1st Cir. 1894); *The Ella*, [1915] P. 111 (1914); Comment, Substantive and Remedial Problems in Preventing Interferences with Navigation: The *Republic Steel Case*, 59 Col. L. Rev. 1065, 1067 (1959); Wisdom, Obstructions in Rivers, 119 Just. P. 846 (1955). We therefore do not pass either on the question whether such a nonstatutory right of the sovereign has ever existed in the United States, cf. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 8 (1888); *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 486 (1960); or on whether such a right, if it ever did exist, survived the series of enactments beginning with the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, in which Congress asserted the general interest of the United States in the removal of sunken vessels obstructing navigable waters. Cf. *In re Debs*, 158 U. S. 564 (1895).

Harbors Act of 1899, 33 U. S. C. § 409, read in light of our decision in *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (1960), controls the issues here presented. Section 15 reads in relevant part as follows:

> "It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels . . . . And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411–416, 418, and 502 of this title." 33 U. S. C. § 409.

Petitioners do not dispute, as indeed they could not, that the negligent sinking of a vessel falls within the prohibition of the first above-quoted clause of § 15.[6] They contend, however, that the Act contains specific remedies for such a violation of § 15, and that those remedies were meant by Congress to be exclusive of all

[6] It bears emphasis that we are here concerned with the *careless or negligent* sinking of a vessel, which is specifically declared not to be lawful by the first above-quoted clause of § 15. Negligence is the sole theory of recovery in the Government's libels. Questions involving a non-negligent sinking, which is not forbidden by § 15, are not now before us and we do not mean to indicate what relief, if any, may be available to the Government in that situation.

others. Petitioners point to the § 15 duty of the owner to mark and remove a sunken craft. They note that failure to remove "shall be considered as an abandonment of such craft, and subject the same to removal by the United States." And petitioners call our attention to §§ 19 and 20 of the Act, 33 U. S. C. §§ 414–415, which set forth the procedure whereby the United States may remove a sunken craft that "shall be considered as" abandoned under § 15. Section 19 provides that whenever a sunken vessel exists as an obstruction to any navigable waters of the United States for a period longer than 30 days, or whenever the abandonment of such obstruction can be legally established in a shorter time, the sunken vessel "shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same." That section further contemplates "[t]hat any money received from the sale of any such wreck . . . shall be covered into the Treasury of the United States." 33 U. S. C. § 414. Section 20, an emergency provision applicable only when a sunken vessel obstructs a waterway "in such manner as to stop, seriously interfere with, or specially endanger navigation," 33 U. S. C. § 415, is similar in structure to § 19.[7]

Finally, petitioners emphasize that § 16 of the Act provides criminal penalties for "[e]very person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the pro-

[7] The determination of the applicability of § 20 is left by that section to "the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority." Once the determination is made, the Secretary or his agent may "take immediate possession" of a sunken vessel "so far as to remove or to destroy it and to clear immediately" the obstructed waterway. See n. 20, *infra*.

visions [of § 15]." 33 U. S. C. § 411.[8] They point out that § 12 of the Act, 33 U. S. C. § 406, which provides penalties for violations of § 10, 33 U. S. C. § 403,[9] expressly authorizes the injunctive remedy. They argue that the lack of such an authorization in § 16 should be taken to mean that Congress did not intend the United States to be able to obtain what is, in effect, injunctive relief as a remedy for a violation of § 15.[10]

The position of petitioners is, therefore, that in the case of a negligently sunk vessel, the Government may require the owner to mark it; it may expect him to remove it or forfeit his interest in the vessel; and if the Government proceeds to remove the vessel, it possesses the right to sell vessel and cargo and retain the proceeds of these sales.[11] Moreover, the Government may proceed criminally, under § 16, against those responsible for the negligent sinking. But, petitioners argue, the Government may do no more. Under their view, the very detail of the Rivers and Harbors Act negates the possibility that Congress intended the Government to be

[8] Violation is a misdemeanor, punishable by "a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court . . . ."

[9] See n. 5, *supra*.

[10] As noted, the United States sought declaratory relief in the *Cargill* action.

[11] The Government notes, in regard to petitioners' contention that these remedies are exclusive, that they apply only to the owner of a vessel. The Government argues that the position of those allegedly negligent petitioners who are not owners is substantially weaker. But see *United States* v. *Bethlehem Steel Corp.*, 319 F. 2d 512, 521 (C. A. 9th Cir. 1963). We note that the prohibition of § 15 against the negligent sinking of a vessel and the criminal penalties of § 16 are not limited to owners. Our disposition of these cases makes it unnecessary for us to pass on the Government's contention.

able to recover removal expenses exceeding the value of the vessel and its cargo. Petitioners would apply the same analysis to a government action for declaratory or injunctive relief. Indeed, petitioners believe that authorization of the injunction remedy in another, analogous, section of the Act indicates congressional intent to withhold declaratory or injunctive relief as a means of enforcing § 15.[12]

We do not agree. Petitioners' interpretation of the Rivers and Harbors Act of 1899 would ascribe to Congress an intent at variance with the purpose of that statute. Petitioners' proposal is, moreover, in disharmony with our own prior construction of the Act, with our decisions on analogous issues of statutory construction, and with a major maritime statute of the United States. If there were no other reasonable interpretation of the statute, or if petitioners could adduce some persuasive indication that their interpretation accords with the congressional intent, we might be more disposed to accept that interpretation. But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else—in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law—that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We therefore hold that the remedies and procedures specified by the Act for the

[12] Petitioners concede the *in rem* right of the United States against a negligently sunk vessel and its cargo, see Brief for Petitioners, p. 12, despite the fact that the right of the Government to proceed against cargo is by no means clearly granted by the statute. See § 19, 33 U. S. C. § 414; *United States* v. *Cargo Salvage Corp.*, 228 F. Supp. 145 (D. C. S. D. N. Y. 1964). See also § 16, 33 U. S. C. § 412.

enforcement of § 15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel,* we conclude that other remedies, including those here sought, are available to the Government.

II.

Article I, § 8, of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power, the navigable waters of the United States are to be deemed the "public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia,* 3 Wall. 713, 725 (1866). The Federal Government is charged with ensuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction. Cf. *In re Debs,* 158 U. S. 564, 586 (1895). The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, *Sanitary District* v. *United States,* 266 U. S. 405 (1925), was obviously intended to prevent obstructions in the Nation's waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad. See, *e. g., Sanitary District* v. *United States, supra; United States* v. *Republic Steel Corp.,* 362 U. S. 482 (1960).[13] And we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself. *United States* v. *Republic Steel Corp., supra,* at 492.

Our decisions have established, too, the general rule that the United States may sue to protect its interests. *Cotton* v. *United States,* 11 How. 229 (1851); *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273 (1888); *Sanitary District* v. *United States, supra.* This rule is not

[13] In this conclusion we have been supported by similarly broad readings of similar statutes predating this one. See, *e. g., United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690 (1899).

necessarily inapplicable when the particular governmental interest sought to be protected is expressed in a statute carrying criminal penalties for its violation. *United States* v. *Republic Steel Corp., supra.* Our decisions in cases involving civil actions of private parties based on the violation of a penal statute so indicate. *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33 (1916); *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964).[14] In those cases we concluded that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts § 286. We see no reason to distinguish the Government, and to deprive the United States of the benefit of that rule.

The inadequacy of the criminal penalties explicitly provided by § 16 of the Rivers and Harbors Act is beyond dispute. That section contains only meager monetary penalties. In many cases, as here, the combination of these fines and the Government's *in rem* rights would not serve to reimburse the United States for removal expenses. It is true that § 16 also provides for prison terms, but this punishment is hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner may inflict upon the sovereign. Cf. *United States* v. *Acme Process Equipment Co.,* 385 U. S. 138 (1966).

It was a similar process of reasoning that underlay our decision in *United States* v. *Republic Steel Corp.,* 362

[14] See *North Bloomfield Gravel Min. Co.* v. *United States,* 88 F. 664, 678–679 (C. A. 9th Cir. 1898). See also *Dann* v. *Studebaker-Packard Corp.,* 288 F. 2d 201, 208–209 (C. A. 6th Cir. 1961); *Reitmeister* v. *Reitmeister,* 162 F. 2d 691, 694 (C. A. 2d Cir. 1947).

U. S. 482 (1960). That case concerned the deposit of industrial solids which, we believed, created an "obstruction . . . to the navigable capacity" of a waterway of the United States, within the meaning of § 10 of the Act. We decided that the Government might seek injunctive relief to compel removal of such an obstruction, even though such relief was nowhere specifically authorized in the Act. We concluded that the authorization of injunctive relief in § 12, which is applicable only to a limited category of § 10 obstructions (structures), should not be read to exclude injunctions to compel removal of other types of § 10 obstructions. In referring to the Act, we noted that "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." 362 U. S., at 492.

Although we do not approach the instant cases in the context of § 10, we believe the principles of *Republic Steel* apply, by analogy, to the issues now before us.[15]

[15] Petitioners would distinguish *Republic Steel* on the ground that, in that case, "if . . . injunctive relief . . . was not available, the free navigability of the channel would be seriously impaired and Republic Steel Corp., by repeatedly paying the fine imposed [by § 12], would, in effect, be operating under a license." See Brief for Petitioners, p. 29; *United States* v. *Bethlehem Steel Corp.*, 319 F. 2d 512, 518 (C. A. 9th Cir. 1963). This ground of distinction will not do, for at least three reasons. First, the criminal provisions of § 12 include not only a fine but a prison term. See *United States* v. *Bethlehem Steel Corp.*, 319 F. 2d 512, 523 (C. A. 9th Cir. 1963) (dissenting opinion). Second, if fines were in practice the only deterrent in § 12 and § 16, it might well be worthwhile to risk fines rather than take necessary safety measures for tows. Third, the proposed ground of distinction concentrates upon the injunction in *Republic Steel* against future violations of the Act; it does not explain the mandatory injunction in that case to compel removal of the obstruc-

The Government may, in our view, seek an order that a negligent party is responsible for rectifying the wrong done to maritime commerce by a § 15 violation. Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim. It might in some cases permit the negligent party to benefit from commission of a criminal act. We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act. We think we correctly divine the congressional intent in inferring the availability of that remedy from the prohibition of § 15.

It is but a small step from declaratory relief to a civil action for the Government's expenses incurred in removing a negligently sunk vessel. See *United States* v. *Perma Paving Co.*, 332 F. 2d 754 (C. A. 2d Cir. 1964). Having properly chosen to remove such a vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel. See Restatement of Restitution § 115; *United States* v. *Moran Towing & Transportation Co.*, 374 F. 2d 656, 667 (C. A. 4th Cir. 1967). No issue regarding the propriety of the Government's removal of Wyandotte's barge is now raised. Indeed, the facts surrounding that sinking constitute a classic case in which rapid removal by someone was essential. Wyandotte was unwilling to effectuate removal itself. It would be surprising if Congress intended that, in such a situation, the Government's

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tion that had already been created at the time of the Government's suit.

Indeed, the argument for exclusivity was stronger in *Republic Steel* than it is here. In that case, we decided that injunctive relief was a proper enforcement measure against a violation of the very section to which § 12 (but not the statutory provision of injunctive process) applies.

commendable performance of Wyandotte's duty must be at Government expense. Indeed, in any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility for removal. Otherwise, the Government would be subject to a financial penalty for the correct performance of its duty to prevent impediments in inland waterways.[16] See *United States* v. *Perma Paving Co., supra,* at 758.

We note, moreover, that under the Limitation of Shipowners' Liability Act of 1851, 9 Stat. 635, as amended, 46 U. S. C. § 181 *et seq.,* the liability of a shipowner "for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture" may be limited to "the interest of such owner in such vessel, and her freight then pending"; but this limitation is available only if the act or damage occurred "without the privity or knowledge of such owner." 46 U. S. C. § 183. "For his own fault, neglect and contracts the owner remains liable." *American Car & Foundry Co.* v. *Brassert,* 289 U. S. 261, 264 (1933). The reading that petitioners would place on the Rivers and Harbors Act of 1899 would create an additional right of limitation, applicable in the special case of a sinking even though the owner is himself negligent. Yet Congress gave no indication, in passing the Rivers and Harbors Act, that it intended to alter or qualify the 1851 Act.[17] In the congressional failure to

[16] Wyandotte, noting that Government funds spent in removal operations were provided under the Disaster Relief Act, 42 U. S. C. §§ 1855–1855g, argues that nothing in that Act authorizes the United States to recover disaster relief expenditures from private parties. We agree, but the argument misses the point. We believe the United States may recover its expenses under the Rivers and Harbors Act of 1899. We see nothing in the Disaster Relief Act to the contrary.

[17] We do not, of course, pass on the applicability of the Limitation Act, before or after passage of the Rivers and Harbors Act, to the

connect these two statutes, we find at least some evidence that petitioners' discovery of a limitation of liability in the Rivers and Harbors Act is unwarranted.[18]

III.

Petitioners contend that, despite our prior decisions and the silence of the Rivers and Harbors Act on this point, that statute authorizes them simply to abandon their negligently sunk vessels, without further responsibility for those vessels. We find in the Act no support for such an absolute right of abandonment. The provision upon which petitioners place most reliance, the final clause of § 15, creates a "duty of the owner of [a] sunken craft to commence the immediate removal of the same, and prosecute such removal diligently." Because "failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections [19 and 20]," petitioners contend that such failure in no case has other consequences. But the duty imposed by and the remedy provided in the final clause of § 15 and §§ 19 and 20 are not prescribed only for owners of negligently sunk ves-

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facts of the case now before us. We only note that the principle for which petitioners are contending is very much like the principle of limitation of liability, known to the statutory maritime law of the United States almost 50 years prior to passage of the Rivers and Harbors Act.

[18] Petitioners' theory is, moreover, in conflict with the administrative interpretation of the statute. A regulation promulgated by the Department of the Army provides that "a person who . . . negligently permits a vessel to sink in navigable waters of the United States . . . may . . . be compelled to remove the wreck as a public nuisance or to pay for its removal." 33 CFR § 209.410. The origins of this regulation go back to 1901. Letter from William Cary Sanger, Acting Secretary of War, to William L. Hughes, July 31, 1901. See *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 490, n. 5 (1960).

sels. Those provisions apply "whenever a vessel . . . is wrecked and sunk in a navigable channel, accidentally or otherwise . . . ." Unlike a negligent sinking, a non-negligent sinking is not declared by the Act to be unlawful. It seems highly unlikely that Congress, having specified that only a negligent or intentional sinking is a crime, would then employ such indirect language to grant the culpable owner a personal civil immunity from the consequences of that crime.

We believe the sections noted by petitioners are intended to protect the United States against liability for removing a sunken vessel if it chooses to do so. See *Zubik* v. *United States,* 190 F. 2d 278 (C. A. 3d Cir. 1951); *Gulf Coast Transp. Co.* v. *Ruddock-Orleans Cypress Co.,* 17 F. 2d 858 (D. C. E. D. La. 1927). Section 19 speaks explicitly of the discretion of the Secretary of the Army to break up, remove, sell, or otherwise dispose of a sunken vessel that has obstructed a waterway "without liability for any damage to the owners of the same." These sections do not negate the rights of the United States to obtain declaratory relief or to recover removal expenses. It is true that a proviso to § 19 states "[t]hat any money received from the sale of any such wreck . . . shall be covered into the Treasury of the United States." But that proviso does not indicate that the United States, having chosen to remove a sunken vessel, shall receive no other monies. At most, the proviso establishes the proposition that, if the United States chooses to sell a wreck, the owner of the vessel has no right to any monies received.[19] Section 20, the emergency

[19] This rule is not unfair. See 41 Tulane L. Rev. 459, 464, n. 29 (1967). The shipowner should know the value of his vessel and cargo. If he believes that value is greater than the cost of removal, he may, within 30 days after the obstruction is created, raise the vessel himself. See § 19, 33 U. S. C. § 414.

section, closely parallels § 19. It adds nothing to petitioners' argument.[20]

Petitioners also claim that a substantial body of nonstatutory law establishes the rule that a shipowner who has negligently sunk a vessel may abandon it and be insulated from all but *in rem* liability.[21] They argue that Congress must have intended to codify this rule in the Rivers and Harbors Act. We do not accept petitioners' claim. Although several modern courts have

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[20] Thus, § 20 concludes with the proviso "[t]hat the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States." Petitioners rely heavily on the phrase "shall be a charge against such craft and cargo." But that phrase does not lead to the conclusion that the Government possesses no other right to recover. The phrase merely describes the lien interest of the United States. See *United States* v. *Moran Towing & Transportation Co.*, 374 F. 2d 656, 671 (C. A. 4th Cir. 1967) (dissenting opinion). Such a provision is necessary in a § 20 case because, under the terms of that section, the owner is not given a statutory period in which to decide whether the value of his vessel and cargo exceeds the cost of removal and to effectuate removal himself.

[21] Petitioners do not appear to claim that the legislative history of the Rivers and Harbors Act of 1899 clearly indicates the intent of Congress to create or codify this rule. To the extent that any intent appears in the legislative history of the 1899 Act, it is the intent not to alter pre-existing statutory law. Thus, the House conferees said of the statute that it was a "codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law." 32 Cong. Rec. 2923 (1899); see *United States* v. *Republic Steel Corp.*, 362 U. S., at 486. The legislative history of prior statutes is scant. And the prior Acts themselves lend no support to petitioners. See Rivers and Harbors Act of 1880, 21 Stat. 180; Rivers and Harbors Act of 1882, 22 Stat. 191; Rivers and Harbors Act of 1890, 26 Stat. 426.

assumed the existence of such a common-law rule, see, *e. g., United States* v. *Moran Towing & Transportation Co.*, 374 F. 2d 656, 667 (C. A. 4th Cir. 1967); *United States* v. *Bethlehem Steel Corp.*, 319 F. 2d 512, 518–519 (C. A. 9th Cir. 1963), the rule evaporates upon close analysis.[22] We do not believe Congress intended the Rivers and Harbors Act to embody this illusory nonstatutory law.

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[22] The American decisions speaking of a nonstatutory right of abandonment all trace back to a dictum in *Winpenny & Chedester* v. *Philadelphia*, 65 Pa. 135 (1870). See, *e. g., The Manhattan*, 10 F. Supp. 45 (D. C. E. D. Pa. 1935); *Gulf Coast Transp. Co.* v. *Ruddock-Orleans Cypress Co.*, 17 F. 2d 858 (D. C. E. D. La. 1927). In *Winpenny* the Pennsylvania Supreme Court stated in dictum that the "owner [of a sunken vessel] is absolutely not liable to raise or remove the hulk." 65 Pa., at 138. For this proposition, the Pennsylvania court cited three treatises and five English cases. The cases are not good authority. The only one close to the point, *King* v. *Watts*, 2 Esp. 675, 170 Eng. Rep. 493 (1798), held that an indictment for having sunk a vessel in the Thames could not be maintained because the owner had not been negligent and "it would be adding to the calamity to subject the party to an indictment . . . against which he could not guard, or which he could not prevent." Of the two treatises cited, one, Shearman & Redfield on Negligence (3d ed. 1869), states at § 583 that "[i]t is well settled that the owner of a vessel which has been sunk in navigable waters, and abandoned by him, is under no obligation to remove the vessel . . . ." But the only case cited for this "well-settled" rule is *King* v. *Watts*.

Moreover, it seems clear that the *Winpenny* court was not speaking of the "rule" that petitioners propose. That court, after the above quoted passage, went on as follows:

"There seem to be good reasons for this rule. When a vessel is lost by the act of God, or by accident, the owner suffers oftentimes great damage, and when she becomes a total loss, it seems to be a great hardship to add to his misfortune the duty of removing the wreck. It would discourage commerce to hold him to so severe a duty; for who would engage in trade, if, when he has lost his vessel, he might be forced to incur an expense of more than her original cost in removing the wreck from some difficult position? If compelled by the accident to abandon his property, the duty of

IV.

These cases were decided in the District Court on petitioners' motions for summary judgment. The Court of Appeals reversed and remanded for further proceedings. As we have noted, the Government's libels were based on a theory of negligence, and the award of the Court of Appeals called for a determination whether the acts of the various petitioners constituted negligence. We agree with that disposition.

Affirmed.

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

MR. JUSTICE HARLAN, concurring.

I concur in the Court's holding that under § 15 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 409, the United States may recover the costs of removing a vessel negligently sunk in navigable waters from those responsible for the sinking. I further agree with the holding that the United States is entitled to the declaratory relief sought in the *Cargill* action. In affording this latter relief it is my understanding that the Court does not purport to decide whether the United States may also obtain an injunction compelling removal, but has

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removal should rather fall on the public, who are interested in the navigation, than on him."

Cases cited for petitioners that do not rely on *Winpenny* either do not support petitioners' claim of a nonstatutory rule, see, *e. g.*, *In re Highland Nav. Corp.*, 24 F. 2d 582 (D. C. S. D. N. Y. 1927), affirmed, 29 F. 2d 37 (C. A. 2d Cir. 1928); *Zubik* v. *United States*, 190 F. 2d 278 (C. A. 3d Cir. 1951); *United States* v. *Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. C. D. Conn. 1926), or support it only with unsupported dicta of their own, see, *e. g.*, *Barraclough* v. *Brown*, [1897] A. C. 615 (construing the Aire and Calder Navigation Act, 1889 (52 & 53 Vict., c. 32)).

left that question to be answered in light of a full development of the facts, and in accordance with normal standards of equity.

In reaching these conclusions, I have not been unmindful of the view stated by me in dictum in my dissenting opinion in *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 493, to the effect that the courts are precluded from supplying relief not expressly found in the Rivers and Harbors Act. Insofar as that dictum might be taken to encompass the present case, where, contrary to my view in *Republic Steel,* I do believe that the relief afforded by this Court is fairly to be implied from the statute, candor would compel me to say that the dictum was ill-founded.

On these premises I join the opinion of the Court.

LUCAS ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL.

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

No. 568. Decided December 4, 1967.

Reversed and remanded.

Jack G. Day, Russell T. Adrine, Richard Gunn and *Kenneth G. Weinberg* for appellants.

William B. Saxbe, Attorney General of Ohio, and *J. Philip Redick,* Assistant Attorney General, for appellees.

PER CURIAM.

The judgment is reversed and the cause is remanded to the United States District Court for the Northern District of Ohio. *Wesberry* v. *Sanders,* 376 U. S. 1 (1964).

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

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, dissenting.

Because of the uninformative nature of the Court's reversal, some exposition of the issue in this case is necessary as a predicate for my view that the judgment of the District Court should be affirmed. My point of departure is, of course, *Wesberry* v. *Sanders,* 376 U. S. 1, a decision with which I am in continuing disagreement, see 376 U. S., at 20 *et seq.,* 50–51, but by which I consider myself bound.

The appellants, Ohio voters, challenge the constitutionality of Ohio's 1964 congressional redistricting statute. They assert that the redistricting plan does not satisfy the standard of population equality laid down in *Wesberry* v. *Sanders, supra,* because some of the resulting

districts vary as much as 13% above and 18% below the population average, according to the 1960 census. In the District Court, the appellees, state officials, defended on the ground that the Ohio Legislature had properly taken into account unofficial, post-1960 population figures which were available for some counties, and which seemed to bring the 1964 redistricting into line with *Wesberry*.

The majority below apparently held that these unofficial population statistics were insufficient to justify the disparity among districts because they were too unreliable and not available for all areas. However, the majority went on to uphold the districting plan because

> "although the varied sources of population information used by the Ohio legislature may lack uniformity of the federal census and the percentage deviation between selected Ohio districts may exceed that generally found acceptable in other states, we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree."

Given these circumstances, I believe that the Ohio plan has not been shown to be unconstitutional, even prima facie. This Court held in *Wesberry, supra,* at 7–8, that "as nearly as is practicable one man's vote in a congressional election [must] be worth as much as another's." However, mathematical exactness was not required of a redistricting plan, 376 U. S., at 18, and what is marginally allowable in one State may be unacceptable in another, cf. *Reynolds* v. *Sims,* 377 U. S. 533, 578. It seems to me that by failing to heed the District Court's evident recognition that substantial shifts in population among Ohio's congressional districts had taken place since the federal census of 1960, this Court has now given to *Wesberry* a Procrustean tenor which the opinion in that case does not evince.

I would affirm the judgment of the District Court.

DOLOMITE PRODUCTS CO., INC. *v.* KIPERS ET AL., CONSTITUTING TOWN BOARD OF TOWN OF GATES, NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 619. Decided December 4, 1967.

19 N. Y. 2d 739, 225 N. E. 2d 894, appeal dismissed and certiorari denied.

Richard Maguire for appellant.

William R. Durland and *George C. Pendleton* 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.

BRESOLIN *v.* RHAY, PENITENTIARY SUPERINTENDENT.

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

No. 4, Misc. Decided December 4, 1967.

Certiorari granted; judgment reversed.

John J. O'Connell, Attorney General of Washington, and *Stephen C. Way,* 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 reversed. *Mempa* v. *Rhay, ante,* p. 128.

WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 489. Decided December 4, 1967.*

267 F. Supp. 458, affirmed.

MacDonald Gallion, Attorney General of Alabama, and *John C. Satterfield* for appellants in No. 489. *Reid B. Barnes* for appellants in No. 671.

Acting Solicitor General Spritzer, Assistant Attorney General Doar, Louis F. Claiborne and *David L. Norman* for the United States in No. 489; *Solicitor General Griswold* and *Assistant Attorney General Doar* for the United States in No. 671; *Fred D. Gray, Jack Greenberg, James M. Nabrit III, Charles H. Jones, Jr., Charles Stephen Ralston* and *Melvyn Zarr* for Lee et al. in both cases, appellees.

PER CURIAM.

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

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*Together with No. 671, *Bibb County Board of Education et al.* v. *United States et al.*, also on appeal from the same court.

GREYHOUND LINES, INC. *v.* UNITED STATES ET AL.

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

No. 555. Decided December 4, 1967.

268 F. Supp. 746, affirmed.

Amos Mathews and *Robert J. Bernard* for appellant.

Solicitor General Griswold, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Raymond M. Zimmet* for the United States et al., and *John L. Arrington, Jr.*, for Missouri, Kansas & Oklahoma Coach Lines, 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.

Syllabus.

UNITED MINE WORKERS OF AMERICA, DISTRICT 12 *v.* ILLINOIS STATE BAR ASSOCIATION ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 33. Argued October 17, 1967.—Decided December 5, 1967.

The Illinois Bar Association and others brought this action to enjoin petitioner Union from the unauthorized practice of law. The Union employs a licensed lawyer, solely compensated by an annual salary, to represent members and their dependents in connection with their claims under the Illinois Workmen's Compensation Act. The trial court found that the Union's employment of the attorney constituted unauthorized practice of law and enjoined the Union from "[e]mploying attorneys on salary or retainer basis to represent its members with respect to Workmen's Compensation [or other statutory] claims." The Illinois Supreme Court affirmed, rejecting petitioner's contentions that the decree violated the First and Fourteenth Amendments. *Held:* The trial court's decree preventing petitioner from hiring attorneys on a salary basis to assist its members in asserting their legal rights violates the freedom of speech, assembly, and petition provisions of the First Amendment as incorporated by the Fourteenth Amendment. Pp. 221–225.

(a) No restraints by legislation or otherwise upon First Amendment rights can be sustained merely because they were imposed for the purpose of dealing with some evil within the State's competence. P. 222.

(b) In this case, as in *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964), and *NAACP* v. *Button,* 371 U. S. 415 (1963), the principles of which are controlling here, the remote possibility of harm arising from the theoretically conflicting interests of the Union and its members cannot justify the substantial impairment of the Union members' associational rights which results from the trial court's decree. Pp. 222–224.

35 Ill. 2d 112, 219 N. E. 2d 503, vacated and remanded.

Harrison Combs argued the cause for petitioner. With him on the briefs were *Edmund Burke, Edward L. Carey, Willard P. Owens* and *M. E. Boiarsky.*

Bernard H. Bertrand argued the cause and filed a brief for respondents.

Briefs of *amici curiae,* urging reversal, were filed by *Jack Greenberg, James M. Nabrit III, Melvyn Zarr* and *Jay H. Topkis* for the NAACP Legal Defense and Educational Fund et al., and by *Victor Rabinowitz* and *Allan Brotsky* for the National Lawyers Guild.

Joseph A. Ball, John J. Goldberg and *Samuel O. Pruitt, Jr.,* filed a brief for the State Bar of California, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Illinois State Bar Association and others filed this complaint to enjoin the United Mine Workers of America, District 12, from engaging in certain practices alleged to constitute the unauthorized practice of law. The essence of the complaint was that the Union had employed a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission. The trial court found from facts that were not in dispute that employment of an attorney by the association for this purpose did constitute unauthorized practice and permanently enjoined the Union from "[e]mploying attorneys on salary or retainer basis to represent its members with respect to Workmen's Compensation claims and any and all other claims which they may have under the statutes and laws of Illinois." [1] The

[1] In addition to the portion just quoted, the court's decree enjoins the Union from:

"1. Giving legal counsel and advice

"2. Rendering legal opinions

"3. Representing its members with respect to Workmen's Compensation claims and any and all other claims which they may have under the laws and statutes of the State of Illinois

"4. [Quoted above]

"5. Practicing law in any form either directly or indirectly."

It is conceded that the Union's employment of an attorney was the basis for these other provisions of the injunction, and it was not

Illinois Supreme Court rejected the Mine Workers' contention that this decree abridged their freedom of speech, petition, and assembly under the First and Fourteenth Amendments and affirmed. We granted certiorari, 386 U. S. 941 (1967), to consider whether this holding conflicts with our decisions in *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964), and *NAACP* v. *Button,* 371 U. S. 415 (1963).

As in the *Trainmen* case, we deal here with a program that has been in successful operation for the Union members for decades. Shortly after enactment of the Illinois Workmen's Compensation Statute [2] in 1911, the Mine Workers realized that some form of mutual protection was necessary to enable them to enjoy in practice the many benefits that the statute promised in theory. At the Union's 1913 convention the secretary-treasurer reported that abuses had already developed: "the interests of the members were being juggled and even when not, they were required to pay forty or fifty per cent of the amounts recovered in damage suits, for attorney fees." In response to this situation the convention instructed the Union's incoming executive board to establish the "legal department" which is now attacked for engaging in the unauthorized practice of law.

The undisputed facts concerning the operation of the Union's legal department are these. The Union employs one attorney on a salary basis to represent members and their dependents in connection with claims for personal injury and death under the Illinois Workmen's Compensation Act. The terms of the attorney's employment, as outlined in a letter from the acting president of the Union to the present attorney, include the following

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claimed that the Union was otherwise engaged in the practice of law. Our opinion and holding is therefore limited to this one aspect of the Union's activities.

[2] Ill. Rev. Stat., c. 48, § 138.1 *et seq.* (1963).

specific provision: "You will receive no further instructions or directions and have no interference from the District, nor from any officer, and your obligations and relations will be to and with only the several persons you represent." The record shows no departure from this agreement. The Union provides injured members with forms entitled "Report to Attorney on Accidents" and advises them to fill out these forms and send them to the Union's legal department. There is no language on the form which specifically requests the attorney to file with the Industrial Commission an application for adjustment of claim on behalf of the injured member, but when one of these forms is received, the attorney presumes that it does constitute such a request. The members may employ other counsel if they desire, and in fact the Union attorney frequently suggests to members that they can do so. In that event the attorney is under instructions to turn the member's file over to the new lawyer immediately.

The applications for adjustment of claim are prepared by secretaries in the Union offices, and are then forwarded by the secretaries to the Industrial Commission.[3] After the claim is sent to the Commission, the attorney prepares his case from the file, usually without discussing the claim with the member involved. The attorney determines what he believes the claim to be worth, presents his views to the attorney for the respondent coal company during prehearing negotiations, and attempts to reach a settlement. If an agreement between opposing counsel is reached, the Union attorney will notify the injured member, who then decides, in light

[3] The Union's present attorney, who was the only witness on this matter, testified that the application to be filed with the Industrial Commission was dictated by him to the secretaries, who prepared this form under his direction. R. 18, 40. See also R. 58 (Union's answers to interrogatories).

of his attorney's advice, whether or not to accept the offer. If no settlement is reached, a hearing is held before the Industrial Commission, and unless the attorney has had occasion to discuss a settlement proposal with the member, this hearing will normally be the first time the attorney and his client come into personal contact with each other. It is understood by the Union membership, however, that the attorney is available for conferences on certain days at particular locations. The full amount of any settlement or award is paid directly to the injured member. The attorney receives no part of it, his entire compensation being his annual salary paid by the Union.

The Illinois Supreme Court rejected petitioner's contention that its members had a right, protected by the First and Fourteenth Amendments, to join together and assist one another in the assertion of their legal rights by collectively hiring an attorney to handle their claims. That court held that our decision in *Railroad Trainmen* v. *Virginia Bar, supra,* protected plans under which workers were advised to consult specific attorneys, but did not extend to protect plans involving an explicit hiring of such attorneys by the union. The Illinois court recognized that in *NAACP* v. *Button, supra,* we also held protected a plan under which the attorneys recommended to members were actually paid by the association, but the Illinois court viewed the *Button* case as concerned chiefly with litigation that can be characterized as a form of political expression. We do not think our decisions in *Trainmen* and *Button* can be so narrowly limited. We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth [4] Amendments gives petitioner the right to

[4] The freedoms protected against federal encroachment by the First Amendment are entitled under the Fourteenth Amendment to the same protection from infringement by the States. See, *e. g.,*

hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). See *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (1937). The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider* v. *State,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).

The foregoing were the principles we invoked when we dealt in the *Button* and *Trainmen* cases with the right of an association to provide legal services for its members. That the States have broad power to regulate the practice of law is, of course, beyond question. See *Trainmen, supra,* at 6. But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms. Thus in *Button, supra,* we dealt with a plan under which the NAACP not only advised prospective

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New York Times Co. v. *Sullivan,* 376 U. S. 254, 276–277 (1964), and cases there cited.

litigants to seek the assistance of particular attorneys but in many instances actually paid the attorneys itself. We held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. Likewise in the *Trainmen* case there was a theoretical possibility that the union's interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interests of his client. Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries.

We think that both the *Button* and *Trainmen* cases are controlling here. The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button,* but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins, supra,* at 531. And of course in *Trainmen,* where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent, see 377 U. S., at 10 (Clark, J.), that the principles announced in *Button* were applicable only to litigation for political purposes. See 377 U. S., at 8.

Nor can the case at bar be distinguished from the *Trainmen* case in any persuasive way.[5] Here, to be sure, the attorney is actually paid by the Union, not merely the beneficiary of its recommendations. But in both situations the attorney's economic welfare is dependent to a considerable extent on the good will of the union, and if the temptation to sacrifice the client's best interests is stronger in the present situation, it is stronger to a virtually imperceptible degree. In both cases, there was absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose in the context of a particular lawsuit; indeed in the present case the Illinois Supreme Court itself described the possibility of conflicting interests as, at most, "conceivabl[e]."

It has been suggested that the Union could achieve its goals by referring members to a specific lawyer or lawyers and then reimbursing the members out of a common fund for legal fees paid. Although a committee of the American Bar Association, in an informal opinion, may have approved such an arrangement,[6] we think the

[5] It is irrelevant that the litigation in *Trainmen* involved statutory rights created by Congress, while the litigation in the present case involved state-created rights. Our holding in *Trainmen* was based not on State interference with a federal program in violation of the Supremacy Clause but rather on petitioner's freedom of speech, petition, and assembly under the First and Fourteenth Amendments, and this freedom is, of course, as extensive with respect to assembly and discussion related to matters of local as to matters of federal concern.

[6] American Bar Association, Standing Committee on Professional Ethics, Informal Opinion No. 469 (December 26, 1961). The ABA committee did not in fact consider the problem presented where the union not only pays the fee but also recommends the specific attorney, and it strongly implied that it would reach a different result in such a situation: "there is nothing unethical in the situations which you describe so long as the participation of the employer, association or union is confined to payment of or reimbursement for legal expenses only."

view of the Illinois Supreme Court is more relevant on this point. In the present case itself the Illinois court stressed that where a union recommends attorneys to its members, "any 'financial connection of any kind'" between the union and such attorneys is illegal.[7] It cannot seriously be argued, therefore, that this alternative arrangement would be held proper under the laws of Illinois.

The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members. Since the operative portion of the decree prohibits any financial connection between the attorney and the Union, the decree cannot stand; and to the extent any other part of the decree forbids this arrangement it too must fall.

The judgment and decree are vacated and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART concurs in the result upon the sole ground that the disposition of this case is controlled by *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1.

MR. JUSTICE HARLAN, dissenting.

This decision cuts deeply into one of the most traditional of state concerns, the maintenance of high

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[7] 35 Ill. 2d 112, 118, 219 N. E. 2d 503, 506 (1966), quoting *In re Brotherhood of R. R. Trainmen,* 13 Ill. 2d 391, 150 N. E. 2d 163 (1958).

standards within the state legal profession. I find myself unable to subscribe to it.

The Canons of Professional Ethics of the Illinois State Bar Association forbid the unauthorized practice of law by any lay agency.[1] The Illinois Supreme Court, acting in light of these canons and in exercise of its common-law power of supervision over the Bar,[2] prohibited the United Mine Workers of America, District 12, from employing a salaried lawyer to represent its members in workmen's compensation actions before the Illinois Industrial Commission. I do not believe that this regulation of the legal profession infringes upon the rights of speech, petition, or assembly of the Union's members, assured by the Fourteenth Amendment.

I.

As I stated at greater length in my dissenting opinion in *NAACP* v. *Button*, 371 U. S. 415, 448, 452–455, the freedom of expression guaranteed against state interference by the Fourteenth Amendment includes the liberty of individuals not only to speak but also to unite to make their speech effective. The latter right encompasses the right to join together to obtain judicial redress. However, litigation is more than speech; it is conduct. And the States may reasonably regulate conduct even though it is related to expression. The pivotal point is how these competing interests should be resolved in this instance.

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[1] Canons 35, 47, Canons of Ethics of the Illinois State Bar Association. These canons are identical to the corresponding canons of the American Bar Association.

[2] Even in the absence of applicable statutes, state courts have held themselves empowered to promulgate and enforce standards of professional conduct drawn from the common law and the closely related prohibitions of the Canons of Ethics. See, *e. g.*, *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272, and cases therein cited. See generally Drinker, Legal Ethics 26–30, 35–48.

My brethren are apparently in accord. The majority begins by noting that this activity of the Union is related to expression and therefore is of a type which may be sheltered from state regulation by the Constitution. But the majority's inquiry does not stop there; it goes on to examine the state concerns and concludes that the decree "is not needed to protect the State's interest in high standards of legal ethics." See *ante,* at 225.[3] I agree, of course, with this "balancing" approach. See, *e. g., NAACP* v. *Button, supra,* at 452–455 (dissenting opinion); *Konigsberg* v. *California Bar,* 366 U. S. 36, 49–51; *Talley* v. *California,* 362 U. S. 60, 66 (concurring opinion). Indeed, I cannot conceive of any other sound method of attacking this type of problem. For if an "absolute" approach were adopted, as some members of this Court have from time to time insisted should be so with "First Amendment" cases,[4] and the state interest in regulation given no weight, there would be no appar-

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[3] This weighing of the competing interests involved is the same approach as that used in *NAACP* v. *Button,* 371 U. S. 415, and in *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1. However, since a new balance must be struck whenever the competing interests are significantly different, this decision is not controlled by those cases. The union members in this case are not asserting legal rights which stem either from the Constitution or from a federal statute, sources of origin stressed respectively in *Button,* see 371 U. S., at 429–431, 441–444, and in *Railroad Trainmen,* see 377 U. S., at 3–6. Furthermore, the union plan at issue here differs from the referral practice involved in *Railroad Trainmen* because it involves the services of a union-salaried lawyer.

Similarly, the interests in this case are very different from those in cases involving legal aid to the indigent. The situation of a salaried lawyer representing indigent clients was expressly distinguished by the court below. See 35 Ill. 2d 112, 121, 219 N. E. 2d 503, 508.

[4] See, *e. g., Lathrop* v. *Donohue,* 367 U. S. 820, 865, 871–874 (dissenting opinion); *Konigsberg* v. *California Bar,* 366 U. S. 36, 56, 60–71 (dissenting opinion).

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ent reason why, for example, a group might not employ a layman to represent its members in court or before an agency because it felt that his low fee made up for his deficiencies in legal knowledge. Cf. *Hackin* v. *Arizona*, *ante*, p. 143 (DOUGLAS, J., dissenting).

II.

Although I agree with the balancing approach employed by the majority, I find the scales tip differently. I believe that the majority has weighed the competing interests badly, according too much force to the claims of the Union and too little to those of the public interest at stake. As indicated previously, the interest of the Union stems from its members' constitutionally protected right to seek redress in the courts or, as here, before an agency. By the plan at issue, the Union has sought to make it easier for members to obtain benefits under the Illinois Workmen's Compensation Act.[5] The plan is evidently designed to help injured union members in three ways: (1) by assuring that they will have knowledge of and access to an attorney capable of handling their claims; (2) by guaranteeing that they will not be charged excessive legal fees; and (3) by protecting them from crippling, even though reasonable, fees by making legal costs payable collectively through union dues. These are legitimate and laudable goals. However, the union plan is by no means necessary for their achievement. They all may be realized by methods which are proper under the laws of Illinois.

The Illinois Supreme Court in this case repeated its statement in a prior case that a union may properly make known to its members the names of attorneys it deems capable of handling particular types of claims.[6]

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[5] Ill. Rev. Stat., c. 48, § 138.1 *et seq.* (1963).

[6] See 35 Ill. 2d, at 118–119, 219 N. E. 2d, at 506–507. The earlier Illinois decision referred to was *In re Brotherhood of R. R. Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163.

Such union notification would serve to assure union members of access to competent lawyers.

As regards the protection of union members against the charging of unreasonable fees, a fully efficient safeguard would seem to be found in the Illinois Workmen's Compensation Act itself. An amendment to the Act in 1915, shortly after its initial passage,[7] provided that the Industrial Commission

> "shall have the power to determine the reasonableness and fix the amount of any fee or compensation charged by any person for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this Act." [8]

In 1927, the words "including attorneys, physicians, surgeons and hospitals" were added following the phrase "or compensation charged by any person." [9] Thus, there would now appear to be no reasonable grounds for fearing that union members will be subjected to excessive legal fees.

The final interest sought to be promoted by the present plan is in the collective payment of legal fees. That objective could presumably be realized by imposing assessments on union members for the establishment of a fund out of which injured members would be reimbursed for their legal expenses.[10] There is no reason to believe that this arrangement would be improper under Illinois law, since the union's obligation would run only to the

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[7] It may be significant that the union plan was instituted in 1913, prior to this amendment of the Act. See *ante*, at 219.

[8] Ill. Laws, 1915, p. 408.

[9] Ill. Laws, 1927, p. 511.

[10] Cf. American Bar Association, Committee on Professional Ethics, Informal Opinion No. 469 (December 26, 1961) (union may reimburse member client for legal expenses).

member and there would be no financial connection between union and attorney.

The regulatory interest of the State in this instance is found in the potential for abuse inherent in the union plan. The plan operates as follows. The Union employs a licensed lawyer on a salary basis [11] to represent members and their dependents in connection with their claims under the Workmen's Compensation Act. Members are told that they may employ other attorneys if they wish. The attorney is selected by the Executive Board of District 12, and the terms of employment specify that the attorney's sole obligation is to the person represented and that there will be no interference by the Union. Injured union members are furnished by the Union with a form which advises them to send the form to the Union's legal department. Upon receipt of the form, the attorney assumes it to constitute a request that he file on behalf of the injured member a claim with the Industrial Commission, though no such explicit request is contained in the form. The application for compensation is prepared by secretaries in the union offices, and when complete it is sent directly to the Industrial Commission. In most instances, the attorney has neither seen nor talked with the union member at this stage, though the attorney is available for consultation at specified times. After the filing of the claim and prior to the hearing before the Commission, the attorney prepares for its presentation by resorting to his file and to the application, usually without conferring with the injured member. Ordinarily the member and this attorney first meet at the time of the hearing before the Commission.

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[11] The salary paid at the time of this action was $12,400 per annum.

The attorney determines what he thinks the claim to be worth and attempts to settle with the employer's attorney during prehearing negotiations. If agreement is reached, the attorney recommends to the injured member that he accept the result. If no settlement occurs, a hearing on the merits is held before the Industrial Commission. The full amount of the settlement or award is paid to the injured member. The attorney retains for himself no part of the amount received, his sole compensation being his annual salary paid by the Union.

This union plan contains features which, in my opinion, Illinois may reasonably consider to present the danger of lowering the quality of representation furnished by the attorney to union members in the handling of their claims. The union lawyer has little contact with his client. He processes the applications of injured members on a mass basis. Evidently, he negotiates with the employer's counsel about many claims at the same time. The State was entitled to conclude that, removed from ready contact with his client, insulated from interference by his actual employer, paid a salary independent of the results achieved, faced with a heavy caseload,[12] and very possibly with other activities competing for his time,[13] the attorney will be tempted to place undue emphasis upon quick disposition of each case. Conceivably, the desire to process forms rapidly might influence the lawyer not to check with his client regarding ambiguities or omissions in the form, or to miss facts and circumstances which face-to-face consultation with his client would

[12] The attorney employed by the Union in this case handled more than 400 workmen's compensation claims a year.

[13] The attorney employed by the Mine Workers was also an Illinois state senator and had a private practice other than the Mine Workers' representation.

have brought to light. He might be led, so the State might consider, to compromise cases for reasons unrelated to their own intrinsic merits, such as the need to "get on" with negotiations or a promise by the employer's attorney of concessions relating to other cases. The desire for quick disposition also might cause the attorney to forgo appeals in some cases in which the amount awarded seemed unusually low.[14]

III.

Thus, there is solid support for the Illinois Supreme Court's conclusion that the union plan presents a danger of harm to the public interest in a regulated bar. The reasonableness of this result is further buttressed by the numerous prior decisions, both in Illinois and elsewhere, in which courts have prohibited the employment of salaried attorneys by groups for the benefit of their members.[15]

The majority dismisses the State's interest in regulation by pointing out that there have been no proven instances of abuse or actual disadvantage to union members resulting from the operation of the union plan. See *ante*, at 225. But the proper question is not whether

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[14] Of 351 workmen's compensation cases, from all sources, which were appealed to the Illinois courts during the period 1936–1967, only one was appealed by a miner affiliated with District 12. No such miner has appealed since 1942. See Respondents' Brief, at 17–18.

[15] See, *e. g.*, *People ex rel. Courtney* v. *Association of Real Estate Tax-payers*, 354 Ill. 102, 187 N. E. 823; *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272, and cases therein cited; *Richmond Assn. of Credit Men, Inc.* v. *Bar Assn. of Richmond*, 167 Va. 327, 189 S. E. 153. The Canons of Ethics of the American Bar Association have also been interpreted as forbidding arrangements of the kind at issue here. See American Bar Association, Committee on Unauthorized Practice of the Law, Informative Opinion No. A of 1950, 36 A. B. A. J. 677.

this particular plan has in fact caused any harm.[16] It is, instead, settled that in the absence of any dominant opposing interest a State may enforce prophylactic measures reasonably calculated to ward off foreseeable abuses, and that the fact that a specific activity has not yet produced any undesirable consequences will not exempt it from regulation. See, *e. g., Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, 321–322; *Daniel* v. *Family Sec. Life Ins. Co.,* 336 U. S. 220, 222–225.

It is also irrelevant whether we would proscribe the union plan were we sitting as state judges or state legislators. The sole issue before us is whether the Illinois Supreme Court is forbidden to do so because the plan unduly impinges upon rights guaranteed to the Union's members by the Fourteenth Amendment. Since the finding that the union plan presents dangers to the public and legal profession is not an arbitrary one, and since the limitation upon union members is so slight, in view of the permissible alternatives still open to them, I would hold that there has been no denial of constitutional rights occasioned by Illinois' prohibition of the plan.

IV.

This decision, which again manifests the peculiar insensitivity to the need for seeking an appropriate constitutional balance between federal and state authority that in recent years has characterized so many of the Court's decisions under the Fourteenth Amendment,

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[16] It is possible that the operation of the plan did result in union members receiving a lower quality of legal representation than they otherwise would have had. For example, the Mine Workers' present attorney recovered an average of $1,160 per case, while his predecessor secured an average of $1,350, even though the permissible rates of recovery were lower during the predecessor's tenure. See Record, at 53–54, 58–60; Brief for Respondents 18. See also n. 14, *supra.*

puts this Court more deeply than ever in the business of supervising the practice of law in the various States. From my standpoint, what is done today is unnecessary, undesirable, and constitutionally all wrong. In the absence of demonstrated arbitrary or discriminatory regulation, state courts and legislatures should be left to govern their own Bars, free from interference by this Court.[17] Nothing different accords with longstanding and unquestioned tradition and with the most elementary demands of our federal system.

I would affirm.

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[17] It has been suggested both in this case and elsewhere, cf. *Hackin* v. *Arizona, ante,* p. 143 (DOUGLAS, J., dissenting), that prevailing Canons of Ethics and traditional customs in the legal profession will have to be modified to keep pace with the needs of new social developments, such as the Federal Poverty Program. That may well be true, but such considerations furnish no justification for today's heavy-handed action by the Court. The American Bar Association and other bodies throughout the country already have such matters under consideration. See, *e. g.,* 1964 ABA Reports 381–383 (establishment of Special Committee on Ethical Standards); 1966 ABA Reports 589–594 (Report of Special Committee on Availability of Legal Services); 39 Calif. State Bar Journal 639–742 (Report of Committee on Group Legal Services). Moreover, the complexity of these matters makes them especially suitable for experimentation at the local level. And, all else failing, the Congress undoubtedly has the power to implement federal programs by establishing overriding rules governing legal representation in connection therewith.

NASH *v.* FLORIDA INDUSTRIAL COMMISSION ET AL.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 48. Argued November 9, 1967.—Decided December 5, 1967.

Florida's Unemployment Compensation Law, as applied by the State Industrial Commission's holding that petitioner was disqualified for unemployment compensation solely because she filed an unfair labor practice charge with the National Labor Relations Board, *held* invalid as violating the Supremacy Clause of the Constitution because it frustrates enforcement of the National Labor Relations Act. Pp. 238–240.

191 So. 2d 99, reversed.

Michael H. Gottesman argued the cause for petitioner. With him on the briefs were *Bernard Kleiman, Elliot Bredhoff, George H. Cohen, Jerome Cooper* and *Neal Rutledge.*

Glenn L. Greene, Jr., argued the cause and filed a brief for respondents Stanley Works et al.

Solicitor General Marshall, Robert S. Rifkind, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* filed a memorandum for the National Labor Relations Board, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 10 of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 160, authorizes the National Labor Relations Board to initiate unfair labor practice proceedings whenever some person charges that another person has committed such practices. The Board cannot start a proceeding without such a charge being filed with it. See, *e. g., National Labor Relations Board* v. *National Licorice Co.,* 104 F. 2d 655 (C. A. 2d Cir.),

modified on other grounds, 309 U. S. 350; *Local 138, Operating Engineers* (*Skura*), 148 N. L. R. B. 679, 681. The crucial question presented here is whether a State can refuse to pay its unemployment insurance to persons solely because they have preferred unfair labor practice charges against their former employer.

The facts are stipulated and need not be stated at length. The petitioner, Mrs. Nash, who previously had been out on strike against her employer, the Stanley Works and Stanley Building Specialties, was, pursuant to union-management agreement, reinstated to her former job on April 14, 1965. Approximately five weeks later, on May 16, 1965, she was laid off by the company because of alleged "slow production," meaning that the company had insufficient work to warrant her retention. Mrs. Nash was unemployed from this time until October 5, 1965, when the company voluntarily called her back to work. She has been allowed unemployment compensation, under Florida Statutes, chapter 443, from the time of her discharge on May 16, up to June 17, but denied any compensation from June 17 to October 5. The reason given for this denial was that on June 17 she filed an unfair labor practice charge against her employer seeking reinstatement and back pay on the ground that the employer had actually laid her off because of her union activities in violation of the National Labor Relations Act, and that this charge was still pending on October 5 when she resumed work. In making this ruling the Florida Industrial Commission relied on § 443.06 of the Florida Unemployment Compensation Law which provides:

> "An individual shall be disqualified for [unemployment] benefits . . . . (4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in

> active progress which exists at the factory, establishment or other premises at which he is or was last employed . . . ."

The Commission held that the filing of the unfair labor practice charge brought petitioner within the wording of the Act in that her "unemployment" then became "due to a labor dispute." Thus the sole reason that petitioner was disqualified from compensation was that she filed an unfair labor practice charge. According to the Commission, the act of filing was the determinative factor under Florida law which rendered petitioner ineligible for unemployment compensation. The District Court of Appeal of Florida, Third District, denied *per curiam* petitioner's application for writ of certiorari to review the determinations of the Florida Industrial Commission Unemployment Compensation Board of Review. Since such denial by the Florida District Court of Appeal apparently precludes further state review,[1] we granted certiorari because of the important constitutional question involved, specifically whether the Commission's ruling violates the Supremacy Clause of the Constitution (Art. VI, cl. 2) because it allegedly "frustrates" enforce-

[1] The Florida Supreme Court seems to have decided that it lacks jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Court of Appeal. *Callendar* v. *State,* 181 So. 2d 529. While it is true that a district court of appeal may certify a question "of great public interest" to the Florida Supreme Court, this is done upon the district court of appeal's own motion, and although litigants may file a suggestion that a particular question be certified, such suggestion has been declared to have "no legal effect." See *Whitaker* v. *Jacksonville Expressway Authority,* 131 So. 2d 22 (1st D. C. App. Fla. 1961). Thus, it is impossible for us to say that under Florida law petitioner here had any right to call upon the State Supreme Court for review. In these circumstances, we therefore are unable to say that the District Court of Appeal was not the highest court in Florida wherein a decision could be had as required by 28 U. S. C. § 1257 (3).

ment of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*[2]

The National Labor Relations Act is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal. Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge.[3] Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8 (a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges. See *John Hancock Mutual Life Insurance Co.* v. *National Labor Relations Board,* 89 U. S. App. D. C. 261, 263–264, 191 F. 2d 483, 485–486; *National Labor Relations Board* v. *Lamar Creamery Co.,* 246 F. 2d 8, 9–10 (C. A. 5th Cir.); *National Labor Relations Board* v. *Syracuse Stamping Co.,* 208 F. 2d 77, 80 (C. A. 2d Cir.). And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges. *National Labor Relations Board* v. *Clearfield Cheese Co.,* 213 F. 2d 70 (C. A. 3d Cir.); *National Labor Relations Board* v. *Gibbs Corp.,* 308 F. 2d 247 (C. A. 5th Cir.); *Roberts* v. *National Labor Relations Board,* 121 U. S. App. D. C. 297, 350 F. 2d 427.

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[2] Because of our disposition of the case on Supremacy Clause grounds, we need not consider petitioner's alternative argument that such ruling violates her privileges and immunities of United States citizenship in contravention of the Fourteenth Amendment.

[3] Although § 10 (a) of the Act empowers the Board to prevent unfair labor practices, and thus to protect the employees' § 7 rights, § 10 (b) conditions the exercise of that power on the filing of charges; the Board cannot initiate its own processes.

We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States. The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board. Florida has applied its Unemployment Compensation Law so that an employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure surrendering his right to unemployment compensation, and risk financial ruin if the litigation is protracted. Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds. It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for the implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan.[4]

In holding that this Florida law as applied in this case conflicts with the Supremacy Clause of the Consti-

[4] Respondents suggest that petitioner might enjoy a windfall if she was paid compensation and was subsequently awarded back pay by the Labor Board. This argument is unresponsive to the issue in dispute, however, since a State is free to recoup compensation payments made during any period covered by a back-pay award. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365, n. 1.

tution we but follow the unbroken rule that has come down through the years.

In *McCulloch* v. *Maryland,* 4 Wheat. 316, 436, decided in 1819, this Court declared the States devoid of power "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." In *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, decided in 1896, this Court declared that a state law cannot stand that "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created." *Id.,* at 283. And again in *Hill* v. *Florida,* 325 U. S. 538, 542–543, decided in 1945, this Court struck down a labor regulation saying it stood " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . .' " *Id.,* at 542.

All of the cases just cited and many more support our invalidation under the Supremacy Clause of the Florida Unemployment Compensation Law as here applied.

Reversed.

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

ZWICKLER *v.* KOOTA, DISTRICT ATTORNEY OF KINGS COUNTY.

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

No. 29. Argued October 12, 1967.—Decided December 5, 1967.

Reversal on state law grounds of appellant's conviction of violating a New York statute by distributing anonymous political handbills was affirmed by the State's highest court. Thereafter appellant, invoking federal jurisdiction under the Civil Rights Act and the Declaratory Judgment Act, sought in the District Court declaratory relief and an injunction against future criminal prosecutions for violating the statute, claiming that, on its face, the statute contravened the First Amendment by its "overbreadth." A three-judge court applied the doctrine of abstention and dismissed the complaint, leaving the appellant to assert his constitutional challenge in the state courts either in the defense of any criminal prosecution for future violations of the statute or by way of a declaratory judgment action. The court held that abstention from ruling on the declaratory judgment issue was warranted because appellant had made no special showing of the need for an injunction against criminal prosecution. *Held:*

1. The District Court erred in refusing to pass on appellant's claim for a declaratory judgment as there was no "special circumstance" warranting its application of the abstention doctrine to that claim. Pp. 245–252.

(a) A federal court has the duty of giving due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims and escape from that duty is not permissible merely because state courts are equally responsible for the enforcement and protection of federal constitutional rights. P. 248.

(b) A statutory construction by the state courts would not avoid or modify the constitutional question as the statute involved here is being challenged, not for its lack of clarity, but for its "overbreadth." Pp. 249–250.

(c) The principle that abstention cannot be used simply to give the state courts the first opportunity to vindicate a federal claim is particularly significant when, as here, the statute is being attacked as repugnant to the First Amendment, for the delay

from requiring recourse to the state courts might chill the very constitutional right which a plaintiff seeks to protect. P. 252.

2. The District Court had the duty of adjudicating the request for a declaratory judgment regardless of its conclusion as to the propriety of the issuance of an injunction, for, as *Dombrowski* v. *Pfister,* 380 U. S. 479, made clear, the questions of abstention and of injunctive relief are not the same. Pp. 252–255.

261 F. Supp. 985, reversed and remanded.

Emanuel Redfield argued the cause and filed a brief for appellant.

Samuel A. Hirshowitz, First Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Irving L. Rollins, George D. Zuckerman* and *Brenda Soloff,* Assistant Attorneys General.

Jack Greenberg, Melvyn Zarr and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* urging reversal.

Harry Brodbar and *Raymond J. Scanlan* filed a brief for the National District Attorneys Association, as *amicus curiae,* urging affirmance.

Mr. Justice Brennan delivered the opinion of the Court.

Section 781–b of the New York Penal Law makes it a crime to distribute in quantity, among other things, any handbill for another which contains any statement concerning any candidate in connection with any election of public officers, without also printing thereon the name and post office address of the printer thereof and of the person at whose instance such handbill is so distributed.[1]

[1] N. Y. Penal Law § 781–b (now superseded in identical language by N. Y. Election Law § 457, see Laws 1965, c. 1031, at 1782–1783):

"No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed

Appellant was convicted of violating the statute by distributing anonymous handbills critical of the record of a United States Congressman seeking re-election at the 1964 elections. The conviction was reversed, on state law grounds, by the New York Supreme Court, Appellate Term,[2] and the New York Court of Appeals affirmed

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by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

[2] "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781 (b) [sic] of the Penal Law. We do not reach the question of the constitutionality of the statute involved." *People* v. *Zwickler,* Sup. Ct., App. Term, Kings County, April 23, 1965 (unreported), as quoted in *Zwickler* v. *Koota,* 261 F. Supp. 985, 987.

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without opinion, 16 N. Y. 2d 1069, 266 N. Y. S. 2d 140, 213 N. E. 2d 467. Thereafter appellant, invoking the District Court's jurisdiction under the Civil Rights Act, 28 U. S. C. § 1343, and the Declaratory Judgment Act, 28 U. S. C. § 2201,[3] sought declaratory and injunctive relief in the District Court for the Eastern District of New York on the ground that, on its face, the statute was repugnant to the guarantees of free expression secured by the Federal Constitution. His contention, below and in this Court, is that the statute suffers from impermissible "overbreadth" in that its sweep embraces anonymous handbills both within and outside the protection of the First Amendment. Cf. *Talley* v. *California,* 362 U. S. 60. A three-judge court, one judge dissenting, applied the doctrine of abstention and dismissed the complaint,[4] remitting appellant to the New York courts

[3] Appellee questions the statement of the majority below that "[t]he complaint . . . alleges a case or controversy which is within the adjudicatory power of this court. Douglas v. City of Jeannette, 319 U. S. 157, 162." 261 F. Supp., at 989. Notwithstanding this statement, we are not persuaded, in light of its decision to abstain, that the majority below considered the prerequisites to a declaratory judgment or that these issues were in fact adjudicated. "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273. It will be for the District Court on the remand to decide whether appellant's allegations entitle him to a declaratory judgment on the constitutional question.

[4] It is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss, see Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967), but other courts have also ordered dismissal. Compare *Government & Civic Employees Organizing Committee, CIO* v. *Windsor,* 353 U. S. 364; *Shipman* v. *DuPre,* 339 U. S. 321, with *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368; *Local 333B, United Marine Div., Int'l Long-*

to assert his constitutional challenge in defense of any criminal prosecution for any future violations of the statute or, short of this, to the institution of "an action in the state court for a declaratory judgment." [5] 261 F. Supp. 985, 993. Because appellant's appeal presents an important question of the scope of the discretion of the district courts to abstain from deciding the merits of a challenge that a state statute on its face violates the Federal Constitution, we noted probable jurisdiction. 386 U. S. 906. We reverse.

We shall consider *first* whether abstention from the declaratory judgment sought by appellant would have been appropriate in the absence of his request for injunctive relief, and *second,* if not, whether abstention was nevertheless justified because appellant also sought an injunction against future criminal prosecutions for violation of § 781–b.

I.

During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. The only exception was the 25th section of the Judiciary Act of 1789, 1 Stat. 85, providing for review in this Court when a claim of federal right was denied by a state court.[6]

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shoremen's Assn. v. *Battle,* 101 F. Supp. 650 (D. C. E. D. Va.), aff'd *per curiam,* 342 U. S. 880. See generally Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Col. L. Rev. 749, 772–774 (1959).

[5] New York provides a Declaratory Judgment remedy, N. Y. Civ. Prac. § 3001. See *De Veau* v. *Braisted,* 5 App. Div. 2d 603, 174 N. Y. S. 2d 596 (2d Dept.), aff'd, 5 N. Y. 2d 236, 183 N. Y. S. 2d 793, 157 N. E. 2d 165, aff'd, 363 U. S. 144.

[6] Thus Congress did not exercise the grant under Art. III, § 2, cl. 1, of the Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." Original "arising under" juris-

But that policy was completely altered after the Civil War when nationalism dominated political thought [7] and brought with it congressional investiture of the federal judiciary with enormously increased powers. The Act of March 3, 1875,[8] was the principal ". . . measure of the

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diction was vested in the federal courts by § 11 of the Act of February 13, 1801, c. 4, 2 Stat. 92, but it was repealed only a year later by § 1 of the Act of March 8, 1802, c. 8, 2 Stat. 132. An earlier version of the Judiciary Act of 1789, which died in committee, provided for jurisdiction in the federal courts " '*of all cases of federal jurisdiction, whether in law or equity* above the value of five hundred dollars' . . . ." Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 61 (1923). See generally Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System, c. 1.

[7] "The history of the federal courts is woven into the history of the times. The factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts, enlarged their jurisdiction, modified and expanded their structure." Frankfurter & Landis, *supra,* at 59; see also Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L. Q. 499, 507–511 (1928).

[8] The statute granted the district courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . ." Act of March 3, 1875, § 1, 18 Stat. 470. See generally Hart & Wechsler, The Federal Courts and the Federal System 727–733; Wright, Federal Courts § 17; Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Forrester, Federal Question Jurisdiction and Section 5, 18 Tulane L. Rev. 263 (1943); Forrester, The Nature of a "Federal Question," 16 Tulane L. Rev. 362 (1942); Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157 (1953).

"This development in the federal judiciary, which in the retrospect seems revolutionary, received hardly a contemporary comment." Frankfurter & Landis, *supra,* at 65. While there is practically no legislative history of the Act, see *id.,* at 65–69, for a summary of what history is available, commentators are generally

broadening federal domain in the area of individual rights," *McNeese* v. *Board of Education,* 373 U. S. 668, 673. By that statute ". . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the Untied States." (Emphasis added.) Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65. Indeed, even before the 1875 Act, Congress, in the Civil Rights Act of 1871,[9] subjected to suit, "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws . . . ," 42 U. S. C. § 1983; and gave the district courts "original jurisdiction" of actions "[t]o redress the deprivation, under color of any State law . . . of any right . . . secured by the Constitution . . . ." 28 U. S. C. § 1343 (3).

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agreed that a broad grant of jurisdiction was intended. See, *e. g.,* Forrester, The Nature of a "Federal Question," 16 Tulane L. Rev. 362, 374–385 (1942); Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 160 (1953). This is not to say that this Court has read the congressional grant of power in the Act of 1875 as equated with the potential for federal jurisdiction found in Article III of the Constitution. See, *e. g., National Mut. Ins. Co.* v. *Tidewater Transfer Co.,* 337 U. S. 582, 613–615 (opinion of Rutledge, J.); *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505.

[9] Five Civil Rights Acts were passed between 1866 and 1875. See 14 Stat. 27 (1866), 16 Stat. 140 (1870), 16 Stat. 433 (1871), 17 Stat. 13 (1871), 18 Stat. 335 (1875). Only § 1 of the Act of April 20, 1871, 17 Stat. 13, presently codified as 42 U. S. C. § 1983, achieved measurable success in later years. See generally Note, The Civil Rights Act of 1871: Continuing Vitality, 40 Notre Dame Law. 70 (1964).

In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, ". . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ," *Robb* v. *Connolly,* 111 U. S. 624, 637. "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Stapleton* v. *Mitchell,* 60 F. Supp. 51, 55; see *McNeese* v. *Board of Education,* 373 U. S., at 674, n. 6. Cf. *Cohens* v. *Virginia,* 6 Wheat. 264, 404. The judge-made doctrine of abstention, first fashioned in 1941 in *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, sanctions such escape only in narrowly limited "special circumstances." *Propper* v. *Clark,* 337 U. S. 472, 492.[10] One of the "special circumstances"—that

[10] See, *e. g., City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639; *Government & Civic Employees Organizing Committee, CIO* v. *Windsor,* 353 U. S. 364; *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220; *Albertson* v. *Millard,* 345 U. S. 242; *Shipman* v. *DuPre,* 339 U. S. 321; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168. See generally Wright, The Abstention Doctrine Reconsidered, 37 Tex. L. Rev. 815 (1959); Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Col. L. Rev. 749 (1959); Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967); Note, Doctrine of Abstention: Need of Reappraisal, 40 Notre Dame Law. 101 (1964). Even

thought by the District Court to be present in this case—is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question. *Harrison* v. *NAACP,* 360 U. S. 167. Compare *Baggett* v. *Bullitt,* 377 U. S. 360.[11]

But we have here no question of a construction of § 781–b that would "avoid or modify the constitutional question." Appellant's challenge is not that the statute is void for "vagueness," that is, that it is a statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391.[12] Rather his constitutional

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when parties are sent to state court for clarification of state law, the federal question may be reserved for decision by the district court. *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411.

[11] Other "special circumstances" have been found in diversity cases, see, *e. g., Clay* v. *Sun Insurance Ltd.,* 363 U. S. 207; *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25; *Meredith* v. *Winter Haven,* 320 U. S. 228; but see *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185; cf. Note, Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals," 73 Yale L. J. 850, and cases cited therein; and in cases involving possible disruption of complex state administrative processes, see, *e. g., Alabama Public Serv. Comm'n* v. *Southern R. Co.,* 341 U. S. 341; *Burford* v. *Sun Oil Co.,* 319 U. S. 315; cf. *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185; *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25. See generally Wright, Federal Courts § 52; Note, 59 Col. L. Rev., *supra,* at 757–762.

[12] A lower court held "void for indefiniteness" a predecessor statute of § 781–b. *People* v. *Clampitt,* 34 Misc. 2d 766, 222 N. Y. S. 2d 23 (Ct. Spec. Sess., N. Y. City, 1961). Thereupon the legislature amended the statute to its present form, providing that an offense could not be made out under it until whatever literature might be "printed'" or "reproduced" might also be "distributed." The constitutionality of the amended statute has not been determined in the New York courts.

attack is that the statute, although lacking neither clarity nor precision, is void for "overbreadth," that is, that it offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama,* 377 U. S. 288, 307. See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508–509; *NAACP* v. *Button,* 371 U. S. 415, 438; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 246; *Martin* v. *City of Struthers,* 319 U. S. 141, 146–149; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304–307; *Schneider* v. *State,* 308 U. S. 147, 161, 165.[13] Appellee does not contest appellant's suggestion that § 781–b is both clear and precise; indeed, appellee concedes that state court construction cannot narrow its allegedly indiscriminate cast and render unnecessary a decision of appellant's constitutional challenge. See *Aptheker* v. *Secretary of State,* 378 U. S. 500.

The analysis in *United States* v. *Livingston,* 179 F. Supp. 9, 12–13, aff'd, *Livingston* v. *United States,* 364 U. S. 281, is the guide to decision here:

> "Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. Harrison v. N. A. A. C. P., 360 U. S. 167. The decision in Harrison, however, is not a broad encyclical commanding automatic remission to the state

[13] For the different constitutional considerations involved in attacks for "vagueness" and for "overbreadth" see *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603–604, 608–610.

> courts of all federal constitutional questions arising in the application of state statutes. N. A. A. C. P. v. Bennett, 360 U. S. 471. Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

In *Turner* v. *City of Memphis,* 369 U. S. 350 (*per curiam*), we vacated an abstention order which had been granted on the sole ground that a declaratory judgment action ought to have been brought in the state court before the federal court was called upon to consider the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In *McNeese* v. *Board of Education,* 373 U. S. 668, we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim.[14] After examining the purposes of the Civil Rights Act, under which that action was brought, we concluded that "[w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U. S., at 672. For the "recognition of the role of

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[14] We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction. *Harman* v. *Forssenius,* 380 U. S. 528, 534; *Davis* v. *Mann,* 377 U. S. 678, 690; *Baggett* v. *Bullitt,* 377 U. S. 360, 375–379; *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 415–416; *McNeese* v. *Board of Education,* 373 U. S. 668, 673, 674; *NAACP* v. *Bennett,* 360 U. S. 471; *City of Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, 84; *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 105; Note, 80 Harv. L. Rev., *supra,* at 605; Note, 40 Notre Dame Law., *supra,* n. 10, at 102.

state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 415–416.

These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect. See *Dombrowski* v. *Pfister,* 380 U. S. 479, 486–487; *Baggett* v. *Bullitt, supra,* at 378–379; *NAACP* v. *Button, supra,* at 433; cf. *Garrison* v. *Louisiana,* 379 U. S. 64, 74–75; *Smith* v. *California,* 361 U. S. 147.

It follows that unless appellant's addition of a prayer for injunctive relief supplies one, no "special circumstance" prerequisite to application of the doctrine of abstention is present here, *Baggett* v. *Bullitt,* 377 U. S. 360, 375–379, and it was error to refuse to pass on appellant's claim for a declaratory judgment.[15]

II.

In support of his prayer for an injunction against further prosecutions for violation of § 781–b, appellant's amended complaint alleges that he desires to continue to distribute anonymous handbills in quantity "in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." [16] He further

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[15] Of course appellant must establish the elements governing the issuance of a declaratory judgment. See n. 3, *supra.*

[16] Appellant urges that these allegations refute appellee's suggestion in his Motion to Dismiss that "[s]ince the political literature appellant intended to distribute all related to the 1966 congressional

alleges that "[b]ecause of the previous prosecution of plaintiff for making the distribution of the leaflet . . . plaintiff is in fear of exercising his right to make distribution as aforesaid and is in danger of again being prosecuted therefor, unless his right of expression is declared by this court, without submitting himself to the penalties of the statute."

The majority below was of the view that, in light of this prayer, abstention from deciding the declaratory judgment issue was justified because appellant had made no showing of "special circumstances" entitling him to an injunction against criminal prosecution. Appellee supports this holding by reliance upon the maxim that a federal district court should be slow to act "where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court." *Douglas* v. *City of Jeannette,* 319 U. S. 157, 162. We have recently recognized the continuing validity of that pronouncement. *Dombrowski* v. *Pfister,* 380 U. S. 479, 483–485. However, appellant here did not, as did the plaintiffs in *Douglas,* 319 U. S., at 159, seek solely to "restrain threatened criminal prosecution of [him] in the state courts . . . ." Rather, he also requested a declaratory judgment that the state statute underlying the apprehended criminal prosecution was unconstitutional.

The majority below, although recognizing that *Douglas* might be inapposite to this case, 261 F. Supp., at 990, read *Dombrowski* v. *Pfister* as requiring abstention from considering appellant's request for a declaratory judgment in the absence of a showing by appellant of "spe-

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candidacy of Abraham Multer . . . , this matter now might be properly dismissed for mootness." This dispute will be part of the issues to be decided by the District Court on the remand. See n. 3, *supra.* Multer has since been elected to the Supreme Court of New York and will take office on January 1, 1968. New York Times, p. 31, col. 2, November 8, 1967.

cial circumstances to justify the exercise of federal court jurisdiction . . ." to grant injunctive relief. 261 F. Supp., at 991. Since the majority found no "special circumstances" justifying that relief, the majority concluded that it was also required to abstain from considering the request for declaratory relief.

This conclusion was error. *Dombrowski* teaches that the questions of abstention and of injunctive relief are not the same.[17] The question of the propriety of the action of the District Court in abstaining was discussed as an independent issue governed by different considerations. We squarely held that "the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression . . . ." 380 U. S., at 489–490. This view was reaffirmed in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 601, n. 9, when a statute was attacked as unconstitutional on its face and we said, citing *Dombrowski* and *Baggett* v. *Bullitt, supra,* "[t]his is not a case where abstention pending state court interpretation would be appropriate . . . ."

It follows that the District Court's views on the question of injunctive relief are irrelevant to the question of abstention here. For a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction. *Douglas* v. *City of Jeannette, supra,* is not contrary. That case involved only the request for injunctive relief. The Court re-

[17] Our discussion of the issue of injunctive relief in *Dombrowski* is at 380 U. S., at 483–489, and our discussion of the issue of abstention is at 489–492.

fused to enjoin prosecution under an ordinance declared unconstitutional the same day in *Murdock* v. *Pennsylvania,* 319 U. S. 105. Comity between the federal and Pennsylvania courts was deemed sufficient reason to justify the holding that "in view of the decision rendered today in *Murdock* . . . we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate." 319 U. S., at 165. It will be the task of the District Court on the remand to decide whether an injunction will be "necessary or appropriate" should appellant's prayer for declaratory relief prevail. We express no view whatever with respect to the appropriateness of declaratory relief in the circumstances of this case or the constitutional validity of the law.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the judgment.

I agree that, in the circumstances of this case, the District Court should not have declined to adjudicate appellant's constitutional claims. I am, however, constrained by my uncertainty as to the implications of certain portions of the Court's opinion to state my views separately.

This Court has repeatedly indicated that "abstention" is appropriate "where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships." *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25, 32 (dissenting

opinion). See generally *Harrison* v. *NAACP*, 360 U. S. 167; *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188–189. The first of these interests has been found in cases in which the federal constitutional issue might be mooted or "presented in a different posture" [1] by a state court determination of pertinent state law. See, *e. g.*, *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450. The second of these interests has been found, for example, in situations in which the exercise of jurisdiction by a federal court would disrupt a state administrative process, *Burford* v. *Sun Oil Co.*, 319 U. S. 315; interfere with the collection of state taxes, *Toomer* v. *Witsell*, 334 U. S. 385, 392; or otherwise create "needless friction" between the enforcement of state and federal policies. *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*, at 33. See also *Harrison* v. *NAACP*, *supra*.

I agree that the present situation is within none of these categories, and that the District Court should therefore not have dismissed, but proceeded to judgment on the issues in the case.[2] In particular, I can find in this statute no room for a state construction which might obviate the need for a decision on the constitutional

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[1] *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, at 189.

[2] Unlike the Court, I obtain no assistance for this conclusion from the ubiquitous and slippery "chilling effect" doctrine. Appellant might have sought in the state courts the declaratory relief he now asks. N. Y. Civ. Prac. § 3001. Given the state courts' disposition of appellant's earlier prosecution, he can scarcely maintain that those courts would not promptly provide any relief to which he is entitled. Absent such allegations, it is difficult to see how that doctrine can have the slightest relevance. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 499 (dissenting opinion). In these circumstances, to apply the amorphous chilling-effect doctrine would serve only to chill the interests sought to be maintained by abstention.

issue. If, however, the opinion of the Court is intended to suggest that the central, or even a principal, issue in deciding the propriety of abstention is whether the complaint has alleged "overbreadth," or only "vagueness," with respect to the New York statute in question, I cannot agree. My reasons are three. *First,* neither principle has ever been definitively delimited by this Court; a doctrine built upon their supposed differences would be likely to founder for lack of a foundation. See generally, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67. *Second,* there is no reason to suppose that a case involving allegations of overbreadth would inevitably be inappropriate for abstention; the federal court might nonetheless reasonably consider that its exercise of jurisdiction would create "needless friction" with state officials, *Louisiana Power & Light Co.* v. *City of Thibodaux, supra,* at 33; or it might reasonably conclude that a state court determination would present the federal issues "in a different posture." *County of Allegheny* v. *Frank Mashuda Co., supra,* at 189. *Third,* such a standard might in effect reduce the abstention doctrine to a pleader's option; the fundamental interests served by the doctrine would be jettisoned whenever a complainant had sufficient foresight to insert into his pleading an allegation of overbreadth. I can see no proper alternative to a careful examination, in light of the interests served by abstention, of the circumstances of each case.

I agree with the Court, substantially for the reasons given in its opinion, that whether or not injunctive relief might ultimately prove appropriate in this instance is not a pertinent question at this stage of the matter.

I accordingly concur in the judgment of the Court, but in doing so wish to emphasize that, like the Court, I intimate no view whatever upon the merits of the constitutional challenge to this statute.

UNITED STATES *v.* ROBEL.

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

No. 8. Argued November 14, 1966.—Reargued October 9, 1967.—Decided December 11, 1967.

Appellee, a member of the Communist Party (which had been ordered to register as a Communist-action organization under the Subversive Activities Control Act) remained an employee at a shipyard after the Secretary of Defense had designated it a "defense facility" under the Act. Petitioner was thereafter indicted under § 5 (a) (1) (D) of the Act for having "unlawfully and willfully engage[d]" in employment at the shipyard with knowledge of the outstanding order against the Party and of the notice of the Secretary's designation. The District Court, relying on *Scales* v. *United States,* 367 U. S. 203, dismissed the indictment for failure to allege that appellee was an active Party member with knowledge of and a specific intent to advance its unlawful purposes. The case was appealed to the Court of Appeals and then certified to this Court as a direct appeal. *Held:* Section 5 (a) (1) (D) is invalid since by its overbreadth it unconstitutionally abridges the right of association protected by the First Amendment. Pp. 262–268.

(a) The indiscriminate application of § 5 (a) (1) (D) to all types of association with Communist-action groups, regardless of the quality and degree of membership, makes it impossible by limiting construction to save the provision from constitutional infirmity. Cf. *Aptheker* v. *Secretary of State,* 378 U. S. 500. P. 262.

(b) An individual's associational rights under the First Amendment are no less basic than the right to travel involved in *Aptheker.* Pp. 262–263.

(c) The fact that the Act was passed pursuant to Congress' "war power" to further the "national defense" cannot "remove constitutional limitations safeguarding essential liberties," *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426. Pp. 263–264.

(d) The statute literally establishes guilt by association alone, without any need to show that an individual's association poses the threat of sabotage and espionage in defense plants at which the legislation is directed. P. 265.

(e) Section 5 (a)(1)(D) includes within its coverage not only association which may be proscribed consistently with the First Amendment but also association (such as that of passive members of a designated organization, those unaware of or disagreeing with its unlawful aims, and those in nonsensitive jobs at defense facilities) which cannot be so proscribed. Pp. 265–266.

(f) Congress in exercising its ample power to safeguard the national defense cannot exceed constitutional bounds, particularly where First Amendment rights are at stake. Pp. 266–268.

Affirmed.

Kevin T. Maroney reargued the cause for the United States. With him on the brief on reargument were *Solicitor General Marshall, Assistant Attorney General Yeagley, John S. Martin, Jr.,* and *Lee B. Anderson,* and on the original argument *Solicitor General Marshall, Assistant Attorney General Yeagley, Nathan Lewin* and *Mrs. Anderson.*

John J. Abt reargued the cause for appellee. With him on the briefs on the original argument and on the reargument were *John Caughlan* and *Joseph Forer.*

John J. Sullivan, Marvin M. Karpatkin and *Melvin L. Wulf* filed a brief on the original argument for the American Civil Liberties Union et al., as *amici curiae,* urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This appeal draws into question the constitutionality of § 5 (a)(1)(D) of the Subversive Activities Control Act of 1950, 64 Stat. 992, 50 U. S. C. § 784 (a)(1)(D),[1]

[1] The Act was passed over the veto of President Truman. In his veto message, President Truman told Congress, "The Department of Justice, the Department of Defense, the Central Intelligence Agency, and the Department of State have all advised me that the bill would seriously damage the security and the intelligence operations for which they are responsible. They have strongly expressed

which provides that, when a Communist-action organization [2] is under a final order to register, it shall be unlawful for any member of the organization "to engage in any employment in any defense facility." In *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1 (1961), this Court sustained an order of the SACB requiring the Communist Party of the United States to register as a Communist-action organization under the Act. The Board's order became final on October 20, 1961. At that time appellee, a member of the Communist Party, was employed as a machinist at the Seattle, Washington, shipyard of Todd Shipyards Corporation. On August 20, 1962, the Secretary of Defense, acting under authority delegated by § 5 (b) of the Act, designated that shipyard a "defense facility." Appellee's continued employment at the shipyard after that date subjected him to prosecution under § 5 (a)(1)(D), and on May 21, 1963, an indictment was filed charging him with a violation of that section. The indictment alleged in substance that appellee had "unlawfully and willfully engage[d] in employment" at the shipyard with knowledge of the outstanding order against the Party and with knowledge and notice of the shipyard's designation as

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the hope that the bill would not become law." H. R. Doc. No. 708, 81st Cong., 2d Sess., 1 (1950).

President Truman also observed that "the language of the bill is so broad and vague that it might well result in penalizing the legitimate activities of people who are not Communists at all, but loyal citizens." *Id.,* at 3.

[2] Section 3 (3)(a) of the Act, 50 U. S. C. § 782 (3)(a), defines a "Communist-action organization" as:

"any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operates primarily to advance the objectives of such world Communist movement . . . ."

a defense facility by the Secretary of Defense. The United States District Court for the Western District of Washington granted appellee's motion to dismiss the indictment on October 4, 1965. To overcome what it viewed as a "likely constitutional infirmity" in § 5 (a) (1)(D), the District Court read into that section "the requirements of active membership and specific intent." Because the indictment failed to allege that appellee's Communist Party membership was of that quality, the indictment was dismissed. The Government, unwilling to accept that narrow construction of § 5 (a)(1)(D) and insisting on the broadest possible application of the statute,[3] initially took its appeal to the Court of Appeals for the Ninth Circuit. On the Government's motion, the case was certified here as properly a direct appeal to this Court under 18 U. S. C. § 3731. We noted probable jurisdiction. 384 U. S. 937.[4] We affirm the judgment of the District Court, but on the ground that § 5 (a) (1)(D) is an unconstitutional abridgment of the right of association protected by the First Amendment.[5]

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[3] The Government has persisted in this view in its arguments to this Court. Brief for the Government 48–56.

[4] We initially heard oral argument in this case on November 14, 1966. On June 5, 1967, we entered the following order:

"Case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate 'defense facilities' satisfies pertinent constitutional standards." 387 U. S. 939.

We heard additional arguments on October 9, 1967.

[5] In addition to arguing that § 5 (a)(1)(D) is invalid under the First Amendment, appellee asserted the statute was also unconstitutional because (1) it offended substantive and procedural due process under the Fifth Amendment; (2) it contained an unconstitutional delegation of legislative power to the Secretary of Defense; and (3) it is a bill of attainder. Because we agree that the statute is contrary to the First Amendment, we find it unnecessary to consider the other constitutional arguments.

We cannot agree with the District Court that § 5 (a)(1)(D) can be saved from constitutional infirmity by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. The District Court relied on *Scales* v. *United States,* 367 U. S. 203 (1961), in placing its limiting construction on § 5 (a)(1)(D). It is true that in *Scales* we read the elements of active membership and specific intent into the membership clause of the Smith Act.[6] However, in *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964), we noted that the Smith Act's membership clause required a defendant to have knowledge of the organization's illegal advocacy, a requirement that "was intimately connected with the construction limiting membership to 'active' members." *Id.,* at 511, n. 9. *Aptheker* involved a challenge to § 6 of the Subversive Activities Control Act, 50 U. S. C. § 785, which provides that, when a Communist organization is registered or under a final order to register, it shall be unlawful for any member thereof with knowledge or notice thereof to apply for a passport. We held that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." *Id.,* at 515. We take the same view of § 5 (a)(1)(D). It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment.

In *Aptheker,* we held § 6 unconstitutional because it too broadly and indiscriminately infringed upon constitutionally protected rights. The Government has argued that, despite the overbreadth which is obvious on the face of § 5 (a)(1)(D), *Aptheker* is not controlling in

[6] 18 U. S. C. § 2385.

this case because the right to travel is a more basic freedom than the right to be employed in a defense facility. We agree that *Aptheker* is not controlling since it was decided under the Fifth Amendment. But we cannot agree with the Government's characterization of the essential issue in this case. It is true that the specific disability imposed by § 5 (a)(1)(D) is to limit the employment opportunities of those who fall within its coverage, and such a limitation is not without serious constitutional implications. See *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959). But the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment.[7] Wherever one would place the right to travel on a scale of constitutional values, it is clear that those rights protected by the First Amendment are no less basic in our democratic scheme.

The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court.[8] However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.

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[7] Our decisions leave little doubt that the right of association is specifically protected by the First Amendment. *E. g., Aptheker* v. *Secretary of State, supra,* at 507; *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 543 (1963); *Bates* v. *City of Little Rock,* 361 U. S. 516, 522–523 (1960); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460 (1958). See generally Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1 (1964).

[8] See, *e. g., Lichter* v. *United States,* 334 U. S. 742, 754–772 (1948); *Hirabayashi* v. *United States,* 320 U. S. 81, 93 (1943).

"[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426 (1934). More specifically in this case, the Government asserts that § 5 (a)(1)(D) is an expression "of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s]."[9] Yet, this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our "delicate and difficult task" to determine whether the resulting restriction on freedom can be tolerated. See *Schneider* v. *State,* 308 U. S. 147, 161 (1939). The Government emphasizes that the purpose of § 5 (a)(1)(D) is to reduce the threat of sabotage and espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cut deeply into the right of association. Section 5 (a)(1)(D) put appellee to the choice of surrender-

[9] Brief for the Government 15.

ing his organizational affiliation, regardless of whether his membership threatened the security of a defense facility,[10] or giving up his job.[11] When appellee refused to make that choice, he became subject to a possible criminal penalty of five years' imprisonment and a $10,000 fine.[12] The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it.[13] The inhibiting effect on the exercise of First Amendment rights is clear.

It has become axiomatic that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); see *Aptheker* v. *Secretary of State,* 378 U. S. 500, 512–513; *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). Such precision is notably lacking in § 5 (a)(1)(D). That statute casts its net across a

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[10] The appellee has worked at the shipyard, apparently without incident and apparently without concealing his Communist Party membership, for more than 10 years. And we are told that, following appellee's indictment and arrest, "he was released on his own recognizance, and immediately returned to his job as a machinist at the Todd Shipyards, where he has worked ever since." Brief for Appellee 6, n. 8. As far as we can determine, appellee is the only individual the Government has attempted to prosecute under § 5 (a)(1)(D).

[11] We recognized in *Greene* v. *McElroy,* 360 U. S., at 492, that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

[12] 50 U. S. C. § 794 (c).

[13] The Government has insisted that Congress, in enacting § 5 (a)(1)(D), has not sought "to punish membership in 'Communist-action' . . . organizations." Brief for the Government 53. Rather, the Government asserts, Congress has simply sought to regulate access to employment in defense facilities. But it is clear the employment disability is imposed only because of such membership.

broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished [14] and membership which cannot be so proscribed.[15] It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims.[16] It is also made irrelevant that an individual who is subject to the penalties of § 5 (a)(1)(D) may occupy a nonsensitive position in a defense facility.[17] Thus, § 5 (a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights. See *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State, supra; NAACP* v. *Alabama ex rel. Flowers,* 377 U. S. 288 (1964); *NAACP* v. *Button, supra.* This the Constitution will not tolerate.

We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense

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[14] See *Scales* v. *United States,* 367 U. S. 203 (1961).

[15] See *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966).

[16] A number of complex motivations may impel an individual to align himself with a particular organization. See *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 562–565 (1963) (concurring opinion). It is for that reason that the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal goals.

[17] See *Cole* v. *Young,* 351 U. S. 536, 546 (1956): "[I]t is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security."

facilities those who would use their positions to disrupt the Nation's production facilities. We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 160 (1963). Spies and saboteurs do exist, and Congress can, of course, prescribe criminal penalties for those who engage in espionage and sabotage.[18] The Government can deny access to its secrets to those who would use such information to harm the Nation.[19] And Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials. The Government has told us that Congress, in passing § 5 (a)(1)(D), made a considered judgment that one possible alternative to that statute—an industrial security screening program—would be inadequate and ineffective to protect against sabotage in defense facilities. It is not our function to examine the validity of that congressional judgment. Neither is it our function to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today

[18] Congress has already provided stiff penalties for those who conduct espionage and sabotage against the United States. 18 U. S. C. §§ 792–798 (espionage); §§ 2151–2156 (sabotage).

[19] The Department of Defense, pursuant to Executive Order 10865, as amended by Executive Order 10909, has established detailed procedures for screening those working in private industry who, because of their jobs, must have access to classified defense information. 32 CFR Part 155. The provisions of those regulations are not before the Court in this case.

simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.[20] *Shelton* v. *Tucker, supra;* cf. *United States* v. *Brown,* 381 U. S. 437, 461 (1965). The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less.

Affirmed.

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

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[20] It has been suggested that this case should be decided by "balancing" the governmental interests expressed in § 5 (a) (1) (D) against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. There is, of course, nothing novel in that analysis. Such a course of adjudication was enunciated by Chief Justice Marshall when he declared: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution,* are constitutional." *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421 (1819) (emphasis added). In this case, the means chosen by Congress are contrary to the "letter and spirit" of the First Amendment.

MR. JUSTICE BRENNAN, concurring in the result.

I too agree that the judgment of the District Court should be affirmed but I reach that result for different reasons.

Like the Court, I disagree with the District Court that § 5 (a)(1)(D) can be read to apply only to active members who have the specific intent to further the Party's unlawful objectives. In *Aptheker* v. *Secretary of State,* 378 U. S. 500, we rejected that reading of § 6 of the Act which provides that, when a Communist organization is registered or under final order to register, it shall be unlawful for any member thereof with knowledge or notice of the order to apply for or use a passport. We held that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." 378 U. S., at 515. I take the same view of § 5 (a)(1)(D).

Aptheker held § 6 of the Act overbroad in that it deprived Party members of the right to travel without regard to whether they were active members of the Party or intended to further the Party's unlawful objectives, and therefore invalidly abridged, on the basis of political associations, the members' constitutionally protected right to travel. Section 5 (a)(1)(D) also treats as irrelevant whether or not the members are active, or know the Party's unlawful purposes, or intend to pursue those purposes. Compare *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11, 17; *Scales* v. *United States,* 367 U. S. 203; *Schneiderman* v. *United States,* 320 U. S. 118, 136. Indeed, a member such as appellee, who has worked at the Todd Shipyards without complaint or known ground for suspicion for over 10 years, is afforded no opportunity to prove that the statute's presumption that he is a security risk is invalid as applied to him. And no importance whatever is attached to the sensitivity of the jobs held by Party mem-

bers, a factor long considered relevant in security cases.[1] Furthermore, like § 6, § 5 (a)(1)(D) affects constitutionally protected rights. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . . ." *Greene* v. *McElroy,* 360 U. S. 474, 492. That right is therefore also included among the "[i]ndividual liberties fundamental to American institutions [which] are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers." *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 96. Since employment opportunities are denied by § 5 (a)(1)(D) simply on the basis of political associations the statute also has the potential of curtailing free expression by inhibiting persons from establishing or retaining such associations. See *Wieman* v. *Updegraff,* 344 U. S. 183, 191. "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in . . . area[s] so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438; see *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304.

It is true, however, as the Government points out, that Congress often regulates indiscriminately, through preventive or prophylactic measures, *e. g., Board of Governors* v. *Agnew,* 329 U. S. 441; *North American Co.* v. *SEC,* 327 U. S. 686, and that such regulation has been upheld even where fundamental freedoms are potentially affected, *Hirabayashi* v. *United States,* 320 U. S. 81;

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[1] See *Cole* v. *Young,* 351 U. S. 536, 546:

"[I]t is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security."

Cafeteria Workers v. *McElroy*, 367 U. S. 886; *Carlson* v. *Landon*, 342 U. S. 524. Each regulation must be examined in terms of its potential impact upon fundamental rights, the importance of the end sought and the necessity for the means adopted. The Government argues that § 5 (a)(1)(D) may be distinguished from § 6 on the basis of these factors. Section 5 (a)(1)(D) limits employment only in "any defense facility," while § 6 deprived every Party member of the right to apply for or to hold a passport. If § 5 (a)(1)(D) were in fact narrowly applied, the restrictions it would place upon employment are not as great as those placed upon the right to travel by § 6.[2] The problems presented by the employment of Party members at defense facilities, moreover, may well involve greater hazards to national security than those created by allowing Party members to travel abroad. We may assume, too, that Congress may have been justified in its conclusion that alternatives to § 5 (a)(1)(D) were inadequate.[3] For these reasons,

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[2] The Government also points out that § 5 (a)(1)(D) applies only to members of "Communist-action" organizations, while § 6 applied also to members of "Communist-front" organizations, groups which the Government contends are less dangerous to the national security under Congress' definitions, and whose members are therefore presumably less dangerous. This distinction is, however, open to some doubt. Even if a "front" organization, which is defined as an organization either dominated by or primarily operated for the purpose of aiding and supporting "action" organizations, could in some fashion be regarded as less dangerous, *Aptheker* held § 6 invalid because it failed to discriminate among affected persons on the bases of their activity and commitment to unlawful purposes, and nothing in the opinion indicates the result would have been different if Congress had been indiscriminate in these respects with regard only to "Communist-action" group members.

[3] The choice of a prophylactic measure "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U. S. 479, 488. Since I would affirm on another ground, however, I put aside the question whether existing

I am not persuaded to the Court's view that overbreadth is fatal to this statute, as I agreed it was in other contexts; see, *e. g., Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *NAACP* v. *Button,* 371 U. S. 415.

However, acceptance of the validity of these distinctions and recognition of congressional power to utilize a prophylactic device such as § 5 (a)(1)(D) to safeguard against espionage and sabotage at essential defense facilities, would not end inquiry in this case. Even if the statute is not overbroad on its face—because there may be "defense facilities" so essential to our national security that Congress could constitutionally exclude all Party members from employment in them—the congressional delegation of authority to the Secretary of Defense to designate "defense facilities" creates the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms and therefore, in my view, renders this statute invalid. Because the statute contains no meaningful standard by which the Secretary is to govern his desig-

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security programs were inadequate to prevent serious, possibly catastrophic consequences.

Congress rejected suggestions of the President and the Department of Justice that existing security programs were adequate with only slight modifications. See H. R. Doc. No. 679, 81st Cong., 2d Sess., 5 (1950); Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities before the House Un-American Activities Committee, 81st Cong., 2d Sess., 2122–2125 (1950). Those programs cover most of the facilities within the reach of § 5 (a)(1)(D) and make Party membership an important factor governing access. 32 CFR § 155.5. They provide measures to prevent and punish subversive acts. The Department of Defense, moreover, had screened some 3,000,000 defense contractor employees under these procedures by 1956, Brown, Loyalty and Security 179–180 (1958), thereby providing at least some evidence of its capacity to handle this problem in a more discriminating manner.

nations, and no procedures to contest or review his designations, the "defense facility" formulation is constitutionally insufficient to mark "the field within which the [Secretary] is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus* v. *United States,* 321 U. S. 414, 425.

The Secretary's role in designating "defense facilities" is fundamental to the potential breadth of the statute, since the greater the number and types of facilities designated, the greater is the indiscriminate denial of job opportunities, under threat of criminal punishment, to Party members because of their political associations. A clear, manageable standard might have been a significant limitation upon the Secretary's discretion. But the standard under which Congress delegated the designating power is so indefinite as to be meaningless. The statute defines "facility" broadly enough to include virtually every place of employment in the United States; the term includes "any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing." 50 U. S. C. § 782 (7). And § 5 (b) grants the Secretary of Defense untrammelled discretion to designate as a "defense facility" any facility "with respect to the operation of which he finds and determines that the security of the United States requires . . ." that Party members should not be employed there. Congress could easily have been more specific.[4] Instead, Congress left the Secretary completely

[4] Congress, in fact, originally proposed to limit the Secretary's discretion in designating "defense facilities." H. R. 9490, passed by both the House and Senate, provided that the Secretary should determine and designate each "defense plant" as defined in § 3 (7) of the Act. The difference between that version and § 5 (a) (1) (D)

at large in determining the relevance and weight to be accorded such factors as the importance and secrecy of the facility and of the work being done there, and the indispensability of the facility's service or product to the national security.

Congress ordinarily may delegate power under broad standards. *E. g., Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163, 183; *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591; *NBC* v. *United States,* 319 U. S. 190. No other general rule would be feasible or desirable. Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems. "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function . . . ." *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421; *Currin* v. *Wallace,* 306 U. S. 1, 15. It is generally enough that, in conferring power upon an appropriate authority, Congress

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adopted at conference is commented upon in H. R. Conf. Rep. No. 3112, 81st Cong., 2d Sess., 50 (1950):

"Under section 3 (7) a defense plant was defined as any plant, factory, or other manufacturing or service establishment, or any part thereof, engaged in the production or furnishing, for the use of the Government of any commodity or service determined and designated by the Secretary of Defense to be of such character as to affect the military security of the United States.

"Section 3 (7), and the provisions of section 5 relating to the designation of defense plants by the Secretary of Defense, have been modified in the conference substitute so as to broaden the concept of defense plants to cover any appropriately designated plant, factory or other manufacturing, producing, or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. Because of this broader coverage, section 3 (7) has been changed so as to define the two terms 'facility' and 'defense facility.'"

indicate its general policy, and act in terms or within a context which limits the power conferred. See, *e. g., Arizona* v. *California,* 373 U. S. 546, 584–585; *FCC* v. *RCA Communications, Inc.,* 346 U. S. 86; *Lichter* v. *United States,* 334 U. S. 742; *Yakus* v. *United States, supra,* at 424; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8; *FTC* v. *Gratz,* 253 U. S. 421; *Buttfield* v. *Stranahan,* 192 U. S. 470. Given such a situation, it is possible for affected persons, within the procedural structure usually established for the purpose, to be heard by the implementing agency and to secure meaningful review of its action in the courts, and for Congress itself to review its agent's action to correct significant departures from Congress' intention.

The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does § 5 (a)(1)(D). See *Barenblatt* v. *United States,* 360 U. S. 109, 140, n. 7 (BLACK, J., dissenting). This is because the numerous deficiencies connected with vague legislative directives, whether to a legislative committee, *United States* v. *Rumely,* 345 U. S. 41; to an executive officer, *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; to a judge and jury, *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 465; or to private persons, *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58; see *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; are far more serious when liberty and the exercise of fundamental rights are at stake. See also *Gojack* v. *United States,* 384 U. S. 702; *Kunz* v. *New York,* 340 U. S. 290; *Winters* v. *New York,* 333 U. S. 507; *Thornhill* v. *Alabama,* 310 U. S. 88; *Hague* v. *CIO,* 307 U. S. 496; *Herndon* v. *Lowry,* 301 U. S. 242.

First. The failure to provide adequate standards in § 5 (a)(1)(D) reflects Congress' failure to have made a "legislative judgment," *Cantwell* v. *Connecticut,* 310

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U. S., at 307, on the extent to which the prophylactic measure should be applied. Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. "[S]tandards of permissible statutory vagueness are strict . . ." in protected areas. *NAACP* v. *Button,* 371 U. S., at 432. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene* v. *McElroy,* 360 U. S. 474, 507.

Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered. But instead of a determination by Congress reflected in guiding standards of the types of facilities to which § 5 (a)(1)(D) should be applied, the statute provides for a resolution by the Secretary of Defense acting on his own accord. It is true that the Secretary presumably has at his disposal the information and expertise necessary to make reasoned judgments on which facilities are important to national security. But that is not the question to be resolved under this statute. Compare *Hague* v. *CIO,* 307 U. S. 496. Rather, the Secretary is in effect determining which facilities are so important to the national security that Party members, active or inactive, well- or ill-intentioned, should be prohibited from working within them in any capacity, sensitive or innocuous, under threat of criminal prosecution. In resolving this conflict of interests, the Secretary's judgment, colored by his overriding obligation to protect the national defense, is not

a constitutionally acceptable substitute for Congress' judgment, in the absence of further, limiting guidance.[5]

The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed. *Cantwell* v. *Connecticut, supra,* at 304. Before we can decide whether it is an undue infringement of protected rights to send a person to prison for holding employment at a certain type of facility, it ought at least to appear that Congress authorized the proscription as warranted and necessary. Such congressional determinations will not be assumed. "They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene* v. *McElroy, supra,* at 507.

Second. We said in *Watkins* v. *United States,* 354 U. S. 178, 205, that Congress must take steps to assure "respect

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[5] The Secretary has published criteria which guide him in applying the statute:

"The list of 'defense facilities' is comprised of (1) facilities engaged in important classified military projects; (2) facilities producing important weapons systems, subassemblies and their components; (3) facilities producing essential common components, intermediates, basic materials and raw materials; (4) important utility and service facilities; and (5) research laboratories whose contributions are important to the national defense. The list, which will be amended from time to time as necessary, has been classified for reasons of security."

Department of Defense Release No. 1363–62, Aug. 20, 1962. These broad standards, which might easily justify applying the statute to most of our major industries, cannot be read into the statute to limit the Secretary's discretion, since they are subject to unreviewable amendment.

for constitutional liberties" by preventing the existence of "a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power." Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated, *Speiser* v. *Randall,* 357 U. S. 513; *Marcus* v. *Search Warrant,* 367 U. S. 717, 730; *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205, 213; even when Congress acts pursuant to its "great powers," *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 164. Without procedural safeguards, regulatory schemes will tend through their indiscriminate application to inhibit the activity involved. See *Marcus* v. *Search Warrant, supra,* at 734–735.

It is true that "[a] construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." *Lockerty* v. *Phillips,* 319 U. S. 182, 188. However, the text and history of this section compel the conclusion that Congress deliberately chose not to provide for protest either to the Secretary or the courts from any designation by the Secretary of a facility as a "defense facility." The absence of any provision in this regard contrasts strongly with the care that Congress took to provide for the determination by the SACB that the Party is a Communist-action organization, and for judicial review of that determination. The Act "requires the registration only of organizations which . . . are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence." *Communist Party* v. *Subversive Activities Control Board,*

supra, at 86–87. In contrast, the Act nowhere provides for an administrative hearing on the Secretary's designation, either public or private, nor is his finding subject to review. A Party member charged with notice of the designation must quit the Party or his job; he cannot contest the Secretary's action on trial if he retains both and is prosecuted.[6]

This is persuasive evidence that the matter of the designation of "defense facilities" was purposely committed by Congress entirely to the discretionary judgment of the Secretary. Unlike the opportunities for hearing and judicial review afforded the Party itself, the Party member was not to be heard by the Secretary to protest the designation of his place of employment as a "defense facility," nor was the member to have recourse to the courts. This pointed distinction, as in the case of the statute before the Court in *Schilling* v. *Rogers,* 363 U. S. 666, 674, is compelling evidence "that in this Act Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation." This clear indication of the congressional plan, coupled

[6] The statute contemplates only four significant findings before criminal liability attaches: (1) that the Communist Party is a "Communist-action organization"; (2) that defendant is a member of the Communist Party; (3) that defendant is engaged in employment at a "defense facility"; and (4) that he had notice that his place of employment was a "defense facility." The first finding was made by the Subversive Activities Control Board. The third finding—that the shipyard is a "defense facility"—was made by the Secretary of Defense. The fourth finding refers to the notice requirement which is no more than a presumption from the posting required of the employer by § 5 (b). Thus the only issue which a defendant can effectively contest is whether he is a Communist Party member. In view of the result which I would reach, however, I need not consider appellee's argument that this affords defendants only the shadow of a trial, and violates due process.

with a flexibility—as regards the boundaries of the Secretary's discretion—so unguided as to be entirely unguiding, must also mean that Congress contemplated that an affected Party member was not to be heard to contend even at his criminal trial that the Secretary acted beyond the scope of his powers, or that the designation of the particular facility was arbitrary and capricious. Cf. *Estep* v. *United States,* 327 U. S. 114.

The legislative history of the section confirms this conclusion. That history makes clear that Congress was concerned that neither the Secretary's reasons for a designation nor the fact of the designation should be publicized. This emerged after President Truman vetoed the statute. In its original form the Act required the Secretary to "designate and proclaim, and from time to time revise, a list of facilities . . . to be promptly published in the Federal Register . . . ." § 5 (b). The President commented in his veto message, "[s]pies and saboteurs would willingly spend years of effort seeking to find out the information that this bill would require the Government to hand them on a silver platter." H. R. Doc. No. 708, 81st Cong., 2d Sess., 2 (1950). Shortly after this Court sustained the registration provisions of the Act in *Communist Party* v. *Subversive Activities Control Board, supra,* the Act was amended at the request of the Secretary to eliminate the requirement that the list of designated facilities be published in the Federal Register. 76 Stat. 91. Instead, the list is classified information. Whether or not such classification is practically meaningful—in light of the fact that notice of a designation must be posted in the designated facility—the history is persuasive against any congressional intention to provide for hearings or judicial review that might be attended with undesired publicity. We are therefore not free to imply limitations upon the Secretary's discretion or procedural safeguards that Congress obviously

chose to omit. Compare *Cole* v. *Young,* 351 U. S. 536; *United States* v. *Rumely, supra; Ex parte Endo,* 323 U. S. 283, 299; *Japanese Immigrant Case,* 189 U. S. 86, 101; see *Greene* v. *McElroy, supra,* at 507.

Third. The indefiniteness of the delegation in this case also results in inadequate notice to affected persons. Although the form of notice provided for in § 5 (b) affords affected persons reasonable opportunity to conform their behavior to avoid punishment, it is not enough that persons engaged in arguably protected activity be reasonably well advised that their actions are subject to regulation. Persons so engaged must not be compelled to conform their behavior to commands, no matter how unambiguous, from delegated agents whose authority to issue the commands is unclear. *Marcus* v. *Search Warrant, supra,* at 736. The legislative directive must delineate the scope of the agent's authority so that those affected by the agent's commands may know that his command is within his authority and is not his own arbitrary fiat. *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Scull* v. *Virginia,* 359 U. S. 344; *Watkins* v. *United States, supra,* at 208–209. There is no way for persons affected by § 5 (a)(1)(D) to know whether the Secretary is acting within his authority, and therefore no fair basis upon which they may determine whether or not to risk disobedience in the exercise of activities normally protected.

Section 5 (a)(1)(D) denies significant employment rights under threat of criminal punishment to persons simply because of their political associations. The Government makes no claim that Robel is a security risk. He has worked as a machinist at the shipyards for many years, and we are told is working there now. We are in effect invited by the Government to assume that Robel is a law abiding citizen, earning a living at his chosen trade. The justification urged for punishing him is that

Congress may properly conclude that members of the Communist Party, even though nominal or inactive members and believing only in change through lawful means, are more likely than other citizens to engage in acts of espionage and sabotage harmful to our national security. This may be so. But in areas of protected freedoms, regulation based upon mere association and not upon proof of misconduct or even of intention to act unlawfully, must at least be accompanied by standards or procedural protections sufficient to safeguard against indiscriminate application. "If . . . 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress . . . [a]nd if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." *Kent* v. *Dulles,* 357 U. S. 116, 129.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, dissenting.

The Court holds that because of the First Amendment a member of the Communist Party who knows that the Party has been held to be a Communist-action organization may not be barred from employment in defense establishments important to the security of the Nation. It therefore refuses to enforce the contrary judgments of the Legislative and Executive Branches of the Government. Respectfully disagreeing with this view, I dissent.

The constitutional right found to override the public interest in national security defined by Congress is the right of association, here the right of appellee Robel to remain a member of the Communist Party after being notified of its adjudication as a Communist-action organization. Nothing in the Constitution requires this result. The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to assemble, and

to petition for redress of grievances.[1] While the right of association has deep roots in history and is supported by the inescapable necessity for group action in a republic as large and complex as ours, it has only recently blossomed as the controlling factor in constitutional litigation; its contours as yet lack delineation. Although official interference with First Amendment rights has drawn close scrutiny, it is now apparent that the right of association is not absolute and is subject to significant regulation by the State. The law of criminal conspiracy restricts the purposes for which men may associate and

[1] If men may speak as individuals, they may speak in groups as well. If they may assemble and petition, they must have the right to associate to some extent. In this sense the right of association simply extends constitutional protection to First Amendment rights when exercised with others rather than by an individual alone. In *NAACP* v. *Alabama,* the Court said that the freedom to associate for the advancement of beliefs and ideas is constitutionally protected and that it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ." 357 U. S. 449, 460 (1958). That case involved the propagation of ideas by a group as well as litigation as a form of petition. The latter First Amendment element was also involved in *NAACP* v. *Button,* 371 U. S. 415 (1963); *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964); and *United Mine Workers* v. *Illinois Bar Assn., ante,* p. 217. The activities in *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961), although commercially motivated, were aimed at influencing legislative action. Whether the right to associate is an independent First Amendment right carrying its own credentials and will be carried beyond the implementation of other First Amendment rights awaits a definitive answer. In this connection it should be noted that the Court recently dismissed, as not presenting a substantial federal question, an appeal challenging Florida regulations which forbid a Florida accountant from associating in his work, whether as partner or employee, with any nonresident accountant; out-of-state associations are barred from the State unless every partner is a qualified Florida accountant, and in practice only Florida residents can become qualified there. *Mercer* v. *Hemmings, ante,* p. 46.

the means they may use to implement their plans. Labor unions, and membership in them, are intricately controlled by statutes, both federal and state, as are political parties and corporations.

The relevant cases uniformly reveal the necessity for accommodating the right of association and the public interest. *NAACP* v. *Alabama,* 357 U. S. 449 (1958), which contained the first substantial discussion of the right in an opinion of this Court, exemplifies the judicial approach. There, after noting the impact of official action on the right to associate, the Court inquired "whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." 357 U. S., at 463. The same path to decision is evident in *Bates* v. *City of Little Rock,* 361 U. S. 516 (1960); *NAACP* v. *Button,* 371 U. S. 415 (1963); and *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964). Only last week, in *United Mine Workers* v. *Illinois Bar Assn., ante,* p. 217, the Court weighed the right to associate in an organization furnishing salaried legal services to its members against the State's interest in insuring adequate and personal legal representation, and found the State's interest insufficient to justify its restrictions.

Nor does the Court mandate a different course in this case. Apparently "active" members of the Communist Party who have demonstrated their commitment to the illegal aims of the Party may be barred from defense facilities. This exclusion would have the same deterrent effect upon associational rights as the statute before us, but the governmental interest in security would override that effect. Also, the Court would seem to permit barring appellee, although not an "active" member of the

Party, from employment in "sensitive" positions in the defense establishment. Here, too, the interest in anticipating and preventing espionage or sabotage would outweigh the deterrent impact of job disqualification. If I read the Court correctly, associating with the Communist Party may at times be deterred by barring members from employment and nonmembership may at times be imposed as a condition of engaging in defense work. In the case before us the Court simply disagrees with the Congress and the Defense Department, ruling that Robel does not present a sufficient danger to the national security to require him to choose between membership in the Communist Party and his employment in a defense facility. Having less confidence than the majority in the prescience of this remote body when dealing with threats to the security of the country, I much prefer the judgment of Congress and the Executive Branch that the interest of appellee in remaining a member of the Communist Party, knowing that it has been adjudicated a Communist-action organization, is less substantial than the public interest in excluding him from employment in critical defense industries.

The national interest asserted by the Congress is real and substantial. After years of study, Congress prefaced the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. §§ 781–798, with its findings that there exists an international Communist movement which by treachery, deceit, espionage, and sabotage seeks to overthrow existing governments; that the movement operates in this country through Communist-action organizations which are under foreign domination and control and which seek to overthrow the Government by any necessary means, including force and violence; that the Communist movement in the United States is made up of thousands of adherents, rigidly disciplined, operating in secrecy, and employing espionage and sabotage tactics

in form and manner evasive of existing laws. Congress therefore, among other things, defined the characteristics of Communist-action organizations, provided for their adjudication by the SACB, and decided that the security of the United States required the exclusion of Communist-action organization members from employment in certain defense facilities. After long and complex litigation, the SACB found the Communist Party to be a Communist-action organization within the meaning of the Act. That conclusion was affirmed both by the Court of Appeals, *Communist Party* v. *Subversive Activities Control Board,* 107 U. S. App. D. C. 279, 277 F. 2d 78 (1959), and this Court, 367 U. S. 1 (1961). Also affirmed were the underlying determinations, required by the Act, that the Party is directed or controlled by a foreign government or organization, that it operates primarily to advance the aims of the world Communist movement, and that it sufficiently satisfies the criteria of Communist-action organizations specified by 50 U. S. C. § 792 (e), including the finding by the Board that many Party members are subject to or recognize the discipline of the controlling foreign government or organization. This Court accepted the congressional appraisal that the Party posed a threat "not only to existing government in the United States, but to the United States as a sovereign, independent nation . . . ." 367 U. S., at 95.

Against this background protective measures were clearly appropriate. One of them, contained in 50 U. S. C. § 784 (a)(1)(D), which became activated with the affirmance of the Party's designation as a Communist-action organization, makes it unlawful "[f]or any member of such organization, with knowledge or notice . . . that such order has become final . . . to engage in any employment in any defense facility . . . ." A defense facility is any of the specified types of establishment "with respect to

the operation of which [the Secretary of Defense] finds and determines that the security of the United States requires" that members of such organizations not be employed. Given the characteristics of the Party, its foreign domination, its primary goal of government overthrow, the discipline which it exercises over its members, and its propensity for espionage and sabotage, the exclusion of members of the Party who know the Party is a Communist-action organization from certain defense plants is well within the powers of Congress.

Congress should be entitled to take suitable precautionary measures. Some Party members may be no threat at all, but many of them undoubtedly are, and it is exceedingly difficult to identify those in advance of the very events which Congress seeks to avoid. If Party members such as Robel may be barred from "sensitive positions," it is because they are potential threats to security. For the same reason they should be excludable from employment in defense plants which Congress and the Secretary of Defense consider of critical importance to the security of the country.

The statute does not prohibit membership in the Communist Party. Nor are appellee and other Communists excluded from all employment in the United States, or even from all defense plants. The touchstones for exclusion are the requirements of national security, and the facilities designated under this standard amount to only about one percent of all the industrial establishments in the United States.

It is this impact on associational rights, although specific and minimal, which the Court finds impermissible. But as the statute's dampening effect on associational rights is to be weighed against the asserted and obvious government interest in keeping members of Communist-action groups from defense facilities, it would seem important to identify what interest Robel has in

joining and remaining a member of a group whose primary goals he may not share. We are unenlightened, however, by the opinion of the Court or by the record in this case, as to the purposes which Robel and others like him may have in associating with the Party. The legal aims and programs of the Party are not identified or appraised nor are Robel's activities as a member of the Party. The Court is left with a vague and formless concept of associational rights and its own notions of what constitutes an unreasonable risk to defense facilities.

The Court says that mere membership in an association with knowledge that the association pursues unlawful aims cannot be the basis for criminal prosecution, *Scales* v. *United States,* 367 U. S. 203 (1961), or for denial of a passport, *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). But denying the opportunity to be employed in some defense plants is a much smaller deterrent to the exercise of associational rights than denial of a passport or a criminal penalty attached solely to membership, and the Government's interest in keeping potential spies and saboteurs from defense plants is much greater than its interest in keeping disloyal Americans from traveling abroad or in committing all Party members to prison. The "delicate and difficult" judgment to which the Court refers should thus result in a different conclusion from that reached in the *Scales* and *Aptheker* cases.[2]

[2] I cannot agree with my Brother BRENNAN that Congress delegated improperly when it authorized the Secretary of Defense to determine "with respect to the operation of which [defense facilities] . . . the security of the United States requires the application of the provisions of subsection (a) of this section." Rather I think this is precisely the sort of application of a legislative determination to specific facts within the administrator's expertise that today's complex governmental structure requires and that this Court has

The Court's motives are worthy. It seeks the widest bounds for the exercise of individual liberty consistent with the security of the country. In so doing it arrogates to itself an independent judgment of the requirements of national security. These are matters about which judges should be wary. James Madison wrote:

> "Security against foreign danger is one of the primitive objects of civil society. . . .
>
> ". . . The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." [3]

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frequently upheld. *E. g., Yakus* v. *United States,* 321 U. S. 414 (1944). I would reject also appellee's contention that the statute is a bill of attainder. See *United States* v. *Brown,* 381 U. S. 437, 462 (1965) (WHITE, J., dissenting).

[3] The Federalist No. 41, pp. 269–270 (Cooke ed. 1961).

HUGHES *v.* WASHINGTON.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 15. Argued November 6, 1967.—Decided December 11, 1967.

Petitioner's predecessor in title received from the Federal Government a grant of ocean-front realty in what is now the State of Washington. The State asserts that when it acquired statehood in 1889, its new constitution denied ocean-front property owners any further rights in accretion that might be formed between their property and the ocean. The trial court upheld petitioner's contention that the right to accretion remained subject to federal law and that she was the owner of the accreted lands. The State Supreme Court reversed, holding that state law controlled and that the State owned the lands. *Held:* This question is governed by federal law, under which a grantee of land bounded by navigable water acquires a right to accretion formed along the shore; and the petitioner, who traces her title to a federal grant prior to statehood, is the owner of these accretions. Pp. 291–294.

67 Wash. 2d 799, 410 P. 2d 20, reversed and remanded.

Charles B. Welsh argued the cause for petitioner. With him on the briefs was *John Gavin.*

Harold T. Hartinger, Assistant Attorney General of Washington, argued the cause for respondent. With him on the brief were *John J. O'Connell,* Attorney General, and *J. R. Pritchard* and *John R. Miller,* Assistant Attorneys General.

Assistant Attorney General Weisl argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Marshall, Robert S. Rifkind, Roger P. Marquis* and *George S. Swarth.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question for decision is whether federal or state law controls the ownership of land, called accretion, grad-

ually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. Prior to 1889 all land in what is now the State of Washington was owned by the United States, except land that had been conveyed to private parties. At that time owners of property bordering the ocean, such as the predecessor in title of Mrs. Stella Hughes, the petitioner here, had under the common law a right to include within their lands any accretion gradually built up by the ocean.[1] Washington became a State in 1889, and Article 17 of the State's new constitution, as interpreted by its Supreme Court, denied the owners of ocean-front property in the State any further rights in accretion that might in the future be formed between their property and the ocean. This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. The trial court upheld Mrs. Hughes' contention that the right to accretions remained subject to federal law, and that she was the owner of the accreted lands. The State Supreme Court reversed, holding that state law controlled and that the State owned these lands. 67 Wash. 2d 799, 410 P. 2d 20 (1966). We granted certiorari. 385 U. S. 1000 (1967). We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions.

While the issue appears never to have been squarely presented to this Court before, we think the path to deci-

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[1] *Jones* v. *Johnston,* 18 How. 150 (1856); *County of St. Clair* v. *Lovingston,* 23 Wall. 46 (1874).

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sion is indicated by our holding in *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We held that

> "[t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U. S., at 22.

No subsequent case in this Court has cast doubt on the principle announced in *Borax.* See also *United States* v. *Oregon,* 295 U. S. 1, 27–28 (1935). The State argues, and the court below held, however, that the *Borax* case should not be applied here because that case involved no question as to accretions. While this is true, the case did involve the question as to what rights were conveyed by the federal grant and decided that the extent of ownership under the federal grant is governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion. See *United States* v. *Washington,* 294 F. 2d 830, 832 (C. A. 9th Cir. 1961), cert. denied, 369 U. S. 817 (1962). We therefore find no significant difference between *Borax* and the present case.

Recognizing the difficulty of distinguishing *Borax,* respondent urges us to reconsider it. *Borax* itself, as well as *United States* v. *Oregon, supra,* and many other cases, makes clear that a dispute over title to lands owned by the Federal Government is governed by federal law,

although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. *Borax* holds that there has been no such choice in this area, and we have no difficulty in concluding that *Borax* was correctly decided. The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. In *Jones* v. *Johnston,* 18 How. 150 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "[l]and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, *County of St. Clair* v. *Lovingston,* 23 Wall. 46 (1874); *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178 (1890),[2] and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually

[2] In *Ker & Co.* v. *Couden,* 223 U. S. 268 (1912), Mr. Justice Holmes, writing for the Court, held that under the governing Spanish law, lands added to the shore by accretion in the Philippines belonged to the public domain rather than to the adjacent estate.

vulnerable to harassing litigation challenging the location of the original water lines. While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland,[3] this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. See *Stevens* v. *Arnold,* 262 U. S. 266, 269–270 (1923). We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean.

The judgment below is reversed, and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

MR. JUSTICE STEWART, concurring.

I fully agree that the extent of the 1866 federal grant to which Mrs. Hughes traces her ownership was originally measurable by federal common law, and that under the applicable federal rule her predecessor in title acquired the right to all accretions gradually built up by the sea. For me, however, that does not end the matter. For the Supreme Court of Washington decided in 1966, in the case now before us, that Washington terminated the

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[3] It has been held that a State may, without paying compensation, deprive a riparian owner of his common-law right to utilize the flowing water, *St. Anthony Falls Water Power Co.* v. *Water Comm'rs,* 168 U. S. 349 (1897), or to build a wharf over the water, *Shively* v. *Bowlby,* 152 U. S. 1 (1894). It has also been held that the State may fill its tidelands and thus block the riparian owner's natural access to the water. *Port of Seattle* v. *Oregon & W. R. Co.,* 255 U. S. 56 (1921).

right to oceanfront accretions when it became a State in 1889. The State concedes that the federal grant in question conferred such a right prior to 1889. But the State purports to have reserved all post-1889 accretions for the public domain. Mrs. Hughes is entitled to the beach she claims in this case only if the State failed in its effort to abolish all private rights to seashore accretions.

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. *Joy* v. *St. Louis,* 201 U. S. 332, 342. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 236–241.

Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state

property law constitute a compensable taking? Second: If so, does the constitutional right to compensation run with the land, so as to give not only the 1889 owner, but also his successors—including Mrs. Hughes—a valid claim against the State?

The fact, however, is that Article 17 contained no such unambiguous provision. In that Article, the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." In the present case the Supreme Court of Washington held that, by this 1889 language, "[l]ittoral rights of upland owners were terminated." 67 Wash. 2d 799, 816, 410 P. 2d 20, 29. Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple

device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest* v. *City Bank Co.,* 321 U. S. 36, 42–43. Cf. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95. The Washington court insisted that its decision was "not startling." 67 Wash. 2d 799, 814, 410 P. 2d 20, 28. What is at issue here is the accuracy of that characterization.

The state court rested its result upon *Eisenbach* v. *Hatfield,* 2 Wash. 236, 26 P. 539, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The *Eisenbach* court declined to resolve the accretions question presented here. This question was resolved in 1946, in *Ghione* v. *State,* 26 Wash. 2d 635, 175 P. 2d 955. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Supreme Court rejected that assertion in *Ghione* and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its *Ghione* decision, the Washington Supreme Court reached a different conclusion. The state court in this case sought to distinguish *Ghione:* The water there involved was part of a river. But the *Ghione* court had emphatically stated that the same "rule of accretion . . . applies to both tidewaters and fresh waters." 26 Wash. 2d 635, 645, 175 P. 2d 955, 961. I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every

reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

UNITED STATES *v.* CORRELL ET UX.

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

No. 113. Argued November 14, 1967.—Decided December 11, 1967.

The Commissioner of Internal Revenue's long-standing ruling that "traveling expenses" incurred in the pursuit of business "while away from home," which are deductible under § 162 (a) (2) of the Internal Revenue Code of 1954, include the cost of meals only if the trip requires sleep or rest, *held* to achieve not only ease and certainty of application but also substantial fairness and to be within the Commissioner's authority to implement the statute in any reasonable manner. Pp. 301–307.

369 F. 2d 87, reversed.

Solicitor General Griswold argued the cause for the United States. On the briefs were former *Solicitor General Marshall, Assistant Attorney General Rogovin, Harris Weinstein, Gilbert E. Andrews* and *Edward Lee Rogers.*

William L. Taylor, Jr., argued the cause for respondents. On the brief was *Carl A. Swafford.*

Briefs of *amici curiae,* urging affirmance, were filed by *Leonard L. Silverstein* and *Sherwyn E. Syna* for the Bureau of Salesmen's National Associations, and by *Raphael Sherfy* for the Manufacturing Chemists' Association, Inc.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Commissioner of Internal Revenue has long maintained that a taxpayer traveling on business may deduct the cost of his meals only if his trip requires him to stop for sleep or rest. The question presented here is the validity of that rule.

The respondent in this case was a traveling salesman for a wholesale grocery company in Tennessee.[1] He customarily left home early in the morning, ate breakfast and lunch on the road, and returned home in time for dinner. In his income tax returns for 1960 and 1961, he deducted the cost of his morning and noon meals as "traveling expenses" incurred in the pursuit of his business "while away from home" under § 162 (a)(2) of the Internal Revenue Code of 1954.[2] Because the respondent's daily trips required neither sleep nor rest, the Commissioner disallowed the deductions, ruling that the cost of the respondent's meals was a "personal, living" expense under § 262 [3] rather than a travel expense under § 162 (a)(2). The respondent paid the tax, sued for a refund in the District Court, and there received a favorable jury verdict.[4] The Court of Appeals for the Sixth

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[1] Since Mr. and Mrs. Correll filed a joint income tax return, both are respondents here. Throughout this opinion, however, the term "respondent" refers only to Mr. Correll.

[2] "(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . . . .

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business . . . ." § 162 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a)(2) (1958 ed.).

[3] "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." § 262 of the Internal Revenue Code of 1954, 26 U. S. C. § 262.

[4] After denying the Government's motion for a directed verdict, the District Judge charged the jury that it would have to "determine under all the facts of this case whether or not" the Commissioner's rule was "an arbitrary regulation as applied to these plaintiffs under the facts in this case." He told the jury to consider whether the meal expenses were "necessary for the employee to properly perform the duties of his work." "Should he have eaten them at his home rather than . . . away from home in order to

Circuit affirmed, holding that the Commissioner's sleep or rest rule is not "a valid regulation under the present statute." 369 F. 2d 87, 90. In order to resolve a conflict among the circuits on this recurring question of federal income tax administration,[5] we granted certiorari. 388 U. S. 905.

Under § 162 (a)(2), taxpayers "traveling . . . away from home in the pursuit of a trade or business" may deduct the total amount "expended for meals and lodging." [6] As a result, even the taxpayer who incurs sub-

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properly carry on his business or to perform adequately his duties as an employee of this produce company[?]" "You are instructed that the cost of meals while on one-day business trips away from home need not be incurred while on an overnight trip to be deductible, so long as the expense of such meals . . . proximately results from the carrying on the particular business involved and has some reasonable relation to that business." Under these instructions, the jury found for the respondent. The District Court denied the Government's motion for judgment notwithstanding the verdict.

[5] The decision below conflicts with that of the First Circuit in *Commissioner* v. *Bagley*, 374 F. 2d 204, but is in accord with that of the Eighth Circuit in *Hanson* v. *Commissioner*, 298 F. 2d 391, reaffirmed in *United States* v. *Morelan*, 356 F. 2d 199, 208–210.

[6] Prior to the enactment in 1921 of what is now § 162 (a)(2), the Commissioner had promulgated a regulation allowing a deduction for the cost of meals and lodging away from home, but only to the extent that this cost exceeded "any expenditures ordinarily required for such purposes when at home." Treas. Reg. 45 (1920 ed.), Art. 292, 4 Cum. Bull. 209 (1921). Despite its logical appeal, the regulation proved so difficult to administer that the Treasury Department asked Congress to grant a deduction for the "entire amount" of such meal and lodging expenditures. See Statement of Dr. T. S. Adams, Tax Adviser, Treasury Department, in Hearings on H. R. 8245 before the Senate Committee on Finance, 67th Cong., 1st Sess., at 50, 234–235 (1921). Accordingly, § 214 (a)(1) of the Revenue Act of 1921, c. 136, 42 Stat. 239, for the first time included the language that later became § 162 (a)(2). See n. 2, *supra*. The section was amended in a respect not here relevant by the Revenue Act of 1962, § 4 (b), 76 Stat. 976.

stantial hotel and restaurant expenses because of the special demands of business travel receives something of a windfall, for at least part of what he spends on meals represents a personal living expense that other taxpayers must bear without receiving any deduction at all.[7] Not surprisingly, therefore, Congress did not extend the special benefits of § 162 (a)(2) to every conceivable situation involving business travel. It made the total cost of meals and lodging deductible only if incurred in the course of travel that takes the taxpayer "away from home." The problem before us involves the meaning of that limiting phrase.

In resolving that problem, the Commissioner has avoided the wasteful litigation and continuing uncertainty that would inevitably accompany any purely case-by-case approach to the question of whether a particular taxpayer was "away from home" on a particular day.[8] Rather than requiring "every meal-purchasing taxpayer to take pot luck in the courts," [9] the Commissioner has consistently construed travel "away from home" to exclude all trips requiring neither sleep nor rest,[10] regard-

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[7] Because § 262 makes "personal, living, or family expenses" nondeductible, see n. 3, *supra*, the taxpayer whose business requires no travel cannot ordinarily deduct the cost of the lunch he eats away from home. But the taxpayer who can bring himself within the reach of § 162 (a)(2) may deduct what he spends on his noontime meal although it costs him no more, and relates no more closely to his business, than does the lunch consumed by his less mobile counterpart.

[8] Such was the approach of the Tax Court in *Bagley* v. *Commissioner*, 46 T. C. 176, 183, vacated, 374 F. 2d 204; of the Eighth Circuit in *Hanson* v. *Commissioner*, 298 F. 2d 391, 397; and evidently of the Sixth Circuit in this case, see 369 F. 2d 87, 90.

[9] *Commissioner* v. *Bagley*, 374 F. 2d 204, 207.

[10] The Commissioner's interpretation, first expressed in a 1940 ruling, I. T. 3395, 1940–2 Cum. Bull. 64, was originally known as the overnight rule. See *Commissioner* v. *Bagley*, *supra*, at 205.

less of how many cities a given trip may have touched,[11] how many miles it may have covered,[12] or how many hours it may have consumed.[13] By so interpreting the statutory phrase, the Commissioner has achieved not only ease and certainty of application but also substantial fairness, for the sleep or rest rule places all one-day travelers on a similar tax footing, rather than discriminating against intracity travelers and commuters, who of course cannot deduct the cost of the meals they eat on the road. See *Commissioner* v. *Flowers,* 326 U. S. 465.

Any rule in this area must make some rather arbitrary distinctions,[14] but at least the sleep or rest rule avoids the obvious inequity of permitting the New Yorker who makes a quick trip to Washington and back, missing neither his breakfast nor his dinner at home, to deduct the cost of his lunch merely because he covers more miles

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[11] The respondent lived in Fountain City, Tennessee, some 45 miles from his employer's place of business in Morristown. His territory included restaurants in the cities of Madisonville, Engelwood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, La Follette, and Jellico, all in eastern Tennessee.

[12] The respondent seldom traveled farther than 55 miles from his home, but he ordinarily drove a total of 150 to 175 miles daily.

[13] The respondent's employer required him to be in his sales territory at the start of the business day. To do so, he had to leave Fountain City at about 5 a. m. He usually finished his daily schedule by 4 p. m., transmitted his orders to Morristown, and returned home by 5:30 p. m.

[14] The rules proposed by the respondent and by the two *amici curiae* filing briefs on his behalf are not exceptional in this regard. Thus, for example, the respondent suggests that § 162 (a)(2) be construed to cover those taxpayers who travel outside their "own home town," or outside "the greater . . . metropolitan area" where they reside. One *amicus* stresses the number of "hours spent and miles traveled away from the taxpayer's principal post of duty," suggesting that some emphasis should also be placed upon the number of meals consumed by the taxpayer "outside the general area of his home."

than the salesman who travels locally and must finance all his meals without the help of the Federal Treasury.[15] And the Commissioner's rule surely makes more sense than one which would allow the respondent in this case to deduct the cost of his breakfast and lunch simply because he spends a greater percentage of his time at the wheel than the commuter who eats breakfast on his way to work and lunch a block from his office.

The Court of Appeals nonetheless found in the "plain language of the statute" an insuperable obstacle to the Commissioner's construction. 369 F. 2d 87, 89. We disagree. The language of the statute—"meals and lodging . . . away from home"—is obviously not self-defining.[16] And to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position, for the statute speaks of "meals and lodging" as a unit, suggesting—at least arguably—that Congress contemplated a deduction for the cost of meals only where the travel in question involves lodging as well.[17] Ordinarily, at least, only the taxpayer who finds it necessary to stop for sleep or rest incurs significantly higher living expenses as a direct

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[15] See *Amoroso* v. *Commissioner,* 193 F. 2d 583.

[16] The statute applies to the meal and lodging expenses of taxpayers "traveling . . . away from home." The very concept of "traveling" obviously requires a physical separation from one's house. To read the phrase "away from home" as broadly as a completely literal approach might permit would thus render the phrase completely redundant. But of course the words of the statute have never been so woodenly construed. The commuter, for example, has never been regarded as "away from home" within the meaning of § 162 (a) (2) simply because he has traveled from his residence to his place of business. See *Commissioner* v. *Flowers,* 326 U. S. 465, 473. More than a dictionary is thus required to understand the provision here involved, and no appeal to the "plain language" of the section can obviate the need for further statutory construction.

[17] See *Commissioner* v. *Bagley,* 374 F. 2d 204, 207, n. 10.

result of his business travel,[18] and Congress might well have thought that only taxpayers in that category should be permitted to deduct their living expenses while on the road.[19] In any event, Congress certainly recognized, when it promulgated § 162 (a) (2), that the Commissioner had so understood its statutory predecessor.[20] This case thus comes within the settled principle that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have

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[18] The taxpayer must ordinarily "maintain a home for his family at his own expense even when he is absent on business," *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917, and if he is required to stop for sleep or rest, "continuing costs incurred at a permanent place of abode are duplicated." *James* v. *United States*, 308 F. 2d 204, 206. The same taxpayer, however, is unlikely to incur substantially increased living expenses as a result of business travel, however far he may go, so long as he does not find it necessary to stop for lodging. One *amicus curiae* brief filed in this case asserts that "those who travel considerable distances such as [on] a one-day jet trip between New York and Chicago" spend more for "comparable meals [than] those who remain at their home base" and urges that all who travel "substantial distances" should therefore be permitted to deduct the entire cost of their meals. It may be that eating at a restaurant costs more than eating at home, but it cannot seriously be suggested that a taxpayer's bill at a restaurant mysteriously reflects the distance he has traveled to get there.

[19] The court below thought that "[i]n an era of supersonic travel, the time factor is hardly relevant to the question of whether or not . . . meal expenses are related to the taxpayer's business . . . ." 369 F. 2d 87, 89–90. But that completely misses the point. The benefits of § 162 (a) (2) are limited to business travel "away from home," and *all* meal expenses incurred in the course of such travel are deductible, however unrelated they may be to the taxpayer's income-producing activity. To ask that the definition of "away from home" be responsive to the business necessity of the taxpayer's meals is to demand the impossible.

[20] In considering the proposed 1954 Code, Congress heard a taxpayer plea for a change in the rule disallowing deductions for meal expenses on one-day trips. Hearings on General Revision of the Internal Revenue Code before the House Committee on Ways and

received congressional approval and have the effect of law." *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Fribourg Nav. Co.* v. *Commissioner,* 383 U. S. 272, 283.

Alternatives to the Commissioner's sleep or rest rule are of course available.[21] Improvements might be imagined.[22] But we do not sit as a committee of revision to

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Means, 83d Cong., 1st Sess., pt. 1, at 216–219 (1953); Hearings on H. R. 8300 before the Senate Committee on Finance, 83d Cong., 2d Sess., pt. 4, at 2396 (1954). No such change resulted.

In recommending § 62 (2)(C) of the 1954 Code, permitting employees to deduct certain transportation expenses in computing adjusted gross income, the Senate Finance Committee stated:

"At present, business transportation expenses can be deducted by an employee in arriving at adjusted gross income only if they are reimbursed by the employer or if they are incurred while he was *away from home overnight* . . . .

"Because these expenses, when incurred, usually are substantial, it appears desirable to treat employees in this respect like self-employed persons. For this reason both the House and your committee's bill permit employees to deduct business transportation expenses in arriving at adjusted gross income even though the expenses are not incurred in travel *away from home* or not reimbursed by the employer. . . ." S. Rep. No. 1622, 83d Cong., 2d Sess., 9 (1954) (emphasis added). See also H. R. Rep. No. 1337, 83d Cong., 2d Sess., 9 (1954).

And in discussing § 120 of the 1954 Code (repealed by 72 Stat. 1607 (1958)), which allowed policemen to exclude from taxable income up to $5 per day in meal allowances, both the House and Senate Reports noted that, under the prevailing rule, police officers could deduct expenses *over* the $5 limit of § 120 "for meals while *away from home overnight.*" H. R. Rep. No. 1337, 83d Cong., 2d Sess., A40 (1954) (emphasis added); S. Rep. No. 1622, 83d Cong., 2d Sess., 191 (1954) (emphasis added). Thus Congress was well aware of the Commissioner's rule when it retained in § 162 (a)(2) the precise terminology it had used in 1921.

[21] See n. 14, *supra.*

[22] See, *e. g.,* the 1963 proposal of the Treasury Department, in Hearings on the President's 1963 Tax Message before the House Committee on Ways and Means, 88th Cong., 1st Sess., pt. 1, at 98 (1963).

perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U. S. C. § 7805 (a). In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments." *Commissioner* v. *Stidger,* 386 U. S. 287, 296. The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner. Because the rule challenged here has not been shown deficient on that score, the Court of Appeals should have sustained its validity. The judgment is therefore

Reversed.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE FORTAS concur, dissenting.

The statutory words "while away from home," 26 U. S. C. § 162 (a)(2), may not in my view be shrunken to "overnight" by administrative construction or regulations. "Overnight" injects a time element in testing deductibility, while the statute speaks only in terms of geography. As stated by the Court of Appeals:

> "In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute." *Correll* v. *United States,* 369 F. 2d 87, 89–90.

I would affirm the judgment below.

276-943 O - 68 - 27

UNITED STATES *v.* PENN-OLIN CHEMICAL CO. ET AL.

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

No. 26. Argued December 7, 1967.—Decided December 11, 1967.

246 F. Supp. 917, affirmed by an equally divided Court.

Edwin M. Zimmerman argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Turner, Ralph S. Spritzer, Daniel M. Friedman* and *Richard A. Posner.*

Albert R. Connelly and *H. Francis DeLone* argued the cause for appellees. With them on the brief were *William S. Potter, John W. Barnum* and *Eugene P. Souther.*

PER CURIAM.

The judgment of the United States District Court for the District of Delaware is affirmed by an equally divided Court.

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

Per Curiam.

W. E. B. DuBOIS CLUBS OF AMERICA ET AL. *v.* CLARK, ATTORNEY GENERAL, ET AL.

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

No. 515. Decided December 11, 1967.

The Attorney General filed a petition with the Subversive Activities Control Board for an order requiring the W. E. B. DuBois Clubs of America to register as a Communist-front organization pursuant to 50 U. S. C. § 786. Prior to hearing thereon appellants sued in the District Court to have the registration provisions declared unconstitutional. A three-judge District Court dismissed the complaint for failure to exhaust administrative remedies. *Held:* Ordinarily where Congress has provided a civil proceeding in which appellants can raise their constitutional claims, this administrative procedure should be followed so that the District Court will not have to decide the constitutional issues devoid of factual context and before it is clear that appellants are covered by the Act. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), distinguished.

277 F. Supp. 971, affirmed.

William M. Kunstler, Arthur Kinoy, Melvin L. Wulf, David Rein, Monroe H. Freedman and *Floyd McKissick* for appellants.

Acting Solicitor General Spritzer, Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls and *Lee B. Anderson* for appellees.

PER CURIAM.

On March 4, 1966, the Attorney General petitioned the Subversive Activities Control Board for an order, after appropriate hearings, requiring the W. E. B. DuBois Clubs of America to register with the Attorney General as a Communist-front organization.[1] On April 26, 1966,

[1] The term "Communist-front organization" is defined in § 3 (4) of the Internal Security Act of 1950, 64 Stat. 989, 50 U. S. C.

before hearings were held, appellants attempted to bypass the Board by suing in the District Court.[2] Appellants' complaint in the District Court alleged that the Communist-front registration provisions of the Act were unconstitutional.[3] The complaint also alleged that the "very pendency of these administrative proceedings . . . has resulted and will continue to result . . . in immediate and irreparable injury to fundamental constitutional rights . . . ." Appellants asked the District

§ 782 (4). Communist-front organizations are required to register with the Attorney General. 50 U. S. C. § 786. When a Communist-front organization does not register, the Attorney General may petition the SACB for an order requiring registration. 50 U. S. C. § 792.

[2] On April 27, 1966, appellants also filed with the Board a motion to dismiss the Attorney General's petition. The Board denied this motion and, subsequently, on August 18, 1966, appellants filed an answer to the Attorney General's petition. According to the District Court, the DuBois Clubs "(1) denied generally that it was a Communist-front organization within the meaning of the Act, and (2) denied various allegations of fact made by the Attorney General in the petition."

[3] Appellants attacked the provisions, 50 U. S. C. §§ 786 (b), (c), and (d), "on their face and as applied" as violations of Art. I, § 9, cl. 3, Art. III, and the First, Fifth, Eighth, Ninth, Tenth, Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution. Although the Communist-front provisions have been upheld by the District of Columbia Circuit, *American Committee for Protection of Foreign Born* v. *SACB,* 117 U. S. App. D. C. 393, 401, 331 F. 2d 53, 61 (1963), reversed on other grounds, 380 U. S. 503 (1965); *Veterans of the Abraham Lincoln Brigade* v. *SACB,* 117 U. S. App. D. C. 404, 413, 331 F. 2d 64, 73 (1963), reversed on other grounds, 380 U. S. 513 (1965); *Weinstock* v. *SACB,* 118 U. S. App. D. C. 1, 331 F. 2d 75 (1963); *Jefferson School of Social Science* v. *SACB,* 118 U. S. App. D. C. 2, 331 F. 2d 76 (1963), their constitutionality has not been specifically determined by this Court. *American Committee for Protection of Foreign Born* v. *SACB,* 380 U. S. 503 (1965); *Veterans of the Abraham Lincoln Brigade* v. *SACB,* 380 U. S. 513 (1965). Cf. *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964).

Court for an order declaring the Communist-front registration provisions unconstitutional and also for an order enjoining the Attorney General and the SACB from enforcing them. A three-judge District Court, convened on appellants' motion, dismissed the complaint because appellants had failed to exhaust their administrative remedies.[4] This appeal followed.

Before there may be proceedings to punish appellants for failure to register with the Attorney General, the SACB must first find that the DuBois Clubs is a Communist-front organization and issue an order to that effect.[5] The Act provides for a full evidentiary hearing which is to be held in public. Appellants may be represented by counsel, offer oral or documentary evidence, submit rebuttal evidence, and conduct cross-examination. The SACB must make a written report and state its finding of fact. If appellants are aggrieved by the Board's order, they may obtain review in the United States Court of Appeals for the District of Columbia Circuit which may set aside the order if it is not "supported by the preponderance of the evidence." [6] Upon motion of a party, the Court of Appeals may order the Board to take additional evidence. Of course, if the Board and the Court of Appeals find that the Act does cover appellants, they may challenge its constitutionality either as applied or on its face. Judgments of the Court of Appeals are reviewable by this Court on certiorari.[7]

It is evident that Congress has provided a way for appellants to raise their constitutional claims. But appellants, denying that they are within the coverage

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[4] However, the District Court did stay further Board proceedings pending this Court's disposition of the case.

[5] 50 U. S. C. § 794 (a).

[6] See *National Council of American-Soviet Friendship* v. *SACB*, 116 U. S. App. D. C. 162, 322 F. 2d 375 (1963).

[7] See 50 U. S. C. §§ 792 (d), (g), 793 (a).

of the Act, wish to litigate these claims in an injunctive proceeding in the District Court. The effect would be that important and difficult constitutional issues would be decided devoid of factual context and before it was clear that appellants were covered by the Act.[8] We have previously refused to decide the constitutionality of the very provisions involved here because it was not clear that the Act would be applied to the objecting parties. *American Committee for Protection of Foreign Born* v. *SACB*, 380 U. S. 503, *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U. S. 513. Similarly, the District Court should not be forced to decide these constitutional questions in a vacuum.

Appellants rely on *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), to support their contention that the usual rule requiring exhaustion of administrative remedies[9] should not apply in this case. In *Dombrowski*, however, the constitutional issues were presented in a factual context. Upon a record demonstrating a history of harassment of appellants in connection with their exercise of First Amendment rights, the Court ordered a federal district court to issue an injunction against pending criminal prosecutions under state statutes. This Court held the statutes "void on their face," and it concluded that, in the circumstances of that case, if appellants were required to submit to a criminal prosecution, the injury to First Amendment freedoms which had already taken place would be compounded. Accordingly,

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[8] Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–585 (1947).

[9] See, *e. g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938); *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543–545 (1946); *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771–774 (1947); *Allen* v. *Grand Cent. Aircraft Co.*, 347 U. S. 535, 553 (1954); *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481–482 (1964).

the Court allowed appellants to assert their claims in an equitable proceeding.

In this case, the complaint and the affidavits constitute no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to "harass" appellants and that harassment was the intended result of the Attorney General's announcement that he had filed a petition with the SACB. Further, appellants are not being forced to assert their claims in a criminal prosecution. As the court below made clear, "Congress has made careful provision that no tangible sanctions can come into play until the facts have been explored in open hearing [before the Board] and the courts have scrutinized what they show, both in their adequacy to support a registration order and in their constitutional impact upon the statute itself." [10] In the context of this case, we decline to require the court below to permit substitution of an injunctive proceeding for the civil proceeding which Congress has specifically provided.

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

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I believe that the provisions of the Act now challenged are void on their face, that there are no factual issues to be resolved which should condition the outcome of the litigation, and that therefore there is no reason for the lower court to abstain from exercising its jurisdiction.

The statute defines "Communist-front organization" as one which is substantially directed, dominated, or controlled by a Communist-action organization and which is primarily operated for the purpose of giving

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[10] See 50 U. S. C. §§ 793 (b), 794.

aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. 50 U. S. C. § 782 (4). A Communist-front organization, as defined, is not a group engaged in *action* but in *advocacy;* or if *action* is included, so is advocacy, for § 781 (15) in describing the growth of the Communist movement speaks of those who seek "converts far and wide by an extensive system of schooling and indoctrination."

Legislation curbing or penalizing *advocacy* even of ideas we despise is, I submit, at war with the First Amendment. Under our Constitution one's belief or ideology is of no concern to government. One can think as he likes, embrace any philosophy he chooses, and select the politics that best fits his ideals or needs. That is all implicit in the First Amendment rights of assembly, petition, and expression. Those rights merely enforce, protect, or sanction the beliefs or ideology to which one is committed. So does the right of association which we have said over and again to be part and parcel of those First Amendment rights. Basic in this scheme of values is the immunity of beliefs, ideas, and ideology from government inquiry, probing, or surveillance.[1]

Jefferson expressed the American constitutional theory:

> "[T]he opinions of men are not the object of civil government, nor under its jurisdiction . . . . [I]t

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[1] Hannah Arendt writes:

"The word 'people' retained for them [the Founding Fathers] the meaning of manyness, of the endless variety of a multitude whose majesty resided in its very plurality. Opposition to public opinion, namely to the potential unanimity of all, was therefore one of the many things upon which the men of the American Revolution were in complete agreement; they knew that the public realm in a republic was constituted by an exchange of opinion between equals, and that this realm would simply disappear the very moment an exchange became superfluous because all equals happened to be of the same opinion." On Revolution 88–89 (1963).

> is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . ." Jefferson, A Bill For Establishing Religious Freedom, in The Jeffersonian Cyclopedia 976 (1900).

That is my reading of the First Amendment. Those who can be officially pilloried or punished for having a particular philosophic or political creed are effectively deterred from exercising First Amendment rights.

I see no constitutional method whereby the Government can punish or penalize one for "being a Communist" or "supporting Communists" or "promoting communism." Communism, as an ideology, embraces a broad array of ideas. To some it has appeal because the state owns the main means of production, with the result that all phases of national life are in the public sector, guaranteeing full employment. To some communism means a medical care program that reaches to the lowest levels of society. To others the communal way of life, even in agriculture, means a fuller life for the average person. To some the flowering of the dance, music, painting, sculpture, and even athletics is possible only when those arts and activities move from the private to the public sector. To some there can be no equivalent of the unemployment insurance, old age insurance, and social security that obtain in a socialized state. To others communism is a commitment to the atheistic philosophy and way of life. To still others, adherence to communism means a commitment to use force and violence, if necessary, to achieve that kind of socialist state. And to some of course it means all of the projects I have enumerated plus perhaps others as well.

The word "revolution" has of course acquired a subversive connotation in modern times. But it has roots that

are eminently respectable in American history.[2] This country is the product of revolution. Our very being emphasizes that when grievances pile high and there are no political remedies, the exercise of sovereign powers reverts to the people. Teaching and espousing revolution—as distinguished from indulging in overt acts—are therefore obviously within the range of the First Amendment.

Dennis v. *United States,* 341 U. S. 494, decided in 1951 at the peak of the notorious "witch hunt" in this Nation, is to the contrary. My Brother BLACK and I, the only remaining members of the Court who sat in that case, dissented. The crime charged and sustained was a conspiracy to teach and advocate the Marxist creed, including the overthrow of the Government by force or violence. *Id.,* at 497. No overt acts designed to overthrow the Government were charged; no attempt to overthrow was charged. The crime was an agreement to teach, advocate, and espouse a creed that was and is noxious to most Americans.

I cannot believe that *Dennis* has any continuing vitality. It is out of line with *Terminiello* v. *Chicago,* 337 U. S. 1, where a fascist was held to be protected by the First Amendment for espousing his creed, which most Americans find as obnoxious as communism.

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[2] "America had become the symbol of a society without poverty long before the modern age in its unique technological development had actually discovered the means to abolish that abject misery of sheer want which had always been held to be eternal. And only after this had happened and had become known to European mankind could the social question and the rebellion of the poor come to play a truly revolutionary role. The ancient cycle of sempiternal recurrences had been based upon an assumedly 'natural' distinction of rich and poor; the factual existence of American society prior to the outbreak of the Revolution had broken this cycle once and for all." H. Arendt, On Revolution 15–16 (1963).

It is not conceivable that the Court that decided *Dombrowski* v. *Pfister,* 380 U. S. 479, would approve *Dennis.* In *Dombrowski* a state prosecution for subversion was enjoined. The people prosecuted were fostering civil rights for Negroes in the South. While it would have been possible to win the state case on constitutional grounds, the Court held that the trial itself would result in irreparable injury. We said:

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Id.,* at 486.

A Communist-front organization under the present Act is a group promoting the world Communist movement. See 50 U. S. C. § 782 (4). If it were defined as a group which, for example, collected arms for the violent overthrow of government, the case would be free of First Amendment problems. But here as in *Dombrowski* the statute is overbroad, bringing within its scope advocacy, espousal, and teaching of a creed or of causes for which the Communist movement stands.

If an organization is classified a Communist front, serious consequences follow: employment of its members is restricted, § 784; application for or use of passports is made illegal, § 785; registration is required, § 786; use of the mails and of the radio and TV is curtailed, § 789; tax exemptions are denied, § 790. At least some of these provisions are unconstitutional under our decisions as bills of attainder or as a denial of First and Fifth Amendment rights. Yet vindication would come only after long and protracted hearings and appeals. Meanwhile there would be a profound "chilling" effect on the exercise of

First Amendment rights [3] within the principle of *Dombrowski* v. *Pfister*.

The members of the DuBois Clubs may or may not be Communists. But as I said, I see no possibility under our Constitution of penalizing one for holding or expressing that or any other belief. The DuBois Clubs may advocate causes that parallel Communist thought or Communist policies.[4] They appear, for example, to advocate the termination of the hostilities in Vietnam. But *so far as advocacy is concerned,* I see no constitutional way of putting restraints on them so long as we have the First Amendment.

Harassing them by public hearings and by probing into their beliefs and attitudes, pillorying them for their minority views by exposing them to the hearings under the Act—these actions will have the same "chilling" effect as the Court held the trial in *Dombrowski* would have had.

First Amendment values ride on what we do today. If government can investigate ideas, beliefs, and advocacy at the left end of the spectrum, I see no reason why it may not investigate at any other part of the spectrum. Yet as I read the Constitution, one of its essential purposes was to take government off the backs of people and keep it off. There is the line between action on the one hand and ideas, beliefs, and advocacy on the other. The former is a legitimate sphere for legis-

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[3] No such question was presented in *American Committee for Protection of Foreign Born* v. *SACB,* 380 U. S. 503, and *Veterans of the Abraham Lincoln Brigade* v. *SACB,* 380 U. S. 513. Those cases were reviews of the actions of the Board and did not involve the present question, whether it is necessary to exhaust administrative remedies as a prerequisite to challenging the Act as being invalid on its face.

[4] On the vices of parallelism see *United States* v. *Lattimore,* 127 F. Supp. 405 (D. C. D. C.), aff'd by equally divided court, 98 U. S. App. D. C. 77, 232 F. 2d 334 (*en banc*).

lation. Ideas, beliefs, and advocacy are beyond the reach of committees, agencies, Congress, and the courts.

MR. JUSTICE BLACK and I adhere to the views we expressed in the other cases we have had under this Act (see, *e. g., Communist Party* v. *SACB,* 367 U. S. 1, 137, 169; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 517, 519; *American Committee* v. *SACB,* 380 U. S. 503, 506, 511; *Brigade Veterans* v. *SACB,* 380 U. S. 513, 514) and would reverse the judgment below.

BURKE, DBA RANCH ACRES LIQUORS, ET AL. *v.* FORD ET AL., DBA ALL BRANDS SALES CO., ET AL.

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

No. 632. Decided December 11, 1967.

Petitioners, Oklahoma liquor retailers, sued under § 1 of the Sherman Act to enjoin a state-wide market division by territories and brands by the Oklahoma liquor wholesalers. There are no distilleries in Oklahoma. Out-of-state liquor is shipped in substantial volume to wholesalers' warehouses and held there until purchased by retailers. The District Court, finding, *inter alia,* that the liquor "came to rest" in the wholesalers' warehouses and that the Act's interstate commerce prerequisite was thus not satisfied, entered judgment for the wholesalers. The Court of Appeals affirmed, solely on the ground that the proof did not show that the activities complained of were in or adversely affected interstate commerce. *Held:* Whether or not the lower courts' conclusion was valid that the market division did not occur *in* interstate commerce, it inevitably *affected* such commerce and thus came within the Act since the territorial division by reducing competition almost surely resulted in fewer sales to wholesalers by out-of-state distillers and the brands division meant fewer wholesale outlets available to any one distiller.

Certiorari granted; 377 F. 2d 901, reversed.

Robert S. Rizley for petitioners.

Irvine E. Ungerman for respondents.

PER CURIAM.

Petitioners, Oklahoma liquor retailers, brought this action under § 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, to enjoin an alleged state-wide market division by all Oklahoma liquor wholesalers. The trial judge, sitting without a jury, found that there had in fact been a division of markets—both by territories and by brands. The court nevertheless entered judgment for

the wholesalers because, among other reasons, it found that the interstate commerce prerequisite of the Sherman Act was not satisfied. The Court of Appeals affirmed upon the sole ground that "the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." 377 F. 2d 901, 903.

There are no liquor distilleries in Oklahoma. Liquor is shipped in from other States to the warehouses of the wholesalers, where it is inventoried and held until purchased by retailers. The District Court and the Court of Appeals found that the liquor "came to rest" in the wholesalers' warehouses and that interstate commerce ceased at that point. Hence, they concluded that the wholesalers' division of the Oklahoma market did not take place "in interstate commerce." But whatever the validity of that conclusion, it does not end the matter. For it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce. *United States* v. *Employing Plasterers Association,* 347 U. S. 186; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219.

Recognizing this, the District Court went on to find that the wholesalers' market division had no effect on interstate commerce, and the Court of Appeals agreed. The Court of Appeals held that proof of a state-wide wholesalers' market division in the distribution of goods retailed in substantial volume [1] within the State but produced entirely out of the State was not by itself sufficient proof of an effect on interstate commerce. We disagree. Horizontal territorial divisions almost invariably reduce competition among the participants. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211; *United States*

[1] Between $44 and $45 million in wholesale purchases in 1964.

v. *Sealy, Inc.*, 388 U. S. 350. When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers.[2] In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the state-wide wholesalers' market division inevitably affected interstate commerce.

The petition for certiorari is granted and the judgment of the Court of Appeals is reversed. The case is remanded to that court for further proceedings consistent with this opinion.

MR. JUSTICE HARLAN concurs in the result.

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[2] The Court of Appeals stressed the fact that unit sales to the wholesalers increased (885,976 cases to 891,176 cases) from 1963 to 1964 while the market division was in effect. But if there had been free competition among the wholesalers—all other things being equal—presumably sales to them would have increased even more.

The increase in liquor sales noted by the Court of Appeals was 0.6%; during the same period total personal income in Oklahoma increased from $4,880 million to $5,220 million, an increase of 7.0%. Table 1, Survey of Current Business, p. 30, Office of Business Economics, Department of Commerce (August 1967). Adjusting for concurrent price inflation (see Table 8.1, Survey of Current Business, p. 42 (July 1967)), the increase in real personal income was approximately 5.7%.

EAGAR ET AL. *v.* MAGMA COPPER CO.

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

No 659. Decided December 11, 1967.

Certiorari granted; 380 F. 2d 318, reversed.

Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley, Alan S. Rosenthal and *Richard S. Salzman* for petitioners.

Howard A. Twitty for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, dissenting.

Petitioner Eagar [1] began working for Magma Copper Company March 12, 1958, and left to enter military service just shy of one year later, March 6, 1959. After being honorably discharged, Eagar promptly resumed his employment with Magma, May 2, 1962. He seeks vacation pay for the work year following March 12, 1958, and for the Memorial Day and Independence Day holidays in 1962, which followed his re-employment.

[1] There are three other employees of respondent Magma Copper in addition to Eagar on whose behalf the Department of Justice has sought review. The Solicitor General and respondent agree that the facts in Eagar's case are representative of the other petitioners' cases, and this Court is asked to resolve the legal dispute on the basis of these facts.

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Under Magma's collective bargaining agreement with petitioners' union, paid vacations are provided at the end of a work year if the employee works 75% of the shifts available to him in that year and is employed with Magma on the one-year anniversary date. Employees who get paid holidays must have worked the shift before and the shift after the holiday and have been on Magma's payroll continuously for three months before the holiday.

Although Eagar had worked 75% of the shifts for the year March 12, 1958, to March 12, 1959, and had worked the shifts before and after Memorial Day and Independence Day in 1962, Magma denied him benefits. Eagar was not, Magma claims, in its employ on March 12, 1959, nor had he been on the payroll three straight months prior to Memorial and Independence days in 1962.

The majority hold that Magma has violated § 9 (c) of the Universal Military Training and Service Act, 62 Stat. 615, as amended, 50 U. S. C. App. § 459, which provides, *inter alia,* that a returning serviceman such as Eagar who is re-employed "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, [and] shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees *on furlough or leave of absence* in effect with the employer at the time such person was inducted into such forces . . . ." [2] (Italics added.)

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[2] Section 9 (c) also provides:

"It is declared to be the sense of the Congress that any person who is restored to a position in accordance with . . . this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Section 9 (c) speaks both of "seniority" and of "insurance or other benefits." In dealing with seniority problems under a like statutory provision, we held that the employee is to be treated as if he had kept his position continuously during his stint in the Army. *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225, 228; *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284–285.

But this case does not concern "seniority." No employee of Magma, it appears, regardless of how long he has been with the firm, gets paid vacation if he is not on the payroll on his work-year anniversary date. No employee gets a paid holiday unless he has been with Magma for the three preceding months. The *length* of vacation and the *amount* of vacation and holiday pay Magma gives do turn on seniority. But petitioners do not contest Magma's assertion that it does figure the length of vacation for returning servicemen as though they had been constantly on the payroll during their tour of duty in the military. In considering the employee's eligibility for vacation and holiday pay, since seniority is not involved, the courts must apply the "other benefits" clause of § 9 (c). See *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 738 (C. A. 2d Cir.). As noted, these benefits are accorded as if the employee were on "furlough or leave of absence" while in service. That is precisely what Magma has done.

Accardi admonishes the courts to give the term "seniority" a broad interpretation. 383 U. S., at 229. But *Accardi* did not involve the "other benefits" clause, which must be applicable in this clear fringe-benefits case if at all.[3] As Judge Learned Hand said, "[O]bviously the

[3] The "sense of Congress" proviso in § 9 (c) does not indicate a different result. The language was added in 1948 when the "seniority" and "other benefits" provisions were re-enacted upon the expiration of § 8 of the Selective Training and Service Act of 1940, 54 Stat. 890. The "sense of Congress" is concerned with employee "status,"

considerations which might make it proper that service in the Army should not affect a man's seniority are utterly different from those which should count in computing vacations." *Dwyer* v. *Crosby Co.*, 167 F. 2d 567, 570 (C. A. 2d Cir.). I would affirm the judgment below.

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see n. 2, *supra*. But if "status" were meant to include eligibility for fringe benefits, Congress would not have left unchanged the explicit provision that "other benefits" are to be dispensed as if the returning serviceman had been on leave of absence.

Per Curiam.

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL.

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

No. 353. Decided December 11, 1967.

Petition for certiorari denied because case *held* not ripe for review where Court of Appeals had ordered remand for District Court to determine if petitioner union was in contempt of District Court's order not to strike and, if so, whether that court's coercive fine was warranted.

Reported below: 127 U. S. App. D. C. 23, 380 F. 2d 570.

Joseph L. Rauh, Jr., John Silard, Harriett R. Taylor, Isaac N. Groner, Harold C. Heiss, Donald W. Bennett, Alex Elson, Willard J. Lassers and *Aaron S. Wolff* for petitioners.

Francis M. Shea, Richard T. Conway, James R. Wolfe and *Charles I. Hopkins, Jr.*, for respondents.

PER CURIAM.

The order of December 4, 1967, denying the petition for a writ of certiorari* is vacated.

This case is a consequence of a dispute with respect to the scope of an arbitration award governing the manning of trains and engines in freight service. The union took the position that the award had no effect after 12:01 a. m., March 31, 1966. On March 28, the District Court for the District of Columbia issued a temporary restraining order forbidding a strike. On March 31, the union struck against a number of railroads. The District Court

*[REPORTER'S NOTE: See *post*, p. 970.]

entered contempt orders, imposing substantial fines for alleged violation of its restraining order. The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was "of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey."

Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied. See *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 257–258 (1916).

MR. JUSTICE BLACK would grant the petition and set the case for argument.

December 11, 1967.

GERMANN *v.* UNITED STATES.

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

No. 384. Decided December 11, 1967.

Certiorari granted; 370 F. 2d 1019, vacated and remanded.

Louis Bender for petitioner.

Solicitor General Griswold, Assistant Attorney General Vinson, Ralph S. Spritzer, Beatrice Rosenberg and *Paul C. Summitt* for the United States.

PER CURIAM.

The petition for certiorari is granted.

The judgment of the United States Court of Appeals for the Second Circuit is vacated, and the case is remanded to the United States District Court for the Southern District of New York in order to give that court an opportunity to consider the motion to substitute the Konkursamt Basel-Stadt (the Bankruptcy Office of Basel, Switzerland) as party petitioner, and to reconsider that court's former adjudication of contempt and the accompanying fine in light of the original petitioner's death.

It is so ordered.

UNITED NATIONAL LIFE INSURANCE CO. ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 669. Decided December 11, 1967.

66 Cal. 2d 577, 427 P. 2d 199, appeal dismissed.

Hugh P. Cox, Henry P. Sailer, Dennis G. Lyons and *William W. Vaughn* for appellants.

Thomas C. Lynch, Attorney General of California, and *H. Warren Siegel,* 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.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case assigned for oral argument.

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

DEMERS *v.* LANGTON, TAX ADMINISTRATOR.

APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

No. 650, Misc. Decided December 11, 1967.

— R. I. —, 230 A. 2d 870, 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.

TOWNSHIP OF SPRINGFIELD *v.* GREEN ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 675. Decided December 11, 1967.

Appeal dismissed and certiorari denied.

Read Rocap, Jr., for appellant.

R. Winfield Baile 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.

DEVORE *v.* WEST VIRGINIA BOARD OF DENTAL EXAMINERS ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 686. Decided December 11, 1967.

Appeal dismissed.

William C. Beatty for appellant.

C. Donald Robertson, Attorney General of West Virginia, and *Thomas B. Yost*, 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.

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

TCHEREPNIN ET AL. *v.* KNIGHT ET AL.

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

No. 104. Argued November 13, 1967.—Decided December 18, 1967.

Withdrawable capital share in state-chartered savings and loan association *held* to be a "security" within the meaning of the Securities Exchange Act of 1934. Pp. 335–346.

371 F. 2d 374, reversed.

Arnold I. Shure argued the cause for petitioners. With him on the briefs were *Anthony Bradley Eben, Solomon Jesmer* and *Robert A. Sprecher.*

Stuart D. Perlman, Assistant Attorney General of Illinois, argued the cause for respondents Knight et al. With him on the brief were *William G. Clark,* Attorney General, *Richard E. Friedman,* First Assistant Attorney General, and *John J. O'Toole,* Assistant Attorney General. *Charles J. O'Laughlin* argued the cause for respondents City Savings Association et al. With him on the brief was *Albert E. Jenner, Jr. Kinsey T. James* filed a memorandum for respondent Mensik.

Philip A. Loomis, Jr., argued the cause for the Securities and Exchange Commission, as *amicus curiae,* urging reversal. With him on the briefs were *Solicitor General Griswold, Ralph S. Spritzer, David Ferber* and *Richard E. Nathan.*

Opinion of the Court by MR. CHIEF JUSTICE WARREN, announced by MR. JUSTICE BRENNAN.

The narrow question for decision in this case is whether a withdrawable capital share in an Illinois savings and loan association is a "security" within the meaning of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.*

The petitioners are a number of individuals holding withdrawable capital shares in City Savings Association of Chicago, a corporation doing business under the Illinois Savings and Loan Act.[1] On July 24, 1964, they filed a class action [2] in the United States District Court for the Northern District of Illinois, alleging that the sales of the shares to them by City Savings were void under § 29 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (b), and asking that the sales be rescinded. Named as defendants in the complaint were City Savings, its officers and directors, two state officials who had taken custody of the Association,[3] and three individuals named as liquidators by the Association's shareholders in voting a voluntary plan of liquidation.[4] The complaint alleged that the withdrawable capital shares purchased by the petitioners were securities within the meaning of § 3 (a) (10) of the Securities Exchange Act,[5] that the petitioners had purchased such securities in reliance upon printed solicitations received from City Savings through the mails, and that such

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[1] Ill. Rev. Stat., c. 32, §§ 701–944.

[2] The members of the class were identified in the complaint as "more than 5,000 investors [who] have purchased securities [*i. e.*, withdrawable capital shares] of City Savings since July 23, 1959 . . . ." The total investment of the class members was alleged to amount to "between fifteen and twenty million dollars."

[3] The state officials had acted under the authority of Ill. Rev. Stat., c. 32, § 848. The record does not disclose the precise reason for placing City Savings under state custody. However, the complaint filed in the District Court and the petitioners' brief in this Court suggest that City Savings has been the victim of mismanagement of major proportions.

[4] The voluntary plan of liquidation was formally approved four days after the petitioners had filed their complaint. However, the three liquidators had been nominated prior to the filing of the complaint, and their election had been a foregone conclusion. Voluntary liquidation is authorized by Ill. Rev. Stat., c. 32, Art. 9.

[5] 15 U. S. C. § 78c (a) (10).

solicitations contained false and misleading statements in violation of § 10 (b) of the Securities Exchange Act [6] and of Rule 10b–5 adopted thereunder by the Securities and Exchange Commission.[7] More specifically, the complaint alleged that the mailed solicitations portrayed City Savings as a financially strong institution and its shares as desirable investments. But the solicitations failed to disclose, *inter alia,* that the Association was controlled by an individual who had been convicted of mail fraud involving savings and loan associations, that the Association had been denied federal insurance of its accounts because of its unsafe financial policies, and that the Association had been forced to restrict withdrawals by holders of previously purchased shares.

The respondents filed motions to dismiss on the ground that the complaint failed to state a cause of action under § 10 (b) because the petitioners' withdrawable capital shares were not securities within the meaning of the Securities Exchange Act. The District Court denied the motions to dismiss, ruling that the petitioners' shares fell within the Act's definition of securities. However, recognizing that the ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion," the District Court certified its order for an interlocutory appeal to the Court of Appeals for the Seventh Circuit under 28 U. S. C. § 1292 (b). The Court of Appeals, with one judge dissenting, agreed with respondents that the withdrawable capital shares issued by City Savings did not fit the definition of securities in § 3 (a)(10) of the Securities Exchange Act. Consequently, it ruled that the District Court was without jurisdiction in the case, and it remanded with instructions to dismiss the com-

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[6] 15 U. S. C. § 78j (b).

[7] 17 CFR § 240.10b–5.

plaint. 371 F. 2d 374. Because this case presents an important question concerning the scope of the Securities Exchange Act, we granted certiorari. 387 U. S. 941. We disagree with the construction placed on § 3 (a)(10) by the Court of Appeals, and we reverse its judgment.

Section 3 (a)(10) of the Securities Exchange Act of 1934 provides:

> "3. (a) When used in this title, unless the context otherwise requires—
>
> . . . . .
>
> "(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

This case presents the Court with its first opportunity to construe this statutory provision. But we do not start with a blank slate. The Securities Act of 1933 (48 Stat. 74, as amended) contains a definition of security [8]

[8] "2. When used in this title, unless the context otherwise requires—

"(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or

virtually identical to that contained in the 1934 Act. Consequently, we are aided in our task by our prior decisions which have considered the meaning of security under the 1933 Act.[9] In addition, we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation.[10] One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities, and the definition of security in § 3 (a)(10) necessarily determines the classes of investments and investors which will receive the Act's protections. Finally, we are reminded that, in searching for the meaning and scope of the word "security" in the Act, form should be disregarded for substance and the emphasis should be on economic reality. *S. E. C.* v. *W. J. Howey Co.*, 328 U. S. 293, 298 (1946).

Because City Savings' authority to issue withdrawable capital shares is conferred by the Illinois Savings and Loan Act, we look first to the legal character imparted to those shares by that statute. The issuance of with-

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participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security'. . . ." 48 Stat. 905.

[9] *S. E. C.* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967); *S. E. C.* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65 (1959); *S. E. C.* v. *W. J. Howey Co.*, 328 U. S. 293 (1946); and *S. E. C.* v. *C. M. Joiner Corp.*, 320 U. S. 344 (1943).

[10] The Securities Exchange Act was a product of a lengthy and highly publicized investigation by the Senate Committee on Banking and Currency into stock market practices and the reasons for the stock market crash of October 1929. See Loomis, The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940, 28 Geo. Wash. L. Rev. 214, 216–217 (1960).

drawable capital shares is one of two methods by which Illinois savings and loan associations are authorized to raise capital.[11] City Savings' capital is represented exclusively by withdrawable capital shares. Each holder of a withdrawable capital share becomes a member of the association [12] and is entitled to "the vote of one share for each one hundred dollars of the aggregate withdrawal value of such accounts, and shall have the vote of one share for any fraction of one hundred dollars." [13] The holders of withdrawable capital shares are not entitled to a fixed rate of return. Rather, they receive dividends declared by an association's board of directors and based on the association's profits.[14] The power of a holder of a withdrawable capital share to make voluntary withdrawals is restricted by statute.[15] While withdrawable capital shares are declared nonnegotiable and not subject to Article 8 of the Uniform Commercial Code,[16] such shares can be transferred "by written assignment accompanied by delivery of the appropriate certificate or account book." [17]

While Illinois law gives legal form to the withdrawable capital shares held by the petitioners, federal law must govern whether shares having such legal form constitute

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[11] "The capital of an association may be represented by withdrawable capital accounts (shares and share accounts) or permanent reserve shares, or both . . . ." Ill. Rev. Stat., c. 32, § 761 (a). "Permanent reserve shares shall constitute a secondary reserve out of which losses shall be paid after all other available reserves have been exhausted . . . ." *Id.*, § 763.

[12] *Id.*, § 741 (a)(1).

[13] *Id.*, § 742 (d)(2). Each borrower from a savings and loan association automatically becomes a member of the association, *id.*, § 741 (a)(2), but is entitled to only one vote, *id.*, § 742 (d)(4).

[14] *Id.*, § 778 (c). The directors are required to apportion an association's profits at least annually.

[15] *Id.*, § 773.

[16] *Id.*, § 768 (c).

[17] *Id.*, § 768 (b).

securities under the Securities Exchange Act.[18] Even a casual reading of § 3 (a)(10) of the 1934 Act reveals that Congress did not intend to adopt a narrow or restrictive concept of security in defining that term.[19] As this Court observed with respect to the definition of security in § 2 (1) of the Securities Act of 1933, "the reach of the Act does not stop with the obvious and commonplace." *S. E. C.* v. *C. M. Joiner Corp.*, 320 U. S. 344, 351 (1943). As used in both the 1933 and 1934 Acts, security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *S. E. C.* v. *W. J. Howey Co., supra,* at 299. We have little difficulty fitting the withdrawable capital shares held by the petitioners into that expansive concept of security. Of the several types of instruments designated as securities by § 3 (a)(10) of the 1934 Act, the petitioners' shares most closely resemble investment contracts. "The test [for an investment contract] is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.*, at 301. Petitioners are participants in a common enterprise—a money-lending operation dependent for its success upon the skill and efforts of the management of City Savings in making sound loans. Because Illinois law ties the payment of dividends on withdrawable capital shares to an apportionment of profits,[20] the petitioners

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[18] Cf. *S. E. C.* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, 69.

[19] "[T]he term 'security' [in the Securities Act of 1933 is defined] in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security." H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933).

[20] Ill. Rev. Stat., c. 32, § 778.

can expect a return on their investment only if City Savings shows a profit. If City Savings fails to show a profit due to the lack of skill or honesty of its managers, the petitioners will receive no dividends. Similarly, the amount of dividends the petitioners can expect is tied directly to the amount of profits City Savings makes from year to year. Clearly, then, the petitioners' withdrawable capital shares have the essential attributes of investment contracts as that term is used in § 3 (a)(10) and as it was defined in *Howey*.[21] But we need not rest our decision on that conclusion alone. "Instruments may be included within any of [the Act's] definitions, as matter of law, if on their face they answer to the name or description." *S. E. C.* v. *C. M. Joiner Corp., supra,* at 351. The petitioners' shares fit well within several other descriptive terms contained in § 3 (a)(10). For example, the petitioners' shares can be viewed as "certificate[s] of interest or participation in any profit-sharing agreement." The shares must be evidenced by a certificate,[22] and Illinois law makes the payment of dividends contingent upon an apportionment of profits. These same factors make the shares "stock" under § 3 (a)(10). Finally, the petitioners' shares can be considered "transferable share[s]" since "[t]he holder of a withdrawable capital account

[21] The Court of Appeals refused to apply the *Howey* test in this case. It did not view the petitioners as entering a common enterprise with profits to come solely from the efforts of others because "profit is derived from loans to other members of the savings and loan association." 371 F. 2d, at 377. That analysis, however, places too much emphasis on the fact that, under Illinois law, anyone who borrows from a savings and loan association automatically becomes a member of the association. Ill. Rev. Stat., c. 32, § 741 (a)(2). It also overlooks the several other classes of investments which Illinois savings and loan associations are authorized to make. *Id.,* §§ 792–792.10.

[22] *Id.,* § 768 (a).

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may transfer his rights therein absolutely or conditionally to any other person eligible to hold the same." [23]

Our conclusion that a withdrawable capital share is a security within the meaning of § 3 (a)(10) is reinforced by the legislative history of federal securities legislation. When Congress was considering the Securities Act of 1933, representatives of the United States Building and Loan League appeared before House and Senate committees to plead the cause of the League's members. The League's spokesmen asked Congress for an exemption from the Act's registration requirements for building and loan association shares. The spokesmen argued that the cost of complying with the registration requirements whenever a building and loan association issued a new share would be prohibitive. However, the League's spokesmen emphatically endorsed the coverage of building and loan associations under the Act's antifraud provisions.[24] Thus, Morton Bodfish, the League's Executive Manager, told the House Committee on Interstate and Foreign Commerce:

> "When a person saves his money in a building and loan association, he purchases shares and nearly all of our $8,000,000,000 of assets are in the form of shares . . . .
>
> "The practical difficulties of an association having to register every issue of shares . . . are obvious.[25]
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> . . . . . .

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[23] *Id.*, § 768 (b).

[24] Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 70–75 (1933) (testimony of Morton Bodfish, Executive Manager, United States Building and Loan League); Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 50–54 (1933) (testimony of C. Clinton James, Chairman, Federal Legislative Committee of the United States Building and Loan League).

[25] Hearings on H. R. 4314, *supra*, at 71.

> "[W]e approve vigorously and are quite willing to be subject to section 13, which is the fraud section . . . .[26]
>
> . . . . .
>
> "Now, gentlemen, we want you to leave the fraud sections there, just as they are, so that [if] any fraud developed in connection with the management of any of our institutions anywhere or under the name of building and loan, this law can be effective and operative." [27]

Congress responded to the appeals from the building and loan interests by including in § 3 (a)(5) of the 1933 Act an exemption from the registration requirements for "[a]ny security issued by a building and loan association, homestead association, savings and loan association, or similar institution . . . ." [28] It seems quite apparent that the building and loan interests would not have sought an exemption from the registration requirements and Congress would not have granted it unless there was general agreement that the Act's definition of security in § 2 (1) brought building and loan shares within the purview of the Act.[29]

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[26] *Id.*, at 73.

[27] *Id.*, at 74.

[28] 15 U. S. C. § 77c (a)(5).

[29] The view expressed by the building and loan association interests in 1933 has not changed over the years. The United States Savings and Loan League, in its Membership Bulletin, made the following comments on the Court's decision to hear this case:

"This case is not necessarily as significant and earth shaking in its implications as many savings and loan people assume. In the first place the savings and loan business always has assumed that it was subject to the antifraud provisions of the Securities Acts relating to advertising practices, etc. Regardless of how this case goes it does not mean that savings and loan associations will be any more involved with the SEC than they have been in the past. It does not mean that associations would have to register with the

The same Congress which passed the Securities Act in 1933 approved the Securities Exchange Act in 1934, and the definition of security contained in the 1934 Act is virtually identical to that in the earlier enactment. The legislative history of the 1934 Act is silent with respect to savings and loan shares, but the Senate Report on the Act asserts that its definition of security was intended to be "substantially the same as [that contained] in the Securities Act of 1933." S. Rep. No. 792, 73d Cong., 2d Sess., 14 (1934). In addition, when Congress amended the 1934 Act in 1964 to provide for the registration of certain equity securities, it provided an exemption for "any security . . . issued by a savings and loan association . . . ." 15 U. S. C. § 78*l* (g)(2)(C). Thus, the 1934 Act has a pattern of coverage and exemption of savings and loan shares similar to the pattern in the 1933 Act.[30]

SEC and be subject to all of the rules that apply to typical securities transactions."

United States Savings and Loan League, Membership Bulletin, June 28, 1967, p. 15.

[30] The Court of Appeals rejected the view that we take of the legislative history of federal securities legislation with respect to savings and loan association shares. In effect, the Court of Appeals viewed Congress' exemption of savings and loan shares from the registration requirements as what Professor Loss calls "supererogation." 1 Loss, Securities Regulation 497 (2d ed. 1961). The Court of Appeals based its argument on the analogy it drew between ordinary insurance policies, which are also exempted from the 1933 Act's registration provisions, and savings and loan shares. The analogy, however, is inappropriate. Congress specifically stated that "insurance policies are not to be regarded as securities subject to the provisions of the act," H. R. Rep. No. 85, 73d Cong., 1st Sess., 15 (1933), and the exemption from registration for insurance policies was clearly supererogation. See *S. E. C.* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, 74, n. 4. The same cannot be said for savings and loan shares, particularly when the spokesmen for those who issue savings and loan shares had told Congress they fully expected to be covered by the 1933 Act's antifraud provisions.

We view the Court of Appeals' conclusion that the petitioners' withdrawable capital shares are not securities as a product of misplaced emphasis. After reviewing the definition of security in § 3(a)(10), the Court of Appeals stated that "[t]he type of interest now before us, if it is covered by this definition, must be an 'instrument commonly known as a "security." ' " 371 F. 2d, at 376. Thus, the Court of Appeals read the words an "instrument commonly known as a 'security' " in § 3 (a)(10) as a limitation on the other descriptive terms used in the statutory definition. This, of course, is contrary to our decision in *Joiner* where we rejected the respondents' invitation to "constrict the more general terms substantially to the specific terms which they follow." 320 U. S., at 350. In addition, we cannot agree with the Court of Appeals' analysis which led it to conclude that a withdrawable capital share is not an "instrument commonly known as a 'security.' " For example, the Court of Appeals stressed that withdrawable capital shares can be issued in unlimited amounts and their holders have no pre-emptive rights. Yet the same is true of shares in mutual funds, and we have little doubt that such shares are securities within the meaning of the Securities Exchange Act. The Court of Appeals also emphasized that the withdrawable capital shares are made nonnegotiable by Illinois law. This simply reflects the fact that such shares are not a usual medium for trading in the markets. The same can be said for the types of interests which we found to be securities in *Howey* and *Joiner*.[31] The Court of Appeals noted further that the holders of withdrawable capital shares are not entitled under Illinois law to inspect the gen-

[31] In *Howey*, this Court ruled that interests in orange groves were securities under the 1933 Act. In *Joiner*, it held that oil leases were securities under the Act.

eral books and records of the association. Inspection of that nature, however, is not a right which universally attaches to corporate shares.[32] In short, the various factors highlighted by the Court of Appeals in concluding that the withdrawable capital shares are not an "instrument commonly known as a 'security' " serve only to distinguish among different types of securities. They do not, standing alone, govern whether a particular instrument is a security under the federal securities laws.

The Court of Appeals thought it highly significant that the term "evidence of indebtedness" appears in the definition of security in the 1933 Act but was omitted from the definition in the 1934 Act. We cannot agree that the omission has any controlling significance in this case. For one thing, we have found other descriptive terms in § 3 (a)(10) which cover the petitioners' withdrawable capital shares. The Court of Appeals' emphasis on the omission of "evidence of indebtedness" from § 3 (a)(10) flowed from its conclusion that the petitioners' "relationship with the enterprise is much more that of debtor-creditor than investment." 371 F. 2d, at 377. That assertion, however, overlooks the fact that, under Illinois law, the holder of a withdrawable capital share does not become a creditor of a savings and loan association even when he files an application for withdrawal.[33] For this reason alone, the omission of the term "evidence of indebtedness" from § 3 (a)(10) provides no basis for concluding that Congress intended to exclude the petitioners' withdrawable capital shares from the Act's coverage.

The Court of Appeals sought a policy basis for its decision when it noted that the federal securities laws

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[32] See Baker & Cary, Cases and Materials on Corporations 739–741 (3d ed. 1958).

[33] Ill. Rev. Stat., c. 32, § 773 (f).

"were passed in the aftermath of the great economic disaster of 1929. Congress was concerned with speculation in securities which had a fluctuating value and which were traded in securities exchanges or in over-the-counter markets." 371 F. 2d, at 377. This statement suggests, and the respondents have argued in this Court, that the petitioners' withdrawable capital shares are not within the purview of the 1934 Act because their value normally does not fluctuate and because they are normally not traded in securities exchanges or over-the-counter. The accuracy of this assertion is open to question.[34] But, more important, it is irrelevant to the question before us. As was observed in *Howey*, "it is immaterial whether the enterprise is speculative or non-speculative." 328 U. S., at 301.

Policy considerations lead us to conclude that these petitioners are entitled to the investor protections afforded by the Securities Exchange Act. We agree fully with the following observations made by Judge Cummings in his dissent below:

> "The investors in City Savings were less able to protect themselves than the purchasers of orange groves in *Howey*. These [petitioners] had to rely completely on City Savings' management to choose suitable properties on which to make mortgage loans. . . . The members of City Savings were widely scattered. Many of them probably invested in City Savings on the ground that their money

[34] The SEC, in its brief *amicus curiae* submitted in this case, points out that it granted a temporary exemption from §§ 7, 8, 12, and 13 of the 1934 Act to passbooks of savings and loan associations, which were being traded on the Cleveland Stock Exchange shortly after the Act's passage. The SEC also points out that it has repeatedly enforced the Act's registration provisions against brokers and dealers whose business includes the solicitation of funds for deposit in savings and loan associations. Brief for the SEC 22–24.

> would be safer than in stocks. . . . Because savings and loan associations are constantly seeking investors through advertising . . . the SEC's present tender of its expert services should be especially beneficial to would-be savings and loan investors as a shield against unscrupulous or unqualified promoters." 371 F. 2d, at 384–385.

The respondents have argued that we should not declare the petitioners' withdrawable capital shares securities under § 3 (a)(10) because the petitioners, if they are successful in their suit for rescission, will gain an unfair advantage over other investors in City Savings in the distribution of the limited assets of that Association, which is now in liquidation. This argument, at best, is a *non sequitur*. This case in its present posture involves no issue of priority of claims against City Savings. This case involves only the threshold question of whether a federal court has jurisdiction over the complaint filed by the petitioners—a question which turns on our construction of the term "security" as defined by § 3 (a)(10) of the Securities Exchange Act of 1934. It is totally irrelevant to that narrow question of statutory construction that these petitioners, if they are successful in their federal suit, might have rights in the limited assets of City Savings superior to those of other investors in that Association.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration and decision of this case.

KATZ *v.* UNITED STATES.

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

No. 35. Argued October 17, 1967.—Decided December 18, 1967.

Petitioner was convicted under an indictment charging him with transmitting wagering information by telephone across state lines in violation of 18 U. S. C. § 1084. Evidence of petitioner's end of the conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the telephone booth from which the calls were made, was introduced at the trial. The Court of Appeals affirmed the conviction, finding that there was no Fourth Amendment violation since there was "no physical entrance into the area occupied by" petitioner. *Held:*

1. The Government's eavesdropping activities violated the privacy upon which petitioner justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. Pp. 350–353.

(a) The Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements. *Silverman* v. *United States*, 365 U. S. 505, 511. P. 353.

(b) Because the Fourth Amendment protects people rather than places, its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure. The "trespass" doctrine of *Olmstead* v. *United States*, 277 U. S. 438, and *Goldman* v. *United States*, 316 U. S. 129, is no longer controlling. Pp. 351, 353.

2. Although the surveillance in this case may have been so narrowly circumscribed that it could constitutionally have been authorized in advance, it was not in fact conducted pursuant to the warrant procedure which is a constitutional precondition of such electronic surveillance. Pp. 354–359.

369 F. 2d 130, reversed.

Burton Marks and *Harvey A. Schneider* argued the cause and filed briefs for petitioner.

John S. Martin, Jr., argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute.[1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amend-

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[1] 18 U. S. C. § 1084. That statute provides in pertinent part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

ment, because "[t]here was no physical entrance into the area occupied by [the petitioner]." [2] We granted certiorari in order to consider the constitutional questions thus presented.[3]

The petitioner has phrased those questions as follows:

> "A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

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[2] 369 F. 2d 130, 134.

[3] 386 U. S. 954. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do not reach that issue.

We find no merit in the petitioner's further suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 48 Stat. 1096, as amended, 47 U. S. C. § 409(*l*), it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He contends that his conviction must be vacated and the charges against him dismissed lest he be "subjected to [a] penalty . . . on account of [a] . . . matter . . . concerning which he [was] compelled . . . to testify . . . ." 47 U. S. C. § 409 (*l*). *Frank* v. *United States*, 347 F. 2d 486. We disagree. In relevant part, § 409 (*l*) substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U. S. C. § 46, which was Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. *Counselman* v. *Hitchcock*, 142 U. S. 547, 585–586. The statutory provision here involved was designed to provide such protection, see *Brown* v. *United States*, 359 U. S. 41, 45–46, not to confer immunity from punishment pursuant to a *prior* prosecution and adjudication of guilt. Cf. *Reina* v. *United States*, 364 U. S. 507, 513–514.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.[5] But the protection of a person's *general* right to privacy—his right to be let alone by other people[6]—is, like the

[4] "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home." *Griswold* v. *Connecticut,* 381 U. S. 479, 509 (dissenting opinion of MR. JUSTICE BLACK).

[5] The First Amendment, for example, imposes limitations upon governmental abridgment of "freedom to associate and privacy in one's associations." *NAACP* v. *Alabama,* 357 U. S. 449, 462. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . '. . . the right of each individual "to a private enclave where he may lead a private life."' " *Tehan* v. *Shott,* 382 U. S. 406, 416. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

[6] See Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

protection of his property and of his very life, left largely to the law of the individual States.[7]

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States,* 385 U. S. 206, 210; *United States* v. *Lee,* 274 U. S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally pro-

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[7] See, *e. g., Time, Inc.* v. *Hill,* 385 U. S. 374. Cf. *Breard* v. *Alexandria,* 341 U. S. 622; *Kovacs* v. *Cooper,* 336 U. S. 77.

[8] In support of their respective claims, the parties have compiled competing lists of "protected areas" for our consideration. It appears to be common ground that a private home is such an area, *Weeks* v. *United States,* 232 U. S. 383, but that an open field is not. *Hester* v. *United States,* 265 U. S. 57. Defending the inclusion of a telephone booth in his list the petitioner cites *United States* v. *Stone,* 232 F. Supp. 396, and *United States* v. *Madison,* 32 L. W. 2243 (D. C. Ct. Gen. Sess.). Urging that the telephone booth should be excluded, the Government finds support in *United States* v. *Borgese,* 235 F. Supp. 286.

[9] It is true that this Court has occasionally described its conclusions in terms of "constitutionally protected areas," see, *e. g., Silverman* v. *United States,* 365 U. S. 505, 510, 512; *Lopez* v. *United States,* 373 U. S. 427, 438–439; *Berger* v. *New York,* 388 U. S. 41, 57, 59, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

tected. See *Rios* v. *United States,* 364 U. S. 253; *Ex parte Jackson,* 96 U. S. 727, 733.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States,* 277 U. S. 438, 457, 464, 466; *Goldman* v. *United States,* 316 U. S. 129, 134–136, for that Amendment was thought to limit only searches and seizures of tangible

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[10] *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

[11] *Jones* v. *United States,* 362 U. S. 257.

[12] *Rios* v. *United States,* 364 U. S. 253.

property.[13] But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden* v. *Hayden,* 387 U. S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under . . . local property law." *Silverman* v. *United States,* 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

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[13] See *Olmstead* v. *United States,* 277 U. S. 438, 464–466. We do not deal in this case with the law of detention or arrest under the Fourth Amendment.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth,[14] and they took great care to overhear only the conversations of the petitioner himself.[15]

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of

[14] Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information.

[15] On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

such an authorization, holding that, under sufficiently "precise and discriminate circumstances," a federal court may empower government agents to employ a concealed electronic device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." *Osborn* v. *United States,* 385 U. S. 323, 329–330. Discussing that holding, the Court in *Berger* v. *New York,* 388 U. S. 41, said that "the order authorizing the use of the electronic device" in *Osborn* "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." *Id.,* at 57.[16] Here, too, a similar

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[16] Although the protections afforded the petitioner in *Osborn* were "*similar* . . . to those . . . of conventional warrants," they were not identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See *Ker* v. *California,* 374 U. S. 23, 37–41.

Although some have thought that this "exception to the notice requirement where exigent circumstances are present," *id.,* at 39, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, *id.,* at 55–58 (opinion of Mr. Justice Brennan), the reasons for such a limitation have no bearing here. However true it may be that "[i]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," *id.,* at 57, and that "the requirement of awareness . . . serves to minimize the hazards of the officers' dangerous calling," *id.,* at 57–58, these considerations are not rele-

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judicial order could have accommodated "the legitimate needs of law enforcement" [17] by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive

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vant to the problems presented by judicially authorized electronic surveillance.

Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41 (d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place. *Nordelli* v. *United States*, 24 F. 2d 665, 666–667.

Thus the fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful. 388 U. S. 41, 57.

[17] *Lopez* v. *United States*, 373 U. S. 427, 464 (dissenting opinion of Mr. Justice Brennan).

means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States,* 269 U. S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Wong Sun* v. *United States,* 371 U. S. 471, 481–482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U. S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment [18]—subject only to a few specifically established and well-delineated exceptions.[19]

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest.[20]

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[18] See, *e. g., Jones* v. *United States,* 357 U. S. 493, 497–499; *Rios* v. *United States,* 364 U. S. 253, 261; *Chapman* v. *United States,* 365 U. S. 610, 613–615; *Stoner* v. *California,* 376 U. S. 483, 486–487.

[19] See, *e. g., Carroll* v. *United States,* 267 U. S. 132, 153, 156; *McDonald* v. *United States,* 335 U. S. 451, 454–456; *Brinegar* v. *United States,* 338 U. S. 160, 174–177; *Cooper* v. *California,* 386 U. S. 58; *Warden* v. *Hayden,* 387 U. S. 294, 298–300.

[20] In *Agnello* v. *United States,* 269 U. S. 20, 30, the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Whatever one's view of "the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest," *United States* v. *Rabinowitz,* 339 U. S. 56, 61; cf. *id.,* at

Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." [21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[22]

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case.[23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

> "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio,* 379 U. S. 89, 96.

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amend-

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71–79 (dissenting opinion of Mr. Justice Frankfurter), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

[21] Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden* v. *Hayden,* 387 U. S. 294, 298–299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

[22] A search to which an individual consents meets Fourth Amendment requirements, *Zap* v. *United States,* 328 U. S. 624, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." *Lopez* v. *United States,* 373 U. S. 427, 463 (dissenting opinion of Mr. Justice Brennan).

[23] Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

ment violations "only in the discretion of the police." *Id.*, at 97.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment," [24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother WHITE, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously inves-

[24] See *Osborn* v. *United States*, 385 U. S. 323, 330.

tigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes. Article III, § 3, gives "treason" a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses. The arrests in cases of "hot pursuit" and the arrests on visible or other evidence of probable cause cut across the board and are not peculiar to any kind of crime.

I would respect the present lines of distinction and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks* v. *United States*, 232 U. S. 383, and unlike a field, *Hester* v. *United States*, 265 U. S. 57, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amend-

ment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. *Hester* v. *United States, supra.*

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. *Ante,* at 352. The point is not that the booth is "accessible to the public" at other times, *ante,* at 351, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. Cf. *Rios* v. *United States,* 364 U. S. 253.

In *Silverman* v. *United States,* 365 U. S. 505, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment.

That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in *Wong Sun* v. *United States,* 371 U. S. 471, at 485, and *Berger* v. *New York,* 388 U. S. 41, at 51. Also compare *Osborn* v. *United States,* 385 U. S. 323, at 327. In *Silverman* we found it unnecessary to re-examine *Goldman* v. *United States,* 316 U. S. 129, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider *Goldman,* and I agree that it should now be overruled.* Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

MR. JUSTICE WHITE, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be sub-

*I also think that the course of development evinced by *Silverman, supra, Wong Sun, supra, Berger, supra,* and today's decision must be recognized as overruling *Olmstead* v. *United States,* 277 U. S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.

jected to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.*

In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See *Berger* v. *New York,* 388 U. S. 41, 112–118 (1967) (WHITE, J.,

*In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, *Hoffa* v. *United States,* 385 U. S. 293 (1966); (2) by a recording device hidden on the person of such an informant, *Lopez* v. *United States,* 373 U. S. 427 (1963); *Osborn* v. *United States,* 385 U. S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee* v. *United States,* 343 U. S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

MR. JUSTICE BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion. For on that premise my Brother STEWART sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect today's opinion differs sharply from *Berger* v. *New York*, 388 U. S. 41, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The *Berger* case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and abates to a large extent the confusion and near-paralyzing effect of the *Berger* holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what

is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger, supra,* recognized, "an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." 388 U. S., at 45. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This

principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. See, *e. g., Olmstead* v. *United States,* 277 U. S. 438 (1928), and *Goldman* v. *United States,* 316 U. S. 129 (1942).

So far I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption and that the Court's decision in this case, along with its amorphous holding in *Berger* last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, *Olmstead, supra.* In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

> "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is

> that it must specify the place to be searched and the person or *things* to be seized. . . .
>
> . . . . .
>
> "Justice Bradley in the *Boyd* case [*Boyd* v. *United States,* 116 U. S. 616], and Justice Clark[e] in the *Gouled* case [*Gouled* v. *United States,* 255 U. S. 298], said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." 277 U. S., at 464–465.

Goldman v. *United States,* 316 U. S. 129, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to *Olmstead,* found no Fourth Amendment violation.

It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown, *supra,* in the cited quotation from the case, the Court went to great pains to examine the actual language of the Amendment and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court in citing *Hester* v. *United States,* 265 U. S. 57, indicated that even where there was a trespass the Fourth Amendment does not automatically apply to evidence obtained by "hearing or

sight." The *Olmstead* majority characterized *Hester* as holding "that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects." 277 U. S., at 465. Thus the clear holding of the *Olmstead* and *Goldman* cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the *Olmstead* and *Goldman* cases convinces me that they were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in *Berger* v. *New York,* 388 U. S. 41, 76, I continue to believe that this exclusionary rule formulated in *Weeks* v. *United States,* 232 U. S. 383, rests on the "supervisory power" of this Court over other federal courts and is not rooted in the Fourth Amendment. See *Wolf* v. *Colorado,* concurring opinion, 338 U. S. 25, 39, at 40. See also *Mapp* v. *Ohio,* concurring opinion, 367 U. S. 643, 661–666. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this Court said in *Lopez* v. *United States,* 373 U. S. 427, 438–439, "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear [citing

Olmstead and *Goldman*]. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman* v. *United States.*"

To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* and *Goldman* have been . . . eroded by our subsequent decisions . . . ." But the only cases cited as accomplishing this "eroding" are *Silverman* v. *United States,* 365 U. S. 505, and *Warden* v. *Hayden,* 387 U. S. 294. Neither of these cases "eroded" *Olmstead* or *Goldman. Silverman* is an interesting choice since there the Court expressly refused to re-examine the rationale of *Olmstead* or *Goldman* although such a re-examination was strenuously urged upon the Court by the petitioners' counsel. Also it is significant that in *Silverman,* as the Court described it, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," 365 U. S., at 509, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls." (At 511.) Yet this statement should not becloud the fact that time and again the opinion emphasizes that there has been an unauthorized intrusion: "For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an *unauthorized physical penetration* into the premises occupied by the petitioners." (At 509, emphasis added.) "Eavesdropping

accomplished by means of such a *physical intrusion* is beyond the pale of even those decisions . . . ." (At 509, emphasis added.) "Here . . . the officers overheard the petitioners' conversations only by *usurping* part of the petitioners' house or office . . . ." (At 511, emphasis added.) "[D]ecision here . . . is based upon the reality of an *actual intrusion* . . . ." (At 512, emphasis added.) "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, *by even a fraction of an inch.*" (At 512, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement: "In view of the determination by the majority that the *unauthorized physical penetration* into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion." (At 513, emphasis added.) As I made clear in my dissent in *Berger,* the Court in *Silverman* held the evidence should be excluded by virtue of the exclusionary rule and "I would not have agreed with the Court's opinion in *Silverman* . . . had I thought that the result depended on finding a violation of the Fourth Amendment . . . ." 388 U. S., at 79–80. In light of this and the fact that the Court expressly refused to reexamine *Olmstead* and *Goldman,* I cannot read *Silverman* as overturning the interpretation stated very plainly in *Olmstead* and followed in *Goldman* that eavesdropping is not covered by the Fourth Amendment.

The other "eroding" case cited in the Court's opinion is *Warden* v. *Hayden,* 387 U. S. 294. It appears that this case is cited for the proposition that the Fourth Amendment applies to "intangibles," such as conversation, and the following ambiguous statement is quoted from the opinion: "The premise that property interests control the right of the Government to search and seize has been discredited." 387 U. S., at 304. But far from being con-

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cerned with eavesdropping, *Warden* v. *Hayden* upholds the seizure of *clothes,* certainly tangibles by any definition. The discussion of property interests was involved only with the common-law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that although the Court attempts to convey the impression that for some reason today *Olmstead* and *Goldman* are no longer good law, it must face up to the fact that these cases have never been overruled or even "eroded." It is the Court's opinions in this case and *Berger* which for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversations can be "seized."* I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

*The first paragraph of my Brother HARLAN's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court "has long held" eavesdropping to be a violation of the Fourth Amendment and therefore "presumptively unreasonable in the absence of a search warrant." There is no reference to any long line of cases, but simply a citation to *Silverman,* and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read *Silverman* as holding any such thing; and in the second place, *Silverman* was decided in 1961. Thus, whatever it held, it cannot be said it "has [been] long held." I think my Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule *Olmstead* and *Goldman.* In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it "has long held." This is emphasized by my Brother HARLAN's claim that it is "bad physics" to adhere to *Goldman.* Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in *Griswold* v. *Connecticut,* 381 U. S. 479, "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy'

of individuals. But there is not." (Dissenting opinion, at 508.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'" (See generally dissenting opinion, at 507–527.)

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* FLEETWOOD TRAILER CO., INC.

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

No. 49. Argued November 8, 1967.—
Decided December 18, 1967.

Respondent, employer, on the termination of a strike against it by union members, announced that it could not then reinstate the strikers because of production curtailment caused by the strike. Respondent planned to resume full production as soon as possible. Two days after the strike and on a number of subsequent occasions six strikers applied for reinstatement but were rejected on the ground that no jobs were available. However, about two months after the strike respondent hired six new employees for jobs for which the striker-applicants were qualified. The six striker-applicants, who were not reinstated until about a month later, filed a complaint with the National Labor Relations Board (NLRB) charging unfair labor practices within the meaning of §§ 8 (a)(1) and (3) of the National Labor Relations Act because of interference with the exercise of the rights to organize and to strike guaranteed by §§ 7 and 13. The Trial Examiner, after hearing, found that the job openings filled by the new applicants could have been filled by the striker-applicants and made recommendations, which the NLRB adopted, that respondent should reimburse the six striker-applicants for earnings losses attributable to respondent's failure to reinstate them when it hired the six new employees. The Court of Appeals denied the NLRB's enforcement petition, holding that the strikers' right to jobs must be judged as of the date when they first applied, when there were no jobs available. *Held:*

1. Respondent's refusal to reinstate the strikers constituted an unfair labor practice under the Act, since respondent did not show that its action was due to "legitimate and substantial business justifications." *NLRB* v. *Great Dane Trailers,* 388 U. S. 26. Pp. 378–380.

2. The right of strikers to reinstatement does not depend upon job availability when they first apply but continues until they have obtained "other regular and substantially equivalent em-

ployment," § 2 (3), at least where, as here, their continued desire for reinstatement is apparent. Pp. 380–381.

366 F. 2d 126, vacated and remanded.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, Arnold Ordman* and *Dominick L. Manoli.*

Hugh J. Scallon argued the cause for respondent. With him on the brief was *Jerome C. Byrne.*

J. Albert Woll, Laurence Gold and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Respondent is a manufacturer of mobile homes. On August 5, 1964, it employed about 110 persons. On August 6, 1964, as a result of a breakdown in collective bargaining negotiations between respondent and the Union,[1] about half of the employees struck. Respondent cut back its production schedule from the prestrike figure of 20 units to 10 units per week, and curtailed its orders for raw materials correspondingly. On August 18, the Union accepted the respondent's last contract offer, terminated the strike, and requested reinstatement of the strikers.

Respondent explained that it could not reinstate the strikers "right at that moment" because of the curtailment of production caused by the strike. The evidence is undisputed that it was the company's intention "at all times" to increase production to the full prestrike volume "as soon as possible." [2]

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[1] The Union is the San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

[2] Respondent's production program was consistent with this intention. During a period of about 18 weeks after the strike, the num-

The six strikers involved in this case applied for reinstatement on August 20 and on a number of occasions thereafter. On that date, no jobs were available, and their applications were rejected. However, between October 8 and 16, the company hired six new employees, who had not previously worked for it, for jobs which the striker-applicants were qualified to fill. Later, in the period from November 2 through December 14, the six strikers were reinstated.

An NLRB complaint was issued upon charges filed by the six employees. As amended, the complaint charged respondent with unfair labor practices within the meaning of §§ 8 (a)(1) and (3) of the National Labor Relations Act (61 Stat. 140, 29 U. S. C. §§ 158 (a)(1) and (3)) because of the hiring of new employees instead of the six strikers. After hearing, the Trial Examiner concluded that respondent had discriminated against the strikers by failing to accord them their rights to reinstatement as employees in October when respondent hired others to fill the available jobs. Accordingly, the Examiner recommended that respondent should make each of the six whole for loss of earnings due to its failure to return them to employment at the time of the October hirings and until they were re-employed. A three-member panel of the Board adopted the findings, conclusions and recommendations of the Trial Examiner.[3]

The Board filed a petition for enforcement of the order. The Court of Appeals for the Ninth Circuit, one judge dissenting, denied enforcement. 366 F. 2d 126 (1966). It held that the right of the strikers to jobs must be

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ber of units scheduled per week increased in a steady progression from 10 to 12 to 14 to 16 to 18 to 19 and, finally, to 20 for the week ending December 13, 1964.

[3] 153 N. L. R. B. 425 (1965). "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." Section 3 (b), 61 Stat. 139, 29 U. S. C. § 153 (b).

judged as of the date when they apply for reinstatement. Since the six strikers applied for reinstatement on August 20, and since there were no jobs available on that date, the court concluded that the respondent had not committed an unfair labor practice by failing to employ them. We granted certiorari on petition of the Board. 386 U. S. 990 (1967). We reverse.

Section 2 (3) of the Act (61 Stat. 137, 29 U. S. C. § 152 (3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U. S. C. §§ 157 and 163). Under §§ 8 (a)(1) and (3) (29 U. S. C. §§ 158 (1) and (3)) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB* v. *Great Dane Trailers,* 388 U. S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.* It is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.,* at 33–34. See also *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221, 228–229, 235–236 (1963). *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), is not an invitation to disregard this rule.[4]

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[4] Although the decision of the Court of Appeals, as we read it, resulted from its erroneous holding that the right of the strikers to

In some situations, "legitimate and substantial business justifications" for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346 (1938); *NLRB* v. *Plastilite Corp.*, 375 F. 2d 343 (C. A. 8th Cir. 1967); *Brown & Root*, 132 N. L. R. B. 486 (1961).[5] In the present case, respondent hired 21 replacements during the strike, compared with about 55 strikers; and it is clear that the jobs of the six strikers were available after the strike. Indeed, they were filled by new employees.[6]

A second basis for justification is suggested by the Board—when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations: for example, "the need to adapt to changes in business conditions or to improve efficiency."[7] We need not consider this claimed justification because in the present case no changes in methods of production or operation were shown to have been

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jobs depends upon the date of their (first) application for reinstatement, it recited that the Board's General Counsel had failed to show "that the jobs of complainants had not been absorbed or that they were still available." Such proof is not essential to establish an unfair labor practice. It relates to justification, and the burden of such proof is on the employer. *NLRB* v. *Great Dane Trailers, supra,* at 34. Cf. also *NLRB* v. *Plastilite Corp.*, 375 F. 2d 343, 348 (C. A. 8th Cir. 1967).

[5] Unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements. See *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 278 (1956).

[6] The Trial Examiner found that "the six job openings in October could have been filled by the striker applicants and, had the Respondent considered them as employees rather than as mere applicants for hire, would have been so filled."

[7] Brief on behalf of NLRB 15.

instituted which might have resulted in eliminating the strikers' jobs.

The Court of Appeals emphasized in the present case the absence of any antiunion motivation for the failure to reinstate the six strikers. But in *NLRB* v. *Great Dane Trailers, supra,* which was decided after the Court of Appeals' opinion in the present case, we held that proof of antiunion motivation is unnecessary when the employer's conduct "could have adversely affected employee rights to *some* extent" and when the employer does not meet his burden of establishing "that he was motivated by legitimate objectives." *Id.,* at 34. *Great Dane Trailers* determined that payment of vacation benefits to nonstrikers and denial of those payments to strikers carried "a potential for adverse effect upon employee rights." Because "no evidence of a proper motivation appeared in the record," we agreed with the Board that the employer had committed an unfair labor practice. *Id.,* at 35. A refusal to reinstate striking employees, which is involved in this case, is clearly no less destructive of important employee rights than a refusal to make vacation payments. And because the employer here has not shown "legitimate and substantial business justifications," the conduct constitutes an unfair labor practice without reference to intent.

The Court of Appeals, however, held that the respondent did not discriminate against the striking employees because on the date when they applied for work, two days after the end of the strike, respondent had no need for their services. But it is undisputed that the employees continued to make known their availability and desire for reinstatement, and that "at all times" respondent intended to resume full production to reactivate the jobs and to fill them.

It was clearly error to hold that the right of the strikers to reinstatement expired on August 20, when they first

applied. This basic right to jobs cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application. On the contrary, the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." (29 U. S. C. § 152 (3).) Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications." *NLRB* v. *Great Dane Trailers, supra.*

Accordingly, the judgment of the Court of Appeals is vacated and the cause is remanded for further proceedings consistent with this opinion.[8]

It is so ordered.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in the result.

The issue in this case seems to me rather simpler, and the indicated resolution of it rather more obvious, than the majority opinion implies. A striking worker remains

[8] The respondent contends that the Union agreed to a nonpreferential hiring list and thereby waived the rights of the strikers to reinstatement ahead of the new applicants. The Board found that the Union, having lost the strike, merely "bowed to the [respondent's] decision." The Court of Appeals did not rule on this point or on the effect, if any, that its resolution might have upon the outcome of this case. Upon remand, the issue will be open for such consideration as may be appropriate.

an "employee" at least as long as his job remains unfilled and he has not found other equivalent work.[1] Consequently, as the Court of Appeals stated in this case, "If their jobs had not been filled or eliminated due to a decrease in production, the strikers were entitled to be treated as employees and to be given preference over other job applicants." 366 F. 2d, at 128.

In the present case, full production was not resumed until two months after the strikers indicated their willingness to return to work. The only question is whether the six strikers here involved were still at that point "employees" whom the employer had an affirmative obligation to prefer. The Trial Examiner, whose decision was affirmed by the Board, concluded that the strikers were still employees because the employer had neither abolished nor filled their jobs but intended at all times to return to full production "as soon as practicable." [2] The Court of Appeals found that the six had lost their employee status because their jobs were unavailable, by reason of a production cutback, at the precise and earlier moment when they offered to return to work. Yet it seems palpably inconsistent with the statutory purpose in preserving the employee status of strikers to hold that the temporary production adjustment occasioned by the strike itself is the equivalent of "permanent replacement" or "job abolition" and de-

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[1] Section 2 (3) of the National Labor Relations Act, 61 Stat. 137, 29 U. S. C. § 152 (3), reads in part as follows:

"The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ."

[2] Nothing in the record suggests that the employer believed, or had reason to believe, that the six employees' offers to return to work had been revoked by October.

stroys the right of a striker to preference in rehiring. I would reverse the Court of Appeals on the basis of the Trial Examiner's conclusion that the employer's error was to see the strikers "only as applicants for employment who were entitled to no more than nondiscriminatory consideration for job openings. But they had a different standing—they were employees." 153 N. L. R. B., at 428.

The problems of "employer motivation" and "legitimate business justification" are not, on this view, involved in this case at all. The employer's obligation was not simply to be neutral between strikers and nonstrikers, or between union and nonunion personnel, an obligation that may give rise to questions concerning an employer's reasons, good or bad, for making employment decisions. This employer simply failed, for whatever reasons, to recognize the status given the six strikers by the Act, and its corresponding obligation to them. It did not assert in this Court any "legitimate business justification" whatever for refusing to rehire the six strikers in October; it claimed only that it did not need a reason. Since this claim was simply wrong, no question of "motivation" or "justification" need be reached here.

On this basis I concur in the judgment of the Court.

CASE-SWAYNE CO., INC. *v.* SUNKIST GROWERS, INC.

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

No. 66. Argued October 18–19, 1967.—Decided December 18, 1967.

Petitioner brought a treble-damage Clayton Act suit for alleged violations by respondent of §§ 1 and 2 of the Sherman Act. The District Court granted a directed verdict for respondent. The Court of Appeals reversed as to the § 2 complaint but affirmed the dismissal of the § 1 charge, holding that Sunkist qualified as a cooperative organization under the Capper-Volstead Act and thus could not be held for an intraorganizational conspiracy to restrain trade. Section 1 of that Act privileges collective activity in processing and marketing for "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." Sunkist, which controls approximately 70% of the oranges grown in California and Arizona, and approximately 67% of the "product" oranges (used for processing), is composed of about 12,000 citrus growers, who are organized into 160 local associations, of which 80% are cooperative associations in which all members are growers. However, about 15% of the local associations, called "agency associations," are private corporations or partnerships owning and operating packing houses for profit. They have marketing contracts with growers to handle fruit for cost plus a fixed fee. All the local associations participate in the control and policy making of Sunkist. *Held:* Respondent is not entitled to assert the Capper-Volstead Act as a defense to the suit based on § 1 of the Sherman Act, as it was not the intention of Congress to allow an organization with such nonproducer interests to avail itself of the exemption provided by that Act. Pp. 390–396.

369 F. 2d 449, reversed and remanded.

William H. Henderson argued the cause for petitioner. With him on the briefs were *W. Glenn Harmon* and *Richard A. Perkins.*

Seth M. Hufstedler argued the cause for respondent. With him on the brief were *Charles E. Beardsley* and *Donald D. Stark.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This is a treble-damage action under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for alleged violations of both § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. The District Court granted a directed verdict, at the close of plaintiff's case, for the defendant, Sunkist Growers, Inc. The Court of Appeals for the Ninth Circuit reversed as to that portion of the complaint predicated on § 2 of the Sherman Act, holding that sufficient evidence was presented that Sunkist monopolized or attempted to monopolize trade in the relevant market; [1] it affirmed as to the dismissal of the Sherman Act § 1 charge, holding that Sunkist qualified as a cooperative organization under the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291,[2] and therefore could

[1] 369 F. 2d 449 (1966), cert. denied, 387 U. S. 932 (1967). See *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458 (1960); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962).

[2] Section 1 of the Act reads:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than

not be held for any intraorganizational conspiracy to restrain trade. In order to determine the scope of that exemption from the antitrust laws, we granted certiorari. 387 U. S. 903 (1967).

The issue is whether Sunkist is an association of "[p]ersons engaged in the production of agricultural products as . . . fruit growers" within the meaning of the Capper-Volstead Act, notwithstanding that certain of its members are not actually growers. We hold that it is not.

I.

The organizational structure of the Sunkist system is as follows. At the base are some 12,000 growers of citrus fruit in Arizona and California. The growers are organized into "local associations," as they are designated in Sunkist's bylaws, numbering approximately 160, each of which operates a packing house for the preparation of the fruit for market. The vast majority of these local associations—about 80% by number and 82% by volume of fruit marketed in the Sunkist system—are, it is stipulated, cooperative associations in which all members are fruit growers.[3] A few of the local associa-

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one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." 7 U. S. C. § 291.

[3] "Limitation of membership in local associations to actual citrus-fruit producers is a cardinal principle of the Exchange [*i. e.*, Sunkist] system." Gardner & McKay, California Fruit Growers Exchange System 88 (U. S. Dept. of Agriculture, FCA Cir. No. C–135 (1950)). See also Cumberland, Cooperative Marketing—Its Advantages as Exemplified in the California Fruit Growers Exchange 87 (1917). The corporate name of Sunkist prior to 1952 was the California Fruit Growers Exchange.

tions—no more than 5% by number and volume of fruit—are corporate growers whose total volume is sufficient to justify installation of their own packing house facilities.

The remainder of the local associations (also designated as "agency associations")—about 15% by number handling about 13% of the fruit in the Sunkist system—are private corporations and partnerships, owning and operating packing houses for profit. Their relationship to the growers whose fruit they handle is defined not by a cooperative agreement but by a marketing contract, *i. e.*, these packing houses contract with each grower to handle his fruit for cost plus a fixed fee. It is the membership of these agency associations in the Sunkist system that gives rise to the issue presented here.

The local associations, including these private packing houses, are members of "district exchanges," nonprofit membership corporations. The principal functions of the approximately threescore district exchanges are in the marketing of the fresh fruit of their member associations; they negotiate sales, arrange for shipment, and serve as conduits of communication between the local associations and Sunkist. Representatives of the district exchanges select the board of directors of Sunkist.

Sunkist itself, since 1958,[4] has two classes of "members": the district exchanges, whose principal member-

[4] In 1958, approximately the midpoint of the period relevant to this complaint, Sunkist altered its structure in two principal respects: first, local associations became members of Sunkist Growers directly, whereas under the old bylaws they had been represented through the district exchanges; second, two wholly owned corporate subsidiaries of Sunkist—Exchange Lemon Products Co. and Exchange Orange Products Co.—were merged into Sunkist. Since the parties have agreed that these changes in no way affect the issue here, we discuss Sunkist in its post-1958 form.

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ship function is to select the board of directors, and the local associations, which vote on all other matters and which have the proprietary ownership of Sunkist's assets. The corporate entity Sunkist Growers, Inc., owns the trade name "Sunkist" under which the fruit of its members is marketed. It has an extensive sales organization; employs marketing and traffic specialists; and performs many other services for its members through, for example, its research facilities.

More particularly, Sunkist owns processing facilities for what is known as "product" fruit, *i. e.*, fruit that for various reasons is not sold in the fresh fruit market, but rather is used for processed fruit products such as canned or concentrated juices.

Sunkist controls approximately 70% of the oranges grown in California and Arizona, and approximately 67% of the product oranges. This control is manifested through various contractual agreements. For example, each grower in the cooperative local associations agrees that he will market all of his fruit through his association. Each grower who contracts with an agency association packing house appoints it as the marketing agent for all of his fruit. That agreement is generally for five shipping seasons, although it may be canceled at any time "by mutual consent" or on written notice by the grower during August of any year in which it is in force. An escape clause permits the grower to sell such fruit as may be "mutually agreed upon" between him and the packing house to others, if he can obtain a price higher, in the judgment of the packing house, than that which the grower would obtain through his agreement with it. Should the grower be so released from his agreement, he is to pay to the packing house $2.50 per ton of fruit released.

Each of the local associations, including the private packing house agency associations, contracts with its

district exchange and with Sunkist Growers, Inc., to market all of its fruit—product and fresh—in the Sunkist system. Each association, under the Sunkist-District Exchange-Association Agreement, reserves the right to decide to what market it will ship and what price it is willing to receive for its fruit; however, Sunkist may decide to pool product fruit and fruit for export, in which event that fruit is handled solely in Sunkist's discretion. Sunkist also determines "the maximum amount of fresh fruit to be marketed currently," and allocates the "opportunity to ship equitably among Local Associations." Each local association agrees not to release any of its growers from the marketing contract without notifying its district exchange and Sunkist, and must obtain the approval of both if releases total more than 5% of the volume of the particular variety of fruit handled by the association. Further, each district exchange and local association agrees that "[a]ll prices, quotations and allowances shall be issued and distributed solely by Sunkist."

Petitioner Case-Swayne manufactures single-strength orange juice and other blended orange juices. In its complaint, insofar as relevant to the issues here, petitioner charged that the Sunkist system was a conspiracy in restraint of trade in violation of § 1 of the Sherman Act, the effect of which was to limit sharply the supply of product citrus fruit available to petitioner during the period covered by the complaint.

II.

Section 1 of the Capper-Volstead Act (see n. 2, *supra*) privileges collective activity in processing and marketing on the part of "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." 42 Stat. 388, 7 U. S. C. § 291. Despite that specific language, Sunkist

argues that Congress, in enacting the measure, intended to give sanction to any organizational form by which the benefits of collective marketing inured to the grower; and that, because the agency packing houses, by charging cost plus a fixed fee [5] for their services, do not participate directly in the gain or loss involved in the collective marketing of fruit through the Sunkist system, they are in the Sunkist system a privileged form of organization for the growers who contract with them.[6] We think that argument misconceives the requirements of the Act and runs counter to the relevant legislative history.

Congress enacted § 6 of the Clayton Act in response to the urgings of those who felt the Sherman Act's prohibition against combinations in restraint of trade might be applied to imperil the development of cooperative en-

[5] Under the marketing contract, the agency packing house obtains for its services "all of its costs of every kind incurred in connection with" processing and marketing the fruit; the so-called "fixed fee," in the contract in this record, is an amount "not in excess of 5 cents per field box on grapefruit, 10 cents on oranges," etc. We are not advised how that fixed fee is determined, other than that it is the result of bargaining between the company and the grower. It may well be that the fixed fee is dependent on the benefits of collective marketing through Sunkist, in the limited sense that it represents to the parties what one can charge and the other can pay, both anticipating the return the grower may achieve through pooling his fruit with the Sunkist organization. The stipulation, we note, provides only that the agency association "does not itself participate in either the gain or loss involved in marketing fruit through Sunkist *beyond* the recovery of its costs and fixed fee for packing." (Emphasis added.) In our view, however, that discrepancy in the record is not crucial to the decision here.

[6] The majority below held that the issue here was resolved *sub silentio* in favor of Sunkist in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962). But nongrower participation in Sunkist was not pointed out nor was the issue raised in that case; indeed, it was conceded by the respondents there that Sunkist was a Capper-Volstead cooperative.

deavors, principally unions.[7] That section provided that the antitrust laws were not to be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit," *i. e.*, such organizations were not to be deemed "illegal combinations or conspiracies in restraint of trade . . . ." 38 Stat. 731, 15 U. S. C. § 17. From the standpoint of agricultural cooperatives, the principal defect in that exemption was that it applied only to nonstock organizations. The Capper-Volstead Act was intended to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock.[8]

The reports on both H. R. 13931, the predecessor bill that failed of passage, and H. R. 2373, which became the Capper-Volstead Act, state:

> "Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" (Emphasis added.) H. R. Rep. No. 24, 67th Cong., 1st Sess., 1 (1921); H. R. Rep. No. 939, 66th Cong., 2d Sess., 1 (1920).

That it was intended that only actual producers of agricultural products be covered by the legislation is demonstrated in the debates on the two bills, *e. g.*, the following

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[7] See H. R. Rep. No. 627, 63d Cong., 2d Sess., 14–16 (1914); *Allen Bradley Co.* v. *Local No. 3,* 325 U. S. 797 (1945).

[8] The purpose and object of the limited exemption of the Capper-Volstead Act is fully discussed in *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458, 464–468 (1960); see also Hanna, Antitrust Immunities of Cooperative Associations, 13 Law & Contemp. Prob. 488 (1948).

exchange involving Senator Kellogg, a principal sponsor of the measure:

> "Mr. CUMMINS. . . . Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?
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> "Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
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> "Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?
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> "Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.
>
> "Mr. TOWNSEND. They must be persons who produce these things.
>
> "Mr. KELLOGG. Yes; that has always been the understanding." [9]

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[9] 62 Cong. Rec. 2052 (1922). See also 60 Cong. Rec. 369 (1920) (remarks of Senator Lenroot). It is significant that an amendment was offered on the floor of the Senate to bring within the bill processors of agricultural products where the grower's return depended upon the price the processor obtained for the finished product, reference being made to the beet sugar manufacturer. 62 Cong. Rec. 2273 (1922). Like Sunkist's argument here, it was stated that "the beneficiary of this [amendment] would be the

To be sure, a principal concern of Congress was to prohibit the participation in the collectivity of the predatory middleman, the speculator who bought crops in the field and returned but a small percentage of their eventual worth to the grower. Sunkist focuses on the expression of that concern, urging that the agency associations are not such predatory middlemen. That focus is wide of the mark. We deal here with "special exceptions to a general legislative plan," *Allen Bradley Co.* v. *Local No. 3,* 325 U. S. 797, 809 (1945) (§ 6 of the Clayton Act), and therefore we are not justified in expanding the Act's coverage, which otherwise appears quite plain. The Act states those whose collective activity is privileged under it; that enumeration is limited in quite specific terms to producers of agricultural products.[10]

Nor does the proviso in § 1—"[t]hat such associations are operated for the mutual benefit of the members thereof"—broaden the earlier language. That provision, in conjunction with the other prerequisites for qualification under the Act—either that each member be limited to one vote without regard to the capital he furnished or

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producer." *Id.,* at 2274. But as Senator Norris stated in opposition to the inclusion of the processors (*id.,* at 2275):

"They are not cooperators; they are not producers; it is not an organization composed of producers who incorporate together to handle their own products . . . ."

The amendment was rejected. *Id.,* at 2275, 2281.

[10] See Hulbert, Legal Phases of Farmer Cooperatives 170 (U. S. Dept. of Agriculture, FCS Bull. No. 10, 1958):

"This and other language which appears in the act make it plain that a cooperative, to come within the act, must be composed of producers."

See also Hulbert, Legal Phases of Cooperative Associations 45 (U. S. Dept. of Agriculture, Bull. No. 1106, 1922); Mischler, Agricultural Cooperative Law, 30 Rocky Mt. L. Rev. 381, 385 (1958); 36 Op. Atty. Gen. 326, 339 (1930); Note, 44 Va. L. Rev. 63, 69–70, 100 (1958).

that dividends on capital be limited to 8%, and that dealings in products of nonmembers be limited—was designed to insure that qualifying associations be truly organized and controlled by, and for, producers. In short, Congress was aware that even organizations of producers could serve a purpose other than the mutual obtaining of a fair return to their members, as producers, or be controlled by persons other than producers, and the proviso adds a measure of insurance that such organizations do not gain the Act's benefits.[11] Moreover, virtually the only mention in the legislative history of possible participation in a Capper-Volstead cooperative by nonproducers occurs with respect to cooperatives issuing capital stock.[12] Whatever may be the effect and significance of that recognition of the financial stake of nonproducers in an otherwise solely producer organization, their participation and role being narrowly restricted by the voting and dividend prerequisites of the Act, they are unpersuasive here. Capital participation by nonproducers—and that is the extent to which the debates can fairly be read as contemplating their participation

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[11] Cf. *Sheffield Farms Co.*, 44 F. T. C. 555 (1948); *Gold Medal Farms, Inc.*, 29 F. T. C. 356 (1939).

[12] *E. g.*, 62 Cong. Rec. 2271 (1922); 60 Cong. Rec. 365 (1920). Sunkist—a membership, rather than stock, corporation—points out that it, then known as the California Fruit Growers Exchange, was favorably referred to during the debates, see, *e. g.*, 62 Cong. Rec. 2052, 2267, 2271, 2277 (1922); 60 Cong. Rec. 312, 315, 360–361, 370 (1920). There is nothing to show, however, that Congress was aware that nonproducers participated in the marketing of fruit in the Sunkist system; in our reading of those references, it is more likely that Congress assumed the organization was solely of producers. For that matter, Senator Walsh, for one, doubted that the Exchange's federation of cooperative associations would even be encompassed by the Act (62 Cong. Rec. 2277–2278). In any event, we cannot take those remarks as intending specific approval of Sunkist, in light of the language of the Act and its other history.

at all [13]—does not directly enlarge the market share already possessed by the producers themselves. The participation in Sunkist of the agency associations has precisely that effect.

Sunkist suggests that "membership" of the agency associations has no "economic significance," relying on that provision of the Capper-Volstead Act permitting an association to deal in the products of nonmembers. The argument is that if the agency packing houses were not members of the Sunkist system, Sunkist would still be free to handle their products. But this Court has held that the antitrust implications of the relationship between a cooperative association and others is governed by entirely different standards. "The right of . . . agricultural producers thus to unite [under the Act] . . . cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U. S. 188, 204–205 (1939); accord, *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458, 466–467 (1960). Moreover, the agency associations participate in the control and policy making of Sunkist, even though they may be private profit-making operations.[14] We think Congress did not intend to allow

[13] It was recognized, for example, that producers who desired to organize for collective marketing might not have, at the outset, the necessary finances to do so, and might therefore seek capital from nonproducers. See 60 Cong. Rec. 365 (1920) (remarks of Senator Walsh); 62 Cong. Rec. 2271 (1922) (same); 62 Cong. Rec. 2273 (1922) (remarks of Senator Norris). See also Hearings on H. R. 2373 before a Subcommittee of the Senate Judiciary Committee, 67th Cong., 1st Sess. (1921).

[14] As such, the agency association's interests may in some situations be antithetical to those of the growers with which it has contracted. For example, Sunkist has the power to review contracts between growers and the agency associations. Obviously, to the extent that the agency associations are represented in the councils of Sunkist, they in effect review their own contracts.

an organization with such nonproducer interests to avail itself of the Capper-Volstead exemption.[15]

The judgment below is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I agree with the Court's holding that Congress did not intend that nonstock organizations with nonproducer members should qualify for the antitrust exemption conferred by § 1 of the Capper-Volstead Act, 7 U. S. C. § 291, and that the Sunkist system therefore is technically not a properly constituted Capper-Volstead cooperative. However, like my Brother WHITE, I am unable to ignore the possible effect of the Court's holding insofar as it subjects this large agricultural organization to antitrust liability extending far beyond the confines of this suit.

There is nothing in the record to indicate that Sunkist intended to evade the mandate of the Capper-Volstead Act when it allowed privately owned "agency association" packing houses to become members of the Sunkist system. Sunkist's only apparent motive in including the agency associations as members was to provide a greater range of packing facilities for citrus growers who desired to market through Sunkist. The agency associations have been an integral part of the Sunkist system for many years.[1] Until the bringing of the present action,

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[15] All we decide is that Sunkist Growers, Inc., is not entitled to assert Capper-Volstead as a defense to the suit based on § 1 of the Sherman Act. We express no views on the merits of that suit.

[1] It appears that the agency associations have been members of the system at least since 1924. See McKay & Stevens, Organization and Development of a Cooperative Citrus-Fruit Marketing Agency 22–23 (U. S. Dept. of Agriculture, Bull. No. 1237, 1924).

this aspect of Sunkist's organization had apparently gone without challenge from private persons who dealt with Sunkist. Its legality never seems to have been questioned by any agency of government. Sunkist argued before us, without challenge to its sincerity, that the membership of the agency associations did not deprive it of antitrust immunity so long as all of its actions were taken for the benefit of the growers. There is no reason to doubt that this has been Sunkist's belief through the years.

In these circumstances, it seems inequitable that the membership of the agency associations should cause Sunkist to lose all of its previously assumed immunity from liability under § 1 of the Sherman Act. This would evidently be the consequence of the Court's holding, and if not mitigated in any way it would appear to expose Sunkist to very large liabilities. Many of the activities of a marketing organization the size of Sunkist presumably amount to restraints of trade, and under the Court's rationale Sunkist would be subject to treble damage suits in respect of all of them. The chief result would be to allow windfall treble damage recoveries to persons with whom Sunkist dealt at arm's length and in good faith. The main burden would ultimately fall on the growers at the base of the Sunkist organization.

I would hold that Sunkist is not liable under § 1 of the Sherman Act for past acts merely because the agency associations participated in its government by virtue of their membership. It seems to me that this result is not only more equitable but accords better with the basic purpose of Congress, which was to aid producers, than does the Court's holding, which burdens the growers with heavy potential liabilities. This belief is supported by the frequent reference in the congressional debates to the forerunner of this very organization as one which Congress intended by the Act to protect.[2]

[2] See n. 12, *ante*, at 394.

Sufficient precedent for this type of equitable mitigation is found in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, in which this Court held that Sunkist's former "tripartite" structure did not deprive it of its § 1 immunity. The Court there stated that

> "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." *Id.*, at 29.

The very words of Capper-Volstead § 1, however, make it clear that Congress granted antitrust immunity to agricultural cooperatives only on condition that all of the benefits of cooperative organization were received by agricultural producers. Therefore, I would also hold that Sunkist may not assert antitrust immunity if the damage complained of resulted from attempts by the agency associations to use their power within Sunkist for their own benefit as distinguished from that of the growers.

The Court holds, and, for the future, I agree, that even those organizations in which all gains are channeled to the producers may not qualify under Capper-Volstead § 1 if they have nonproducer members. Congress may have excluded nonproducers simply because it felt that the benefits to producers from nonproducer membership were outweighed by the dangers of admitting nonproducer foxes into the cooperative hen roost. However, as the Court recognizes, see *ante*, at 394–395, the evident congressional concern about the possibility of monopoly by organizations immunized from antitrust prosecution by Capper-Volstead [3] indicates that in restricting membership to producers Congress

[3] See, *e. g.*, 62 Cong. Rec. 2217–2226, 2257–2280.

also intended to limit in a rough way the amount of market power which could be controlled by such organizations. The resources of nonproducers were to be available to the cooperatives, not through the broad avenue of membership, but by the narrower path of contract: the Act provides that qualifying organizations and their members "may make the necessary contracts and agreements" to effect the Act's purposes. To give effect to this legislative intent, I would hold that the marketing agreements of the agency associations with Sunkist and with individual growers must be tested by the standard applicable to contracts with nonmembers.

The Court of Appeals held that, treated as contracts with nonmembers, the agreements in question were proper under the Act. 369 F. 2d 449, 461–462. I agree. Regarded as contracts, these agreements provide essentially that a grower who desires to market through the Sunkist system and have his fruit packed by an agency association shall deliver to such association his entire crop for the year, that the agency association shall pack it in return for cost plus a fixed fee, and that the entire crop shall then be marketed by Sunkist. The contract may be canceled by the grower in August of any year. Since the main effect of these agreements is simply to give the growers who want to market through Sunkist a wider choice of packing facilities than they would enjoy if limited to cooperative packing houses, I would hold that the agreements are permissible when looked upon as contracts with nonmembers.

In accord with this opinion, I would remand the case to the District Court so that Case-Swayne may show what, if any, of the damage allegedly suffered by it resulted from actions taken by the agency associations for their own benefit as distinguished from that of the growers. I need hardly say that for the future Sunkist

would forfeit its entire Capper-Volstead antitrust exemption were it to elect to continue the membership of the agency associations.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring in the result.

I agree with the Court's basic judgment that Congress intended to grant immunity from the antitrust laws only to the cooperative efforts of "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . . ." Arrangements between growers and nongrowers are subject to scrutiny under the antitrust laws. Under the controlling decisions any combination between Sunkist and nongrower packing houses, were they not members of Sunkist, would have to meet the standards of the antitrust statutes. *United States* v. *Borden Co.*, 308 U. S. 188 (1939). Making the nongrower a member of the cooperative should not and does not immunize grower-nongrower transactions from any of the antitrust laws. Despite such membership, these transactions continue to be forbidden if they violate § 1. Indeed, membership should itself be looked upon as an agreement or combination between growers and nongrowers which, if it restrains trade, is subject to suit under the Sherman Act. Hence, since the complaint in this case encompassed a charge that certain arrangements between Sunkist and the nongrower agency associations denied product fruit to Case-Swayne and violated the antitrust laws, I agree that it was error to dismiss the § 1 charge on immunity grounds.

But it does not follow that Sunkist has lost its antitrust immunity completely. The bulk of its members are grower cooperatives or marketing agencies, and the great majority of its transactions are dealings with and for the account of these agricultural cooperatives which Congress clearly intended to exempt from the antitrust laws. An

exempt organization may not conspire with an outsider to violate § 1, but if it does, it does not forfeit its immunity except for that transaction. I see no reason for a different consequence where the conspiracy or combination takes the form of granting membership in the exempt organization. If nongrower membership is a combination in restraint of trade or if any agreements between Sunkist and the nongrower member violate the Sherman Act, Case-Swayne should be able to collect treble damages for any injury flowing from such violations. But I see little basis for concluding that the membership of the agency association strips Sunkist of its status as an exempt cooperative and exposes it to what would be very extensive liability under the antitrust laws wholly unrelated to the nongrower affiliation.

At the base of the Sunkist organization are 12,000 growers who themselves are not members of Sunkist but who are members of local associations which operate packing houses and which pick, pack, and arrange for the marketing of the fruit grown by their members. Most of these local associations appear to qualify as exempt agricultural cooperatives. A relatively small number, however, the so-called agency associations, are privately owned packing houses which buy and pack the fruit of those growers with whom they contract. The local associations, including the agency associations, are in turn organized into district exchanges which, unless agency association membership disqualifies some of them, would seem also to be exempt cooperatives. The district exchanges are primarily marketing organizations. Sunkist, a member corporation, is at the top of the pyramid. Among other things, it has ultimate authority and responsibility for the marketing of both fresh and product fruit.

Membership in Sunkist is made up of the local associations and the district exchanges. The agency associations make up about 15% of the membership. They

have, however, no direct voice in the election of Sunkist directors since the selection of directors is vested in the exchange members alone. The directors have very wide authority to conduct the affairs of Sunkist. Under the charter and bylaws, general membership carries with it little power and influence. Membership does, however, involve the execution of a membership application and agreement binding the member to Sunkist's charter and bylaws, which give Sunkist extensive powers over the marketing of its members' fruit, including the power to confine the packing, processing, and marketing functions to the Sunkist family. In addition, local associations and exchanges apparently execute the standard "Sunkist-District Exchange-Association Agreement" which, among other things, contains the agreement by the local association to market fruit exclusively through the exchanges and by the exchange to market exclusively through Sunkist.

If Sunkist's exemption is completely lost because of the membership of the nongrower agency associations, several consequences follow. Those district exchanges which have nongrower members will likewise forfeit their exemption. The arrangements among Sunkist, exempt exchanges, and exempt local associations will be looked upon as arrangements between exempt and nonexempt organizations. Thus for all practical purposes the entire Sunkist structure will be exposed to antitrust liability for a great many transactions which are wholly between growers or between their cooperative organizations, transactions which Congress intended to exempt from the antitrust laws.

Neither the agency associations themselves nor their arrangements with growers are claimed by Sunkist to be Capper-Volstead cooperatives exempt because of that status from examination under the Sherman Act. Also, the contracts and arrangements between the agency associations, nonexempt entities, and the exchanges and

Sunkist, which should be treated as otherwise exempt entities, are themselves within the reach of § 1. Among these nonexempt arrangements is the membership of an agency association in either an exchange or Sunkist itself. Case-Swayne should be able to recover from Sunkist those damages which flow from restraints of trade resulting from the agreements between the agency associations and Sunkist or between the agency associations and the district exchanges and from the membership of the agencies in either Sunkist or the exchanges. But Case-Swayne should not recover for injury to its business caused by other intercooperative or intergrower transactions and not resulting from the forbidden relationship between an exempt and a nonexempt entity. This result, in my view, will more nearly serve the policy of Congress in granting antitrust exemption to growers and their cooperative activities.

I would remand to the District Court for a trial of the § 1 case under the above principles.

MR. JUSTICE DOUGLAS, *dubitante.*

I am not as certain as MR. JUSTICE WHITE appears to be that the immunity of the growers or cooperatives granted by the Capper-Volstead Act is only partially lost in case nongrowers combine with the growers or cooperatives. But the question is certainly not free of doubt and it has not been argued. Nor have the questions discussed by MR. JUSTICE HARLAN been fully presented and argued. So far as we can tell at this stage of the litigation, all of those problems may turn out to be wholly abstract. The extent, let alone the nature, of participation by nongrower elements in the agreements and practices alleged to violate the antitrust laws has indeed hardly been explored. Therefore I think it is the part of wisdom specifically to reserve the questions with regard to the scope of the immunity that may survive today's ruling.

276-943 O - 68 - 33

SIMS *v.* GEORGIA.

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

No. 678. Decided December 18, 1967.

In this case, before the Court for the second time, petitioner, a Negro sentenced to death for rape, again contends that the confession used at his trial was coerced through physical abuse and that the juries which indicted and convicted him were discriminatorily selected. This Court, without reaching these claims, previously remanded the case for a hearing on the voluntariness of the confession, 385 U. S. 538, noting that the State had failed to produce as witnesses police officers who had been present at the time the petitioner claimed he was mistreated and had thus failed to rebut petitioner's testimony regarding physical abuse prior to his confession. Though the facts as to the composition of the juries showed the percentage of Negroes listed on the racially segregated county tax digests from which the jury lists were compiled was far larger than such percentages on the jury lists, the State produced only a jury commissioner's testimony that he did not discriminate in compiling the lists. Following this Court's remand, the judge who had presided at petitioner's trial, without hearing further testimony and solely on the basis of the record previously before this Court, decided that the confession was voluntary, refused to decide other issues, and denied a new trial. The Georgia Supreme Court affirmed. *Held:*

1. The State has again not adequately rebutted petitioner's claim that the confession resulted from coercion, and its second failure to produce the police officers as witnesses supports the conclusion that their testimony would not have rebutted petitioner's.

2. The manner in which the juries which indicted and convicted petitioner were selected was unconstitutional. *Whitus* v. *Georgia*, 385 U. S. 545.

Certiorari granted; 223 Ga. 465, 156 S. E. 2d 65, reversed and remanded.

Jack Greenberg, James M. Nabrit III, Anthony G. Amsterdam and *Howard Moore, Jr.*, for petitioner.

PER CURIAM.

This case is before us for the second time. Last Term we granted certiorari to consider five constitutional questions raised by petitioner in challenging his conviction for rape and his accompanying death sentence. 384 U. S. 998 (1966). Because we decided the case on the ground that petitioner had not received the hearing on the voluntariness of a confession introduced against him required by our decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964), we did not reach the other issues argued by the parties. 385 U. S. 538 (1967).

On remand the case was submitted to the judge who had presided at petitioner's original trial on the basis of the printed record previously before this Court. On that record alone the trial judge determined that petitioner's confession had been voluntary and denied a new trial. The trial court specifically refused to pass on any of the other questions previously briefed and argued here, holding that the prior rulings on these issues by the Georgia Supreme Court constituted the law of the case. The Georgia Supreme Court affirmed, upholding the trial court on all points.

In his present application petitioner raises again two of the four issues not reached in our previous decision in this case: the voluntariness of his confession and the composition of the juries by which he was indicted and tried.* In response to the State's previous argument that "there was no evidence to make any issue of voluntariness" and

*The State has not filed a response. While ordinarily we would call for a response before deciding a case summarily, the exact issues presented now were briefed and argued fully by the State and petitioner last Term. Since the proceedings below on remand consisted solely of a reconsideration of the printed record previously before us, we see no need for another presentation of the arguments already presented to us by the State.

therefore there was no need to apply *Jackson* v. *Denno,* Mr. Justice Clark stated:

> "We cannot agree. There was a definite, clear-cut issue here. Petitioner testified that Doctor Jackson physically abused him while he was in his office and that he was suffering from that abuse when he made the statement, thereby rendering such confession involuntary and the result of coercion. The doctor admitted that he saw petitioner on the floor of his office; that he helped him disrobe and that he knew that petitioner required hospital treatment because of the laceration over his eye but he denied that petitioner was actually abused in his presence. He was unable to state, however, that the state patrolmen did not commit the alleged offenses against petitioner's person because he was not in the room during the entire time in which the petitioner and the patrolmen were there. In fact, the doctor was quite evasive in his testimony and none of the officers present during the incident were produced as witnesses. Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers and was in conflict with the testimony of the physician." 385 U. S., at 543.

Thus in remanding the case for a hearing on voluntariness we indicated to the State that as the evidence then stood it had failed adequately to rebut petitioner's testimony that he had been subjected to physical violence prior to his confession. The State had every opportunity to offer the police officers, whose failure to testify had already been commented upon here, to contradict petitioner's version of the events. Its failure to do so when given a second chance lends support to the conclusion that their testimony would not, in fact, have rebutted petitioner's.

It needs no extended citation of cases to show that a confession produced by violence or threats of violence is involuntary and cannot constitutionally be used against the person giving it. *Beecher* v. *Alabama, ante,* p. 35. The reliance by the State on subsequent warnings made to petitioner prior to his confessing is misplaced. Petitioner had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. He had not been given access to family, friends, or counsel at any point. He is an illiterate, with only a third grade education, whose mental capacity is decidedly limited. Under such circumstances the fact that the police may have warned petitioner of his right not to speak is of little significance. See *Beecher* v. *Alabama, supra,* at 37, n. 4. Compare *Fikes* v. *Alabama,* 352 U. S. 191 (1957).

Petitioner also contends that he was indicted and tried by juries from which members of his race had been unconstitutionally excluded. The facts reveal that the grand and petit jury lists were drawn from the county tax digests which separately listed taxpayers by race in conformity with then existing Georgia law. Negroes constituted 24.4% of the individual taxpayers in the county. However, they amounted to only 4.7% of the names on the grand jury list and 9.8% of the names on the traverse jury list from which petitioner's grand and petit juries were selected. The State's only response to that showing was to call one of the jury commissioners as a witness; the jury commissioner testified that he or one of the other commissioners knew personally every qualified person in the county and did not discriminate in selecting names for the jury lists. The facts in this case make it virtually indistinguishable from *Whitus* v. *Georgia,* 385 U. S. 545 (1967). Accordingly, it is clear that the juries by which petitioner was indicted and tried were selected in a man-

ner that does not comport with constitutional requirements. See also *Jones* v. *Georgia, ante,* p. 24.

The petition for a writ of certiorari is granted, the judgment of the Supreme Court of Georgia is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus.

UNITED STATES ET AL. *v.* DIXIE HIGHWAY EXPRESS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 694. Decided December 18, 1967.*

The Interstate Commerce Commission (ICC) concluded, pursuant to § 207 (a) of the Interstate Commerce Act, that a certificate of public convenience and necessity should issue to Braswell Motor Freight Lines, Inc., authorizing service to certain points which the ICC found were being inadequately served. The District Court on suit by competing motor carriers enjoined the grant to Braswell on the ground that the ICC had failed to make adequate findings and had not afforded existing carriers opportunity to rectify service deficiencies. Upon remand the ICC made detailed findings and held that existing carriers could not be depended upon for adequate service. The District Court, on review, stated that it was the ICC's "invariable rule" that no new certificate would issue without giving existing carriers opportunity to improve service, that this was a "rule of property," and that the rule had not been followed in this case. The court permanently enjoined the issuance of a certificate to Braswell "unless and until" existing carriers "are first afforded a reasonable opportunity to furnish such service." *Held:* While the ICC should consider the public interest in maintaining the health and stability of existing carriers, it may, upon the basis of appropriate findings, authorize a new certificate "even though the existing carriers might arrange to furnish successfully the projected service." *ICC* v. *Parker,* 326 U. S. 60, 70 (1945).

268 F. Supp. 239, reversed and remanded.

Acting Solicitor General Spritzer, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Betty Jo Christian* for the United States et al. in No. 694. *T. S. Christopher* for appellant in No. 707.

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*Together with No. 707, *Braswell Motor Freight Lines, Inc.* v. *Dixie Highway Express, Inc., et al.,* also on appeal from the same court.

Robert E. Short for Dixie Highway Express, Inc., et al., and *Bates Block, Wentworth Griffin, Ed White, W. D. Benson, Jr., John S. Fessenden, Robert E. Joyner, R. J. Reynolds III* and *William O. Turney* for Baggett Transportation Co. et al., appellees in both cases.

PER CURIAM.

Pursuant to § 207 (a) of the Interstate Commerce Act, 49 Stat. 551, 49 U. S. C. § 307 (a), the Interstate Commerce Commission concluded that a certificate of public convenience and necessity should issue to Braswell Motor Freight Lines, Inc., authorizing Braswell to extend its motor carrier services to stated points. This conclusion was based upon the Commission's finding that existing service to those points was inadequate to serve public needs. Upon suit by several competing motor carriers serving the area, the District Court enjoined the Commission from proceeding with the grant to Braswell on the ground that the Commission had failed to make adequate findings and that it had failed to afford existing carriers an opportunity to rectify deficiencies in their service. Upon remand, the Commission did not take further evidence, but it made additional findings in considerable detail. It again concluded that shippers and receivers were hampered by the inadequacy of existing service, and it held that, despite numerous complaints, existing carriers had not demonstrated that they could be depended upon to furnish adequate service.

The competing carriers then filed in the District Court a motion under the All-Writs Act, 28 U. S. C. § 1651, contending that the Commission had disregarded the prior opinion and order of the court and asking that the court enforce its prior judgment. The District Court agreed. It stated that it was the Commission's "invariable rule" that no certificate would issue to add a

carrier to those serving an area without first furnishing existing carriers an opportunity to improve the service. It referred to this as a "rule of property" operating in favor of existing carriers. Accordingly, it permanently enjoined the Commission from issuing a certificate of convenience and necessity to Braswell "unless and until the [appellees—the existing motor carriers] are first afforded a reasonable opportunity to furnish such service . . . ."

The United States and the Commission, and Braswell, appealed the judgment to this Court under the provisions of 28 U. S. C. §§ 1253 and 2101 (b).*

The District Court erred in holding that it is the "invariable rule" of the Commission to grant existing carriers an opportunity to remedy deficiencies in service, and in holding that carriers have a property right to such opportunity before a new certificate may be issued upon a lawful finding of public convenience and necessity pursuant to the statute. The Commission's power is not so circumscribed. No such limitation has been established by the Commission's own decisions or by judicial determinations. It is, of course, true that the Commission should consider the public interest in maintaining the health and stability of existing carriers, see *United States* v. *Drum*, 368 U. S. 370, 374 (1962); but it is also true that, upon the basis of appropriate findings, "the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service." *ICC* v. *Parker*, 326

*Appellees urge that the appeals are untimely because they were filed more than 60 days after the District Court's initial judgment. This is palpably untenable because, without passing upon the appropriateness of the All-Writs procedure which appellees utilized, it is clear that the appeals were properly taken from the District Court's second order entered after the Commission decision upon remand.

U. S. 60, 70 (1945); see *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83, 90–91 (1957). Accordingly, we reverse and remand for further proceedings consistent with this opinion.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

BROOKS *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 14, Misc. Decided December 18, 1967.

Confession given to investigating officer by petitioner, a prisoner, after petitioner was held two weeks under barbaric conditions in "sweatbox" punishment cell *held* involuntary and its use to convict him of prison rioting unconstitutional.

Certiorari granted; reversed.

Earl Faircloth, Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

PER CURIAM.

Petitioner, Bennie Brooks, was convicted of participating in a riot in the Florida prison where he was an inmate and was sentenced to a term of nine years and eight months to run consecutively with the sentence he was already serving. His conviction was affirmed without opinion by the Florida District Court of Appeal, First District, and his petition for writ of certiorari filed in the Florida Supreme Court was dismissed, also without opinion.

The disturbance in the prison occurred on May 27, 1965. The same day Brooks was ordered confined in a punishment cell for 35 days with two other prisoners also accused of the rioting. Brooks says the cell was 7 feet long and 6½ feet wide; a witness for the State testified it was 6 feet longer. This minor difference aside, the parties agree that the punishment cell had no external window, that it contained no bed or other furnishings or facilities except a hole flush with the floor which served as a commode, and that during the first 14 days

he lived in this cell Brooks' only contact with the outside was an unspecified number of interviews with the prison's investigating officer. It is also agreed that while so confined Brooks was fed a "restricted diet" consisting, according to the testimony of the investigating officer, of "peas and carrots in a soup form" three times daily. Brooks' more detailed description of this concoction—"they fed us four ounces of soup three times a day and eight ounces of water"—was not controverted, nor was his testimony that he was stripped naked before being thrown into the cell. On the 15th day of confinement under these conditions, Brooks was taken from the punishment cell and again brought directly to the investigating officer. This time, shortly after questioning began, Brooks confessed and dictated his statement into a tape recorder. The recording was introduced at trial. Brooks says that he was brutally beaten by one officer while the other was taking his statement. However, we do not consider this claim because the officer denied it and the judge disbelieved Brooks' testimony. The judge also concluded that the confession was voluntary. We disagree.

Putting to one side quibbles over the dimensions of the windowless sweatbox into which Brooks was thrown naked with two other men, we cannot accept his statement as the voluntary expression of an uncoerced will. For two weeks this man's home was a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate. For two weeks he subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water. For two full weeks he saw not one friendly face from outside the prison, but was completely under the control and domination of his jailers. These stark facts belie any contention that the confession extracted from him within minutes after he was brought from the cell was not tainted by the 14 days he spent in such an

oppressive hole. In a long line of cases beginning with *Brown* v. *Mississippi,* 297 U. S. 278 (1936), and reaffirmed last Term in *Clewis* v. *Texas,* 386 U. S. 707 (1967), we have held that the Constitution does not permit prosecutorial use of an involuntary confession. We have also asserted repeatedly that, in adjudicating the question of voluntariness, "we cannot escape the responsibility of making our own examination of the record." *Spano* v. *New York,* 360 U. S. 315, 316 (1959). See *Haynes* v. *Washington,* 373 U. S. 503, 515 (1963); *Chambers* v. *Florida,* 309 U. S. 227, 228–229 (1940). The record in this case documents a shocking display of barbarism which should not escape the remedial action of this Court. Accordingly, we reverse the judgment below.*

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Florida District Court of Appeal, First District, must be and hereby is

Reversed.

Mr. Justice Black concurs in the result.

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*Because we hold that the use at trial of the involuntary confession requires reversal of petitioner's conviction, we find it unnecessary to reach other issues raised by him. Thus, we express no views on petitioner's contentions that (1) he was denied a fair trial because the residents of the rural county where venue was set were hostile toward inmates of the prison and (2) he was denied the effective assistance of counsel because his appointed attorney was forced to trial without an opportunity to prepare to represent petitioner and the 12 codefendants tried with him.

DAMICO ET AL. *v.* CALIFORNIA ET AL.

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

No. 629, Misc. Decided December 18, 1967.

Appellants' suit under the Civil Rights Act, challenging the California welfare law and regulations as unconstitutional, was dismissed by a three-judge District Court for failure "to exhaust adequate administrative remedies." *Held:* One of the Act's underlying purposes was "to provide a remedy in the federal courts supplementary to any remedy any State might have," and "relief under the Act may not be defeated because relief was not sought under state law which provided [an administrative] remedy." *McNeese* v. *Board of Education,* 373 U. S. 668.

Reversed and remanded.

George F. Duke for appellants.

Thomas C. Lynch, Attorney General of California, and *Richard L. Mayers* and *Elizabeth Palmer,* Deputy Attorneys General, for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted.

Appellants, welfare claimants under California Welfare and Institutions Code §§ 11250, 11254, and regulation C–161.20 thereunder, sought damages, a declaratory judgment of unconstitutionality, and temporary and permanent injunctive relief in this suit under the Civil Rights Act, 42 U. S. C. § 1983, 28 U. S. C. § 1343. Their complaint alleges that the statute and regulation are discriminatory and that the appellees, in administering them and in applying them to appellants, deprived appellants of equal rights secured by the United States Constitution. The three-judge District Court dismissed the complaint solely because "it appear[ed] to the Court

that all of the plaintiffs [had] failed to exhaust adequate administrative remedies." This was error. In *McNeese* v. *Board of Education,* 373 U. S. 668, noting that one of the purposes underlying the Civil Rights Act was "to provide a remedy in the federal courts supplementary to any remedy any State might have," *id.,* at 672, we held that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy," *id.,* at 671. See *Monroe* v. *Pape,* 365 U. S. 167, 180–183. We intimate no view upon the merits of appellants' allegations nor upon the other grounds not passed upon by the District Court.

The judgment of the District Court for the Northern District of California is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, dissenting.

California's Aid to Families with Dependent Children program provides welfare assistance to mothers and children rendered destitute through desertion by or separation from the fathers of the children. The law requires that, unless a suit for divorce has been filed, the desertion or separation be of at least three months' duration before AFDC aid will be granted.

Appellants were informed by a social worker that, no suit for divorce having been filed, they could not receive AFDC aid before the end of the three-month period; they then brought this suit for a declaration that the three-month requirement violated the Federal Constitution. The District Court, without reaching the question whether it should "abstain" pending appropriate state proceedings for relief, and without reaching the merits, dismissed on the ground that the plaintiffs had

failed to exhaust "adequate administrative remedies."

This Court, without plenary consideration and without stating its reasons, now reverses the District Court's dismissal, citing *McNeese* v. *Board of Education,* 373 U. S. 668. In *McNeese,* the Court held that Negro students, seeking relief from alleged school racial segregation, did not have to pursue and exhaust certain administrative remedies available under state law before bringing their federal action. Although I did not at the time and do not now fully understand the Court's opinion in *McNeese,** the net result of the case as I see it was that

*The source of my difficulty is a compound of the occasional use of language broader than was necessary or warranted by the facts as the majority viewed them, and of my own disagreement with the majority's view of the facts. In *Monroe* v. *Pape,* 365 U. S. 167, in an opinion which I joined, the Court declared that one complaining of unlawful search and seizure by state officials could sue them in a federal court under 42 U. S. C. § 1983, notwithstanding the availability of similar remedies under state law. That case did not say that one who is engaged in a course of dealing with an administrative agency may bypass the orderly procedures established by that agency and the procedures for review of agency action and sue its members individually at any stage. In *McNeese* it was the prevailing view, with which I disagreed under the circumstances, that the administrative procedures established by the State were inadequate for the vindication of federal rights. Reading *Monroe* to have interpreted 42 U. S. C. § 1983 "to provide a remedy where state law was inadequate, [and] 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice,'" 373 U. S., at 672, the Court concluded that "[w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *Id.,* at 676.

The majority opinion in *McNeese* also, however, attributed to *Monroe* the establishment of the principle that 42 U. S. C. § 1983 provides a "supplementary" remedy to any a State might have. This language is now interpreted by the Court to mean that there can be no requirement that a person dealing with an administrative agency continue to deal with it in an orderly fashion, no matter how adequate his remedy there. If this is what the majority

the right to assert, in a federal court, that state officials had acted in a manner depriving the plaintiff of clear constitutional rights could not be delayed by the interposition of intentionally or unintentionally inadequate state remedies for the alleged discrimination.

If that is a correct description of the exhaustion problem in *McNeese,* it bears little relation to the exhaustion question here. State AFDC relief was created pursuant to the provisions of the federal Social Security Act, 49 Stat. 627, 42 U. S. C. § 601 *et seq.* The Federal Government pays the major share of the cost of state aid, see 42 U. S. C. § 603, and in return closely supervises both how it shall be administered and what remedies shall be available to those who have complaints about its operation. Each State receiving federal assistance (which includes California) must formulate and submit to the Secretary of Health, Education, and Welfare, for his approval, a plan of operation of its AFDC program. 42 U. S. C. § 602. In particular, the plan must provide that "aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals," 42 U. S. C. § 602 (a)(9), and must "provide for granting . . . a fair hearing before the State agency [whose creation is required by a separate provision, 42 U. S. C. § 602 (a)(3)] to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness." 42 U. S. C. § 602 (a)(4). The California plan approved by the Secretary apparently includes both California's three-month requirement and California's hearing procedure.

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opinion in *McNeese* meant to say, its dictum was gratuitous both in the sense that it was not compelled by the facts as the Court viewed them and in the sense that it was an incorrect interpretation of *Monroe.*

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The Court simply ignores the highly successful federal-state working relationship created by Congress in this area. The right of these appellants to receive AFDC funds involves not only questions of state law, but also the propriety of that law under federal statutory law. For the determination of these questions Congress has specified a state forum in the first instance. Today's holding, made without benefit of briefs and oral argument and on a skimpy record, that 42 U. S. C. § 1983 may be used to bypass 42 U. S. C. § 602 is a disservice to both of these important statutes.

I would affirm the judgment below.

ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* WELLS ET AL.

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

No. 691. Decided December 18, 1967.

273 F. Supp. 984, affirmed.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *George D. Zuckerman,* Assistant Attorney General, for appellants.

Isidore Levine for appellees.

PER CURIAM.

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

MR. JUSTICE HARLAN, dissenting.

This action was brought by appellees under the Civil Rights Act, 42 U. S. C. §§ 1983, 1988, for declaratory and other relief. Their complaint alleged that New York's congressional districting statute does not conform to the requirements of Art. I, § 2, of the United States Constitution, as those requirements are defined in *Wesberry* v. *Sanders,* 376 U. S. 1. A three-judge court was convened.

The court found, on the basis of 1960 census statistics, that the population of one of New York's 41 congressional districts varied from the average population of the districts by 15.1%, and that 12 other districts varied from the population average by as much as 10%. It concluded that such a variation from average, without a suitable explanation, "violates constitutional requirements." 273 F. Supp. 984, at 989. The court noted that there have been "substantial" population changes

in these districts since 1960, and that complete accuracy in redistricting must await the results of the 1970 census, but reasoned that a suitable compromise would be to require redistricting immediately, premised on the best population figures now available. Revisions could then be made when the 1970 census statistics were released. This Court simply affirms, without elaboration or opinion.

There are, in my opinion, two principal issues here worthy of plenary consideration. First, the District Court thought it "too clear for debate" that this districting statute "violates constitutional requirements as enunciated by the Supreme Court." 273 F. Supp., at 989. There are few issues in reapportionment cases that are clear beyond debate, and, with respect, the invalidity of this statute is certainly not among them. It is true that variations of as much as 18.28% were disapproved in *Swann* v. *Adams,* 385 U. S. 440, but the Court there also re-emphasized that the approval or disapproval of the variations in one State "has little bearing on the validity of a similar variation in another State." *Id.,* at 445. And see *Reynolds* v. *Sims,* 377 U. S. 533, 578. The impossibility of calculating the proper result in these cases from numerical variations is illustrated by *Toombs* v. *Fortson,* 241 F. Supp. 65. The District Court there said specifically that "we will base any test as to the reasonableness of variances on the departure figure of 15 percent." *Id.,* at 70. This Court simply affirmed without opinion. 384 U. S. 210. See also *Moore* v. *Moore,* 246 F. Supp. 578, 582. Yet in this case, in which variations no greater than 15.1% are in issue, the Court again summarily affirms.

Presumably the size of the numerical variation is not alone decisive,[1] but if the "particular circumstances of

[1] I note, however, that the District Court in *Preisler* v. *Secretary of State of Missouri,* 257 F. Supp. 953, said specifically that "population and population alone is the sole standard for congressional

the case," *Reynolds* v. *Sims, supra,* at 578, *Swann* v. *Adams, supra,* at 445, may be crucial to the validity of districting statutes, then surely the Court should endeavor to define what such circumstances are, and to indicate how they are relevant. Instead, the Court more and more often disposes of reapportionment cases summarily, see, *e. g., Toombs* v. *Fortson, supra; Duddleston* v. *Grills,* 385 U. S. 455; *Kirkpatrick* v. *Preisler,* 385 U. S. 450; *Lucas* v. *Rhodes, ante,* p. 212; and when the Court does issue an opinion, it is content simply to recite that such circumstances may be relevant, without undertaking any elucidation. See, *e. g., Swann* v. *Adams, supra.* All this has the effect of leaving the state legislatures,[2] the lower courts, and even Congress[3] without meaningful guidance.

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representation." *Id.,* at 973. This Court affirmed without opinion. 385 U. S. 450. See also *Bush* v. *Martin,* 224 F. Supp. 499, 511, aff'd, 376 U. S. 222.

[2] The New York Legislature, for example, made careful efforts to comply with the constitutional requirements, as they had been enunciated by this Court. The Joint Legislative Committee on Reapportionment thus expressly recognized "the absence of Federal and State constitutional and statutory standards," but concluded that "the most important standard is substantial equality of population." Interim Report of the Joint Legislative Committee on Reapportionment, 1961 N. Y. Leg. Doc. No. 45, p. 4. It added that "[w]hile exact equality of population is the ideal, it is an ideal that, for practical reasons, can never be attained. Some variation from it will always be necessary. The question arises as to what is a permissible fair variation." *Ibid.*

[3] The House Committee on the Judiciary, for example, reported favorably in 1965 on a bill which was intended to implement the requirements of *Wesberry* v. *Sanders, supra,* by creating a series of standards for the apportionment of congressional districts. The Committee noted that "[t]he courts . . . have been reluctant to prescribe standards . . . ." H. R. Rep. No. 140, 89th Cong., 1st Sess., 2. One standard included in the bill was a maximum permissible variation of 15% above or below the average population of the congressional districts within a State. *Id.,* at 2–3. Given the

Second, the confusion created by the Court's reticence is compounded, in cases in which it is held that a districting statute does not satisfy constitutional requirements, by uncertainty as to the appropriate next step. See, *e. g., Lucas* v. *Rhodes, supra.* The District Court here noted that the Court's cases provided "[l]ittle guidance or help," but concluded, nonetheless, that immediate redistricting should be ordered, based on the best available population figures. It thought that this expedient was in the pattern set by *Swann* v. *Adams,* 383 U. S. 210. *Swann,* however, was merely a brief *per curiam* opinion, which did not purport to establish any general rule on appropriate remedies. As the elections of 1968 approach, it seems to me that the time has come for this Court to provide clearer guidance to the lower courts on the proper remedy in reapportionment cases. More particularly, some indication should be given as to what part, if any, 1960 census figures are to play, alone or in combination with later, albeit incomplete or unverified, population figures. See *Lucas* v. *Rhodes, supra.*

I would note probable jurisdiction, and set the case for argument.

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present state of the law in this area, it is difficult to imagine how a legislator could sensibly decide whether such a maximum variation satisfied applicable constitutional requirements. Indeed, Representative Kastenmeier dissented from the Committee's report, noting that "there is serious doubt whether H. R. 5505 can, in light of the *Wesberry* case, withstand constitutional attack." *Id.,* at 5.

SIMON ET AL. *v.* WHARTON, TRUSTEE IN BANKRUPTCY.

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

No. 72. Decided December 18, 1967.

373 F. 2d 649, vacated and remanded to District Court with instructions to dismiss the case as moot.

Marvin Schwartz for petitioners.

Arthur Hill Christy for respondent.

PER CURIAM.

Upon consideration of the joint motion to vacate, the judgments of the lower courts are vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the case as moot.

SATTERFIELD *v.* VIRGINIA.

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

No. 216. Decided December 18, 1967.

Certiorari granted and judgment reversed.

Henry W. McLaughlin, Jr., for petitioner.

J. Willard Greer for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Miranda* v. *Arizona,* 384 U. S. 436.

LANTZ, DBA ALASKA TRUCK TRANSPORT, INC. *v.* LYNDEN TRANSFER, INC., ET AL.

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

No. 623. Decided December 18, 1967.

263 F. Supp. 336, affirmed.

James T. Johnson for appellee Lynden Transfer, Inc.

Acting Solicitor General Spritzer and *Robert W. Ginnane* for the United States et al.

PER CURIAM.

The motion of Douglas Lantz for leave to intervene and for other relief is denied. The motion to affirm is granted and the judgment is affirmed.

BURKE-PARSONS-BOWLBY CORP. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 711. Decided December 18, 1967.

268 F. Supp. 203, affirmed.

Gordon P. MacDougall for appellants.

Solicitor General Griswold, Assistant Attorney General Turner and *Robert W. Ginnane* for the United States et al., and *Laidler B. Mackall* for the Baltimore & Ohio Railroad Co., appellees.

PER CURIAM.

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

ILLINOIS EX REL. MAERAS, TREASURER & EX-OFFICIO COLLECTOR OF TAXES OF MADISON COUNTY *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 670. Decided December 18, 1967.

36 Ill. 2d 585, 224 N. E. 2d 248, appeal dismissed and certiorari denied.

Burton C. Bernard for appellant.

Hugh J. Dobbs, John F. Schlafly, Louis F. Gillespie, Gordon Burroughs, Eldon Martin, Jordan Jay Hillman and *Robert L. Broderick* 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.

HULSHART *v.* MARYLAND.

APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND.

No. 708, Misc. Decided December 18, 1967.

Appeal dismissed and certiorari denied.

James D. Nolan 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.

MOSES ET AL. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 246. Decided December 18, 1967.

70 Wash. 2d 282, 422 P. 2d 775, appeal dismissed and certiorari denied.

L. Frederick Paul and *Frederick W. Post* for appellants.

James E. Kennedy and *J. L. Coniff*, Special Assistant Attorneys General of Washington, for appellees.

Solicitor General Griswold for the United States, as *amicus curiae*.

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.

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

ZSCHERNIG ET AL. *v.* MILLER, ADMINISTRATOR, ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 21. Argued November 7, 1967.—
Decided January 15, 1968.

Appellants, residents of East Germany, are the heirs of an American citizen who died intestate in Oregon, leaving personal property. Appellees include members of the State Land Board who petitioned the Oregon probate court for the escheat of the personalty pursuant to Ore. Rev. Stat. § 111.070. That section provides for escheat where a nonresident alien claims personalty unless (1) there is a reciprocal right of a United States citizen to take property on the same terms as the citizen of a foreign nation, (2) American citizens have the right to receive payment here of funds from estates in the foreign country, and (3) foreign heirs have the right to receive the proceeds of Oregon estates without confiscation. The Oregon Supreme Court held that appellants could not take the personalty, because the reciprocity required by § 111.070 was not present. *Held:* As applied by Oregon, each of the three provisions of § 111.070 involves the State in foreign affairs and international relations, matters which the Constitution entrusts solely to the Federal Government. *Clark* v. *Allen,* 331 U. S. 503, distinguished. Pp. 432–441.

243 Ore. 567, 592, 412 P. 2d 781, 415 P. 2d 15, reversed.

Peter A. Schwabe, Sr., argued the cause for appellants. With him on the briefs was *Peter A. Schwabe, Jr.*

Wayne M. Thompson, Assistant Attorney General of Oregon, argued the cause for appellee State Land Board of Oregon. With him on the brief was *Robert Y. Thornton,* Attorney General.

Briefs of *amici curiae* were filed by *Solicitor General Marshall, Acting Assistant Attorney General Eardley, John S. Martin, Jr.,* and *Alan S. Rosenthal* for the United States, and by *Edward Mosk* for Slaff, Mosk & Rudman.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case concerns the disposition of the estate of a resident of Oregon who died there intestate in 1962. Appellants are decedent's sole heirs and they are residents of East Germany. Appellees include members of the State Land Board that petitioned the Oregon probate court for the escheat of the net proceeds of the estate under the provisions of Ore. Rev. Stat. § 111.070 (1957),[1] which provides for escheat in cases where a nonresident alien claims real or personal property unless three requirements are satisfied:

(1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;

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[1] "(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

(2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and

(3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."

The Oregon Supreme Court held that the appellants could take the Oregon realty involved in the present case by reason of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany [2] (44 Stat. 2135) but that by reason of the same Article, as construed in *Clark* v. *Allen,* 331 U. S. 503, they could not take the personalty. 243 Ore. 567, 592, 412 P. 2d 781, 415 P. 2d 15. We noted probable jurisdiction. 386 U. S. 1030.

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[2] Article IV provides:

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

The Department of Justice, appearing as *amicus curiae,* submits that, although the 1923 Treaty is still in force, *Clark* v. *Allen* should be overruled insofar as it construed the personalty provision of Article IV. That portion of Article IV speaks of the rights of "[n]ationals of either High Contracting Party" to dispose of "their personal property of every kind within the territories of the other." That literal language and its long consistent construction, we held in *Clark* v. *Allen,* "does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals." 331 U. S., at 516.

We do not accept the invitation to re-examine our ruling in *Clark* v. *Allen.* For we conclude that the history and operation of this Oregon statute make clear that § 111.070 is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress. See *Hines* v. *Davidowitz,* 312 U. S. 52, 63.

As already noted [3] one of the conditions of inheritance under the Oregon statute requires "proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries," the burden being on the nonresident alien to establish that fact.

This provision came into Oregon's law in 1951. Prior to that time the rights of aliens under the Oregon statute were defined in general terms of reciprocity,[4] similar to the California Act which we had before us in *Clark* v. *Allen,* 331 U. S., at 506, n. 1.

We held in *Clark* v. *Allen* that a general reciprocity clause did not on its face intrude on the federal domain.

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[3] *Supra,* n. 1.

[4] Ore. Comp. L. Ann. § 61–107 (1940).

331 U. S., at 516–517. We noted that the California statute, then a recent enactment, would have only "some incidental or indirect effect in foreign countries." *Id.*, at 517.[5]

Had that case appeared in the posture of the present one, a different result would have obtained. We were there concerned with the words of a statute on its face, not the manner of its application. State courts, of course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation—whether the matter involves commercial cases, tort cases, or some other type of controversy. At the time *Clark* v. *Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have

[5] In *Clark* v. *Allen,* 331 U. S. 503, the District Court had held the California reciprocity statute unconstitutional because of legislative history indicating that the purpose of the statute was to prevent American assets from reaching hostile nations preparing for war on this country. *Crowley* v. *Allen,* 52 F. Supp. 850, 853 (D. C. N. D. Calif.). But when the case reached this Court, petitioner contended that the statute was invalid, not because of the legislature's motive, but because on its face the statute constituted "an invasion of the exclusively Federal field of control over our foreign relations." In discussing how the statute was applied, petitioner noted that a California court had accepted as conclusive proof of reciprocity the statement of a foreign ambassador that reciprocal rights existed in his nation. Brief for petitioner in *Clark* v. *Allen,* No. 626, October Term 1946, pp. 73–74. Thus we had no reason to suspect that the California statute in *Clark* v. *Allen* was to be applied as anything other than a general reciprocity provision requiring just matching of laws. Had we been reviewing the later California decision of *Estate of Gogabashvele,* 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, see n. 6, *infra,* the additional problems we now find with the Oregon provision would have been presented.

launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

In a California case, involving a reciprocity provision, the United States made the following representation:

> "The operation and effect of the statute is inextricably enmeshed in international affairs and matters of foreign policy. The statute does not work disinheritance of, or affect ownership of property in California by, any group or class, but on the contrary operates in fields exclusively for, and preempted by, the United States; namely, the control of the international transmission of property, funds, and credits, and the capture of enemy property. The statute is not an inheritance statute, but a statute of confiscation and retaliation." *In re Bevilacqua's Estate,* 161 P. 2d 589, 593 (Dist. Ct. App. Cal.), superseded by 31 Cal. 2d 580, 191 P. 2d 752.

In its brief *amicus curiae,* the Department of Justice states that: "The government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations."

The Government's acquiescence in the ruling of *Clark* v. *Allen* certainly does not justify extending the principle of that case, as we would be required to do here to uphold the Oregon statute as applied; for it has more than "some incidental or indirect effect in foreign countries,"

and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle.

As we read the decisions that followed in the wake of *Clark* v. *Allen,* we find that they radiate some of the attitudes of the "cold war," where the search is for the "democracy quotient" of a foreign regime as opposed to the Marxist theory.[6] The Oregon statute introduces the concept of "confiscation," which is of course opposed to the Just Compensation Clause of the Fifth Amendment. And this has led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive' . . . ." See *State Land Board* v. *Kolovrat,* 220 Ore. 448, 461–462, 349 P. 2d 255, 262, rev'd *sub nom. Kolovrat* v. *Oregon,* 366 U. S. 187, on other grounds.

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[6] See *Estate of Gogabashvele,* 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, disapproved in *Estate of Larkin,* 65 Cal. 2d 60, 416 P. 2d 473, and *Estate of Chichernea,* 66 Cal. 2d 83, 424 P. 2d 687. One commentator has described the *Gogabashvele* decision in the following manner:

"The court analyzed the general nature of rights in the Soviet system instead of examining whether Russian inheritance rights were granted equally to aliens and residents. The court found Russia had no separation of powers, too much control in the hands of the Communist Party, no independent judiciary, confused legislation, unpublished statutes, and unrepealed obsolete statutes. Before stating its holding of no reciprocity, the court also noted Stalin's crimes, the Beria trial, the doctrine of crime by analogy, Soviet xenophobia, and demonstrations at the American Embassy in Moscow unhindered by the police. The court concluded that a leading Soviet jurist's construction of article 8 of the law enacting the R. S. F. S. R. Civil Code seemed modeled after Humpty Dumpty, who said, 'When I use a word . . . , it means just what I choose it to mean—neither more nor less.'" Note, 55 Calif. L. Rev. 592, 594–595, n. 10 (1967).

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That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark* v. *Allen*. Yet such forbidden state activity has infected each of the three provisions of § 111.070, as applied by Oregon.

In *State Land Board* v. *Pekarek*, 234 Ore. 74, 378 P. 2d 734, the Oregon Supreme Court in ruling against a Czech claimant because he had failed to prove the "benefit" requirement of subsection (1)(c) of the statute said:

> "Assuming, without deciding, that all of the evidence offered by the legatees was admissible, it can be given relatively little weight. The statements of Czechoslovakian officials must be judged in light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts." *Id.*, at 83, 378 P. 2d, at 738.

Yet in *State Land Board* v. *Schwabe*, 240 Ore. 82, 400 P. 2d 10, where the certificate of the Polish Ambassador was tendered against the claim that the inheritance would be confiscated abroad, the Oregon court, appraising the current attitude of Washington, D. C., toward Warsaw, accepted the certificate as true. *Id.*, at 84, 400 P. 2d, at 11.

In *State Land Board* v. *Rogers*, 219 Ore. 233, 347 P. 2d 57, the court held Bulgarian heirs had failed to prove the requirement of what is now § (1)(b) of the reciprocity statute, the "right" of American heirs of Bulgarian decedents to get funds out of Bulgaria into the United States. Such transmission of funds required a license from the Bulgarian National Bank, but the

court held the fact that licenses were regularly given insufficient, because they were issued only at the discretion or "whim" of the bank. *Id.*, at 245, 347 P. 2d, at 63.[7]

As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the "cold war," and the like are the real desiderata.[8] Yet they of

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[7] The *Rogers* case, we are advised, prompted the Government of Bulgaria to register a complaint with the State Department, as disclosed by a letter of November 20, 1967, written by a State Department adviser to the Oregon trial court stating: "The Government of Bulgaria has raised with this Government the matter of difficulties reportedly being encountered by Bulgarian citizens resident in Bulgaria in obtaining the transfer to them of property or funds from estates probated in this country, some under the jurisdiction of the State of Oregon. . . ."

[8] Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, such as "This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists," and "If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia. . . ." Heyman, The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule," 52 Nw. U. L. Rev. 221, 234 (1957). In Pennsylvania, a judge stated at the trial of a case involving a Soviet claimant that "If you want to say that I'm prejudiced, you can, because when it comes to Communism I'm a bigoted anti-Communist." And another judge exclaimed, "I am not going to send money to Russia where it can go into making bullets which may one day be used against my son." A California judge, upon being asked if he would hear argument on the law, replied, "No, I won't send any money to Russia." The judge took "judicial notice that Russia kicks the United States in the teeth all the time," and told counsel for the Soviet claimant that "I would think your firm would feel it honor bound to withdraw as representing the Russian government. No American can make it too strong." Berman, Soviet Heirs in American Courts, 62 Col. L. Rev. 257, and n. 3 (1962).

A particularly pointed attack was made by Judge Musmanno of the Pennsylvania Supreme Court, where he stated with respect to the Pennsylvania Act that:

"It is a commendable and salutary piece of legislation because it provides for the safekeeping of these funds even with accruing

course are matters for the Federal Government, not for local probate courts.

This is as true of (1)(a) of § 111.070 as it is of (1)(b) and (1)(c). In *Clostermann* v. *Schmidt,* 215 Ore. 55, 332 P. 2d 1036, the court—applying the predecessor of

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interest, in the steelbound vaults of the Commonwealth of Pennsylvania until such time as the Iron Curtain lifts or sufficiently cracks to allow honest money to pass through and be honestly delivered to the persons entitled to them. Otherwise, wages and other monetary rewards faithfully earned under a free enterprise democratic system could be used by Communist forces which are committed to the very destruction of that free enterprising world of democracy." *Belemecich Estate,* 411 Pa. 506, 508, 192 A. 2d 740, 741, rev'd, *sub nom. Consul General of Yugoslavia* v. *Pennsylvania,* 375 U. S. 395, on authority of *Kolovrat* v. *Oregon,* 366 U. S. 187.

And further:

". . . Yugoslavia, as the court below found, is a satellite state where the residents have no individualistic control over their destiny, fate or pocketbooks, and where their politico-economic horizon is raised or lowered according to the will, wish or whim of a self-made dictator." 411 Pa., at 509, 192 A. 2d, at 742.

"All the known facts of a Sovietized state lead to the irresistible conclusion that sending American money to a person within the borders of an Iron Curtain country is like sending a basket of food to Little Red Ridinghood in care of her 'grandmother.' It could be that the greedy, gluttonous grasp of the government collector in Yugoslavia does not clutch as rapaciously as his brother confiscators in Russia, but it is abundantly clear that there is no assurance upon which an American court can depend that a named Yugoslavian individual beneficiary of American dollars will have anything left to shelter, clothe and feed himself once he has paid financial involuntary tribute to the tyranny of a totalitarian regime." *Id.,* at 511, 192 A. 2d, at 742–743.

Another example is a concurring opinion by Justice Doyle in *In re Hosova's Estate,* 143 Mont. 74, 387 P. 2d 305:

"In this year of 1963, the Central Committee of the Communist Party of the U. S. S. R. issued the following directive to all of its member[s], 'We fully stand for the destruction of imperialism and capitalism. We not only believe in the inevitable destruction of

(1)(a)—held that not only must the foreign law give inheritance rights to Americans, but the political body making the law must have "membership in the family of nations" (*id.*, at 65, 332 P. 2d, at 1041), because the purpose of the Oregon provision was to serve as "an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon." *Id.*, at 68, 332 P. 2d, at 1042.

In *In re Estate of Krachler*, 199 Ore. 448, 263 P. 2d 769, the court observed that the phrase "reciprocal right" in what is now part (1)(a) meant a claim "that is enforceable by law." *Id.*, at 455, 263 P. 2d, at 773. Although certain provisions of the written law of Nazi Germany appeared to permit Americans to inherit, they created no "right," since Hitler had absolute dictatorial powers and could prescribe to German courts rules and procedures at variance with the general law. Bequests "'grossly opposed to sound sentiment of the people'" would not be given effect. *Id.*, at 503, 263 P. 2d, at 794.[9]

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capitalism, but also are doing everything for this to be accomplished by way of the class struggle, and *as soon as possible.*'

"Hence, in affirming this decision the writer is knowingly contributing financial aid to a Communist monolithic satellite, fanatically dedicated to the abolishing of the freedom and liberty of the citizens of this nation.

"By reason of self-hypnosis and failure to understand the aims and objective of the international Communist conspiracy, in the year 1946, Montana did not have statutes to estop us from making cash contributions to our own ultimate destruction as a free nation." *Id.*, at 85–86, 387 P. 2d, at 311.

[9] In *Mullart* v. *State Land Board*, 222 Ore. 463, 353 P. 2d 531, the court had little difficulty finding that reciprocity existed with Estonia. But it took pains to observe that in 1941 Russia "moved in and overwhelmed it [Estonia] with its military might. At the same time the Soviet hastily and cruelly deported about 60,000 of its people to Russia and Siberia and, in addition, exterminated

In short, it would seem that Oregon judges in construing § 111.070 seek to ascertain whether "rights" protected by foreign law are the same "rights" that citizens of Oregon enjoy. If, as in the *Rogers* case, the alleged foreign "right" may be vindicated only through Communist-controlled state agencies, then there is no "right" of the type § 111.070 requires. The same seems to be true if enforcement may require approval of a Fascist dictator, as in *Krachler*. The statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious.[10] The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. See Miller, The Corporation as a Private Government in the

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many of its elderly residents. This policy of destroying or decimating families and rendering normal economic life chaotic continued long afterward." *Id.*, at 467, 353 P. 2d, at 534.

"[A]ny effort to communicate with persons in Estonia exposes such persons to possible death or exile to Siberia. It seems that the Russians scrutinize all correspondence from friends of Estonians in lands where freedom prevails and subject the recipient to suspicion of a relationship inimical to the Soviet. . . . This line of testimony has the support of reliable historical matter of which we take notice. We mention it as explaining the futility of attempting, under the circumstances, to secure more cogent evidence than hearsay in the matter." *Id.*, at 476, 353 P. 2d, at 537–538.

[10] See Berman, Soviet Heirs in American Courts, 62 Col. L. Rev. 257 (1962); Chaitkin, The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents, 25 S. Cal. L. Rev. 297 (1952).

World Community, 46 Va. L. Rev. 1539, 1542–1549 (1960). Where those laws conflict with a treaty, they must bow to the superior federal policy. See *Kolovrat* v. *Oregon,* 366 U. S. 187. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. As we stated in *Hines* v. *Davidowitz, supra,* at 64: "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. *Passenger Cases,* 7 How. 283; cf. *Crandall* v. *Nevada,* 6 Wall. 35; *Kent* v. *Dulles,* 357 U. S. 116. If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.

Reversed.

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

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring.

While joining the opinion of the Court, I would go further. Under the Oregon law involved in this case, a foreigner cannot receive property from an Oregon decedent's estate unless he first meets the burden of proving, to the satisfaction of an Oregon court, that his

country (1) grants to United States citizens a "reciprocal right" to take property on the same terms as its own citizens; (2) assures Americans the right "to receive payment" here of funds originating from estates in that country; and (3) gives its own citizens the "benefit, use or control" of property received from an Oregon estate "without confiscation, in whole or in part." The East German claimants in this case did not show in the Oregon courts that their country could meet any one of these criteria. I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States.

In my view, each of the three provisions of the Oregon law suffers from the same fatal infirmity. All three launch the State upon a prohibited voyage into a domain of exclusively federal competence. Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course state courts must routinely construe foreign law in the resolution of controversies properly before them, but here the courts of Oregon are thrust into these inquiries only because the Oregon Legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate. "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chinese Exclusion Case,* 130 U. S. 581, 606. "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field

affecting foreign relations be left entirely free from local interference." *Hines* v. *Davidowitz,* 312 U. S. 52, 63.

The Solicitor General, as *amicus curiae,* says that the Government does not "contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States. To the extent that *Clark* v. *Allen,* 331 U. S. 503, is inconsistent with these views, I would overrule that decision.

MR. JUSTICE HARLAN, concurring in the result.

Although I agree with the result reached in this case, I am unable to subscribe to the Court's opinion, for three reasons. *First,* by resting its decision on the constitutional ground that this Oregon inheritance statute infringes the federal foreign relations power, without pausing to consider whether the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany [1] itself vitiates this application of the state statute, the Court has deliberately turned its back on a cardinal principle of judicial review. *Second,* correctly construed the 1923 treaty, in my opinion, renders Oregon's application of its statute in this instance impermissible, thus requiring reversal of the state judgment. *Third,* the Court's

[1] Dec. 8, 1923, 44 Stat. 2132, T. S. No. 725.

constitutional holding, which I reach only because the majority has done so, is in my view untenable. The impact of today's holding on state power in this field, and perhaps in other areas of the law as well, justifies a full statement of my views upon the case.

I.

Even in this age of rapid constitutional change, the Court has continued to proclaim adherence to the principle that decision of constitutional issues should be avoided wherever possible.[2] In his celebrated concurring opinion in *Ashwander* v. *Valley Authority,* 297 U. S. 288, 341, Mr. Justice Brandeis listed the self-imposed rules by which the Court has avoided the unnecessary decision of constitutional questions. In his fourth rule he dealt with the situation presented by this case, declaring that:

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 191; *Light* v. *United States,* 220 U. S. 523, 538." *Id.,* at 347.[3]

The above rule should control the disposition of this case, for there is what I think must be regarded, within

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[2] See, *e. g., Giles* v. *Maryland,* 386 U. S. 66, 80–81; *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 316; *Bell* v. *Maryland,* 378 U. S. 226, 237; *Communist Party* v. *Catherwood,* 367 U. S. 389, 392; *Poe* v. *Ullman,* 367 U. S. 497, 503; *Machinists* v. *Street,* 367 U. S. 740, 749.

[3] See also *Alma Motor Co.* v. *Timken Co.,* 329 U. S. 129, 136–137.

the meaning of *Ashwander,* as a nonconstitutional ground on which the decision could be founded. Although the appellants chose to argue only the constitutional question, the United States, as *amicus curiae,* forcefully, and I believe correctly, contended that the full relief sought by the appellants should be afforded by overruling the construction of the 1923 treaty, rather than the constitutional holding, in *Clark* v. *Allen,* 331 U. S. 503. The Court simply states that "[w]e do not accept the invitation to re-examine our ruling in *Clark* v. *Allen.*" See *ante,* at 432. I believe that the principle of avoiding unnecessary constitutional adjudication obliges us to accept that invitation and to inquire whether the treaty might provide an adequate alternative ground for affording the appellants their due.[4]

II.

Article IV of the 1923 treaty with Germany provides:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to

[4] It is true, of course, that the treaty would displace the Oregon statute only by virtue of the Supremacy Clause of the Constitution. Yet I think it plain that this fact does not render inapplicable the teachings of *Ashwander.* Disposition of the case pursuant to the treaty would involve no interpretation of the Constitution, and this is what the *Ashwander* rules seek to bring about. Cf. *Swift & Co., Inc.* v. *Wickham,* 382 U. S. 111, 126–127.

be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

In *Clark* v. *Allen, supra,* this Court considered the application of this treaty provision to a case much like the present one. In *Clark* one who was apparently an American citizen died in California and left her real and personal property to German nationals. The California Probate Code provided that

"The rights of aliens not residing within the United States . . . to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and

> conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries." Cal. Prob. Code § 259, added by Stats. 1941, c. 895, § 1.

The *Clark* Court first considered whether the 1923 treaty with Germany had survived the events of the years 1923–1947. It concluded that the treaty was still in effect and that it clearly entitled the German citizens to take the real estate left them by the decedent.

The Court then went on to discuss the application of the treaty to personalty. It noted that a practically identical provision of a treaty with Wurttemburg had been held in the 1860 case of *Frederickson* v. *Louisiana*, 23 How. 445, not to govern "[t]he case of a citizen or subject of the respective countries residing at home, and disposing of [personal] property there in favor of a citizen or subject of the other . . . ," *id.*, at 447, and that the *Frederickson* decision had been followed in 1917 cases involving three other treaties.[5] The Court then said:

> "The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes 'any person'; and the property covered is that within the territory of either of the high contracting parties. In case of personalty, the provision governs the right of 'nationals' of either contracting party to dispose of their property within

[5] *Petersen* v. *Iowa*, 245 U. S. 170; *Duus* v. *Brown*, 245 U. S. 176; *Skarderud* v. *Tax Commission*, 245 U. S. 633.

the territory of the 'other' contracting party; and it is 'such personal property' that the 'heirs, legatees and donees' are entitled to take.

"Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson* v. *Louisiana, supra,* and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it." 331 U. S., at 515–516.

In the case now before us, an American citizen died in Oregon, leaving property to relatives in East Germany. An Oregon statute conditioned a nonresident alien's right to inherit property in Oregon upon the existence of a reciprocal right of American citizens to inherit in the alien's country upon the same terms as citizens of that country; upon the right of American citizens to receive payment within the United States from the estates of decedents dying in that country; and upon proof that the alien heirs of the American decedent would receive the benefit, use, and control of their inheritance without confiscation.[6] The Oregon Supreme Court affirmed the finding of the trial court that the evidence did not establish that American citizens were accorded reciprocal rights to take property from or to receive the proceeds of East German estates. How-

[6] The statute appears in the majority opinion in n. 1, *ante,* at 430.

ever, it found that the 1923 treaty was still effective with respect to East Germany, and consequently held that under *Clark* v. *Allen* the East German heirs must be permitted to take the real, though not the personal, property despite the Oregon statute.

I, too, believe that the 1923 treaty is still applicable to East Germany.[7] However, I am satisfied that *Clark* v. *Allen* should not be followed insofar as the Court there held that the words of the 1923 treaty must be taken to bear the meaning ascribed to them in *Frederickson* v. *Louisiana* because of the "consistent judicial construction of the language since 1860." This reasoning assumes both that the drafters of the 1923 treaty knew of the *Frederickson* decision and that they thought *Frederickson* would control the interpretation of that treaty. The first assumption seems open to substantial doubt, and the second is not beyond question.

There is evidence that in 1899, almost 40 years after the *Frederickson* decision, the State Department's treaty draftsmen were not aware of the meaning given to the crucial treaty language in that opinion. For in 1895 the British Ambassador initiated correspondence with the State Department in which he proposed a treaty which would assure that "no greater charges [would] be imposed . . . on real or personal property in the United States inherited by British subjects, whether domiciled within the union or not, than are imposed upon prop-

[7] The appellees argue that a substantial part of the 1923 treaty has been terminated or abrogated by the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, 7 U. S. T. 1839, T. I. A. S. No. 3593. However, Article XXVI of the 1954 treaty specifies that it extends only to "all areas of land and water under the sovereignty or authority of" the Federal Republic of Germany, and to West Berlin. The United States does not challenge the holding of the Oregon Supreme Court that the 1923 treaty still applies to East Germany. See Brief for the United States as *amicus curiae* 6, n. 5.

erty inherited by American citizens," in return for provisions assuring to American citizens reciprocal rights in Great Britain.[8] The ensuing treaty of 1899 [9] contained language substantially identical to that in the subsequent 1923 treaty with Germany. Since it is highly unlikely that the British Ambassador intended that British subjects should be able to inherit personal property from American decedents only if those decedents happened also to be British subjects, or that the State Department so understood him, it is clear enough that the draftsmen in 1899 must have been unaware of *Frederickson.*

It is also conceivable that the drafters of the 1923 treaty thought that *Frederickson* was inapplicable to that treaty. Because the article of the Wurttemburg treaty dealing with realty was not brought to the attention of the *Frederickson* Court, the *Frederickson* decision was based largely upon the Court's understanding that

> "The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting Powers, and is not embraced in this article of the treaty." 23 How., at 447–448.

Hence, the drafters of the 1923 treaty might have assumed that *Frederickson* was not applicable to that treaty, in which the inclusion of the realty provision made it clear that the parties did consider the case of a citizen dying in his own country. In view of these indications that the draftsmen of the 1923 treaty very likely did not intend that the words of the treaty should bear the meaning given them in *Frederickson,* it seems to me

[8] 125 Notes from Great Britain, Sept. 24, 1895, MSS., Nat. Archives.

[9] Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939.

that the Court in *Clark* v. *Allen* erred in holding the question foreclosed. Accordingly, a *de novo* inquiry into the meaning of the treaty seems entirely appropriate.

III.

The language of Article IV of the 1923 treaty with Germany, which was quoted earlier, is based upon Article X of the treaty of 1785 with Prussia.[10] Article X provided:

> "The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise; and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods . . . and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. . . . And where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on the part of the government of the respective states."

This part of the treaty with Prussia was in turn founded upon earlier treaties with France, the Netherlands, and Sweden.[11] The treaty of 1778 with France

[10] July, Aug., Sept., 1785, 8 Stat. 88.

[11] See Art. XI, Treaty of Feb. 6, 1778, with France, 8 Stat. 18; Art. VI, Treaty of Oct. 8, 1782, with the Netherlands, 8 Stat. 36; Art. VI, Treaty of April 3, 1783, with Sweden, 8 Stat. 64.

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specifically freed American citizens from the burdens of two restrictions on the right of aliens to dispose of or inherit property which were then common in the civil law countries: the *droit d'aubaine* and the *droit de détraction.* The *droit d'aubaine* was the feudal right of the sovereign to appropriate the property of an alien who died within the realm; an aspect of this doctrine was "the complementary incapacity of an alien to inherit, even from a citizen." *Nielsen* v. *Johnson,* 279 U. S. 47, 55, n. 2.[12] The *droit d'aubaine* was replaced during the 18th century by the *droit de détraction,* a tax "imposed on the right of an alien to [inherit] . . . the property of persons dying within the realm," *Nielsen* v. *Johnson, supra,* at 56, n. 2, and levied upon the removal of the inherited property by the alien from the decedent's country.[13]

The 1782 treaty with the Netherlands and the 1783 treaty with Sweden were framed more generally. They provided that:

> "The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession . . . ." [14]

The 1785 treaty with Prussia, which is substantially identical to the 1923 treaty, differed from the earlier treaties in two important respects. For one thing, it dealt

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[12] See also 3 Vattel, The Law of Nations or the Principles of Natural Law § 112, at 147–148 (1916 ed.); Wheaton, Elements of International Law § 82, at 115–116 (1866 ed.).

[13] See Borchard, Diplomatic Protection of Citizens Abroad § 39, at 88 (1916 ed.); 4 Miller, Treaties and other International Acts of the United States of America 547 (1934).

[14] The quotation is from the Swedish treaty. The wording of the Dutch treaty differs only slightly.

separately with realty and with personalty.[15] This separate treatment stemmed from the fact that at common law aliens could freely inherit personalty but could not succeed to realty.[16] The Continental Congress, apparently fearing that under the Articles of Confederation it lacked power thus to alter the laws of the States, instructed the Commissioners who negotiated the treaty "[t]hat no rights be stipulated for aliens to hold real property within the States, this being utterly inadmissible by their several laws and policy," but that a person who would inherit realty but for his alienage should be permitted to sell the property and withdraw the proceeds within a reasonable time.[17]

The other important difference was that the provision of the Prussian treaty dealing with the disposal and inheritance of personalty, though generally based upon the corresponding language in the Dutch and Swedish treaties, was altered by the addition of the phrase "within the jurisdiction of the other," so as to read:

> "The citizens or subjects of each party shall have power to dispose of their personal goods *within the jurisdiction of the other,* by testament, donation or otherwise, and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods . . . and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. . . ." (Emphasis added.)

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[15] The earlier treaties used the words "effects" and "goods," which have been held to include realty. *Todok* v. *Union State Bank,* 281 U. S. 449, 454.

[16] See 1 Blackstone, Commentaries 372; 2 Kent, Commentaries 61–63.

[17] See XXVI Journals of the Continental Congress 357, 360–361.

There is no precise indication why this phrase was added. Its function seems to have been to define more clearly than the earlier treaties the cases in which disposition of property required protection from the *droit d'aubaine,* namely those instances when property was disposed of in a country other than that of the citizenship of the owner. Under this construction, the phrase would modify the word "dispose" rather than the words "personal goods" (or "personal property" in the 1923 treaty). The right of succession would be unaffected, since the words "said personal goods" (or "such personal property" in the 1923 treaty) would refer to all "personal goods" (or to "personal property of every kind" in the 1923 treaty) and not merely to those personal goods within the territory of the other party to the treaty.

Several factors point to the conclusion that this construction is correct, and that the phrase "within the jurisdiction of the other" was not intended to modify the words "personal goods" and thereby to limit the right of succession. The addition of the phrase "within the jurisdiction of the other" was unrelated to the problem of freeing rights of succession from the *droit de détraction,* since that exaction was imposed upon succession by an alien to the property of any person dying within the realm, regardless of the citizenship of the decedent. The phrase therefore cannot have been intended to modify the right of succession in order to enlarge or contract this freedom.

Moreover, the terms of the newly added real property clause affirmatively indicate that the "personal goods" clause of the 1785 treaty (and therefore the "personal property" clause of the 1923 treaty) was intended to confer the right to inherit personal property from both alien and citizen decedents. The first draft of the 1785 treaty was substantially similar to the earlier Dutch and Swedish treaties, and quite clearly would have permit-

ted aliens to succeed to real or personal property regardless of whether the decedent died in his own country.[18] However, as noted earlier, the Continental Congress out of caution instructed the Commissioners that aliens should not be allowed by the treaty to succeed to and hold real estate but should be limited to sale of the land and removal of the proceeds. This indicates that the real estate clause was intended purely as a limitation on the rights accorded with respect to personal property and was not supposed to confer any greater rights. The real property clause certainly permitted inheritance from both alien and citizen, for it allowed succession "on the death of any person holding real estate." This was acknowledged by the Court in *Clark* v. *Allen, supra,* at 517, with respect to the 1923 treaty. It would seem to follow that the more liberal personal property clause was also intended to allow inheritance regardless of the decedent's nationality.

The conclusion that the personal property clause of the 1785 (and hence of the 1923) treaty was intended to grant a right of inheritance no matter what the decedent's citizenship finds additional support in the State Department's interpretations of similar treaty provisions during the 19th century. When negotiating substantially identical provisions in treaties with German states in the 1840's, the then Minister to Prussia, Mr. Wheaton, indicated his belief that the proposed treaties would protect "naturalized Germans, resident in the U[nited] States, who are entitled to inherit the property of their relations deceased in Germany."[19] There was no sug-

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[18] See 2 Diplomatic Correspondence of the United States 1783–1789, at 111, 116–117.

[19] Despatch, Wheaton to Legare, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives; see 4 Miller, Treaties and other International Acts of the United States of America 547–548 (1934).

gestion that the treaties would apply only to real property or, with respect to personal property, only to the small class of naturalized Germans whose "relations" in Germany happened also to be American citizens. In responding to Mr. Wheaton, the State Department instructed him to take as his "general guide" the treaty with Prussia and others similarly worded, and instructed him that the object should be "the removal of all obstructions . . . to the withdrawal from the one country, by the citizens or subjects of the other, of any property which may have been transferred to them by . . . will,— or which they may have inherited *ab intestato*." [20]

Later in the century, after the *Frederickson* decision, the State Department several times indicated that it regarded similarly worded treaties as assuring citizens of one country the right to inherit personal property of citizens of the other dying in their own country. In 1868 and 1880 the Department asserted, under a similarly worded treaty,[21] the right of American citizens to inherit personal property of Swiss decedents who died in Switzerland.[22] In 1877, it took the same position with respect to the rights of Russian heirs to inherit the personal property of American decedents under a like treaty with Russia.[23] The negotiations leading to the British treaty of 1899, which have previously been described, reveal the same attitude.

This course of history, coupled with the general principle that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging,

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[20] 4 Miller, *supra*, at 546, 548.

[21] Treaty of Nov. 25, 1850, with Switzerland, 11 Stat. 587, 590.

[22] See Diplomatic Correspondence of the United States, 1868, Pt. II, 194, 196–197; Foreign Relations of the United States, 1880, 952–953.

[23] See 4 Moore, Digest of International Law 6 (1906). The treaty was the Treaty of Dec. 18, 1832, with Russia, 8 Stat. 444.

rights which may be claimed under it, the more liberal interpretation is to be preferred," [24] leads in my opinion to the conclusion that Article IV of the 1923 treaty should be construed as guaranteeing to citizens of the contracting parties the right to inherit personal property from a decedent who dies in his own country. I would overrule *Frederickson* v. *Louisiana, supra,* and *Clark* v. *Allen, supra,* insofar as they hold the contrary. Considerations of *stare decisis* should not stand in the way of rectifying two decisions that rest on such infirm foundations. Compare *Swift & Co., Inc.* v. *Wickham,* 382 U. S. 111, with *Kesler* v. *Department of Public Safety,* 369 U. S. 153. Properly construed, the 1923 treaty, which of course takes precedence over the Oregon statute under the Supremacy Clause, entitles the appellants in this case to succeed to the personal as well as the real property of the decedent despite the state statute.

IV.

Upon my view of this case, it would be unnecessary to reach the issue whether Oregon's statute governing inheritance by aliens amounts to an unconstitutional infringement upon the foreign relations power of the Federal Government. However, since this is the basis upon which the Court has chosen to rest its decision, I feel that I should indicate briefly why I believe the decision to be wrong on that score, too.

As noted earlier, the Oregon statute conditions an alien's right to inherit Oregon property upon the satisfaction of three conditions: (1) a reciprocal right of Americans to inherit property in the alien's country; (2) the right of Americans to receive payment in the United States from the estates of decedents dying in

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[24] *Bacardi Corp.* v. *Domenech,* 311 U. S. 150, 163, citing *Jordan* v. *Tashiro,* 278 U. S. 123, 127; *Nielsen* v. *Johnson,* 279 U. S. 47, 52.

the alien's country; and (3) proof that the alien heirs of the Oregon decedent would receive the benefit, use, and control of their inheritance without confiscation. In *Clark* v. *Allen, supra,* the Court upheld the constitutionality of a California statute which similarly conditioned the right of aliens to inherit upon reciprocity but did not contain the other two restrictions. The Court in *Clark* dismissed as "farfetched" the contention that the statute unconstitutionally infringed upon the federal foreign relations power. See 331 U. S., at 517. The Court noted that California had not violated any express command of the Constitution by entering into a treaty, agreement, or compact with foreign countries. It said that "[w]hat California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." *Ibid.*

It seems to me impossible to distinguish the present case from *Clark* v. *Allen* in this respect in any convincing way. To say that the additional conditions imposed by the Oregon statute amount to such distinctions would be to suggest that while a State may legitimately place inheritance by aliens on a reciprocity basis, it may not take measures to assure that reciprocity exists in practice and that the inheritance will actually be enjoyed by the person whom the testator intended to benefit. The years since the *Clark* decision have revealed some instances in which state court judges have delivered intemperate or ill-advised remarks about foreign governments in the course of applying such statutes, but nothing has occurred which could not readily have been foreseen at the time *Clark* v. *Allen* was decided.

Nor do I believe that this aspect of the *Clark* v. *Allen* decision should be overruled, as my Brother STEWART would have it. Prior decisions have established that in the absence of a conflicting federal policy or viola-

tion of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.[25] Application of this rule to the case before us compels the conclusion that the Oregon statute is constitutional. Oregon has so legislated in the course of regulating the descent and distribution of estates of Oregon decedents, a matter traditionally within the power of a State. See *ante,* at 440. Apart from the 1923 treaty, which the Court finds it unnecessary to consider, there is no specific interest of the Federal Government which might be interfered with by this statute. The appellants concede that Oregon might deny inheritance rights to all nonresident aliens.[26] Assuming that this is so, the statutory exception permitting inheritance by aliens whose countries permit Americans to inherit would seem to be a measure wisely designed to avoid any offense to foreign governments and thus any conflict with general federal interests: a foreign government can hardly object to the denial of rights which it does not itself accord to the citizens of other countries.

The foregoing would seem to establish that the Oregon statute is not unconstitutional on its face. And in fact the Court seems to have found the statute unconstitutional only as applied. Its notion appears to be that application of the parts of the statute which require that reciprocity actually exist and that the alien heir actually be able to enjoy his inheritance will inevitably

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[25] See, *e. g., Clarke* v. *Deckebach,* 274 U. S. 392; *Frick* v. *Webb,* 263 U. S. 326; *Webb* v. *O'Brien,* 263 U. S. 313; *Terrace* v. *Thompson,* 263 U. S. 197; *Heim* v. *McCall,* 239 U. S. 175.

[26] Brief for Appellants 13. Thus, this case does not present the question whether a uniform denial of rights to nonresident aliens might be a denial of equal protection forbidden by the Fourteenth Amendment. Cf. *Blake* v. *McClung,* 172 U. S. 239, 260–261.

involve the state courts in evaluations of foreign laws and governmental policies, and that this is likely to result in offense to foreign governments. There are several defects in this rationale. The most glaring is that it is based almost entirely on speculation. My Brother DOUGLAS does cite a few unfortunate remarks made by state court judges in applying statutes resembling the one before us. However, the Court does not mention, nor does the record reveal, any instance in which such an occurrence has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequence whatsoever.[27] The United States says in its brief as *amicus curiae* that it

> "does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." [28]

At an earlier stage in this case, the Solicitor General told this Court:

> "The Department of State has advised us . . . that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country. . . . Appellants' apprehension of a deterioration in international relations, unsubstantiated by experience, does not constitute the kind of 'changed conditions' which might call for re-examination of *Clark* v. *Allen*." [29]

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[27] The communication from the Bulgarian Government mentioned in the majority opinion in n. 7, *ante*, at 437, apparently refers not to intemperate comments by state-court judges but to the very existence of state statutes which result in the denial of inheritance rights to Bulgarians.

[28] Brief for the United States as *amicus curiae* 6, n. 5.

[29] Memorandum for the United States 5.

Essentially, the Court's basis for decision appears to be that alien inheritance laws afford state court judges an opportunity to criticize in dictum the policies of foreign governments, and that these dicta may adversely affect our foreign relations. In addition to finding no evidence of adverse effect in the record, I believe this rationale to be untenable because logically it would apply to many other types of litigation which come before the state courts. It is true that, in addition to the many state court judges who have applied alien inheritance statutes with proper judicial decorum,[30] some judges have seized the opportunity to make derogatory remarks about foreign governments. However, judges have been known to utter dicta critical of foreign governmental policies even in purely domestic cases, so that the mere possibility of offensive utterances can hardly be the test.

If the flaw in the statute is said to be that it requires state courts to inquire into the administration of foreign law, I would suggest that that characteristic is shared by other legal rules which I cannot believe the Court wishes to invalidate. For example, the Uniform Foreign Money-Judgments Recognition Act provides that a foreign-country money judgment shall not be recognized if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." [31] When there is a dispute as to the content of foreign law, the court is required under the common law to treat the question as one of fact and to consider any evidence presented as to the actual administration of the foreign legal system.[32] And in the field of choice of law there is a nonstatutory

[30] See, *e. g.*, *Estate of Larkin*, 65 Cal. 2d 60, 416 P. 2d 473.

[31] Uniform Foreign Money-Judgments Recognition Act § 4 (a)(1), 9B Unif. Laws Ann. 67.

[32] See generally Schlesinger, Comparative Law 31–143 (2d ed. 1959).

rule that the tort law of a foreign country will not be applied if that country is shown to be "uncivilized." [33] Surely, all of these rules possess the same "defect" as the statute now before us. Yet I assume that the Court would not find them unconstitutional.

I therefore concur in the judgment of the Court upon the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.

MR. JUSTICE WHITE, dissenting.

I would affirm the judgment below. Generally for the reasons stated by MR. JUSTICE HARLAN in Part IV of his separate opinion, I do not consider the Oregon statute to be an impermissible interference with foreign affairs. Nor am I persuaded that the Court's construction of the 1923 treaty in *Clark* v. *Allen,* 331 U. S. 503 (1947), and of similar treaty language in earlier cases should be overruled at this late date.

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[33] See *Slater* v. *Mexican National R. Co.,* 194 U. S. 120, 129 (Holmes, J.); *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 355–356 (Holmes, J.); *Cuba R. Co.* v. *Crosby,* 222 U. S. 473, 478 (Holmes, J.); *Walton* v. *Arabian American Oil Co.,* 233 F. 2d 541, 545.

WIRTZ, SECRETARY OF LABOR *v.* LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL–CIO.

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

No. 57. Argued November 8, 1967.—Decided January 15, 1968.

The Secretary of Labor filed this action under § 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, seeking invalidation by the District Court of an election of union officers held by respondent in 1963 and an order directing that a new election be conducted under the Secretary's supervision. That provision authorizes the Secretary upon the complaint of a union member who has exhausted his union remedies to file suit when an investigation gives the Secretary probable cause to believe that a union election violates the standards prescribed in § 401 of the Act. If the court finds that a § 401 violation "may have affected the outcome of an election," the Act provides that the court shall declare the election void and direct a new election supervised by the Secretary. The complaint alleged that the Union had violated § 401 (e) of the Act by imposing an unreasonable restriction on members' eligibility to be candidates and to hold office. Although finding the restriction violative of § 401 (e), the District Court dismissed the suit on the ground that it was not established that the violation "may have affected the outcome" of the election. While petitioner's appeal was pending the Union in 1965 held another regular election. The Court of Appeals held that the 1965 election mooted the Secretary's challenge to the 1963 election and vacated the District Court's judgment without reaching the merits. *Held:* When the Secretary of Labor proves the existence of a § 401 violation that may have affected the outcome of a challenged election, he is not deprived of the right to a court order voiding the challenged election and directing that a new election be conducted under his supervision because the union has meanwhile conducted another unsupervised election. Pp. 467–476.

372 F. 2d 86, reversed and remanded.

Louis F. Claiborne argued the cause for petitioner. With him on the brief were *Solicitor General Marshall,*

Acting Assistant Attorney General Eardley, Richard A. Posner, Alan S. Rosenthal, Robert V. Zener, Charles Donahue, James R. Beaird and *Beate Bloch.*

Albert K. Plone argued the cause and filed a brief for respondent.

J. Albert Woll, Laurence Gold and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner, the Secretary of Labor, filed this action in the District Court for the Western District of Pennsylvania seeking a judgment declaring void the election of officers conducted by respondent Local Union on October 18, 1963, and directing that a new election be conducted under the Secretary's supervision.

Section 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 482 (b), authorizes the Secretary of Labor, upon complaint by a union member who has exhausted his internal union remedies, to file the suit when an investigation of the complaint gives the Secretary probable cause to believe that the union election was not conducted in compliance with the standards prescribed in § 401 of the Act, 29 U. S. C. § 481. If the court finds that a violation of § 401 occurred which "may have affected the outcome of an election," it "shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary." [1] The alleged illegality in the

[1] LMRDA § 402, 29 U. S. C. § 482:

"(a) A member of a labor organization—

"(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

"(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

election was a violation of the provision of § 401 (e), 29 U. S. C. § 481 (e), that in a union election subject to the Act every union member "in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . ."

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may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

"(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. . . .

"(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

. . . . . .

"(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. . . .

"(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal."

The complaining union member invoked his internal union remedies on October 24, 1963, and, not having received a final decision within three calendar months, filed a timely complaint with the Secretary.

A Local bylaw provided that union members had to have attended 75% of the Local's regular meetings in the two years preceding the election to be eligible to stand for office.[2] The union member whose complaint invoked the Secretary's investigation had not been allowed to stand for President at the 1963 election because he had attended only 17 of the 24 regular monthly meetings, one short of the requisite 75%; under the bylaws, working on the night shift was the only excusable absence and none of his absences was for this reason.

The District Court held that the meeting-attendance requirement was an unreasonable restriction upon the eligibility of union members to be candidates for office and therefore violated § 401 (e),[3] but dismissed the suit on the ground that it was not established that the violation "may have affected the outcome" of the election. 244 F. Supp. 745. The Secretary appealed to the Court

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[2] Article IX, § 1, of the International Constitution provided that:

"All candidates for office, before nomination, must have attended 75 per cent of the meetings for at least two years prior to the election."

Article 4, § 12, of the Local's bylaws provided:

"No member may be a candidate unless said member is in good standing and has attended seventy-five per cent (75%) of the regular local meetings since the last local election."

And § 13 further provided:

"In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting. . . ."

[3] As a consequence of the meeting-attendance requirement, only 11 of the 500-member Local were eligible to run for office in 1963. The Vice President and Financial Secretary ran for re-election unopposed and there were no candidates for Recording Secretary and for three Trustee positions. These positions were filled by appointment of members who could not have qualified as candidates under the meeting-attendance requirement.

of Appeals for the Third Circuit. The appeal was pending when the Local conducted its next regular biennial election in October 1965. The Court of Appeals held that the Secretary's challenge to the 1963 election was mooted by the 1965 election, and therefore vacated the District Court judgment with the direction to dismiss the case as moot. In consequence, the court did not reach the merits of the question whether the unlawful meeting-attendance qualification may have affected the outcome of the 1963 election. 372 F. 2d 86.[4] Because the question whether the intervening election mooted the Secretary's action is important in the administration of the LMRDA, we granted certiorari, 387 U. S. 904, and set the case for oral argument with No. 58, *Wirtz* v. *Local 125, Laborers' Int'l Union, post,* p. 477. We reverse.

The holding of the Court of Appeals did not rest on any explicit statutory provision that on the happening of another unsupervised election the Secretary's cause of action should be deemed to have "ceased to exist." *California* v. *San Pablo & T. R. Co.,* 149 U. S. 308, 313.[5] Indeed a literal reading of § 402 (b) would more reason-

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[4] Pending decision on the appeal, the Court of Appeals, on the Secretary's application, remanded the case to the District Court to permit the Secretary to make a post-judgment motion to have the 1965 election declared invalid. The District Court denied the motion. That denial was also appealed to the Court of Appeals, which affirmed on the ground that "absent a complaint by a union member challenging the 1965 election, the Secretary had no authority to sue to establish the invalidity of that election." 372 F. 2d, at 88. Our decision makes unnecessary any consideration of the correctness of that holding.

[5] The Court of Appeals adopted the holding of the Court of Appeals for the Second Circuit in *Wirtz* v. *Local 410, IUOE,* 366 F. 2d 438. The Court of Appeals for the Sixth Circuit in No. 58, *Wirtz* v. *Local 125, Laborers' Int'l Union, supra,* also followed the Second Circuit.

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ably compel the contrary conclusion. For no exceptions are admitted by the unambiguous wording that when "the violation of § 401 may have affected the outcome of an election, the court *shall* declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary . . . ." (Emphasis supplied.)

Nonetheless, this does not end the inquiry. We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve. See, *e. g., National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 619. The LMRDA is no exception.[6]

A reading of the legislative history of the LMRDA, and of Title IV in particular, reveals nothing to indicate any consideration of the possibility that another election might intervene before a final judicial decision of the Secretary's challenge to a particular election. The only reasonable inference is that the possibility did not occur to the Congress.[7] We turn therefore to the question

[6] Archibald Cox, who actively participated in shaping much of the LMRDA, has remarked:

"The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words." Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960).

[7] There are references to the desirability of expeditious determinations of the Secretary's suits, but it is clear from the contexts in which they appear that the concern was to settle as quickly as practicable the cloud on the incumbents' titles to office and not to

whether, in light of the objectives Congress sought to achieve, the statute may properly be construed to terminate the Secretary's cause of action upon the fortuitous event of another unsupervised election before final judicial decision of the suit.

The LMRDA has seven subdivisions dealing with various facets both of internal union affairs and of labor-management relations. The enactment of the statute was preceded by extensive congressional inquiries upon which Congress based the findings, purposes, and policy expressed in § 2 of the Act, 29 U. S. C. § 401.[8] Of special significance in this case are the findings that "in the public interest" remedial legislation was necessary to

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avoid possible intervention of another election. See S. Rep. No. 187, 86th Cong., 1st Sess., 21, I Leg. Hist. 417; 104 Cong. Rec. 7954, Leg. Hist. 699 (Dept. Labor 1964) (hereafter cited D. L. Leg. Hist.) (Senator Kennedy); 104 Cong. Rec. 11003, D. L. Leg. Hist. 710 (Senator Smith); cf. Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 631–634 (1959). The provision of § 402 (d), 29 U. S. C. § 482 (d), that "an order directing an election shall not be stayed pending appeal" is consistent with the concern that challenges to incumbents' titles to office be resolved as quickly as possible.

[8] The background and legislative history of the 1959 Act are discussed in Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Cox, Internal Affairs of Labor Unions, *supra,* n. 6; Levitan & Loewenberg, The Politics and Provisions of the Landrum-Griffin Act, in Regulating Union Government 28 (Estey, Taft & Wagner eds. 1964); Rezler, Union Elections: The Background of Title IV of LMRDA, in Symposium on LMRDA 475 (Slovenko ed. 1961). And see Cox, Preserving Union Democracy, *supra,* n. 7, at 628–634.

Although Senator Kennedy, a principal sponsor of the legislation, counseled against mixing up the interests of providing for internal union democracy and of enacting measures concerned with relations between labor and management, see 105 Cong. Rec. 883–885, II Leg. Hist. 968–969; cf. S. Rep. No. 187, *supra,* n. 7, at 5–7, I Leg. Hist. 401–403, neither the debates nor the Act itself reveals unwavering adherence to this principle. See, *e. g.,* Cox, Internal Affairs of Labor Unions, *supra,* n. 6, at 831–833.

further the objective "that labor organizations . . . and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations . . . ," 29 U. S. C. § 401 (a), this because Congress found, "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct . . ." requiring "supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations . . . and their officers and representatives." 29 U. S. C. § 401 (b).

Title IV's special function in furthering the overall goals of the LMRDA is to insure "free and democratic" elections.[9] The legislative history shows that Congress

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[9] "It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guaranty of free and periodic elections. The responsiveness of union officers to the will of the members depends upon the frequency of elections, and an honest count of the ballots. Guaranties of fairness will preserve the confidence of the public and the members in the integrity of union elections." S. Rep. No. 187, *supra,* n. 7, at 20; and H. R. Rep. No. 741, 86th Cong., 1st Sess., 15–16, I Leg. Hist. 416, 773–774. See S. Rep. No. 187, *supra,* at 2–5, H. R. Rep. No. 741, *supra,* at 1–7, I Leg. Hist. 398–401, 759–765.

weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.[10] The extensive and vigorous debate over Title IV manifested a conflict over the extent to which governmental intervention in this most crucial aspect of internal union affairs was necessary or desirable. In the end there emerged a "general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon* v. *Harvey,* 379 U. S. 134, 140.

But the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into § 401. International union elections must be held not less often than once every five years and local union elections not less often than once every three years. Elections must be

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[10] See S. Rep. No. 187, *supra,* n. 7, at 7, I Leg. Hist. 403:

"In acting on this bill [S. 1555] the committee followed three principles: 1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. . . . [I]n establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents. 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. . . . 3. Remedies for the abuses should be direct. . . . [T]he legislation should provide an administrative or judicial remedy appropriate for each specific problem."

See also *ibid.*: "The bill reported by the committee, while it carries out all the major recommendations of the [McClellan] committee, does so within a general philosophy of legislative restraint."

The election title of the Senate bill referred to in the Committee Report was enacted virtually as drafted by the Senate.

by secret ballot among the members in good standing except that international unions may elect their officers at a convention of delegates chosen by secret ballot. 29 U. S. C. §§ 481 (a), (b). Specific provisions insure equality of treatment in the mailing of campaign literature; require adequate safeguards to insure a fair election, including the right of any candidate to have observers at the polls and at the counting of ballots; guarantee a "reasonable opportunity" for the nomination of candidates, the right to vote without fear of reprisal, and, pertinent to the case before us, the right of every member in good standing to be a candidate, subject to "reasonable qualifications uniformly imposed." 29 U. S. C. §§ 481 (c), (e).

Even when an election violates these standards, the stated commitment is to postpone governmental intervention until the union is afforded the opportunity to redress the violation. This is the effect of the requirement that a complaining union member must first exhaust his internal union remedies before invoking the aid of the Secretary. 29 U. S. C. § 482 (a). And if the union denies the member relief and he makes a timely complaint to the Secretary, the Secretary may not initiate an action until his own investigation confirms that a violation of § 401 probably infected the challenged election. Moreover, the Secretary may attempt to settle the matter without any lawsuit; the objective is not a lawsuit but to "aid in bringing about a settlement through discussion before resort to the courts." *Calhoon* v. *Harvey, supra.* And if the Secretary must finally initiate an action, the election is presumed valid until the court has adjudged it invalid. 29 U. S. C. § 482 (a). Congress has explicitly told us that these provisions were designed to preserve a "maximum amount of independence and self-government by giving every inter-

national union the opportunity to correct improper local elections." S. Rep. No. 187, 86th Cong., 1st Sess., 21, I Leg. Hist. 417.

But it is incorrect to read these provisions circumscribing the time and basis for the Secretary's intervention as somehow conditioning his right to relief once that intervention has been properly invoked. Such a construction would ignore the fact that Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV.[11] Congress deliberately gave exclusive enforcement authority to the Secretary, having "decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." *Calhoon* v. *Harvey, supra.* In so doing, Congress rejected other proposals, among them plans that would have authorized suits by complaining members in their own right.[12] And Congress unequivocally declared that

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[11] See, *e. g.*, S. Rep. No. 187, *supra,* n. 7, at 34, I Leg. Hist. 430:

"The committee bill places heavy reliance upon reporting and disclosure to union members, the Government and the public to effect correction of abuses where they have occurred. *However, the bill also endows the Secretary of Labor with broad power to insure effectuation of its objectives.* . . .

. . . . . .

". . . He has power to— . . . (e) investigate violations of the election provisions and bring court actions to overturn improperly held elections and supervise conduct of new elections . . . .

"The committee believes that the *broad powers granted to the Secretary* by this bill combined with full reporting and disclosure to union members and the public *provides a most effective combination of devices by which abuses can be remedied.*" (Emphasis supplied.)

[12] S. 748, 86th Cong., 1st Sess., I Leg. Hist. 84, 118–134; H. R. 8342, 86th Cong., 1st Sess., I Leg. Hist. 687, 727–729. See H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 35, I Leg. Hist. 939.

once the Secretary establishes in court that a violation of § 401 may have affected the outcome of the challenged election, "the court *shall* declare the election . . . to be void and direct the conduct of a new election under supervision of the Secretary . . . ." 29 U. S. C. § 482 (c). (Emphasis supplied.)

We cannot agree that this statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election. That conclusion was reached in light of the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions. See S. Rep. No. 1417, 85th Cong., 2d Sess. These abuses were among the "number of instances of breach of trust . . . [and] disregard of the rights of individual employees . . ." upon which Congress rested its decision that the legislation was required in the public interest.[13] Congress chose the alternative of a supervised election as the remedy for a § 401 violation in the belief that the protective presence of a neutral Secretary of Labor would best prevent the unfairness in the first election from infecting, directly or indirectly, the remedial election. The choice also reflects a conclusion that union members made aware of unlawful practices could not adequately protect their own interests through an unsupervised election. It is clear, therefore, that the intervention of an election

[13] See, *supra*, at 469–470.

in which the outcome might be as much a product of unlawful circumstances as the challenged election cannot bring the Secretary's action to a halt. Aborting the exclusive statutory remedy would immunize a proved violation from further attack and leave unvindicated the interests protected by § 401. Title IV was not intended to be so readily frustrated.

Respondent argues that granting the Secretary relief after a supervening election would terminate the new officers' tenure prematurely on mere suspicion. But Congress, when it settled on the remedy of a *supervised* election, considered the risk of incumbents' influence to be substantial, not a mere suspicion. The only assurance that the new officers do in fact hold office by reason of a truly fair and a democratic vote is to do what the Act requires, rerun the election under the Secretary's supervision.

The Court of Appeals concluded that it would serve "no practical purpose" to void an old election once the terms of office conferred have been terminated by a new election. We have said enough to demonstrate the fallacy of this reasoning: First, it fails to consider the incumbents' possible influence on the new election. Second, it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.

We therefore hold that when the Secretary of Labor proves the existence of a § 401 violation that may have affected the outcome of a challenged election, the fact that the union has already conducted another unsupervised election does not deprive the Secretary of his right to a court order declaring the challenged election void

and directing that a new election be conducted under his supervision.[14]

The judgment of the Court of Appeals is reversed and the case remanded to that court with direction to decide the merits of the Secretary's appeal.

It is so ordered.

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

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[14] There is much discussion in the briefs of possible alternatives to our conclusion, such as expediting proceedings under § 402 to bring about their final decision before the next regular election, or injunctive relief against the conduct of that election pending final decision in the Secretary's suit. That discussion, however, assumes a construction of the statute contrary to that which we have reached and therefore requires no comment.

WIRTZ, SECRETARY OF LABOR *v.* LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO.

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

No. 58. Argued November 8–9, 1967.—Decided January 15, 1968.

In this companion case to *Wirtz* v. *Local 153, Glass Bottle Blowers Assn., ante,* p. 463, the Secretary of Labor sued under § 402 (b) of the Labor-Management Reporting and Disclosure Act to invalidate a general election held by respondent in 1963 and the runoff election for one office held five weeks later, alleging, in part, violations of § 401 (e) in permitting members not "in good standing" to vote and be candidates in both elections. The Secretary's investigation, following a complaint to him about the runoff election by a member of respondent who had exhausted his internal remedies, revealed that a large number of members ineligible under respondent's constitution were allowed to vote in both the general and runoff elections through the fraudulent practice of a union officer, and that 16 of 27 candidates in the general election were similarly ineligible. Finding that the complaint failed to allege that a member of respondent had "complained internally" about the conduct of the general election and that the member's challenge of the runoff election could not support the Secretary's challenge of the general election, the District Court dismissed the part of the complaint relating to the general election. During the pendency of the Secretary's appeal, the respondent held its next regular election of officers, whereupon the Court of Appeals vacated the judgment of dismissal and directed the District Court to dismiss as moot the portion of the Secretary's complaint dealing with the 1963 general election. *Held:*

1. The Secretary is not deprived of his right to challenge the 1963 general election because of the subsequent unsupervised general election. *Wirtz* v. *Local 153, Glass Bottle Blowers Assn., supra,* followed. P. 479.

2. On the facts of this case, where respondent had fair notice from the violation charged by the member with respect to the runoff election that the same unlawful conduct probably occurred

at the earlier general election, the Secretary is entitled to maintain his action challenging the general election. Pp. 481–485.

375 F. 2d 921, reversed and remanded.

Louis F. Claiborne argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, Acting Assistant Attorney General Eardley, Richard A. Posner, Alan S. Rosenthal, Robert V. Zener, Charles Donahue, James R. Beaird* and *Beate Bloch.*

Mortimer Riemer argued the cause and filed a brief for respondent.

J. Albert Woll, Laurence Gold and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a companion case to No. 57, *Wirtz* v. *Local 153, Glass Bottle Blowers Assn., ante,* p. 463. Petitioner, the Secretary of Labor, filed the action in the District Court for the Northern District of Ohio, Eastern Division, under § 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 482 (b). His complaint challenged the validity of a general election of union officers conducted by the respondent Local Union on June 8, 1963, and the validity of a runoff election for the single office of Business Representative made necessary by a tie vote for that office at the June 8 election. The complaint alleged, in part, violations of § 401 (e), 29 U. S. C. § 481 (e), in permitting members not "in good standing" to vote and to run for office on both occasions. However, the only allegation that internal union remedies had been exhausted, as is required by § 402 (a), was in regard to the runoff election of July 13; the complaint stated that the loser in the runoff elec-

tion, one Dial, protested and appealed to the General Executive Board of the International Union concerning the conduct of that election and, having received a final denial of his protest by the General Executive Board, filed a timely complaint with the Secretary. The District Court held that the omission in the complaint of an allegation that a member complained internally about the conduct of the June 8 general election was fatal to the Secretary's action addressed to that election and dismissed that part of the complaint. 231 F. Supp. 590. The Secretary appealed to the Court of Appeals for the Sixth Circuit. During pendency of the appeal, respondent Local conducted its next regular triennial election of officers. The Court of Appeals thereupon vacated the judgment of dismissal and remanded to the District Court with instructions that the portion of the Secretary's complaint dealing with the June 8 election be dismissed as moot. 375 F. 2d 921.[1] We granted certiorari. 387 U. S. 904. In light of our decision today in *Wirtz* v. *Local 153, supra,* the action of the Court of Appeals must be reversed; we there held that ". . . the fact that the union has already conducted another unsupervised election does not deprive the Secretary of his right to a court order declaring the challenged election void and directing that a new election be conducted under his supervision." At 475–476.

In the circumstances we might remand to the Court of Appeals to decide the merits of the Secretary's appeal.

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[1] The order of dismissal in the District Court was entered July 14, 1964. On April 18, 1966, the District Court entered an order granting the Secretary's motion for summary judgment regarding the portion of his complaint directed to the runoff election of July 13, 1963, for the office of Business Representative. The runoff was conducted under the Secretary's supervision on June 11, 1966, the same day the union conducted the unsupervised intervening election. Dial lost the runoff.

The issue on the merits is whether the District Court erred in holding that the Secretary in his suit may not challenge the alleged violations affecting the general election of June 8 because Dial specifically challenged only the runoff election of July 13 with respect to the office of Business Representative. The merits of this question have been fully briefed and argued in this Court and the underlying issue of statutory construction has already been the subject of several and conflicting rulings by various federal courts.[2] The interests of judicial economy are therefore best served if we proceed to resolve this important question now.

Respondent Local is governed by the Constitution and the Uniform Local Union Constitution of the Laborers' International Union of North America. Under the Uniform Local Union Constitution as it existed during the period relevant here, a member's good standing was lost by failure to pay membership dues within a specified grace period, and the member was automatically suspended without notice and with loss of all membership rights except the right to readmission (but as a new member) upon payment of a fee. The eligibility of voters and candidates in both elections in this case was determined by reference to a report to the International

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[2] Compare *Wirtz* v. *Hotel Employees Union, Local 6*, 381 F. 2d 500; *Wirtz* v. *Local 9 et al., IUOE*, 366 F. 2d 911; *Wirtz* v. *Local 174, Musicians*, 65 L. R. R. M. 2972; and *Wirtz* v. *Local 450, IUOE*, 63 L. R. R. M. 2105, which more or less support the view of the District Court herein, with *Wirtz* v. *Local 406, IUOE*, 254 F. Supp. 962; *Wirtz* v. *Local 705, Hotel Employees*, 63 L. R. R. M. 2315; and *Wirtz* v. *Local 169, Hod Carriers*, 246 F. Supp. 741, which support a broader view.

These conflicting views particularly justify our resolution of the question without remanding to the Court of Appeals. In contrast, the issue in No. 57, *Wirtz* v. *Local 153, supra*, which we did remand to the Court of Appeals, was whether a standard not questioned by any party was properly applied to the particular facts.

Union of the names of members for whom a per capita tax had been paid. This report included some 50 to 75 members who were delinquent in the payment of their Local dues and had therefore actually lost good standing under the provisions of the Uniform Local Union Constitution. The cause of this patent disregard of the Local's own constitution was the practice of its Secretary-Treasurer of paying from Local funds the per capita tax of delinquent members selected by him, thus making it appear on the per capita tax report that those members had met their dues obligations when in fact they had not.[3] The Secretary's investigation disclosed that approximately 50 of the members voting in the June 8 general election and approximately 60 voting in the July 13 runoff election were ineligible to vote; and that 16 of the 27 candidates for office in the general election, including Dial's opponent who ultimately won the runoff, were ineligible for the same reason.

The question is one of statutory construction and must be answered by inference since there is lacking an explicit provision regarding the permissible scope of the Secretary's complaint. On the facts of this case we think the Secretary is entitled to maintain his action challenging the June 8 general election because respondent union had fair notice from the violation charged by Dial in his protest of the runoff election that the same unlawful conduct probably occurred at the earlier election as well.[4]

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[3] The International Constitution required respondent Local to remit to the International a per capita tax payment of $1 per member per month. These payments were to be made only for members who had in fact made current payment of their dues to the Local.

[4] See *Wirtz* v. *Local 169, Hod Carriers, supra,* n. 2, at 751–753. Although the eligibility of Dial's opponent in the runoff was an issue before the District Court on the Secretary's motion for summary judgment, the judgment was granted on the ground of voter ineligibility; that judgment is not before us.

We therefore need not consider and intimate no view on the merits of the Secretary's argument that a member's protest triggers a § 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of § 401 discovered in his investigation of the member's complaint.

We reject the narrow construction adopted by the District Court and supported by respondent limiting the Secretary's complaint solely to the allegations made in the union member's initial complaint. Such a severe restriction upon the Secretary's powers should not be read into the statute without a clear indication of congressional intent to that effect. Neither the language of the statute nor its legislative history provides such an indication; indeed, the indications are quite clearly to the contrary.

First, it is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities,[5] yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint which often must be based on incomplete information. The expertise and resources of the Labor Department were surely meant to have a broader play.[6] Second, so to constrict the Secretary

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[5] The Secretary's authority under § 601, 29 U. S. C. § 521, both supplements his investigative mandate under § 402 (b) and authorizes inquiry without regard to the filing of a complaint by a union member. But when the Secretary investigates pursuant to § 601 without a member's complaint, his remedy is limited to disclosure of violations discovered. Whether violations of § 401 uncovered by a § 601 investigation may be the predicate of a member's protest to the union and an enforcement proceeding under § 402 if the union denies relief is a question we need not and do not reach in this case.

[6] Senator Kennedy's reference to the Secretary as the complaining "union member's lawyer," 104 Cong. Rec. 10947, Leg. Hist. 1093

would be inconsistent with his vital role, which we emphasize today in *Wirtz* v. *Local 153, supra,* in protecting the public interest bound up in Title IV. The Act was not designed merely to protect the right of a union member to run for a particular union office in a particular election. Title IV's special function in furthering the general goals of the LMRDA is to insure free and democratic union elections, the regulations of the union electoral process enacted in the Title having been regarded as necessary protections of the public interest as well as of the rights and interests of union members.

We can only conclude, therefore, that it would be anomalous to limit the reach of the Secretary's cause of action by the specifics of the union member's complaint. In an analogous context we rejected such a limiting construction of the National Labor Relations Board's authority to fashion unfair labor practice complaints. *NLRB* v. *Fant Milling Co.,* 360 U. S. 301, 306–309; *National Licorice Co.* v. *NLRB,* 309 U. S. 350, 369.[7]

Respondent argues, however, that the spirit and letter of the statutory requirement that the member first exhaust his internal union remedies before the Secretary may intervene compels the suggested limitation. It contends that even to allow the Secretary to challenge the earlier election for the same violation established as having occurred in the runoff election would be inconsistent with Congress' intention to allow unions first opportunity to redress violations of § 401. This argument is not persuasive.

(Dept. Labor 1964), does not support the District Court's conclusion. The lawyer's function is to use his skills to give shape and substance to his client's often incompletely expressed complaint.

[7] The fact that the National Labor Relations Act does not require prior exhaustion of internal union remedies does not destroy the analogy; nothing in our holding today dispenses with the exhaustion requirement of § 402 (a).

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It is true that the exhaustion requirement was regarded by Congress as critical to the statute's objective of fostering union self-government. By channeling members through the internal appellate processes, Congress hoped to accustom members to utilizing the remedies made available within their own organization; at the same time, however, unions were expected to provide responsible and responsive procedures for investigating and redressing members' election grievances. These intertwined objectives are not disserved but furthered by permitting the Secretary to include in his complaint at least any § 401 violation he has discovered which the union had a fair opportunity to consider and redress in connection with a member's initial complaint.

Here the Secretary sought to challenge the June 8 general election, alleging that the same unlawful conduct occurring in the runoff affected the general election held only five weeks before. Dial's complaint had disclosed the fraudulent practice with respect to the runoff, and he was apparently able to prove at the hearing before the General Executive Board that that practice enabled nine ineligible members to vote in the runoff election; but his protest was denied because he had lost by 19 votes. The Secretary's investigation, however, discovered that a much larger number of ineligible members had been permitted to vote in that runoff election and that the Secretary-Treasurer responsible for the falsification prepared the per capita tax reports used to determine the eligibility of voters and candidates at both elections. Yet in the face of Dial's evidence raising the almost overwhelming probability that the misconduct affecting the runoff election had also occurred at the June 8 election, the union insists that it was under no duty to expand its inquiry beyond the specific challenge to the runoff election made by Dial. Surely this is not the responsible union self-government contemplated by Congress in allowing the

unions great latitude in resolving their own internal controversies. In default of respondent's action on a violation which it had a fair opportunity to consider and resolve in connection with Dial's protest, the Secretary was entitled to seek relief from the court with respect to the June 8 election. Again, Congress, having given the Secretary a broad investigative power, cannot have intended that his right to relief be defined by a complaining member's ignorance of the law or the facts or by the artlessness of the member's protest.

Because the complaint as to the June 8 election was dismissed for deficiency in pleading, the factual allegations have not been tried. We therefore reverse the judgment of the Court of Appeals and remand to that court with direction to enter a judgment reversing the District Court's judgment of dismissal and directing further proceedings by that court consistent with this opinion.

It is so ordered.

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

PENN-CENTRAL MERGER AND N & W INCLUSION CASES.

Decided January 15, 1968.*

Last Term this Court concluded (386 U. S. 372) that the Interstate Commerce Commission (ICC) erred in permitting immediate consummation of the Penn-Central merger without determining the ultimate fate of the Erie-Lackawanna, Delaware & Hudson, and Boston & Maine railroads (the "protected roads"). The ICC then conducted proceedings on the petitions of those three lines for inclusion in the Norfolk & Western (N & W) system and ordered N & W to acquire the stock of the three "protected roads" on prescribed terms. In the remanded Penn-Central proceedings the ICC reconsidered certain protective conditions previously devised to aid the three roads, imposed amended protective conditions for the interim period between consummation of the Penn-Central merger and the protected lines' inclusion in a major system, and again authorized the immediate consummation of the Penn-Central merger. A three-judge district court for the Southern District of New York enjoined implementation of the merger order pending

*No. 778, *Baltimore & Ohio Railroad Co. et al.* v. *United States et al.*; No. 779, *Norfolk & Western Railway Co.* v. *United States et al.*; No. 830, *Oscar Gruss & Son* v. *United States et al.*; No. 831, *New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee et al.* v. *United States et al.*; No. 832, *Erie-Lackawanna Railroad Co. et al.* v. *United States et al.*; No. 833, *Boston & Maine Corp.* v. *United States et al.*; No. 834, *Reading Co.* v. *United States et al.*; No. 835, *City of Scranton et al.* v. *United States et al.*; and No. 836, *John Hancock Mutual Life Insurance Co. et al.* v. *United States et al.*, on appeal from the United States District Court for the Southern District of New York, argued December 4, 1967. No. 433, *City of Pottsville* v. *United States et al.*, on appeal from the United States District Court for the Middle District of Pennsylvania; No. 663, Misc., *Borough of Moosic* v. *United States District Court for the Middle District of Pennsylvania et al.*; and No. 664, Misc., *City of Scranton et al.* v. *United States District Court for the Middle District of Pennsylvania et al.*, on motions for leave to file petitions for writs of mandamus and/or certiorari to the United States District Court for the Middle District of Pennsylvania.

review. Actions were also filed in that court to set aside the ICC's order to include the protected roads in the N & W system. Suits challenging the merger and inclusion orders in other courts were stayed to permit orderly disposition of the issues in the Southern District of New York. The District Court for the Southern District of New York dismissed all complaints attacking the merger and inclusion orders and sustained the decisions of the ICC. The Borough of Moosic filed an action in the Middle District of Pennsylvania to set aside the ICC's orders, in which action the City of Scranton and one Shapp intervened. The City of Pottsville's request to intervene was denied. The action was stayed and Moosic, Scranton and Shapp filed petitions for mandamus or certiorari seeking to challenge the stay, which has since been dissolved. *Held:*

1. The ICC properly and lawfully discharged its duties with respect to the Penn-Central merger, as its findings and conclusions accord with § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, and are supported by substantial evidence. Pp. 498–502.

(a) Under the congressional policy, set forth in the Act, of consolidating railroads into a "limited number of systems" competition is only one of many considerations in determining the public interest in the merger. Pp. 499–500.

(b) The evidence before the ICC, with negligible exceptions, attested to the probability of significant benefit from the merger, not only to the railroads and their investors, but also to shippers and the general public. P. 500.

(c) The ICC retains authority over reductions of service and facilities not specifically approved in the merger plans. P. 501.

(d) Rail service by the merged company will remain subject to restraining pressures and vigorous competition from other railroads and from motor, water, and air carriers. P. 501.

2. The attack on the orders by certain municipalities and Shapp based on the ICC's alleged failure to consider or properly evaluate the adverse effect of the merger considered in light of the inclusion order does not warrant reversal of the judgment of the District Court for the Southern District of New York. Pp. 502–506.

(a) These complainants' petitions for mandamus or certiorari challenging the stay order of the District Court for the Middle District of Pennsylvania are dismissed as moot since the stay order has been dissolved. P. 503.

(b) In its April 6, 1966, opinion approving the merger the ICC considered arguments made by participating communities and stated that the "merger will benefit rather than harm the Commonwealth." Pp. 503–504.

(c) Claims of specific injury resulting from reduction of competition by curtailment of service now provided by the "protected roads" may be asserted in appropriate proceedings when such curtailment is proposed. P. 504.

(d) The City of Scranton and Shapp were parties to the New York proceedings and the Borough of Moosic had adequate opportunity to join in that litigation following the stay of proceedings in the Pennsylvania court, and accordingly the New York court's decision which, with certain exceptions, is affirmed, precludes further judicial review of the issues on which it passes. Pp. 505–506.

(e) Since the proceedings in the Pennsylvania court are not before this Court, except for the petitions challenging the stay order which have been dismissed as moot, it will be that court's task to determine the effect of the present decision upon the proceedings before it. P. 506.

3. The decision of the District Court for the Middle District of Pennsylvania denying intervention to the City of Pottsville is vacated. Pp. 506–507.

4. The appeals of bondholders of the New York, New Haven & Hartford Railroad Company (NH), which has been under reorganization since 1961, challenging the ICC's order of November 21, 1967, providing terms for NH's inclusion in the Penn-Central system and for a loan arrangement to keep NH operating, are rejected. Pp. 507–511.

(a) The merits of the provisions of that order are not before this Court; they have not been reviewed by the bankruptcy court or by a statutory district court under the applicable statute. P. 509.

(b) Continuation of NH's operations can be realistically assured only upon effectuation of the merger, and while the rights of bondholders are entitled to respect, they do not dictate that vital rail operations be jettisoned for this reason alone. Pp. 510–511.

(c) The bondholders' objections may be adjudicated in the reorganization or upon proper judicial review; and the ICC has retained jurisdiction to make further necessary orders. P. 511.

5. The New York court's conclusion that the interim provisions for the "protected roads" are adequate and conform to the purposes insisted on by the ICC and which this Court sought to ensure by its decision last Term, is affirmed. Pp. 511–518.

(a) The protective conditions do not constitute a pooling arrangement within the meaning of the applicable statute; and the ICC's holding may be sustained by the substantial evidence that even if these provisions established a pooling arrangement, "this record clearly supports findings . . . that to protect these carriers clearly is in the interest of better service to the public" and "will not unduly restrain competition." Pp. 513–514.

(b) The ICC has reserved jurisdiction under which it could modify these provisions should improper traffic diversions develop or if the conditions should otherwise prove inequitable. Pp. 514–515.

(c) This Court's decision last Term was based on the ICC's failure to decide the question of the ultimate home of the "protected roads," and does not forbid consummation of the merger until the three roads are actually included in a larger system. Pp. 516–518.

6. The ICC's refusal to permit the Reading Company to reopen the merger record and submit evidence supporting its claim for protection similar to that given the "protected roads" is sustained, without prejudice to any proceeding by Reading, based on actual experience, for relief from undue prejudice caused by the merger. Pp. 519–520.

7. The New York court's disallowance of the claims of those appellants who challenge the ICC's order for inclusion of the "protected roads" in the N & W system is affirmed. Pp. 520–526.

(a) If, after inclusion of Erie-Lackawanna (E–L) in the N & W system by stock acquisition, E–L bondholders feel that N & W has engaged in conduct invading their rights, they may apply to the ICC for relief under its reserved jurisdiction. P. 522.

(b) The financial terms and property valuations involved in the inclusion of the "protected roads" were established by the ICC within the area of fairness and equity, were reviewed in

detail by the District Court and sustained, and there is no basis for reversing the judgment of that court. Pp. 523–526.

(c) The inclusion order has no compulsive or coercive effect on the roads to be included, and unless and until modified by the ICC, it remains available to the protected lines upon the terms specified. P. 526.

(d) The conditions prescribed by the ICC to protect employees of the roads to be included in the N & W system are sustained. They are similar to those set by the ICC for N & W's employees at the time of the N & W-Nickel Plate merger. P. 526.

Nos. 778, 779, 830–836, 279 F. Supp. 316, affirmed, subject to modifications and conditions stated in the opinion, and remanded; Nos. 663, Misc., and 664, Misc., petitions for mandamus or certiorari denied; No. 433, jurisdiction noted, 272 F. Supp. 513, vacated and remanded.

Howard J. Trienens, Myron S. Isaacs, Edward A. McDermott, Ernest R. von Starck, Gordon P. MacDougall, Malcolm Fooshee and *Lester C. Migdal* argued the cause for appellants in Nos. 778, 779, 830–836.

Solicitor General Griswold argued the cause for the United States et al. in Nos. 778, 779, 830–836.

Thomas D. Barr, Harry G. Silleck, Jr., Joseph Auerbach and *Hugh B. Cox* argued the cause for the remaining appellees in Nos. 778, 779, 830–836.

With *Mr. Trienens* on the briefs for Baltimore & Ohio Railroad Co. et al. were *Richard J. Flynn, George L. Saunders, Jr., Lloyd N. Cutler, Daniel K. Mayers* and *Edward K. Wheeler.* With *Mr. Trienens* on the briefs for Norfolk & Western Railway Co. were *Messrs. Flynn, Cutler, Mayers* and *Albert Ritchie.* With *Mr. Isaacs* on the briefs for Oscar Gruss & Son was *Homer Kripke.* With *Mr. Migdal* on the briefs for New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee was *Lawrence W. Pollack.* With *Mr. McDermott* on the briefs for Boston & Maine Corp. was

James A. Belson. With *Mr. von Starck* on the briefs for Reading Co. was *H. Merle Mulloy.* With *Mr. MacDougall* on the briefs for the City of Scranton et al. were *Harvey Gelb, Israel Packel* and *Leon H. Keyserling. Mr. MacDougall* was on the briefs for the City of Pottsville and the Borough of Moosic. With *Mr. Fooshee* on the briefs for John Hancock Mutual Life Insurance Co. et al. were *Carl E. Newton, M. Lauck Walton* and *Ben Vinar.*

With *Solicitor General Griswold* on the briefs for the United States et al. were former *Solicitor General Marshall, Assistant Attorney General Turner, Ralph S. Spritzer, Louis F. Claiborne, Howard E. Shapiro, Robert W. Ginnane, Fritz R. Kahn, Leonard S. Goodman, Betty Jo Christian* and *Jerome Nelson.*

With *Mr. Barr* on the briefs for Erie-Lackawanna Railroad Co. were *Harry H. Voigt, Eldon Olson, John M. Linsenmeyer* and *J. Kenneth Campbell. Mr. Silleck* was on the briefs for Delaware & Hudson Railroad Corp. With *Mr. Auerbach* on the briefs for Smith et al., trustees of the property of New York, New Haven & Hartford Railroad Co., were *James Wm. Moore, Robert W. Blanchette, Arthur Blasberg, Jr., Robert G. Bleakney, Jr., Morris Raker* and *Robert M. Peet.* With *Mr. Cox* on the briefs for Pennsylvania Railroad Co. and New York Central Railroad Co. were *Henry P. Sailer, Windsor F. Cousins, Ulrich Schweitzer, Gerald E. Dwyer, James B. Gray, Edward F. Butler* and *David J. Mountan, Jr. Louis J. Lefkowitz,* Attorney General, *Dunton F. Tynan,* Assistant Solicitor General, *Mortimer Sattler,* Assistant Attorney General, and *Walter J. Myskowski* filed briefs for the State of New York. *Arthur J. Sills,* Attorney General, and *William Gural,* Deputy Attorney General, filed a brief for the State of New Jersey. *Robert K. Killian,* Attorney General of Connecticut, *Samuel Kanell,* Special Assistant Attorney General, *William J. Lynch,*

Elliot L. Richardson, Attorney General of Massachusetts, *Howard M. Miller,* Assistant Attorney General, *Herbert F. DeSimone,* Attorney General of Rhode Island, and *Robert M. Schacht,* Assistant Attorney General, filed a brief for their respective States. *William G. Mahoney* and *William J. Hickey* filed a brief for the Railway Labor Executives' Association.

William C. Sennett, Attorney General, *Edward Friedman,* Counsel General, and *Edward Munce* and *Robert M. Harris,* Assistant Attorneys General, filed a brief for the Commonwealth of Pennsylvania, as *amicus curiae.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

These cases again bring before us problems arising from the program to merge the Pennsylvania and New York Central railroads and related problems proceeding from an Interstate Commerce Commission order that certain railroads be included in the Norfolk & Western (N & W) system. The merger and the inclusion orders are part of a vast reorganization of rail transportation implementing the congressional policy of encouraging consolidation of the Nation's railroads into a "limited number of systems." Section 407 of the Transportation Act of 1920, amending § 5 (4) of the Interstate Commerce Act, 41 Stat. 481. That policy has been with us, in one form or another, for more than 45 years. The original idea of the 1920 Act, that the ICC would formulate a national plan of consolidation, proved unworkable. It ran into heavy opposition from carriers and eventually had to be abandoned. The 1920 Act was replaced by the Transportation Act of 1940, 54 Stat. 898. Section 5 (2)(b) of the Interstate Commerce Act, as amended by the 1940 Act, 54 Stat. 906, 49 U. S. C. § 5 (2)(b), governed the Commission's examination of the present transactions. Under the 1940 Act, the initiation of

merger and consolidation proceedings is left to the carriers themselves, and the Commission possesses no power to compel carriers to merge. However, the congressional directive for a limited number of railroad systems has not been changed. The only change has been in the means of achieving that goal. See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 315–321 (Appendix) (1954).

The Pennsylvania and the New York Central dominate rail transportation in the Northeast. Their freight operations extend over some 20,000 miles of road in 14 States and Canada. They are the two largest passenger carrying railroads in the United States. In 1965 their combined operating revenue surpassed $1,500,000,000 and their combined net income was more than $75,000,000. As independent lines, Pennsylvania and New York Central are, to some extent, in direct competition for rail traffic. There are 32 urban areas in which the two lines are in competition with each other and in which no other rail facilities are available. The two roads operate at 160 common points or junctions and have a substantial amount of parallel trackage and routes. The proposed merger which the ICC has approved contemplates the unification of these vast roads and, as time goes on, the rationalization and elimination of some of the dual facilities and services in various areas and in various respects. The merger will result in "enormous savings in transit time." It is estimated that in eight years, the savings in expense will amount to more than $80,000,000 annually. See *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372, 379–381 (1967).

At the same time the combination of these two roads will directly and adversely affect various smaller railroads in the service area because of the more effective competitive service that the combined system will offer and

because of the tendency of the combined roads, unless restrained by law, to favor their own system rather than to share traffic by interchange with nonsystem roads.

In brief, the antecedents of the issues before us are as follows: the Penn-Central merger has been under consideration by the parties and the Commission for about 10 years. It was preceded by the vast N & W-Nickel Plate merger, which the Commission approved in 1964. That transaction, which, it is anticipated, will eventually produce savings for the N & W system of over $29,000,000 annually, resulted in a large rail network covering some 7,000 miles of track and extending in the north from Des Moines and Kansas City to Buffalo and Pittsburgh, and in the southern tier from Cincinnati to Norfolk. See *Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc.*, 324 I. C. C. 1 (1964). The transaction was not presented to this Court for review.

In 1962 the parties to the Penn-Central transaction signed an agreement of merger including 36 rail carriers. The merger agreement did not include the New York, New Haven & Hartford Railroad (NH), although that road requested inclusion.

Following the merger agreement, the parties submitted the proposal to the Commission for approval under § 5 (2) of the Interstate Commerce Act. Exhaustive hearings were held in which States, municipalities, railroads, shippers, and public bodies—some 200 parties in all—took part. The Commission's own staff participated extensively as did the Department of Justice acting for affected interests of the United States other than the regulatory functions of the Commission. All participants, with relatively minor exceptions to which we shall later advert, agreed that the merger itself would be in the public interest. There were sharp differences, however, with respect to certain issues. These primarily concerned the

provisions to be made for three smaller lines affected by the proposed merger: the Erie-Lackawanna (E–L), Delaware & Hudson (D & H), and Boston & Maine (B & M) railroads. The Commission approved immediate consummation of the merger, subject to a reservation of jurisdiction to establish protective provisions for the three roads. *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, 327 I. C. C. 475 (1966). Its order was approved by a three-judge court in the Southern District of New York. *Erie-Lackawanna R. Co.* v. *United States*, 259 F. Supp. 964 (1966).

At the last Term of Court, we reversed. We noted that the Commission itself had found that the survival of the E–L, D & H, and B & M was essential to the public interest and that these roads would be so seriously affected by the competition of the merged company that they might not be able to survive unless adequate protective arrangements were made. In these circumstances we concluded that the Commission should have determined the means to preserve the "protected roads," on both an interim and a permanent basis, before permitting consummation of the merger. We expressly stated that we were not passing upon the validity of the merger or the "peripheral points posed by the various parties." *Baltimore & Ohio R. Co.* v. *United States, supra,* at 378.

The Court noted that in 1965 each of the three "protected roads" had filed applications for inclusion in the N & W system, and that these were pending before the Commission in the N & W-Nickel Plate merger case pursuant to the Commission's continuing jurisdiction over those proceedings. We further noted that the Commission, pursuant to its power under § 5 of the Act to require as a condition of approval of a merger that other railroads be included in the merger, had obligated the merged N & W system to include the E–L, D & H,

and B & M if the Commission should so direct, upon such equitable terms as the Commission might prescribe. We stated that if the three protected roads were ordered to be included in the N & W system, "such action would provide the solution to the problem of the necessary and indispensable protection to the three railroads that the Commission found prerequisite to the merger." 386 U. S., at 390.

In accordance with our remand of the Penn-Central merger case, the Commission conducted further proceedings in the N & W case on the pending petitions of the three roads. On June 9, 1967, it issued its decision to the effect that "inclusion of the petitioners in the N & W system is preferable to their inclusion in the Penn-Central," and ordered N & W to acquire the stock of the three roads on prescribed terms. *Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc.*, 330 I. C. C. 780, 796 (1967). At the same time, in the remanded Penn-Central merger proceedings, the Commission reconsidered certain protective conditions it had previously devised to aid the three roads, imposed amended protective conditions to operate in the interim between consummation of the Penn-Central merger and the protected lines' inclusion in a major railroad system,[1] and again authorized the immediate consummation of the Penn-Central merger. *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 330 I. C. C. 328 (1967).

On July 3, 1967, on application of parties opposing the Commission's merger order, the three-judge District Court for the Southern District of New York enjoined implementation of that order pending the decision of that court on review. Actions were also filed by sev-

[1] See *infra*, at 511–512.

eral parties in the same court to set aside the order of the Commission requiring the N & W to include the three protected roads in its system. Suits challenging both the merger and inclusion orders were instituted in other courts, but were stayed so as to permit orderly disposition of the basic issues in the Southern District of New York.[2] After expedited proceedings in that court, all complaints attacking the merger and the inclusion orders were dismissed [3] and the decisions of the Interstate Commerce Commission in both the merger and the inclusion proceedings were sustained. 279 F. Supp. 316. Various of the parties then sought relief in this Court. Because of the importance and urgency of the matter, we granted a further stay of the merger order, consolidated all proceedings that were before us relating to the merger and inclusion decisions, and expedited consideration thereof. See *post,* p. 946.

We have before us nine appeals, on behalf of 17 parties, from the decision of the District Court. Also docketed are two related petitions for mandamus or certiorari to the District Court for the Middle District of Pennsylvania, and one appeal from that court.

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[2] See Memorandum Order of the District Court, issued July 3, 1967. Circuit Judge Friendly, for the District Court, noted that "litigation in six or more different district courts has seemingly been averted and all issues concentrated in a single court of first instance." We agree that this is commendable. If review of the inclusion decision and of the merger decision were in different courts, the difficulties presented by these cases would be multiplied.

[3] The Central Railroad of New Jersey (CNJ) asked and was granted a dispensation from the District Court's schedule for briefs and argument. The CNJ has reserved the right to assert that the Commission's order should contain certain protective conditions for it. It has waived the right to argue that the Penn-Central merger should be delayed. The complaint of the CNJ was not dismissed with the others and the Southern District of New York has yet to consider the position of this line.

The particular contentions urged upon us, in this multiplicity of proceedings, are many and varied. In general, however, the issues may be articulated as follows: Has the mandate of this Court been fulfilled, in that appropriate provision has now been made for the three smaller roads? Are the terms of the order providing for inclusion of the protected roads in the N & W system fair and equitable and in the public interest? Did the District Court err in refusing to enjoin consummation of the Penn-Central merger? Has adequate provision been made for resolution of the "peripheral" issues presented by the parties, which would not be foreclosed by a decision authorizing the consummation of the merger and inclusion of the protected roads in the N & W?

I. The Merger Decision.

A. In general.

Most of the parties before us are in accord that the merger is in the public interest and should be consummated as promptly as possible. Those urging immediate consummation before this Court include the Department of Justice and the Commission, the States of Pennsylvania, Connecticut, Rhode Island, New York, Massachusetts, and New Jersey; the Railway Labor Executives' Association; the trustees of the NH; the Pennsylvania and New York Central railroads; B & M; and, in substance, the E–L, D & H, and N & W and its allies. While this consensus has reduced the attacks upon the merits of the merger to a minimum, considering the vast size and implications of the transaction, we must nevertheless address ourselves to the basic merits of the merger as well as to the specific objections that are before us.

With respect to the merits of the merger, however, our task is limited. We do not inquire whether the merger satisfies our own conception of the public in-

terest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence. See, *e. g., Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U. S. 57, 69 (1966).

Section 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 905, 49 U. S. C. § 5, sets forth the national transportation policy that is to guide the Commission in its scrutiny of mergers proposed by railroads. The Commission is to approve such proposals, pursuant to the terms of § 5 (2)(b) of that Act, when they are made upon just and reasonable terms and are "consistent with the public interest." In reaching its decision, the Commission is to give weight to a number of factors, such as: "(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." 49 U. S. C. § 5 (2)(c).

We find no basis for reversing the decision of the District Court that the Commission's approval of the merger is in compliance with law and the statutory standards, and is based on adequate findings supported by substantial evidence. We shall first discuss considerations which are basic to the statutory standards, and we shall then turn to certain particular objections which have been made.

It is, of course, true that the policy of Congress, set forth in the Transportation Act, to consolidate the rail-

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roads of this Nation into a "limited number of systems" is a variation from our traditional national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation. Competition is merely one consideration here. See *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965). This departure from the general and familiar standard of industrial regulation emphasizes the need for insistence that, before a rail merger is approved, there must be convincing evidence that it will serve the national interest and that terms are prescribed so that the congressional objective of a rail system serving the public more effectively and efficiently will be carried out. Obviously, not every merger or consolidation that may be agreed upon by private interests can pass the statutory tests.

Examination of the record and of the findings in the present case, however, satisfies us that the Commission has properly and lawfully discharged its duties with respect to the merits of the merger. In these elaborate and lengthy proceedings the Commission has considered evidence tendered by others and compiled by its own staff. Upon the aggressive suit of parties representing conflicting interests, it has analyzed every pertinent aspect of the merger and the inclusion order. It has weighed conflicting viewpoints on all of the fundamental issues and many that are tangential. As the Commission concluded, the evidence before it, with negligible exceptions, attested to the probability of significant benefit from the merger, not only to the railroads and their investors, but also to shippers and the general public.

The Commission carefully considered the implications of the fact that the Pennsylvania and the New York Central, as individual systems, have operated at a profit, and that there are reasonably good prospects for a continuation of such operation. But it was impressed by the fact

that, as individual systems, these profits are not sufficient to put the roads in a position to make improvements important to the national interest, including the maintenance of services which, although essential to the public, are not self-supporting, and furnishing assistance to other roads serving public needs in their general territory. The Commission emphasized that the merger would enable the unified company to "accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service." 327 I. C. C. 475, 501–502. And it pointed out that only by permitting the merger would it be possible for the Commission to compel Penn-Central to come to the rescue of the New Haven, as we shall describe.

With respect to the lessening of competition where it now exists between the roads to be merged, the Commission pointed out that it will retain continuing power over reductions of service and facilities which are not specifically approved in the merger plans. Such consolidations and abandonments will have to be presented to the Commission for its approval and may be subjected to public criticism and hearings and to conditions or disapproval. It also noted that the rail service by the merged company will remain subject to vigorous competition from other roads, including the N & W and the C & O–B & O systems, and from motor, water, and air carriers. The Commission summarized some of the factors which would act as a restraint upon the merged company as follows:

> "The power of shippers to direct the routing, the availability of numerous routes in a dense network of interline routes, the influence of connecting carriers in preventing a deterioration in service on the joint routes in which they participate, the growing strength of the N & W and C & O–B & O systems,

all stand to provide a check against any abuse of economic power by the merged applicants." 327 I. C. C., at 514.

Considering the record, and the findings and analysis of the Commission, we see no basis for reversal of the District Court's decision that the Commission's "public interest" conclusions are adequately supported and are in accordance with law. We find no basis, consonant with the principles governing judicial review, for setting aside the Commission's determination, approved by the District Court, that the "public interest" directives of the governing statute have been reasonably satisfied: that the transaction is likely to have a beneficial and not an adverse effect upon transportation service to the public; and that, as we shall discuss, appropriate provisions have been made with respect to other railroads that are directly affected by the merger.

B. OBJECTIONS OF CERTAIN PENNSYLVANIA INTERESTS.

The only objectors in this Court to the public interest findings with respect to the merger are certain interests in the State of Pennsylvania. Appeal No. 835 was taken by the City of Scranton and Milton J. Shapp, a stockholder in the Pennsylvania Railroad Company. These parties filed complaints in the Southern District of New York challenging the Commission's original merger decision. After this Court's remand last Term, they were ordered by the District Court to file supplemental complaints. They declined to comply because, having intervened as plaintiffs in a proceeding challenging the merger in the Middle District of Pennsylvania, they chose to rely upon their asserted right to challenge the Commission's merger and inclusion decisions in the Pennsylvania action. After several warnings, their complaints in the New York court were dismissed, with prejudice.

The action in the Middle District of Pennsylvania, in which Shapp and Scranton intervened, was filed by the

Borough of Moosic on June 26, 1967, to set aside the Commission's orders, entered after our remand, approving the Penn-Central merger and the inclusion of the three protected roads in the N & W system. The Pennsylvania court stayed the Moosic proceeding by order of July 11, 1967, on the request of the United States and the Commission, for the sound purpose of preventing a multiplicity of litigation regarding the Commission's merger and inclusion decisions. Cf. *Kansas City Southern R. Co.* v. *United States*, 282 U. S. 760 (1931). Petitions for mandamus or certiorari, on behalf of Moosic (No. 663, Misc.) and Scranton and Shapp (No. 664, Misc.), seeking to challenge the stay of proceedings entered by the Pennsylvania court, have been filed in this Court. Since it now appears that the Middle District of Pennsylvania has dissolved its stay and commenced hearings, it would be pointless for us to review the stay order. Accordingly, the petitions for mandamus or certiorari are dismissed as moot.

Scranton, Shapp, and Moosic attack the Commission's merger and inclusion decisions along a broad front and claim error in the Commission's basic findings that the Penn-Central merger and inclusion of the protected lines in N & W are in the public interest. The thrust of this argument is that the Commission failed to consider or properly to evaluate the adverse effect of the Penn-Central merger, considered in light of the order requiring inclusion of the three protected roads in the N & W system, upon certain affected communities in the State of Pennsylvania. We do not agree. In its April 6, 1966, opinion approving the Penn-Central merger, the Commission examined the arguments made by participating communities in great detail and stated that the "contentions regarding the adverse effect of the merger on Pennsylvania's economy are not substantiated by the evidence. On this record, the prospects clearly import that the

merger will benefit rather than harm the Commonwealth." 327 I. C. C. 475, 492. At the time it made this finding, the Commission was committed to the proposition enunciated in the April 6, 1966, opinion, that the three protected roads would be included in one of the larger systems because of their inability to survive as independent lines. This Court in its decision last Term emphasized the importance of such inclusion. The Commission's conclusion that the net result of the merger would be beneficial to the State of Pennsylvania is bolstered by the strong position taken by the State in this Court that the decision of the District Court for the Southern District of New York should be affirmed.

As we discuss, *infra*, apart from the general and theoretical argument that the Penn-Central merger and the inclusion of the three roads in the N & W system may harm some Pennsylvania interests, complainants' fears of specific injury resulting from reduction of competition by specific curtailments of service now provided by the three protected lines may be asserted in appropriate proceedings when such curtailment is specifically proposed.

All other complaints of these parties relate broadly and generally to the fundamental and underlying economic problems that are involved in the merger and inclusion decisions: for example, the anticompetitive consequences of these decisions and the financial situation and prospects of the Pennsylvania and New York Central as independent lines. They were all the subject of extensive evidence and were analyzed at length by the Commission. In dismissing the complaints of Scranton and Shapp for failure to go forward, Judge Friendly noted that "[w]hile we entertain no doubt of the sufficiency of this [procedural] ground, we think it well to add that . . . we find no merit in the complaints of Shapp and The City of Scranton." The court remarked that, for the most part, "the attacks [of Scranton and Shapp] simply

represent disagreement with procedural and policy determinations which Congress has committed to the Commission." 279 F. Supp., at 326, n. 6. We find no reason to reverse the judgment of the District Court for the Southern District of New York for dismissing the complaints of Scranton and Shapp for failure to prosecute, or to set aside its conclusions as to the lack of merit of their claims, particularly in light of the limited function of judicial review of decisions such as those now before us and the opportunity open to them to challenge proposals which may be made for specific curtailment of service.

Scranton and Shapp, like the Borough of Moosic, wish now to go forward with their complaints in the Middle District of Pennsylvania, in which they seek an injunction against consummation of the Penn-Central merger and the effectiveness of the inclusion order. But Shapp and Scranton were parties to the New York proceedings and the Borough of Moosic had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. As we noted, *supra,* n. 2, all district courts in which actions to review the Commission's findings or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings.[4] In these circumstances, it necessarily follows that the decision of the New York court which, with certain exceptions,

[4] The process of the New York court ran throughout the Nation. 28 U. S. C. § 2321. In addition, the United States waived possible objections on venue grounds to appearances by any party in the New York litigation. In these circumstances, it would be senseless to permit parties seeking to challenge the merger and the inclusion orders to bring numerous suits in many different district courts. See, for the provision governing review of orders of administrative agencies in the courts of appeals, 28 U. S. C. § 2112.

we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes. While it is therefore no longer open to the parties to challenge the Commission's approval of the Penn-Central merger and inclusion of the three protected lines in N & W, or its order that immediate consummation of the merger should be permitted, any claims for specific relief, such as particularized objections which may arise from specific proposals for consolidation or reduction of facilities or services, are unaffected by the decision in the present cases. Claims not precluded by the present decision may be pursued before the Commission or in the courts or both, as may be appropriate. This applies to Shapp, to the City of Scranton, and to the Borough of Moosic as well as to any other affected interests. The proceedings in the Middle District of Pennsylvania are not before us, except as we have dismissed as moot the petitions challenging that court's stay of its proceedings, and it will be the task of that court to determine the effect of the present decision upon the proceedings before it. Scranton, Shapp, and Moosic may, of course, seek such relief, if any, in that court as may be available and appropriate in light of our decision herein.

Finally, we must mention the City of Pottsville, which has appealed to this Court (No. 433). Pottsville's request to intervene in the Moosic action, upon a complaint similar to that of Moosic, was denied by the Middle District of Pennsylvania. Like Moosic, Pottsville had the opportunity—which it failed to seize—to litigate in the Southern District of New York. It appears that a principal basis for denial of Pottsville's request to intervene was the objection interposed by the United States and that this objection will, after our decision in the instant cases, be withdrawn. Upon this representation by the United States, without reference to or any attempt to consider the scope or content of the

action in which intervention is sought, or the issues, if any, which may remain for adjudication in that proceeding, we vacate the decision of the District Court for the Middle District of Pennsylvania denying intervention and remand Pottsville's case to that court for further consideration in light of our decision today.

C. OBJECTIONS OF THE NEW HAVEN'S BONDHOLDERS.

Two appeals, Nos. 830 and 831, have been taken on behalf of bondholders of the New York, New Haven and Hartford Railroad Company (NH). Since 1961 the NH has been in reorganization proceedings under § 77 of the Bankruptcy Act, 11 U. S. C. § 205. Despite the shelter of the bankruptcy court, it has been on the verge of financial collapse with the attendant risk to continuance of its rail service. The Commission has found that passenger as well as freight service by the NH is a national necessity and that termination of either would lead to distress in Connecticut, Massachusetts, and Rhode Island, and would severely damage New York City and the Nation generally. See *New York, New Haven & Hartford Railroad Co., Trustees, Discontinuance of All Interstate Passenger Trains,* 327 I. C. C. 151 (1966).

The NH competes in a relatively small part of its service area with the New York Central; but in the NH's financial condition, diversion of even a small amount of the Pennsylvania's connecting traffic from the NH to the Central would inflict consequential injury. Even without reference to the hazard of such diversion, inclusion of the NH in the Penn-Central combination is the only possibility that has been advanced by any of the parties—including the complaining bondholders—for continued operation of NH, short of the sheer speculation that the States concerned or the Federal Government might take over the road and its operations.

In June 1962, with permission of the bankruptcy court, the New Haven's trustees requested the ICC to make provision under § 5 (2)(d) of the Act for its inclusion in the proposed Penn-Central merger. When the Commission first considered the merger, it stated that "we will require all the New Haven railroad [both passenger and freight operations] to be included in the applicants' transaction"; and in its initial report it provided that "our approval of the merger is conditioned upon such inclusion." 327 I. C. C., at 524, 527. It required that the parties to the merger irrevocably stipulate that they would consent to inclusion upon such terms as might be agreed between the NH and the merger parties or, failing this agreement, upon such terms as the Commission might prescribe with the approval of the bankruptcy court. 327 I. C. C., at 553.

The trustees of the NH and the two companies conducted lengthy negotiations and finally arrived at an agreement as to inclusion terms dated April 21, 1966, amended October 4, 1966. In July 1967 the NH bankruptcy court warned that New Haven's cash depletion was "so serious that, if the present rate of loss continues, there will be insufficient left by late September to meet the payroll." Subsequent improvement of cash position permitted amendment of this dire prediction so that it was expected that operation could be financed to January 1968.

The Commission on August 3, 1967, directed the negotiation of a lease between the New Haven trustees and Penn and Central, to be "immediately available upon consummation of the Penn-Central merger." The parties, however, reported that preparation of a lease in time to meet the New Haven's needs was not possible. Thereupon, the Commission ordered a hearing as to whether a lease, loan, or other arrangement should be made to

assure the NH's continued operation until its acquisition by Penn-Central. On November 21, 1967, the Commission issued an order, subject to the approval of the bankruptcy court, providing (a) terms for the inclusion of the New Haven in the Penn-Central system upon effectuation of the Penn-Central merger; (b) for the Penn-Central to lend $25,000,000 to the New Haven over a three-year period in return for trustees' certificates; and (c) for the Penn-Central to bear 100% of the operating losses of the New Haven during the first year after the merger, 50% in the second, and 25% in the third, subject to a ceiling of $5,500,000 in each year on the total amount that Penn-Central could be required to absorb and subject to termination upon transfer of the New Haven assets. Acceptance of these terms by Penn and Central is a required condition of approval of their merger. The Commission has retained jurisdiction "for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate."

The merits of these provisions are not before us. They have not been reviewed by the bankruptcy court or by a statutory district court under the applicable statute. The New Haven trustees and the States of Connecticut, Massachusetts, Rhode Island, and New York, as well as the United States, have filed briefs urging this Court to affirm approval of the Penn-Central merger, citing the urgent need for this in order to salvage the New Haven's operations. The attack, so far as the New Haven is involved, has been launched by Oscar Gruss & Son, a holder of approximately 14% of the NH's first and refunding mortgage bonds and by the Protective Committee for that issue, which intervened in Gruss' action below. (Nos. 830 and 831.) The claim is that because continued operation of the New Haven at a loss involves progressive erosion of the bondholders' security and

because the interim arrangement does not assure that Penn-Central will absorb all of the operating losses, we should not permit the Penn-Central merger to be consummated without simultaneous inclusion of the NH. In view of the probable difficulties in reaching agreement for inclusion of the NH which will satisfy its bondholders, it is virtually certain that this would mean lengthy delay during which the NH would not have access to the interim Penn-Central financial aid, and might be faced with collapse of its operations.

The Commission, after hearing the bondholders' contention, pointed out that "[i]t is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments, and the NH creditors can expect no less because the NH's properties are devoted to a public use. Indeed, the assistance the creditors are receiving from the States and would receive from Penn-Central through the sharing of operating losses would raise some of that burden from their shoulders." *Pennsylvania Railroad Company—Merger—New York Central Railroad Company,* 331 I. C. C. 643, 704 (1967). The District Court, putting aside questions of the standing of the NH bondholders to attack the Penn-Central merger, affirmed the Commission's rejection of the attack.

Continuation of the operations of the NH, which the Commission has found to be essential, can be assured only upon and after effectuation of the merger of the Penn-Central. The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH have taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven which Penn-Central will perforce accept by its act of merger. While the rights of

the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move.

While we reject the appeals of the NH bondholders, acceptance or rejection of the terms and conditions on behalf of the NH remains to be determined. The bondholders' objections may be registered and adjudicated in the bankruptcy court or upon judicial review as provided by law. Furthermore, as noted above, the Commission has retained jurisdiction to make further appropriate orders, if necessary, and has provided both that inclusion of the NH in Penn-Central and the making of the loan arrangement on such terms as are prescribed by the Commission, are conditions of approval of the merger.

We affirm the District Court's dismissal of the appeals in No. 830 and No. 831.

D. OBJECTIONS BASED ON THE PROVISIONS MADE FOR THE PROTECTED ROADS.

The N & W and roads associated with its position (the Chesapeake & Ohio (C & O), Baltimore & Ohio (B & O), and Western Maryland) have filed an appeal (No. 778). In brief and upon argument they stated that they do not object to the Penn-Central merger itself. Their stated position is that they oppose "immediate consummation"—that is prior to the actual inclusion of E–L, D & H, and B & M in the N & W. They also assail the specific operation and effect of the protective conditions and urge modifications thereof, and attack the basic legality of the conditions as a revenue pool.

The assailed protective provisions appear as Appendix G to the Commission's order in the merger case. They

are essentially of two types: traffic conditions that require the merged Penn-Central not to change routes, rates, or service in such a way as to divert traffic from the protected lines; and revenue indemnity conditions establishing a formula whereby Penn-Central is to compensate the protected lines in the event of adverse revenue results following the merger.[5] At the time the case was before us last Term, the Commission had withdrawn the revenue indemnity conditions pending further consideration. After our remand, the Commission further considered all the conditions, amended them in some respects not here material, and restored the revenue indemnity conditions. None of the protected roads has lodged objections against these provisions, nor has Penn-Central, and we affirm the District Court's conclusion that they appear to provide adequate interim protection for the three roads in conformity with the purposes insisted upon by the Commission and which this Court sought to ensure by its decision last Term.[6]

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[5] The formula is directed to compensation for an approximation of the revenues which may be lost by the protected lines to Penn-Central. Revenue ratios are determined by dividing the combined 1965 freight revenues of Penn and Central into the 1965 freight revenues of each of the protected lines. For any given subsequent year, the total freight revenue of the merged Penn-Central and of the protected line in question is then multiplied by that line's revenue ratio. The actual earned freight revenue of the protected line for the given year is then subtracted from the figure obtained by this multiplication. If the result is a positive figure, it is multiplied by an indemnification ratio of 50%, which yields the total amount of indemnity owed. The Commission has indicated that the indemnity conditions are to supplement the traffic conditions, not to replace them; Penn-Central is not given a choice of obeying the traffic conditions or paying liquidated damages, in the form of indemnity.

[6] E–L and D & H unsuccessfully sought from the Commission a provision for "capital loss indemnification" to be paid them by Penn-Central in the event that the price for their inclusion in N & W was reduced because of the effect of the Penn-Central merger on their

The objectors, however, attack the protective provisions on three grounds: First, they claim that the revenue indemnity provisions create a pooling agreement proscribed by § 5 (1) of the Interstate Commerce Act, 49 U. S. C. § 5 (1). Second, they say that the conditions give each of the protected lines an incentive to divert traffic to Penn-Central and vice versa. Such traffic diversion, they argue, would be at the expense of the objecting, "unprotected," lines. Third, they also assert that the shield which these provisions give the protected lines dilutes their incentive to join the N & W, permits them or some of them unfairly to "shop around" for better terms of inclusion, and may delay or abort their inclusion in the N & W.

We first address ourselves to the argument assailing the indemnity provisions as an illegal pool. As the District Court pointed out, the legislative history of § 5 (1) leads to the conclusion that the section was not intended to apply to cases such as this one, in which the putative revenue pool is not the creation of private parties but is imposed by the Commission itself as a condition to consummation of a merger. Additionally, even if we consider the section applicable in these circumstances, there is no merit to the contention that the protective conditions must be struck down. Section 5 (1) proscribes "any contract, agreement, or combination [among] . . . carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof," unless the Commission finds that such pooling or division "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain com-

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traffic. Although E–L and D & H have presented an appeal (No. 832) on this issue to this Court, the appeal is contingent on our reversal of the Commission's inclusion terms or our upsetting of the protective conditions. Because we today make neither of these decisions, the appeal of E–L and D & H is dismissed.

petition." The Commission has held that, even if the conditions it established were a pooling arrangement, "this record clearly supports findings . . . that to protect these carriers clearly is 'in the interest of better service to the public' " and " 'will not unduly restrain competition.' " 330 I. C. C. 328, 345, n. 8. We agree with the District Court that this finding is supported by substantial evidence in the record. The interim protection of the protected lines is, in the Commission's view and under the decision of this Court last Term, essential. These conditions have been adopted for that purpose and we see no reason on the present record to conclude that they are unlawful. In the event that actual experience reveals that the provisions operate inequitably, recourse may be had to the Commission for relief pursuant to its reserved jurisdiction, subject to judicial review.

With respect to the contention that, regardless of whether the indemnity provisions constitute a revenue pool, those provisions will induce the protected carriers and Penn-Central improperly to divert traffic to one another and thereby to injure the unprotected roads, the District Court correctly concluded that there is no basis for rejecting the Commission's findings that neither the protected roads nor Penn-Central "would have either the motive or the ability to engage in such diversion on any substantial scale." 279 F. Supp., at 328. This conclusion was reached largely because of the ability of the N & W to retaliate and the limitations imposed by economic conditions and geographic facts. The Commission included in its findings "a provision that would prohibit the protected carriers from engaging in manipulation, with sanctions if they do," 330 I. C. C., at 355, and it specifically reserved jurisdiction to reopen proceedings and modify the protective conditions "in the light of experience." The Commission has also included a gen-

eral reservation of jurisdiction, under which it could revise the protective conditions.[7] If, in light of experience, improper traffic diversions should develop or, as noted above, if these conditions should otherwise prove to be inequitable, recourse may be had to the Commission under these reservations, subject to judicial review as appropriate.[8]

N & W expresses the fear that the traffic and revenue indemnity provisions will be so attractive that the three lines or some of them will prefer to continue under their umbrella, and will not promptly accept the Commission's ticket of admission to the N & W system. The Commission's reserved power appears to be adequate to deter such conduct if and when it becomes abusive. Further, one of the protected lines, the largest of the three (E–L), already has accepted, by stockholder vote, its inclusion in N & W. The board of directors of

[7] In establishing the protective conditions, the Commission has ordered "[t]hat the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5 (9) of the Interstate Commerce Act." See n. 11, *infra*.

[8] The "protected period" during which the conditions are to be in effect will run from the date of consummation of the merger until the date of actual "inclusion of [the] protected carrier in a Railway System which includes Norfolk & Western Railway Company or any successor thereto, or in the Railway System to be operated by the merged company . . . ; provided, however, that if, as to any such protected carrier, no such inclusion shall have been effected within 1 year [of] the final determination of (i) the petitions which such protected carrier now has pending for inclusion in such Railway Systems, and (ii) any new or supplemental petition or petitions which such protected carrier may seasonably file for inclusion in any such Railway System then, as to that protected carrier, the protective period shall end when this Commission shall so order." 330 I. C. C., at 362.

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another (D & H) has recommended to stockholders that inclusion be accepted.[9] In view of these circumstances, the fears expressed by N & W and the other protestants as to the dangers which perpetuation of these provisions will pose must be regarded as speculative. Clearly, if one or more of the protected roads should decline to accept the terms for inclusion specified by the Commission's order, the Commission could be called upon to examine, pursuant to its reserved power, the appropriate action to be taken to terminate or modify the interim protective provisions or otherwise to ensure that the shield supplied to the roads is not converted into a sword. The fears expressed by the protestors fall far short of furnishing a reason for rejecting the District Court's approval of the Commission's order that the Penn-Central merger be immediately consummated. Nor is there merit to N & W's contention that it was error for the Commission to fail to rule, now and forever, that the protected roads may not be included in Penn-Central. Whether or not such permission appears likely, there is no occasion for such contingent foreclosure.

Finally, we reject the contention that this Court's prior opinion in this matter now precludes us from permitting consummation of the merger until actual inclusion of the three roads in a larger system. With respect to the inclusion problem, our criticism of the original Commission order ran to the ICC's failure to decide the question over which it had undoubted jurisdiction and which

[9] N & W places emphasis on a letter written to stockholders by the President of D & H, who is a director and a large stockholder, to the effect that he is formulating an alternative proposal to inclusion in the N & W. But at oral argument counsel for D & H reiterated that road's desire that this Court affirm the inclusion order and the merger judgment, and there is no basis in the record before us for concluding that the D & H Board of Directors has changed its position.

the Commission itself had found to be important to the public interest: the determination, so far as the Commission was empowered, of the ultimate home of the three roads. As this Court said: "we can only conclude that it is necessary that the [Commission's] decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger." 386 U. S., at 390. Our decision was not intended to require an indeterminate delay in the consummation of the merger, pending the resolution of the jockeying, negotiating, and fighting among all of the parties concerned and completion of the multitudinous procedures necessarily involved. This would place the public interest as well as the vast majority of the affected private interests at the mercy of decisions not merely of certain corporations whose interests are, in fact, secondary or derivative, but of classes of security holders. It was our intention that the public interest should be served with fairness to all private parties concerned, not that it should be the captive of parties some of whom are understandably engaged in maneuvering solely for the purpose of improving their competitive, strategic, or negotiating positions.

There is no provision of law by which the Commission or the courts may compel the three protected roads to accept inclusion in the N & W, as ordered by the Commission, or in any other system: Section 5 (2)(d) of the Act provides:

> "The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads request-

> ing such inclusion, and upon a finding that such inclusion is consistent with the public interest."

It does not make provision for compelling an unwilling railroad which is not itself a party to a merger agreement to accept inclusion under the terms the Commission prescribes. Our opinion on the first appeals commanded the Commission to specify the opportunity provided for the smaller roads to be included in a major system, before approving consummation of the Penn-Central merger. It was not intended to give the protected corporations or the creditors or stockholders of each of them, or the N & W relying on their position, a veto over the public interest which the Commission has found to inhere in this merger.

We need not pause to discuss in detail N & W's contention that the Commission's findings do not support a conclusion that N & W must proceed with inclusion of fewer than all three of the protected roads, if, for example, B & M does not accept the terms. The original decision in the N & W-Nickel Plate merger proceedings clearly contemplates action by the Commission upon a "petition or petitions" of one or more of the three roads. 324 I. C. C. 1, 148. Separate petitions were in fact filed by each of these roads. As the District Court concluded, in light of the favorable action already taken by E–L stockholders and the D & H Board of Directors, the possibility of noninclusion of B & M would not be cause for setting aside the Commission's order.[10]

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[10] The remaining arguments by appellants in No. 778 may be briefly noted and answered. There is no substance to appellants' contention that the Commission failed to find that the consummation of the merger under the protective conditions would be in the public interest. As the District Court concluded, this finding is "implicit in the very concept of devising conditions permitting consummation prior to actual inclusion of the protected roads in a major system

E. THE POSITION OF READING CO.

No. 834 is an appeal on behalf of the Reading railroad. Reading does not ask that the consummation of the merger be stayed. Its complaint is directed to the District Court's affirmance of the Commission's refusal to permit Reading to reopen the record and submit evidence in support of its claim that it should receive protective conditions similar to those the three "protected roads" were given in Appendix G to the merger order.

Reading is controlled by the C & O–B & O system through stock ownership. It has been suggested under the so-called Dereco plan, that the proposed N & W–C & O merger should include the Reading, as well as certain other small roads. Reading did not and does not ask for inclusion in Penn-Central, or for inclusion at this time in N & W along with E–L, D & H, and B & M. It did not offer evidence in the Penn-Central proceedings as to possible traffic diversion, until its tender made after the record had been closed. It now claims, however, that since much of its trackage is paralleled by lines of the Pennsylvania, it will be injured by the merger and should have the benefit of the Appendix G provisions.

Reading requests that we remand its case to the Commission for a decision as to whether protective conditions should be established for it. The Commission found, in its original report, that Reading would not be harmed

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and was made explicit when the Commission said that only 'some of the merger benefits' would be prevented and that the conditions would not work 'an undue hardship upon applicants either in their operations or merger implementation.' 327 I. C. C., at 532; see also 330 I. C. C., at 361. To deny evidentiary basis for this finding would defy common sense." 279 F. Supp., at 329. And appellants' attack upon the District Court's opinion on the basis of *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947), totally misconceives the limited office of that decision. See n. 14, *infra*.

by the merger and that protective conditions were therefore unnecessary. This finding was based in part on a letter submitted by Reading itself to the Commonwealth of Pennsylvania and introduced, without objection from Reading, in evidence before the Commission. Only after the Commission issued its report did Reading object to the finding of no adverse impact upon it as a result of the merger, and then Reading's fear appears to have been chiefly that a finding of no adverse impact might prejudice its eventual attempt to join in the N & W–C & O merger. The Commission held Reading to its "original concession that the effect of the merger transaction (without the indemnity conditions) upon them would be inconsequential." 330 I. C. C. 328, 357. In response to Reading's specific concern, the Commission modified its finding of no adverse impact to a finding that no adverse impact had been shown. The District Court upheld this decision and, in addition, concluded that Reading's claim of substantial adverse impact as a result of the Penn-Central merger was unpersuasive on the merits.

Ordinarily, we would, without more, concur with the District Court's view. Because of the vastness and complexity of this matter, however, and in order to ensure that whatever substance there may be to Reading's claim is not sacrificed, we sustain the Commission's denial of Reading's submission on condition that it is without prejudice to any proceeding which Reading may hereafter institute, based on actual experience, for relief from undue prejudice caused by the merger.

II. Inclusion Decision.

Three appeals, No. 779, No. 833, and No. 836, relate to the Commission's order, entered in the N & W-Nickel Plate merger proceedings, prescribing that N & W accept inclusion of the E–L, D & H, and B & M in the N & W system and specifying the terms thereof. *Norfolk &*

Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc., 324 I. C. C. 1 (1964), supplemented, 330 I. C. C. 780, reconsidered, 331 I. C. C. 22 (1967). In 1964 the Commission approved the N & W-Nickel Plate merger subject, among other conditions, to the Commission's retention of jurisdiction for five years to permit the filing of petitions by E–L, D & H, and B & M for inclusion in the N & W system. The Commission's approval was also subject to the condition that N & W give its irrevocable consent to inclusion of the three roads on terms that the ICC would itself prescribe in the absence of agreement among the affected parties. 324 I. C. C. 1, 148. The three lines in due course filed petitions for inclusion. Hearings were held, and, on June 9, 1967, following our remand in the Penn-Central merger case, the Commission made findings and entered its order requiring N & W to include the three roads in its system under terms it prescribed.

Appellants are the N & W, the B & M, and a number of E–L bondholders. As we shall discuss, only the N & W appeal raises issues which go broadly to the merits of the Commission's order implementing N & W's duty to accept inclusion of the three roads. B & M seeks remand on the grounds that the terms fixed by the Commission for N & W's offer to acquire the stock of the B & M are inadequate to reflect B & M's value as part of the N & W system. The third appeal, brought by E–L bondholders, turns on the question whether the Commission should have specifically retained jurisdiction to protect the E–L bondholders in the event that N & W attempts after inclusion improperly to divert E–L traffic to itself. We affirm the District Court's action in disallowing the claims of all of these appellants. Reference is made to preceding sections of this opinion for discussion of the bearing of claims respecting the inclusion order upon the Penn-Central proceeding.

We first address ourselves to the demands of E–L bondholders for assurance that the reservation of jurisdiction by the Commission would enable them to obtain consideration of unwarranted traffic diversion by N & W, if that should develop. Since N & W will be acquiring stock control of E–L and E–L's bondholders will look to E–L's fortunes for payment and security, the bondholders fear that N & W may not be entirely solicitous of E–L's welfare. Appellants themselves note that the Commission, in adopting the report and order of the officer presiding over the original hearing, has reserved jurisdiction "to receive such petitions, institute such investigations, and make such orders to accomplish the objectives and purposes of the plan for inclusion and other terms and conditions prescribed herein . . . ." The Commission has also retained jurisdiction "for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5 (9) of the Interstate Commerce Act." [11] Supplemental Order issued June 9, 1967. We have no doubt that if, after inclusion of E–L, N & W should engage in a course of conduct which invades the rights of E–L bondholders, the bondholders may apply to the Commission for relief and the Commission's reservation of jurisdiction will enable it to rule upon this complaint and to grant relief, if warranted, subject to judicial review.

The other two appeals require somewhat more extended comment. We first note that our opinion at the

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[11] Section 5 (9) provides that "the Commission may from time to time, for good cause shown, make such orders, supplemental to any order made (under its power to authorize railroad consolidations) . . . as it may deem necessary or appropriate."

last Term found adequate support for the Commission's conclusion that the public interest requires inclusion of the three roads in a larger system. As we have previously noted, see *supra,* at 503–505, the Commission's findings and order with respect to the "public interest considerations" involved in the inclusion of these lines in the N & W system are in conformity with the statute and are supported by substantial evidence.

The attack of N & W and B & M upon the Commission's order centers, not upon the fundamental issues, but upon the particular terms of that order. In brief, the Commission has provided that N & W will purchase stock control of E–L and B & M through wholly owned subsidiaries. It has fixed the basis for such purchase in relation to the experienced income of the lines, their earnings having been adjusted for various factors including savings and gains which the Commission found would result from inclusion in the N & W system. The Commission has satisfied itself that traffic losses to the merged Penn-Central would be offset by benefits to N & W not otherwise taken into account. The shareholders of these roads are to receive stock of a newly created subsidiary of N & W, which will eventually be convertible into N & W common stock. In the case of D & H, the means of valuation was the same as for the other protected lines, but N & W is to pay for D & H assets either in cash or with a note and N & W stock.

This is the first time in the Commission's history that it has undertaken to "replace the bargaining session." It did so here pursuant to the N & W stipulation, which was accepted by N & W as a condition to the N & W-Nickel Plate merger, and in response to the exigencies of the situation emphasized by this Court's decision at our last Term.

As we have noted above, the E–L stockholders have voted approval of the inclusion terms. The D & H Board

of Directors has recommended approval to its stockholders. N & W complains that the price set for inclusion of the three lines is too high and that some other aspects of inclusion are arbitrary. B & M, on the other hand, complains that the price set for its inclusion is too low. The District Court affirmed the Commission's findings and conclusions, and in the exercise of our reviewing function we find no basis for reversing that court's decision.

The method for determining the value and exchange ratio which the Commission adopted, and which we have briefly described, is not attacked. It is a method that is reasonably conventional and generally accepted, always subject to the modifications and adaptations required by individual cases, and we see no basis for holding it erroneous as a matter of law. The attack that is launched is upon factors of particularized judgment and the weight to be ascribed to various values. These are matters as to which reasonable men may reasonably differ in detail, and we see no basis for setting aside the Commission's conclusions as sustained by the District Court. In setting inclusion terms, the Commission was dealing with complicated and elusive predictions about probable traffic patterns following the Penn-Central merger and the inclusion decision. We are no more competent than the Commission and the District Court to ascertain the accuracy of those predictions. We deem it our function, in the complexities of cases such as these, to review the judgment of the District Court with respect to agency actions to make certain that those actions are based upon substantial evidence and to guard against the possibility of gross error or unfairness. If we find those conclusions to be equitable and rational, it is not for us to second-guess each step in the Commission's process of deliberation.

N & W's attack upon the inclusion order centers upon its disagreement with the Commission's findings as to prospective earnings of the three roads as part of the N & W system. It argues that the Commission had no basis for concluding that the earnings of E–L, D & H, and B & M, as subsidiaries of N & W, would be adequate to assure their "viability." [12] It asserts that the Commission has made various invalid adjustments of actual earnings and failed to make others. This, N & W says, is "the principal area of dispute in these proceedings."

On the other hand, the B & M contends that the Commission's findings substantially underestimate the savings which should be credited to it as an earnings adjustment, and that, therefore, the terms for its inclusion are unjust. Specifically, it urges that the Commission underestimated the probable amount of savings resulting from N & W control and the coordination of operations and equipment repair facilities and reduction of administrative expenses. The Commission, however, accepted and relied on figures submitted by B & M's own witness. B & M now assails these figures, but obviously the Commission was entitled to rely upon them.

The District Court examined in some detail the contentions of the parties attacking the financial terms of the inclusion order. We have reviewed the findings of

[12] N & W contends that, for this reason, the Commission should have considered alternatives to inclusion as possible means of saving the service of the protected lines. We believe N & W is considerably embarrassed, in making these arguments, by the fact that the Commission has contemplated inclusion of the protected lines in N & W ever since 1964, when N & W was permitted to consummate its highly successful merger with the Nickel Plate, and when N & W consented in principle to the inclusion of the three roads in N & W. The protected lines were scarcely faring better in 1964 than they are now. Despite the Commission's recognition that these lines are "weak," it has found their inclusion in N & W to be in the public interest.

the Commission in light of the evidence of record and the District Court's analysis, and we find no basis for reversing the District Court's judgment. The terms fixed by the Commission are clearly within the area of fairness and equity. Although B & M argues forcefully that the Commission underestimated the savings that should redound to its credit, we cannot say in the circumstances that the order should be reversed and remanded in this respect. It must be noted, as we have discussed in connection with appeals relating to the Penn-Central merger decision, that the inclusion order has no compulsive or coercive effect upon the roads to be included. Unless and until modified by the Commission, it remains available to the protected lines upon the terms which it specifies and which the District Court found to be fair and equitable.[13]

Only one other point of the N & W attack upon the inclusion order requires comment. N & W objects to the conditions prescribed by the Commission to protect the interests of the employees affected by the order. We note that those conditions, protecting employees of the protected lines, are the same as the conditions set by the Commission for N & W's employees at the time of the N & W-Nickel Plate merger. As the District Court held, "[t]he Commission acted within its powers in requiring N & W to protect employees of the three roads as thoroughly as those of the roads it was permitted to absorb only on the condition that it would accept these lines if the Commission so directed." 279 F. Supp., at 337.[14]

[13] There is no substance to N & W's argument that the Commission failed to consider the possibility that one or more of the protected lines would not join N & W. The Commission plainly did consider this possibility. It was not required to set a scale of terms for inclusion depending on the various hypothetical consequences of its order.

[14] We reject N & W's argument that the District Court was guilty of a violation of the rule of *SEC* v. *Chenery Corp.*, 332 U. S. 194

III. Conclusion.

The judgment of the District Court for the Southern District of New York is affirmed, subject to the modifications and conditions stated in this opinion. Nos. 778, 779, 830–836 are remanded to that court for the entry of such orders and for such further action as may be consistent with our opinion and judgment herein and as may be appropriate with respect to the exercise of that court's jurisdiction in the premises.

The applications of Scranton, Shapp, and Moosic for mandamus or certiorari (Nos. 663, Misc. and 664, Misc.) are denied without prejudice to further proceedings in the District Court for the Middle District of Pennsylvania, consistent with this opinion.

In No. 433, jurisdiction is noted, the judgment of the Middle District of Pennsylvania with respect to Potts-

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(1947). N & W attempts to extend the principle of that case far beyond its limits. But even if we were to accept N & W's construction of the case, N & W's conclusion would not follow. N & W relies on a statement by the District Court to the effect that "our discussion has revealed many ways by which, in our view, the Commission could support terms as favorable as it has established even if the Court should have held some of its subsidiary findings to be insufficient." 279 F. Supp., at 355. But that statement does not indicate that the court was basing its affirmance of the Commission on grounds other than those relied on by the Commission itself. On the contrary, the District Court appears to have agreed in substance with all the major findings of the Commission. To the Commission's analysis it added several points that it believed would *also* support the Commission's conclusions. The ultimate terms for inclusion were, of necessity, approximations based on the probable value of the protected lines to N & W. The District Court found that these values had been properly computed but that, even if they were not, N & W was protected by several adjustments that had been made by the Commission in order to ensure that inclusion was fair to N & W.

ville is vacated, and the cause is remanded to that court for further proceedings in light of our decision today.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, dissenting in part in Nos. 433, 663, Misc., and 664, Misc.

In my opinion, these cases present important questions concerning the "public interest" which I feel the Commission should be required to answer before judicial review can be feasible.

The Pennsylvania District Court proceedings were initiated by the Borough of Moosic (petitioner in No. 663, Misc.), located in Lackawanna County, Pennsylvania. The Borough brought its action on June 26, 1967, to annul and set aside the orders of the Commission authorizing the Penn-Central merger and requiring the inclusion of E–L, D & H, and B & M in the N & W system.[1] Those orders by the Commission had been issued on June 9, 1967, following our remand last Term on March 27, 1967. *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372. Moosic, whose complaint is dated June 26, 1967, was joined by intervenors City of Scranton and Milton J. Shapp (petitioners in No. 664, Misc.)[2] and

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[1] The Borough of Moosic was a party to the *N & W Inclusion Case* before the Commission, in which it offered testimony and submitted exceptions. It was not, however, a party before the Commission in the *Penn-Central Merger Case,* reviewed by this Court last Term. Moosic, however, seeks to challenge the merger order in the Pennsylvania action. Since Moosic is served only by E–L and D & H, the Borough notes that it became concerned with the proposed Penn-Central merger only after it learned that the merger was in part responsible for the petitions of E–L and D & H for inclusion into N & W.

[2] The City of Scranton and Milton J. Shapp were parties to both proceedings before the Commission, and were intervenors in the

the City of Pottsville (appellant in No. 433).[3] On July 11, the court granted the applications of Shapp and the City of Scranton to intervene, but denied that of the City of Pottsville.

Before the Pennsylvania action was initiated, the District Court for the Southern District of New York, in which the original action to set aside the Commission's order allowing consummation of the Penn-Central merger had been filed (*i. e.*, the action reviewed by this Court

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previous action commenced in the Southern District of New York, which was reviewed by this Court last Term. They were the only parties before the New York court last Term that challenged the basic validity of the Penn-Central merger. (See *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372, 462 (dissenting opinion of MR. JUSTICE FORTAS).) Their original complaint in the New York court was dismissed with prejudice by that court on October 19, 1967, pursuant to Rule 41 (b), Fed. Rules Civ. Proc., for failure to file a supplemental complaint attacking the Commission's order of June 9, 1967, in the *Penn-Central Merger Case*. Scranton and Shapp were never parties to the *N & W Inclusion Case* in the New York court.

Milton J. Shapp is a stockholder of the Pennsylvania Railroad Company, and a citizen of Pennsylvania. The City of Scranton is served by E–L, D & H and the Central Railroad of New Jersey. The city's interest stems both from the fact that the Penn-Central merger has necessitated the inclusion of E–L and D & H into N & W, thus making Scranton a two-railroad town, and from its fears that the proposed N & W–C & O merger will be approved along with the inclusion of CNJ therein, which would reduce Scranton to a one-railroad town. Since Scranton is a part of the Scranton-Wilkes Barre industrial and distribution complex of northeastern Pennsylvania, it also has an interest in the other railroads serving that economic area—the Reading Company, Lehigh Valley, and the Pennsylvania Railroad, together with their switching lines. The city and its surrounding area constitute one of the most important centers of railroad activity in the Eastern District.

[3] City of Pottsville was a party to the Commission proceedings involving the Penn-Central merger. The city is a municipal corporation located in Schuylkill County, Pennsylvania, and is served by the Reading Company and the Pennsylvania Railroad Company.

last Term), was asked to enjoin consummation of the merger authorized by the Commission's June 9 order until the validity of the inclusion order had been finally determined. On July 3 the New York court temporarily enjoined the merger, and ordered all plaintiffs and intervening plaintiffs in the original action to file supplemental complaints by July 17, attacking the June 9, 1967, order of the Commission in the *Penn-Central Merger Case,* or their complaints would be dismissed with prejudice.

Also before the Pennsylvania action was filed, N & W (on June 13) filed an action in a federal district court in Virginia to set aside the inclusion order; and on June 23, D & H filed a similar action in the Southern District of New York. Other interested parties had apparently indicated that they were contemplating filing additional actions in still other district courts, and the Government and the Commission urged all parties to present their challenges to the original District Court in New York. In a hearing before that court on June 28, two days after the filing of Moosic's complaint in Pennsylvania, it was stated that no objections to venue would be interposed by the Government against any party choosing to litigate in the New York forum. Thereafter, the United States and the Commission moved in the Virginia and Pennsylvania courts to stay proceedings pending the final determination of the New York actions. The Virginia court continued its proceedings until after the decision of the New York court should become available to it. The Pennsylvania court issued a stay until October 1, 1967.

Upon failing twice to have the stay order dissolved by the Pennsylvania court, the Borough of Moosic and Shapp and the City of Scranton petitioned this Court to vacate the stay order and command the District Court

to proceed with their complaints. The Court today dismisses those two petitions.[4]

The three communities involved—the Borough of Moosic and the cities of Scranton and Pottsville, make a broadside attack on many aspects of the merger in their actions in the Pennsylvania court. Among those many issues tendered is at least one that has never been considered by any court, namely, whether the inclusion of E–L, D & H, and B & M into N & W would have such a serious detrimental impact on their communities—in terms of services, employment, and business—as to make their inclusion against the "public interest" within the meaning of the Interstate Commerce Act. The communities also contend that they have not been afforded an adequate opportunity to present their arguments to the Commission.

This Court quotes the conclusion of the Commission that the "contentions regarding the adverse effect of the merger on Pennsylvania's economy are not substantiated by the evidence. On this record, the prospects clearly import that the merger will benefit rather than harm the Commonwealth." This statement, however, is taken from an earlier (April 6, 1966) opinion by

[4] Pottsville (No. 433) seeks review of the order of the Pennsylvania court denying its application for intervention in the *Moosic* case on the ground that the city was not located in the Middle District of Pennsylvania and "the defendant has objected to parties raising their objections to these I. C. C. Orders other than in the Southern District of New York . . . ." The Government, however, has no objection to the intervention of Pottsville below, and concedes that the court was in error in assuming that the Government's desire to have all actions challenging the Commission's orders brought in the New York court constituted an objection to Pottsville's formally becoming a party in the *Moosic* case. I therefore concur with the Court and agree to vacate the order denying Pottsville's application for leave to intervene and to remand to the District Court where Pottsville may renew its application.

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the Commission in the merger case. *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, Finance Docket No. 21989, 327 I. C. C. 475, 492. In other words, the Commission was there directing its attention to the effects which the merger of the Penn and Central railroads itself would have on various Pennsylvania communities. It was not concerned with the community impact of the *inclusion of E–L, D & H, and B & M into the N & W system.* That issue was not then even before the Commission, but was presented only at a later date in the separately docketed *N & W Inclusion* case, in which the Commission issued its order on June 9, 1967. *Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc.*, Finance Docket No. 21510, 330 I. C. C. 780.

The Court seems to suggest that because the Commission in its April 6, 1966, order also contemplated that E–L, D & H, and B & M would eventually be included in some major system, it must have been taking into account the impact of such inclusion on the communities served by those roads when it made the statement quoted above. But this assumption flies in the face of the Commission's case-by-case approach. It ignores the fact that the evidence before the Commission in Finance Docket No. 21989 (the *Penn-Central Merger Case*) relating to the community impact of the Penn-Central merger was not addressed to the impact which the eventual inclusion of E–L, D & H, and B & M into N & W would have on communities served by those roads. See Recommended Report, Finance Docket No. 21989, at 229–286; 327 I. C. C. 475, 489–493. And if the Court were correct in divining the Commission's hidden intent, I would have no doubt that the Commission did not provide adequate opportunity to the communities which would be affected by the inclusion of the three roads in any major system to participate in the proceedings. *Infra,* at 535–536.

Congress has, of course, committed all questions of policy under § 5 to the Commission; but on judicial review, we must be able to say that the Commission has made the necessary findings in determining policy—in this instance, that the inclusion will be in the "public interest." I do not find in the opinion of the District Court, or in the Court's opinion, a searching inquiry into the Commission's conclusions regarding the community impact of its orders in the *Inclusion Case* to ascertain whether they are adequately supported by "basic or essential findings." *Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 489. A few words about the community impact of this case—the *Inclusion Case*—will point up what I mean.

In the Recommended Report of Commissioner Webb, served on December 22, 1966, in the *Inclusion Case,* scant attention was paid to the issues tendered by the community interests. Commissioner Webb noted that many representatives of various shipper and community interests testified concerning the vital need for the services of the three roads. He then disposed of the assertions of Milton J. Shapp and certain Pennsylvania interests in one sentence:

> "Contrary to the assertions of Shapp and other Pennsylvania interests, intramodal competition would not be significantly lessened."

An accompanying footnote reads:

> "Shapp's contentions that competition would be substantially curtailed and that rail facilities in the eastern and western portions of Pennsylvania would be contracted are predicated on the merger of both E–L and D & H into N & W. However, the merger of E–L into N & W is not authorized herein [only control was authorized]. Moosic submitted testi-

mony through its Mayor and Northampton through the Chairman of its Board of Commissioners, in which opinions were expressed that inclusion of E–L and D & H in the N & W system would be injurious to shippers and receivers and the economies of their areas. No evidence was offered to support these opinions and they are not sustained by any other evidence in the record."

This cursory treatment of the allegations of Shapp and other Pennsylvania interests is not an analysis of the merits of their assertions sufficient for judicial review. This is hardly a considered treatment of the effects which inclusion would have on communities presently served by more than one of the roads to be included in the N & W system.[5]

The parties in the Pennsylvania court argue that the Hearing Examiner and Commission failed to relate the various pieces of evidence which were available concerning the community impact of any reduction in services or facilities likely to result from the inclusion order in the communities involved. In particular, the parties note that Moosic would be a prime candidate for the pruning of facilities since it has a substantial amount of E–L and D & H track, and that Scranton would be reduced to a two-railroad town with E–L and D & H also having duplicating facilities in the area. It was noted that even though the Commission stated that its inclusion order did not authorize the abandonment of facilities, the evidence introduced by E–L in support of inclusion demonstrated clearly that the avowed purpose underlying the entire transaction was substantially to reduce facilities in the Wilkes Barre-Scranton-Bingham-

[5] This brusque treatment of the community allegations contrasts sharply with the lengthy discussion of certain community interest aspects of the Penn-Central merger found in the Recommended Report in Finance Docket No. 21989, at 229–286.

ton area, and thereby effect economies. It was further alleged that according to E–L's own plan presented to the Commission, inclusion of E–L and D & H into N & W would lead to the tearing up of the main line double track between Binghamton and Scranton, and would thus take Scranton off the main line between Chicago and New York.

The communities also contend that their opportunity to participate meaningfully in the *Inclusion* proceedings was seriously limited: the Commission and its Hearing Examiner denied all requests by Moosic to hold hearings in the Scranton area so that its citizens, businessmen, and civic leaders could be heard concerning the railroad proposals. And the City of Scranton describes the difficulty of meaningful participation by community interests in the following manner:

> "The April 6, 1966 report of the Commission in the *PRR–NYC Merger Case* stated that its decision is related to the 'inclusion' proceeding, F. D. 21510, whereby E–L, D & H and B & M seek to be absorbed by N & W. The Commission stated that it took official notice of F. D. 21510 *and that it had a bearing on its decision.* [327 I. C. C. 475, 487–489.] Yet the fact was that the Commission, on April 6, 1966, did not and could not have considered the evidence of the nonrailroad parties to F. D. 21510, because such evidence from the nonrailroad parties was not circulated until April 13, 1966, and was not received in evidence prior to June 16, 1966. The Commission could not in its April 6, 1966 report have considered the public interest aspects of the inclusion case, but could only have based its PRR–NYC decision in this regard strictly upon consideration of railroad evidence, railroad positions, and railroad arguments."

It is not at all clear to me that the Commission offered a meaningful opportunity in the *Inclusion Case* to local and regional interests to present their arguments. That is a matter for the Pennsylvania court to determine in this *Inclusion Case*.

As respects the question of "public interest" in the *N & W Inclusion Case*, the Commission concluded:

> "On the positive side, inclusion of the petitioners in N & W will strengthen railroad competition, enhance the adequacy of the transportation service provided by N & W as well as the three petitioners by opening new routes and instituting new service, produce the economies and efficiencies inherent in single-line operation, and permit the joint use where possible, of facilities, equipment and routes. . . .
> "Our order herein does not authorize the abandonment of lines, operations or facilities by N & W or the petitioners. Applications for such abandonments are to be filed in appropriate proceedings. We expect N & W to maintain proper divisions with the petitioners." 330 I. C. C. 780, 827.

Despite the Commission's disclaimer that the inclusion order "does not authorize the abandonment of lines, operations or facilities," it appears that some abandonment will almost certainly result given the geographical location of the lines of the four roads involved and the companies' desire for efficiency. In addition, the Commission itself, in the first paragraph quoted above, indicates that it contemplates "economies and efficiencies inherent in single-line operation," and "the joint use where possible, of facilities, equipment and routes"—all of which portend significant effects on the local communities stretched along the routes of the roads. Deferral of the question of community interests until a subsequent hearing on abandonments will not ensure

adequate protection of those interests; for at the subsequent hearing the Penn-Central merger would be a fact, and the pressures would be great for increased economies on the part of the N & W system to make it a more efficient competitor of Penn-Central.

Communities which depend heavily on the railroad industry for employment, such as the City of Scranton, would be affected significantly by any loss of jobs. In its opinion in the *N & W Inclusion Case,* the Commission noted that in the earlier phase of this proceeding, N & W had entered into agreements with certain labor unions which provided that elimination of jobs resulting from the N & W-Nickel Plate unification would be accomplished only through normal attrition (*i. e.,* "principally by death, retirement, discharge for cause, or resignation." 330 I. C. C. 780, 822, n. 26); the agreements were apparently modified at a later date to prohibit transfer of employees to other jobs beyond their general locality. For those employees not covered by the agreements, the Commission imposed certain protective conditions prescribed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I. C. C. 557, as supplemented and clarified in 317 I. C. C. 729 and 320 I. C. C. 377. The Commission concluded that the employees of E–L, D & H, and B & M should be protected in the same manner as their counterparts involved in the N & W-Nickel Plate proceedings. For all employees not covered by attrition agreements, the protection would consist of the following: either N & W's existing agreements had to be modified to cover employees of the included roads or similar new agreements were to be drafted; and, if no agreement was concluded within 60 days, the Commission would impose appropriate conditions. The Commission denied the requests of D & H and B & M to extend this employee protection to their supervisory, professional, and executive personnel.

Whether the use of attrition agreements to eliminate jobs has a substantial adverse impact simply because jobs are eliminated is a question not free of doubt.

The Commission outlined the importance of the service of the three protected roads to the public, but limited this to a showing that, as a geographical matter, the lines of all three roads supplied needed services. 330 I. C. C. 780, 793–794. As far as appears from its decision, the Commission did not consider the unfavorable impact on the communities now served by more than one of the protected roads when the three roads are put into a single system.

Under a heading in its opinion entitled "Advantages to petitioners and to the public," the Commission noted that, under N & W control, the three protected roads could achieve substantial savings; and it observed further that:

> "The petitioners as well as the public will benefit from the unified management of what is now several separate companies operating independently. Among others, such benefits will include joint routes of affiliated lines, the prospect of single-line service, elimination of interchanges, improved schedules, and a more flexible distribution of equipment. Such benefits will increase the petitioners' ability to preserve and improve their present services and meet the needs of the shipping public. Through expanded piggyback operations, petitioners will be in a better position to meet the competition of motor carriers. Because many industries prefer to locate plants where a single-line through-route service will be available, more opportunities for industrial development will be created. As part of the large N & W system, the use of more modern equipment and facilities will be justified, resulting in greater efficiency, improved operations and better service to the public." 330 I. C. C. 780, 795.

These general conclusions are not addressed to the objections made by the communities affected. Moreover, the Commission's references to "joint routes," "elimination of interchanges," and a "more flexible distribution of equipment," suggest that community fears of eventual abandonment or scaling down of facilities are well founded.

The issues tendered by the parties in the Pennsylvania court, touching on the questions just described, are substantial and are not now before this Court for review. They have not been briefed or argued; and I fail to understand how the Court can presume to decide them.

The Court suggests that the community interests involved can obtain adequate protection from possible curtailment of service by asserting their challenges "in appropriate proceedings when such curtailment is specifically proposed." Yet it seems clear that postponing review of this question until a subsequent proceeding on proposed abandonments will not protect the communities adequately. The inclusion of the three protected roads into the N & W system surely portends significant curtailment and rerouting of the facilities of one or more of the four roads involved. Once the Penn-Central merger is consummated, N & W and its three included roads will face competitive injury unless their operations are streamlined and economized. The interests of the communities stretched along the routes of E–L, D & H, B & M, and N & W might well weigh less against the threat of Penn-Central competition once the merger has been consummated than those interests would if they were considered and evaluated before actual competition from a merged Penn-Central system is felt.

I do not suggest that we can now decide whether the impact on community interests justifies disapproval by the Commission of the inclusion of the three protected roads into N & W. The question of the adequacy of the Com-

mission's findings on this point has not been presented either to this Court or to the New York District Court; and as pointed out previously, I have grave doubts that the Commission's opinion in the *Inclusion Case* contains adequate findings on the issue to permit responsible judicial review.

The cases presently pending in Pennsylvania present, *inter alia,* the question whether the Commission failed to evaluate the adverse impact of the inclusion of the E–L, D & H, and B & M into the N & W system upon the communities served by the carriers involved.

In the action before the New York District Court, here for review in Nos. 778 and 779, that court dismissed the complaints of Shapp and the City of Scranton, with prejudice, for failing to file supplemental complaints attacking the Commission's June 9, 1967, order in the *Penn-Central Merger Case.* But the complaints of Shapp and Scranton that were dismissed with prejudice dealt only with the merits of the Commission's approval of the Penn-Central merger in its April 1966 decision in Finance Docket No. 21989. They did not attack the Commission's later (June 9, 1967) order in the separately docketed *Inclusion* proceedings. Thus, there is no question of *res judicata* present with regard to those parts of Shapp's and Scranton's complaints in the Pennsylvania court which attack the Commission's June 9 order in the *Inclusion Case.* And, of course, no question of *res judicata* arises with respect to the complaints of Moosic and Pottsville. Even if the *Penn-Central Merger* and *N & W Inclusion Cases* are regarded as inseparable, it is clear that the community impact aspect of the *Inclusion Case* was not considered by the New York court. It is evident from the record and that court's opinion that the primary concern of the court related to various aspects of the merger and inclusion orders tendered by the railroad parties which were unrelated to at least some of the

attacks leveled by the parties in the Middle District of Pennsylvania, including the question of community impact.[6]

The Court seemingly declares, however, a new rule of *res judicata* in its effort to prevent the parties in Pennsylvania from proceeding with their actions challenging the basic validity of the Commission's inclusion order on the ground, *inter alia,* that the Commission has not made adequate findings on the issue of the community impact of that order. Because the Borough of Moosic,

[6] With respect to the *N & W Inclusion* action, the court below noted that only "two points come even close to the larger public interest in the transaction . . . ." Those points were: first, N & W's complaint that the Commission should have considered the desirability of including the three protected roads along with the Reading Co. and the Central of New Jersey as wholly owned subsidiaries, not in the N & W system, but in the proposed N & W–B & O–C & O system; and second, N & W's assertion that the Commission erred in failing to find that inclusion of any of the three protected roads in the Penn-Central system rather than the N & W system would not be in the public interest. N & W has pursued the latter argument in this Court, asserting that by failing to make the suggested finding the Commission has left open the possibility that one or more of the three protected roads can eventually obtain inclusion in the merged Penn-Central system if inclusion in the N & W system is not voted by shareholders. The court rejected both of these contentions, holding that the Commission was not required to inject the N & W–B & O–C & O proposal into the instant proceeding or to make the negative finding requested by N & W to preclude the possibility of eventual inclusion of one or more of the three roads in the Penn-Central system. The court directed the remainder of its opinion dealing with the *N & W Inclusion Case* to examining the financial terms of the inclusion order, the employee protective conditions imposed by the Commission, the Commission's general standard for, and method of, valuation, certain attacks by E–L, D & H and B & M on matters of valuation peculiar to each road, and the possibility of non-inclusion of D & H and/or B & M in the N & W system—none of which involved the community impact problem. *Erie-Lackawanna R. Co.* v. *United States,* 279 F. Supp., at 336–352 (D. C. S. D. N. Y. 1967).

which had properly filed a suit in the Middle District of Pennsylvania but saw its action stayed, refused to accept the invitation of the New York District Court (a court in which Moosic was never a party, and which neither assumed jurisdiction over Moosic nor attempted to do so by making it an involuntary plaintiff) to come to New York and litigate, the Court holds that Moosic is bound by the decision of the New York court in the *Inclusion Case*. The New York court itself did not attempt to hold that its orders in the *Inclusion Case* would bind Moosic if it did not join in the New York proceedings. And I am at a loss to discover any such principle in the law of *res judicata*.

A party is entitled to its day in court;[7] and I cannot fathom how a party can be deprived of that right or waive it by refusing an invitation—not even an order—to litigate in another court located in another State.[8] The Court could reach its conclusion under the doctrine of *res judicata* only if Moosic could be termed in "privity" with one of the parties litigating in the New York action. See, *e. g., Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322; *Bank of Kentucky* v. *Kentucky*, 207 U. S. 258; *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S. 238; *In re Howard*, 9 Wall. 175. But Scranton and Shapp were the only community interests in the New York court who challenged the Commission's basic finding that the Penn-Central merger was in the public interest;

[7] *Hansberry* v. *Lee*, 311 U. S. 32.

[8] Moosic states in its petition (No. 663, Misc.) that it did not wish to litigate in New York because that court had decided to treat the *Penn-Central Merger Case* and the *N & W Inclusion Case* as "separate proceedings for judicial review purposes," and such an approach would prejudice Moosic "since the adverse impact of *N & W Inclusion* must be considered as an integral part of any judicial review of *PRR–NYC*, and vice versa." Moosic also notes that "the community public interest issues inherent in [its] case . . . are clearly outside the scope of the litigation in the other forums."

and, as pointed out, their allegations were not directed to the Commission's order in the *N & W Inclusion Case*. The Borough of Moosic is a separate community, with distinct interests based on the facilities and lines of the various roads located within the Borough, or serving the Borough. Under such conditions, Moosic cannot properly be called in privity with Scranton or Shapp.[9]

The Court states that "further judicial review or adjudication of the issues upon which [the New York District Court] passes" is precluded by its decision. But,

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[9] In *Hansberry* v. *Lee*, 311 U. S. 32, 43, we stated that even "when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law," it might be possible for a State constitutionally to adopt a procedure whereby the judgment could be made binding on all members of the class; but only if "the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." This Court in the instant case makes no inquiry, however, whether Moosic can be termed a member of the "same class" as one or more of the parties in the New York court; or whether the issues are "common," and if they are, whether the proceedings have been conducted to ensure their "full and fair consideration."

The Court does not appear to argue that the action in the New York court was a "class action" within Rule 23, Fed. Rules Civ. Proc. Indeed, the court below did not treat it as such, nor make the findings (Rule 23 (a) and (b)) or give the type of notice (Rule 23 (c)) required by that Rule for class actions.

I can find no authority for a rule which would require a party not under the jurisdiction of the inviting court to respond affirmatively to an invitation to intervene or else be bound by an adverse decision. Indeed, *Chase National Bank* v. *Norwalk*, 291 U. S. 431, would suggest that the rule is to the contrary. The Court stated in that case that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.*, at 441.

as I have already pointed out, the New York court did not pass on at least some of the contentions, including the question of the community impact of the inclusion order, which are raised by the parties in Pennsylvania; nor were those questions even presented to the New York Court for review.

Congress might, of course, channel all complaints against an administrative agency order to a particular court. It has indeed done so in many instances through provisions that a person aggrieved by a certain type of order should seek review in a designated court of appeals. 28 U. S. C. § 2341 *et seq.* (1964 ed., Supp. II). Where review of an agency order is lodged in a court of appeals and review of the same agency order is also sought in other such courts, the court of appeals where review was first sought is the one to which all other courts are directed to transfer all proceedings with respect to the agency order. 28 U. S. C. § 2112 (a) (1964 ed., Supp. II). That has the obvious advantage of centralizing and consolidating judicial review and avoiding conflicts which might obtain if the parties could go to any court that had venue. Congress, however, has made no such provision respecting ICC orders. Section 2112, on which the Court relies, provides in subsection (d) that its provisions are not applicable to review of agency orders in the district courts. ICC orders are reviewable by three-judge district courts. 28 U. S. C. § 1336 (a), § 2325. The general provision for transfer of actions from one district court to another is 28 U. S. C. § 1404 (a). But 28 U. S. C. § 1398 provides, with exceptions not relevant here, that actions challenging ICC orders "shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action." And where the jurisdiction of more than one three-judge district court has been invoked and a motion to transfer the proceedings from one to another has been made, the mo-

tion is denied if venue would not have been proper for an original action in the district court to which transfer is sought.[10] When a three-judge district court in New York was asked to transfer proceedings challenging an ICC order to the district court in Maryland, where another like challenge was being made, it declined, saying, "None of the plaintiffs in the actions in the Southern District of New York has its residence or principal office in the District of Maryland." *New York Central R. Co.* v. *United States,* 200 F. Supp. 944, 947 (D. C. S. D. N. Y. 1961). The New York District Court, speaking through Judge Friendly, refused to invoke the procedure provided for in 28 U. S. C. § 2112 (a), since that section applies, as already noted, only to review of agency orders in the courts of appeal. *Id.,* at 949–950. That court was much more faithful to the system of review, which Congress has provided, than we are today. Moosic and Scranton by no stretch of the imagination have their "residence" in New York. By 28 U. S. C. § 1398 venue plainly lies in Pennsylvania; and Congress has provided no method of transferring those suits to New York.[11]

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[10] Our decisions in *Hoffman* v. *Blaski,* 363 U. S. 335, and *Van Dusen* v. *Barrack,* 376 U. S. 612, indicate that § 1404 (a) permits transfer only to a district court in which the plaintiff would have been entitled, without regard to consent by the defendant, to bring his action originally. Moosic and Scranton could not have brought an original action in New York.

[11] If statutory provisions provide that a person aggrieved must litigate his contentions in a specific federal court, fair notice has been given that if he does not appear and present his claims in the designated court, he will forfeit his right to be heard. But when there is no such statutory provision and when indeed the applicable statute provides for review in the Pennsylvania District Court, the place of residence, is *due process* satisfied when an aggrieved person, who was never a party in the New York court or in privity with any party there, is deprived of a right to be heard on an issue not litigated in that court, simply because he was invited to participate

It is not only hard cases which make bad law. Cases surcharged with the pressure for instant and immediate decision do the same [12] and create precedents which plague us.

It seems clear to me that we must permit the parties to litigate in the Pennsylvania court *whether E–L, D & H and B & M should be included in the N & W system.* By no stretch of the imagination can it be argued that the question of the adverse impact on the Pennsylvania communities of the inclusion of the three roads in the N & W system, as now posed by the parties in Pennsylvania, was here for review or was before the New York District Court. See *Erie-Lackawanna R. Co.* v. *United States,* 279 F. Supp., at 325–326.

Last Term we held that the ultimate fate of the three protected roads must be determined before the Penn-Central merger could be consummated. This surely means that judicial review must first be had at least

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and the United States waived objections? That, I submit, is not a wholly frivolous question.

Nationwide service of process was available to the New York court. 28 U. S. C. § 2321. The United States and the ICC had waived all objections to venue against any party seeking to litigate in New York. But although the United States and the Commission moved successfully in the New York court under Rule 19, Fed. Rules Civ. Proc., to join N & W as an involuntary plaintiff in D & H's action challenging the inclusion order, they made no effort to join Moosic pursuant to that Rule.

[12] "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Holmes, J., dissenting, in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.

with respect to the contentions which bear on *the basic validity of the inclusion order*—that is, whether the order is in the "public interest," as required by 49 U. S. C. § 5 (2)(d)—as distinguished from collateral questions about the order which need not delay the Penn-Central merger. The basic validity of the inclusion order certainly involves the impact of the inclusion on the communities served by the three lines in question. Whether other questions of like character have survived need not now be determined. It is certain that at least the community-impact issue has not been resolved. And its intimate connection with our holding last Term is evident. For what if it were found that by reason of the impact on the communities the inclusion order was not in the public interest? Our "protected" roads would then have no home.

The stay order of the Pennsylvania court has expired, and that court is now proceeding with these cases. For purposes of review by this Court, the petitions in Nos. 663, Misc. and 664, Misc., seeking review of the stay order or mandamus to compel the Pennsylvania court to proceed with the cases, can be dismissed. But those petitions did not present to this Court any question concerning the merits of the parties' actions in Pennsylvania; rather they attacked the validity of the order staying their actions in deference to proceedings then being conducted in the New York District Court. And, as already pointed out, at least the question of the community impact of the inclusion order, which is raised in Pennsylvania, has not been presented either to this Court or the New York District Court for review. I therefore dissent from the Court's holding that all of the parties now litigating in Pennsylvania are precluded from challenging "the Commission's basic findings that the . . . inclusion of the protected lines in N & W [is] in the public interest." If the Pennsylvania court believes

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that the allegations of the plaintiffs are substantial, it should be free to enjoin the merger until questions concerning *the basic validity of the inclusion order,* at least so far as impact on the Pennsylvania communities is concerned, have been resolved.

MR. JUSTICE DOUGLAS, dissenting in part in Nos. 778, 779, 830–836.

These cases present at least one serious problem under 49 U. S. C. § 5 (2). Section 5 (2)(a) authorizes two or more carriers to consolidate provided that the Commission finds under subdivision (b) that the "terms and conditions" are "just and reasonable" and "will be consistent with the public interest." Moreover, under subdivision (d) of § 5 (2), the Commission "as a prerequisite to its approval" of the merger may require the inclusion of another railroad in the territory "upon equitable terms."

I do not think the Commission has made those necessary findings under § 5 (2).

The majority opinion adopts a piecemeal approach to judicial review of the Commission's orders, which, as I view it, does not conform with our duty of judicial review in one respect.

In the majority opinion last Term, Mr. Justice Clark noted that "[o]ur experience with other mergers, and common sense as well, indicate that the 'scrambling' goes fast but the unscrambling is interminable and seldom effectively accomplished." *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 392. Because of this, we refused to allow the Penn-Central merger to be consummated before the fate of the three protected roads (the Erie-Lackawanna, Delaware & Hudson, and Boston & Maine) had been determined. Some aspects of the Commission's merger and inclusion orders—those which do not go to the heart of the Commission's decision (that is, its determination that the merger or inclusion is in

the "public interest")—can await later judicial review. Examples would be the contentions of Reading and the E–L bondholders. But I fail to see how we can affirm the Commission's decision that this entire transaction is in the "public interest" without considering those points raised by the parties which do go to the heart of the controversy. I refer specifically to the contentions of the parties in the Middle District of Pennsylvania (see my partial dissent in Nos. 433, 663, Misc., and 664, Misc.), and to Nos. 830 and 831 which involve claims of the New Haven creditor interests, to which I now turn.

Certain bondholder interests of the New York, New Haven & Hartford Railroad Company (New Haven) attack the Commission's failure to provide for actual inclusion of the New Haven in the Penn-Central system as a condition simultaneous with, or precedent to, consummation of the merger. Following the filing of these appeals, the Commission, on November 16, 1967, issued a decision concerning the treatment of the New Haven in the merger plan, styling the opinion as a supplemental order in the *Penn-Central Merger Case. Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, Finance Docket No. 21989, 331 I. C. C. 643. On that date the Commission approved as a first step in the New Haven's reorganization a conveyance of its assets to Penn-Central; it fixed terms for interim financing on the basis of a $25,000,000 loan commitment from Penn-Central; and it provided for the sharing of New Haven's operating losses by Penn-Central, on a sliding scale, pending New Haven's inclusion in the merged system. The Commission also specifically provided that consummation of the merger would constitute irrevocable assent by Penn-Central to enter into the interim financing arrangement.

The sale agreement proposed by the New Haven trustees provided for New Haven's physical assets and investments to be purchased by Penn-Central free and

clear of liens and other encumbrances. The lien of the New Haven creditors' interests would shift from New Haven's present assets to the assets held by the trustees as the proceeds of the sale. Provision for the preservation of priorities and rights of claimants was made in the plan. The trustees originally submitted, pursuant to § 77 of the Bankruptcy Act,[1] a plan of reorganization to be accomplished in two steps. Initially, only the first step, providing for the sale of the New Haven to the merged Penn-Central system, was presented to the Commission for approval. After that part of the plan had been completed, the trustees intended to implement the second step, relating to distributing the assets of the New Haven estate or issuing new New Haven securities.

Certain bondholder interests contested the legality of the two-step plan. But in a decision rendered in May 1967 the Court of Appeals held that a decision on the legality of such a plan would be premature. *In the Matter of the New York, New Haven & Hartford R. Co.*, 378 F. 2d 635 (C. A. 2d Cir. 1967). In September 1967 the New Haven trustees filed the second part of their plan, but requested the Commission to make immediate findings required under § 5 (2)(d) of the Interstate Commerce Act with respect to the first part of the plan, rather than await completion of the reorganization proceedings. Creditor interests opposed this request by arguing that creditor claims, in the order of priority, would have to be considered by the Commission before it could arrive at "equitable terms" within the meaning of § 5 (2)(d). The Commission chose to adopt the procedure suggested by the trustees, and approved the plan for the sale of assets independently of a complete reorganization plan.

In short, the Commission concluded that an immediate decision on the question under § 5 (2)(d) of "equitable

[1] 11 U. S. C. § 205. See also 49 U. S. C. § 20b.

terms" for the sale of assets would satisfy "a legal preliminary to NH inclusion without delay once the Penn-Central merger is consummated." [2] On the other hand, it said, delay of such a decision until completion of New Haven's reorganization would prevent a timely rescue of the New Haven as an operating common carrier. Thus, the Commission opted in favor of "improved service through a consummated Penn-Central merger including an operational NH, while the NH creditors are freed to litigate at will the distribution of their estate." [3]

The bondholder interests before this Court contend that under either the majority or dissenting opinions in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298, any sale of the New Haven to the merged Penn-Central system would require at least its submission to a vote of bondholders. See also *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.,* 328 U. S. 495. The bondholders also argue that the Commission ignored the admonition of this Court in *Palmer* v. *Massachusetts,* 308 U. S. 79, 88, that the powers of the Commission and courts under § 77 of the Bankruptcy Act can properly be exercised only in the context of "a complete plan of reorganization for an insolvent road."

In justifying its action, the Commission noted that except for subsections (b)(1), (4), and (5), of § 77, there is no provision in § 77 that deals specifically with the form or content of a reorganization plan. Therefore, no language of § 77 was believed to prohibit evaluation of the New Haven properties and the approval of their sale before approval of a plan for restructuring the New Haven. The Commission noted the doctrine

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[2] *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.,* Finance Docket No. 21989, 331 I. C. C. 643, 653.

[3] *Id.,* at 653–654.

of "wasting assets" employed under Chapter X of the Bankruptcy Act to permit two-step plans of reorganization, and analogized that doctrine to the instant case—since in the view of the Commission, the New Haven could properly be classified as a "wasting asset." [4]

With respect to interim financing of the New Haven, the Commission approved a loan proposal under which Penn-Central would make available to the New Haven a total of $25,000,000 over three years to enable the New Haven to continue its operations until its assets were conveyed to Penn-Central. The Commission noted that the loan authorization did not impair the jurisdiction of the reorganization court since that court would still have to approve issuance of trustees' certificates to evidence those advances.[5]

The loan provisions approved by the Commission provided further that any time the cash balance of the New Haven fell below $5,000,000, the trustees could borrow

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[4] *Id.*, at 112. With respect to the "wasting asset" doctrine in Chapter X proceedings, see, *e. g.*, *In re The Sire Plan, Inc.*, 332 F. 2d 497 (C. A. 2d Cir. 1964); *In re V. Loewer's Gambrinus Brewery Co., Inc.*, 141 F. 2d 747 (C. A. 2d Cir. 1944).

[5] By an order dated December 19, 1967, the reorganization court (D. C. Conn.) authorized the New Haven Trustees to issue up to $25,000,000 in trustees' certificates to evidence any loans from Penn-Central obtained pursuant to the Commission's November 16, 1967 order. The court ordered that each certificate issued was to constitute an expense of administration equal in priority to other expenses of administration; and that the proceeds derived by the Trustees from the issuance of the certificates could be expended by them for purposes deemed necessary within their discretion (including current maintenance and operation expenses), subject to the supervision of the court. The court provided that the Trustees would not be required to seek any further authorization to make borrowings under the Penn-Central loan agreement; but it directed them to notify the court and the other parties concerned when they intended to take down a loan, and reserved jurisdiction to modify its order with respect to any of these future borrowings.

from the $25,000,000 commitment enough money to equal a $5,000,000 cash balance plus $2,500,000. The Commission set an interval of at least three months between loan takedowns, and provided that any reduction in the aid which New Haven was receiving from the New England States would reduce correspondingly the amount that could be borrowed from Penn-Central. The interest rate on the loans was declared to be the prime rate of the Morgan Guaranty Trust Company of New York City prevailing at the time the loan is taken down. December 13, 1971, was designated as the maturity date for the trustees' certificates. Finally, the loan provisions would be terminated upon the occurrence of any of the following events: (1) acquisition of the New Haven by Penn-Central; (2) a final and effective order by a regulatory authority or court granting permission to liquidate the New Haven or to dispose of it to someone other than Penn-Central; (3) cessation of the New Haven operation as a going railroad; (4) a determination that Penn-Central shall not acquire the New Haven; (5) the expiration of three years from the date of the Penn-Central merger.

Although the New Haven creditors argued before the Commission that their interests would be reduced by the issuance of the trustees' certificates, which would acquire precedence over their claims against the New Haven estate, the Commission reasoned that:

> "We consider such a result part of the process of distributing the burdens of the NH's operations. It is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments, and the NH creditors can expect no less because the NH's properties are devoted to a public use. Indeed, the assistance the creditors are receiving from the States and would

receive from Penn-Central through the sharing of operating losses would raise some of that burden from their shoulders." [6]

The Commission did not place all of New Haven's operating losses on Penn-Central during the period of the loan agreement. The amount to be absorbed by Penn-Central is governed by a specific formula approved by the Commission.[7] With respect to deciding how much of the loss was to be assumed by Penn-Central under the formula, the Commission noted two main factors: (1) the admonition of the reorganization court that safeguards against endless litigation by New Haven creditors should be established; and (2) in the interim period before conveyance of New Haven's assets to Penn-Central, the opportunities to integrate New Haven's operations into the Penn-Central system would be restricted, so that many operating economies and efficiencies could not be realized until complete inclusion of the New Haven. The Commission felt that the existence of these factors tended to limit the portion of New Haven losses which Penn-Central should have to absorb under the formula. The final amount decided upon was 100% of the loss during the first year, 50% during the second, and 25% during the third. Further, the Commission set $5,500,000 as the maximum Penn-Central share of operating losses in any one year.

Finally, the Commission provided that under the purchase agreement, the trustees' certificates evidencing the loans were to be offset in an amount equal to the operating loss absorbed by Penn-Central. The Commission asserted that the burdens on the New Haven creditors caused by the loan-loss absorption agreement would be relatively small—and not significantly different from the

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[6] 331 I. C. C. 643, 704.

[7] See *id.*, at 717–720.

burdens under a lease agreement. The Commission expected that the total amount loaned by Penn-Central over three years would probably be "substantially less than $25 million." [8] It noted that the requirements for loans would increase in relation to the operating losses of the New Haven; but as the operating losses increased, Penn-Central would absorb a part of the increase. At the same time, the Commission pointed out that since the amount of losses to be assumed by Penn-Central would decline each year (from 100% to 50% to 25%), the creditors would have much to gain by speedily completing the reorganization proceedings.

The bondholder interests attack the operating loss provisions of the Commission's order—contending that Penn-Central should be required to absorb all the operating losses of the New Haven. They also assert that the purchase price approved by the Commission for the sale of New Haven assets to Penn-Central ($125,000,000, being the value of the consideration to be received by the New Haven) is too low. Further, as indicated above, they contend that the Commission is without authority to adopt a two-step reorganization plan which prevents the bondholders from voting on the first aspect of the plan—the sale of assets.

The New Haven trustees argue that the bondholders will have the opportunity to object to these actions of the Commission in the reorganization court and to seek judicial review of its action. Indeed, Oscar Gruss & Son (appellant in No. 830) and the Bondholders' Committee (appellant in No. 831) have indicated that they intend to seek judicial review of the November 16 order. The trustees also suggest that the questions presented involve only the quantum of consideration to be paid by Penn-Central in implementation of its eventual

[8] *Id.*, at 719.

take-over of the New Haven, and do not merit postponing consummation of the Penn-Central merger.

On the other hand, the bondholders contend that their objections to the Commission's November 16 order are so substantial that even if they have only partial success on judicial review, the feasibility of inclusion would be open to serious question. If inclusion of the New Haven in the Penn-Central system could not be accomplished, a major underpinning in the Commission's finding that the merger was in the public interest would be removed.[9] The New Haven might then have to be liquidated in the reorganization court. Perhaps eventual operation by the Federal Government, or by the States concerned, would be the outcome. In fact, appellant in No. 831 has pending before the reorganization court a petition for immediate liquidation of the New Haven. The bondholders, of course, seek to recover as much of their investment as possible. To the extent that any loans from Penn-Central to the New Haven would not be offset by Penn-Central's obligation to absorb a portion of the New Haven operating losses, the bondholders' equity would be diluted.

The Commission is commanded by § 5 (2)(d) of the Act to authorize inclusion of a road only on "equitable terms." [10] Are the operating loss provisions, as they

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[9] The Commission authorized the Penn-Central merger, subject to the express condition (Condition No. 8, in Appendix A to its Report and Order dated April 6, 1966, *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, 327 I. C. C. 475, as modified in 328 I. C. C. 304 and 330 I. C. C. 328), that the merged system include the properties and operations of the New Haven. The Commission found that the merger would effectively destroy the ability of the New Haven to survive, and would not be in the public interest without the complete inclusion of the New Haven.

[10] 49 U. S. C. § 5 (2)(d). Section 5 (2)(b) authorizes acquisition of one carrier by another on terms which are "just and reasonable."

now stand, "equitable terms"? The provisions may well constitute a prelude to the slow bleeding or squeezing out of creditor interests, as their equity is diminished by loans.

High finance has a great inventive genius; and one does not have to be sophisticated to see how Penn-Central with the use of this loan device can pick up New Haven for a song.

The Commission has itself stated that the Penn-Central merger would not be in the public interest without the complete inclusion of the New Haven.[11] Clearly we should not approve this merger and decide that the mandate of § 5 (2)(b) has been fulfilled without at the same time concluding that the loan agreement and the sharing of the New Haven deficit are "equitable."

On its face the requirement that Penn-Central share the operating losses of the New Haven on a decreasing scale each year—from 100% to 50% to 25%—seems inequitable. Why a 100–50–25 formula? Why not 100–10–1 or 50–25–10 or 25–50–100? The Commission does not clearly indicate how it arrived at its 100–50–25 formula. Of the two factors mentioned by it in making its determination (preventing endless litigation by New Haven creditors, and the inability to realize many economies during the interim period before the sale of New Haven's assets to Penn-Central), only the first would appear to have any relation to the adoption of a sliding-scale formula.

On its face this formula for sharing of losses seems inherently coercive. It would indeed appear that the

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See, *e. g., Schwabacher* v. *United States,* 334 U. S. 182; *Cleveland, C., C. & St. L. R. Co.* v. *Jackson,* 22 F. 2d 509 (C. A. 6th Cir. 1927); *Stott* v. *United States,* 166 F. Supp. 851 (D. C. S. D. N. Y. 1958).

[11] *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.,* 327 I. C. C. 475, 524.

Commission sought to force the creditors to accede to its proposal within a year. The pressure would indeed be great; for once the merger between Penn and Central is consummated, the New Haven creditors would have to absorb the losses of the New Haven at an increasing rate if they did not accept the Commission's proposal.

If that is the purpose and effect of this provision concerning Penn-Central's sharing of the operating losses of the New Haven, *the issue may well have spent itself, unless we grant judicial review prior to the consummation of the merger.* Of course, if the merger is approved, one way in which the coercive effect of this provision of the plan could be eliminated would be to undo the merger. But that gets back to the problem of unscrambling mergers of this kind and intricacy, once they are consummated—the difficulty emphasized by Mr. Justice Clark when the case was here before. 386 U. S. 372, 392.

The Court, while not presuming to approve the November 16, 1967, order of the Commission as prescribing "equitable terms" for inclusion, takes the position that the Commission has done all that is required at this point with respect to the inclusion of the New Haven. But I am unable to reconcile this position with the requirements of the statute, which directs in § 5 (2)(d) that a road may be included in another only upon "equitable terms."

The coercive nature of the operating loss provision may well frustrate effective judicial review once the Penn-Central merger is a fact.

On the other hand, if the creditor interests do challenge the Commission's order in the courts, and are successful, inclusion in the Penn-Central system on "equitable terms" at the time of that decision might well be impossible. The Commission itself seemed to recognize the possibility that the New Haven might not be included

in the Penn-Central system in its November 16 report,[12] although it evidently believed that the possibility of non-inclusion did not justify delaying consummation of the Penn-Central merger. Such an approach is not permissible under the statutory scheme, when the Commission has stated that the Penn-Central merger would not be in the public interest unless the New Haven were included in that merged system. And, as the bondholders have noted, there exists a substantial doubt whether the inclusion of the New Haven on equitable terms as required by § 5 (2)(d) has been provided.

Is such a coercive provision an "equitable" term within the meaning of § 5 (2)(d)? Is "equitable" to be taken to mean what is a "fair" distribution of losses, risks, and burdens between the old creditor interests and the acquiring company? These are old and perennial problems in the reorganization and merger field. They involve a delicate weighing of legal rights and practical realities. How we can approve the merger under the statutory system without determining whether the loan provision and the provision for sharing of losses are "equitable" remains a mystery.

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[12] In its summary of the contingencies upon which the obligation of Penn-Central to loan $25,000,000 to the New Haven would be terminated, the Commission included: "If a regulatory authority or court by a final and effective order grants permission to liquidate the NH or to dispose of it to someone other than Penn-Central"; and "If it should be determined that Penn-Central shall not acquire the NH."

MASSACHUSETTS *v.* PAINTEN.

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

No. 37. Argued October 18, 1967.—Decided January 15, 1968.

Record in this case involving State's use of evidence to convict respondent which allegedly had been illegally seized *held* not sufficiently clear and specific to permit decision of the constitutional issues involved.

368 F. 2d 142, certiorari dismissed as improvidently granted.

Elliot L. Richardson, Attorney General of Massachusetts, argued the cause for petitioner. With him on the briefs were *Willie J. Davis* and *James B. Krasnoo,* Assistant Attorneys General.

Louis M. Nordlinger argued the cause and filed a brief for respondent.

Anthony G. Amsterdam and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging affirmance.

PER CURIAM.

In 1958 respondent was tried and convicted in Middlesex Superior Court, Massachusetts, for armed robbery of a bank and related offenses. He appealed, and in 1961 his conviction was affirmed by the Supreme Judicial Court of Massachusetts, *sub nom. Commonwealth* v. *Binkiewicz,* 342 Mass. 740, 175 N. E. 2d 473.

Respondent eventually filed a petition for a writ of habeas corpus in the Federal District Court. Testimony was taken by the District Court on December 30, 1965. It ruled that respondent's Fourth Amendment rights had been violated by the entry into his apartment, by his arrest, and by the search and seizure of certain articles in his apartment which were introduced in evidence

against him. Accordingly, it set aside his conviction and ordered his release.[1] *Mapp* v. *Ohio,* 367 U. S. 643 (1961). The Court of Appeals affirmed.[2] We granted certiorari because of the importance of the constitutional issues presented.[3]

At the time of respondent's trial in 1958, Massachusetts did not have an exclusionary rule for evidence obtained by an illegal search or seizure, *Commonwealth* v. *Wilkins,* 243 Mass. 356, 138 N. E. 11 (1923); *Commonwealth* v. *Spofford,* 343 Mass. 703, 706, 180 N. E. 2d 673, 675 (1962), and the parties did not focus upon the issues now before us. The evidentiary hearing in 1965 took place almost eight years after the events.

After oral argument and study of the record, we have reached the conclusion that the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case. The writ is therefore dismissed as improvidently granted. Cf. *Smith* v. *Mississippi,* 373 U. S. 238 (1963).

Dismissed.

MR. JUSTICE FORTAS, concurring.

The dissent written by my Brother WHITE, with whom my Brothers HARLAN and STEWART join, impels me to add this note. I agree with the Court's action in dismissing the writ of certiorari for having been improvidently granted because the record is not adequate for disposition of the case in terms of its constitutional problems. MR. JUSTICE WHITE's opinion is not in disagreement on this point. He would remand the case for a purpose which seems to me to be unreal: that is, to hold an inquiry, almost 10 years after the event, as to "whether Officer Rufo could have believed that the

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[1] 252 F. Supp. 851 (D. C. Mass. 1966).

[2] 368 F. 2d 142 (C. A. 1st Cir. 1966).

[3] 386 U. S. 931 (1967).

bag had been abandoned and whether the bag was searched before or after guns were observed." This inquiry—at this late date—is as elusive as an attempt to capture last night's moonbeam.

As some of my colleagues have often said, we do not sit as a court of criminal appeals to review judgments of state courts. The question in the instant case comes here as a result of federal habeas corpus proceedings. We should consider it if, and only if, we should and can dispose of it on its record in terms of constitutional principle. The Court's disposition of this case is based upon the sound premise that we should not use our certiorari jurisdiction to express our views on a point in a case which we cannot dispose of because of inadequacies of the record which cannot realistically be remedied.

I should not ordinarily feel it necessary to file a comment in this vein. In the present situation, I am troubled lest my Brother WHITE's dissent should give the impression that only he and my Brothers HARLAN and STEWART believe that the court below erred in relying on its inferences as to the undisclosed intent of the officers. I agree with the Court's disposition of this case, not because I disagree with the position stated in the dissent on this issue, but because oral argument and detailed consideration of the case after certiorari was granted disclosed the infirmity of the record which precludes the orderly disposition of the case by this Court.

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

The Court granted certiorari [1] because the rule of law applied by the Court of Appeals to the facts found by both it [2] and the District Court [3] raised troubling and difficult

[1] 386 U. S. 931 (1967).

[2] 368 F. 2d 142 (C. A. 1st Cir. 1966).

[3] 252 F. Supp. 851 (D. C. Mass. 1966).

questions about the restrictions imposed by the Fourth Amendment on evidence that may be admitted at a criminal trial. The Court now says, quite rightly, that the record in this case is stale and the facts unclear. We have, however, a set of facts found by a United States District Court and approved by a Court of Appeals. Determining what legal consequences should follow from those facts is difficult, but is the task normally entrusted to this Court. I would accept the facts found by two federal courts and decide the questions of law presented to us.

The relevant facts found below are as follows. Two police officers, having a suspicion that respondent had committed felonies but not having probable cause to believe that he had committed them, went to the door of respondent's apartment. Their motive, the courts below found, was to arrest and search, whether or not their investigation provided the probable cause that would make an arrest and search constitutional. This plan was not communicated to respondent, who when he came to the door was led to believe the officers wished only to speak to him. Told no more than that the officers wished to ask questions, respondent asked them to wait a minute, closed the door, tossed a paper bag onto a fire escape, returned, and let the officers enter. The officers did nothing to respondent but ask questions;[4] while doing that another officer, posted below, who had seen the bag drop, walked through the apartment and out onto the fire escape, where he found guns and bullets in the bag.

[4] One officer "stuck his hand into" the pocket of respondent's companion, one Ash, and "found about $200.00 in ten and twenty dollar bills stuffed in the pocket." 252 F. Supp., at 856. The bills were apparently not introduced at respondent's trial, but the officers' conduct in searching Ash without justification may well have influenced the courts below on the question of the officers' intentions.

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The officers arrested respondent, and undertook a complete search of the apartment incident to the arrest.

On these facts the District Court concluded that "[s]ince the officers had no probable cause to arrest when they entered the apartment they cannot retroactively validate the entry or arrest by reliance on what they discovered as a result of the illegal entry." 252 F. Supp., at 857. The Court of Appeals agreed, saying that the officers "set out to arrest and search [respondent] in the hope that evidence would develop," and that "since their actions were improper, the police were not entitled to the fruits." 368 F. 2d, at 144. The question is thus whether the fact that the officers were not truthful in telling respondent their intentions required that the evidence found by the policemen after they entered the apartment be barred from admission at respondent's trial as a "fruit" of unlawful police conduct.

The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. In the case before us the syllogism must be that although the policeman's words requested entry for the purpose of asking respondent questions, and the policeman—on being allowed to enter—did nothing to respondent but ask questions, the "fruits" of the policeman's otherwise lawful request to enter and question—the bag tossed out of the window and into a place where it could be seen from the street—should not be usable by the State. This is because the policeman was willing, had his lawful conduct not developed probable cause justifying respondent's arrest, to search respondent's apartment unlawfully in the hope of finding evidence of a crime.

That such a rule makes no sense is apparent when one sees it in the context of an abstruse application of the

exclusionary rule, imposed on the States as the only available way to encourage compliance by state police officers with the commands of the Fourth Amendment. See *Mapp* v. *Ohio*, 367 U. S. 643, 652–653 (1961). Because we wish to deter policemen from searching without a warrant, we would bar admission of evidence Officer McNamara discovered by ransacking respondent's apartment without a warrant or a basis for warrantless search. The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources. I voted to grant certiorari in this case in the hope the Court would state that the Court of Appeals erred in its view that a policeman's unlawful subjective intentions require exclusion of evidence obtained by lawful conduct, and I would not dismiss while the opportunity of so stating remains.

A second ground that could support a view that the officers' entry was unlawful is the position that the policemen's untruths—their failure to tell respondent of their plan—"vitiated" his consent to their entry. I might not agree with, but I could understand, a position that police officers acting without a warrant can obtain lawful consent to enter a home and ask questions only by

explaining to the occupants that they have a constitutional right to deny admission, even to officers of the law conducting an authorized and necessary investigation. But I cannot understand a view that consent is permissible if given in response to a mere request to enter uttered by a policeman wishing only to ask questions but not if given to a policeman who says he wishes to question but in fact intends to do more. If the policeman does more we will bar admission of the fruits of his illegal action. But if he does only so much as he has told the occupant he will do, and so less than he was willing to do, the occupant's consent was to the conduct which occurred; in that case there is no reason to exclude what the policeman learns from doing what the occupant consented to his doing.

There remains a possibility that respondent's confinement may offend the Constitution. When the officers entered respondent's apartment, they had permission to ask questions but no permission to search. Had they looked in closets or drawers, or even in a closed paper bag lying in view, they would have been acting in violation of the Fourth Amendment. The paper bag containing the guns was on a fire escape attached to an apartment other than respondent's, but that alone did not give the officers permission to seize it. The Fourth Amendment's protection extends to "effects" as well as to "persons, houses, papers." Of course "abandoned" property may be seized, *Abel* v. *United States,* 362 U. S. 217, 241 (1960), but neither court below inquired whether Officer Rufo reasonably believed this bag had been abandoned or instead should reasonably have thought respondent had set it on the fire escape temporarily without wishing to abandon it, cf. *Rios* v. *United States,* 364 U. S. 253, 262, n. 6 (1960). If the bag was not abandoned, another question of fact is relevant: whether

Officer Rufo saw that the bag contained guns before he opened it, or opened the bag and then saw the guns. Since neither the District Court nor the Court of Appeals reached these issues, I would vacate the judgment of the Court of Appeals and remand the case to the District Court to determine whether Officer Rufo could have believed that the bag had been abandoned and whether the bag was searched before or after guns were observed.[5]

[5] MR. JUSTICE FORTAS, although he does not disagree with the view that the Court of Appeals erred in issuing the writ of habeas corpus for the reasons which it gave, would nevertheless dismiss the writ of certiorari because the record is stale and inadequate with respect to the issue of abandonment. But if it was error to issue the writ of habeas corpus on the grounds relied on by the Court of Appeals—and there is no infirmity in the record with respect to this question—then the judgment should be reversed unless there is some other basis for the issuance of habeas corpus at the behest of this state prisoner. If the record is unclear with respect to this possible additional ground—here the search of the bag and the seizure of the guns—and it is thought undesirable to have the record reopened and the question clarified, the case should simply be reversed, not dismissed so that the erroneous judgment remains in effect. Habeas corpus should not issue and Painten should not be released unless the record clearly justifies such a judgment.

CHANDLER, U. S. DISTRICT JUDGE *v.* UNITED STATES.

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

No. 480. Decided January 15, 1968.

Certiorari granted; vacated and remanded.

Thomas J. Kenan and *Carl L. Shipley* for petitioner.

Solicitor General Griswold for the United States.

PER CURIAM.

Upon the respondent's suggestion of mootness and our independent examination of the papers, the petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Tenth Circuit is vacated. The case is remanded to that court with instructions to dismiss the mandamus proceedings as moot.

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

BOYDEN *v.* CALIFORNIA.

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

No. 730, Misc. Decided January 15, 1968.

251 Cal. App. 2d 798, 60 Cal. Rptr. 271, 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.

BRASWELL MOTOR FREIGHT LINES, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 790. Decided January 15, 1968.

275 F. Supp. 98, affirmed.

T. S. Christopher for appellants.

Solicitor General Griswold, Assistant Attorney General Turner, Robert W. Ginnane and *Emmanuel H. Smith* for the United States et al.; *David Axelrod* for Pacific Intermountain Express Co. et al., and *Wentworth E. Griffin* and *Phillip Robinson* for Transcon Lines, appellees.

PER CURIAM.

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

SEASIDE PROPERTIES, INC. *v.* STATE ROAD DEPARTMENT OF FLORIDA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 754. Decided January 15, 1968.

190 So. 2d 391, appeal dismissed.

Guion T. De Loach for appellant.

P. A. Pacyna for appellee.

PER CURIAM.

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

RANDOLPH *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA.

No. 879. Decided January 15, 1968.

274 F. Supp. 200, affirmed.

Clyde C. Randolph, Jr., pro se, and *Jerry Dee Moize* for appellant.

Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander and *Jack H. Weiner* for the United States.

PER CURIAM.

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

DINIS ET AL. *v.* VOLPE, GOVERNOR OF MASSACHUSETTS, ET AL.

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

No. 882. Decided January 15, 1968.

264 F. Supp. 425, affirmed.

Edmund Dinis, pro se, and for other appellants.

Elliot L. Richardson, Attorney General of Massachusetts, *Howard M. Miller,* Assistant Attorney General, and *Mark L. Cohen,* Deputy Assistant Attorney General, for appellees.

PER CURIAM.

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

LOUISIANA FINANCIAL ASSISTANCE COMMISSION ET AL. *v.* POINDEXTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 793. Decided January 15, 1968.

275 F. Supp. 833, affirmed.

Victor A. Sachse, J. J. Davidson, Jr., S. W. Provensal, Jr., and *C. C. Wood* for appellants.

A. P. Tureaud, Jack Greenberg and *Charles H. Jones, Jr.,* for Poindexter et al., and *Solicitor General Griswold* and *Assistant Attorney General Doar* for the United States, appellees.

PER CURIAM.

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

BUCK ET UX. *v.* NEW JERSEY BY THE STATE HIGHWAY COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 817. Decided January 15, 1968.

49 N. J. 359, 230 A. 2d 393, appeal dismissed.

James T. Dowd for appellants.

Arthur J. Sills, Attorney General of New Jersey, and *Elias Abelson* and *Edward D. McKirdy,* Deputy Attorneys General, for appellee.

PER CURIAM.

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

JAMES, STATE TREASURER OF TEXAS, ET AL. *v.* GILMORE ET AL.

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

No. 850. Decided January 15, 1968.

274 F. Supp. 75, affirmed.

Crawford C. Martin, Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, and *J. C. Davis, W. O. Shultz II* and *James C. McCoy,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for appellants.

David R. Richards for appellees.

PER CURIAM.

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

SCHOOL COMMITTEE OF CITY OF BOSTON *v.* BOARD OF EDUCATION ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 759. Decided January 15, 1968.

352 Mass. 693, 227 N. E. 2d 729, appeal dismissed.

John W. White for appellant.

Elliot L. Richardson, Attorney General of Massachusetts, and *Howard M. Miller,* 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.

I. M. AMUSEMENT CORP. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 260. Decided January 15, 1968.

Reversed.

Allen Brown for appellant.

Melvin G. Rueger and *Calvin W. Prem* for appellee.

PER CURIAM.

The judgment of the Supreme Court of Ohio is reversed. *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE concurs on the ground that evidence of contemporary community standards was excluded at trial.

MR. JUSTICE HARLAN would affirm for the reasons set forth in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, 500–503, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455.

BAXTER ET AL. *v.* CITY OF PHILADELPHIA ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 858. Decided January 15, 1968.

426 Pa. 240, 231 A. 2d 151, appeal dismissed.

Jacob J. Kilimnik for appellants.

Frank J. Pfizenmayer and *Levy Anderson* for appellees.

PER CURIAM.

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

STRICKLAND TRANSPORTATION CO., INC. *v.* UNITED STATES ET AL.

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

No. 839. Decided January 15, 1968.

274 F. Supp. 921, affirmed.

Ralph W. Currie and *Ewell H. Muse, Jr.*, for appellant.

Solicitor General Griswold, Assistant Attorney General Turner, Robert W. Ginnane and *Nahum Litt* for the United States et al., and *Phillip Robinson* for appellees Central Freight Lines, Inc., et al.

PER CURIAM.

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

KIRK, GOVERNOR OF FLORIDA, ET AL. *v.* GONG ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 872. Decided January 15, 1968.

278 F. Supp. 133, affirmed.

Earl Faircloth, Attorney General of Florida, and *T. T. Turnbull* and *Robert A. Chastain,* Assistant Attorneys General, for appellants.

Thomas C. Britton, Stuart Simon, D. P. S. Paul and *P. D. Thomson* for appellees.

PER CURIAM.

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

UNITED STATES *v.* BETHLEHEM STEEL CO. ET AL.

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

No. 130. Decided January 15, 1968.

Certiorari granted; 374 F. 2d 656, judgments vacated and remanded.

Solicitor General Marshall, Assistant Attorney General Sanders, Alan S. Rosenthal and *Martin Jacobs* for the United States.

David R. Owen for Bethlehem Steel Co. and *William A. Grimes* for Moran Towing & Transportation Co., Inc., respondents.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgments of the Court of Appeals for the Fourth Circuit are vacated and the cause is remanded to that court for further proceedings in light of this Court's decision in *Wyandotte Transportation Co.* v. *United States, ante,* p. 191.

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

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL. *v.* RINGSBY TRUCK LINES, INC., ET AL.

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

No. 163. Decided January 15, 1968.

263 F. Supp. 552, appeal dismissed.

Arthur A. Arsham, John J. C. Martin and *Max L. Wymore* for appellants.

LeGrand Alf Carlston and *Z. L. Pearson, Jr.*, for appellees.

Solicitor General Griswold, former *Solicitor General Marshall* and *Robert W. Ginnane* for the United States et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE DOUGLAS dissents.

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

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, ET AL. *v.* SCHERER & SONS, INC.

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

No. 400.* Decided January 15, 1968.

Certiorari granted and judgment reversed.

Morris P. Glushien for petitioners.

Joseph A. Perkins for respondent.

PER CURIAM.

The petition for a writ of certiorari to the Supreme Court of Florida is granted. The judgment below is reversed. *Retail Clerks International Assn.* v. *Schermerhorn,* 375 U. S. 96 (1963); *Local No. 438* v. *Curry,* 371 U. S. 542 (1963).

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would set this case for oral argument.

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

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*[REPORTER'S NOTE: For *per curiam* opinion vacating order and judgment in this case, see 390 U. S. 717.]

ROBERT-ARTHUR MANAGEMENT CORP. *v.* TENNESSEE EX REL. CANALE, DISTRICT ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 679. Decided January 15, 1968.

— Tenn. —, 414 S. W. 2d 638, reversed.

Longstreet Heiskell for appellant.

George F. McCanless, Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for appellee.

PER CURIAM.

The judgment of the Supreme Court of Tennessee is reversed. *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE would affirm.

MR. JUSTICE HARLAN would affirm for the reasons set forth in his separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496, 500–503, and in his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455.

OSBOURNE ET AL. *v.* MISSISSIPPI VALLEY BARGE LINE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 768. Decided January 15, 1968.

273 F. Supp. 1, affirmed.

John L. Laubach, Jr., for appellants Osbourne et al.

Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark and *James M. Henderson* for Mississippi Valley Barge Line Co. et al., and *Solicitor General Griswold, Assistant Attorney General Turner, Robert W. Ginnane* and *Fritz R. Kahn* for the United States et al., appellees.

PER CURIAM.

The motions to affirm are granted and judgment is affirmed without prejudice to the presentation of an appropriate motion in the United States District Court for the Eastern District of Missouri for a modification of the injunction.

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THRIFTY SHOPPERS SCRIP CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 820. Decided January 15, 1968.*

272 F. Supp. 432, affirmed.

David B. Gold for appellant in No. 820. *Howard M. Downs* for appellants in No. 849.

Solicitor General Griswold, Assistant Attorney General Turner and *Daniel M. Friedman* for the United States in both cases. *William W. Alsup, Allyn O. Kreps, Arnold M. Lerman, William E. Mussman* and *Gordon Johnson* for appellees Blue Chip Stamp Co. et al. in both cases.

PER CURIAM.

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

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*Together with No. 849, *Twyman, dba Bill's Union Station, et al.* v. *United States et al.*, also on appeal from the same court.

GOLDSTEIN, AKA PIETRARU, ET AL. *v.* COX ET AL., SURROGATES OF THE COUNTY OF NEW YORK, ET AL.

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

No. 825. Decided January 15, 1968.

Certiorari granted; vacated and remanded.

John R. Vintilla, Emanuel Eschwege and *Novak N. Marku* for petitioners.

Louis J. Lefkowitz, Attorney General of New York, and *Daniel M. Cohen,* Assistant Attorney General, for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Zschernig* v. *Miller, ante,* p. 429.

MILLER *v.* HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 840. Decided January 15, 1968.

Appeal dismissed.

Freeman T. Eagleson, Jr., for appellant.

William B. Saxbe, Attorney General of Ohio, *Winifred A. Dunton*, Assistant Attorney General, and *Charles S. Lopeman* for appellees.

PER CURIAM.

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

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

PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. *v.* BALTIMORE SHIPPERS & RECEIVERS ASSOCIATION, INC., ET AL.

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

No. 846. Decided January 15, 1968.

268 F. Supp. 836, affirmed.

Mary Moran Pajalich and *Bernard A. Peeters* for appellants.

Ronald N. Cobert and *Philip R. Ehrenkranz* for Baltimore Shippers & Receivers Association, Inc., et al., and *Stanley E. Tobin* and *Carl M. Gould* for Charles J. Worth Drayage Co. et al., appellees.

PER CURIAM.

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

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 583 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, 1966, THROUGH JANUARY 15, 1968.

CASES DISMISSED IN VACATION.

No. 159, Misc. QUINN *v.* MOBIL OIL CO., A DIVISION OF SOCONY MOBIL OIL CO., INC. C. A. 1st Cir. Petition for writ of certiorari dismissed July 28, 1967, pursuant to Rule 60 of the Rules of this Court. *Conrad W. Oberdorfer* for respondent. Reported below: 375 F. 2d 273.

No. 262, Misc. GOODMAN *v.* PATE, WARDEN. Sup. Ct. Ill. Petition for writ of certiorari dismissed August 16, 1967, pursuant to Rule 60 of the Rules of this Court.

No. 49, Misc. BRECKENRIDGE *v.* PATTERSON, WARDEN. C. A. 10th Cir. Petition for writ of certiorari dismissed August 29, 1967, pursuant to Rule 60 of the Rules of this Court. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: 374 F. 2d 857.

No. 224. GOLDFARB NOVELTY CO., INC., ET AL. *v.* UNEEDA DOLL CO., INC. C. A. 2d Cir. Petition for writ of certiorari dismissed September 21, 1967, pursuant to Rule 60 of the Rules of this Court. *Thomas R. Farrell, Jr.,* for Goldfarb Novelty Co., Inc., and *Clarence Fried* for Walgreen Eastern Co., Inc., petitioners. *Eugene H. Zimmerman* for respondent. Reported below: 373 F. 2d 851.

OCTOBER 9, 1967.

Miscellaneous Orders.

No. 339, October Term, 1958. SPEVACK *v.* STRAUSS ET AL., 359 U. S. 115. Motion for confirmation of conclusive effect of executed order denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Carleton U. Edwards II* and *Joseph Y. Houghton* on the motion.

No. —, October Term, 1966. IN RE WERNER. James Lee Werner, Esquire, of Cincinnati, Ohio, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court. MR. JUSTICE MARSHALL took no part in this matter.

No. 624, October Term, 1966. MOODY ET AL. *v.* FLOWERS ET AL., 387 U. S. 97. Motion of appellees to retax costs granted and the costs are equally divided. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Truman Hobbs* on the motion. *Cyrus R. Lewis* for appellants, in opposition.

No. 118, October Term, 1966. DOMBROWSKI ET AL. *v.* EASTLAND ET AL., 387 U. S. 82. Motion of respondent J. G. Sourwine to retax costs denied. MR. JUSTICE BLACK and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 21. ZSCHERNIG ET AL. *v.* MILLER, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Ore. (Probable jurisdiction noted, 386 U. S. 1030.) Motion of Slaff, Mosk & Rudman for leave to file brief, as *amicus curiae*, granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Edward Mosk* on the motion.

No. 16. MEMPA *v.* RHAY, PENITENTIARY SUPERINTENDENT; and

No. 22. WALKLING *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Motion of National Legal Aid and Defender Association for leave to file a brief, as *amicus curiae,* granted. Motion in No. 22 to substitute Washington State Board of Prison Terms and Paroles in place of B. J. Rhay, Superintendent, Washington State Penitentiary, as the party respondent granted. *Patrick J. Hughes, Jr.,* for National Legal Aid and Defender Association, as *amicus curiae,* in both cases. *Evan L. Schwab* for petitioner, and *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent, on the motion in No. 22. [For earlier orders herein, see 386 U. S. 907, 953.]

No. 27. FEDERAL TRADE COMMISSION *v.* FRED MEYER, INC., ET AL. C. A. 9th Cir. (Certiorari granted, 386 U. S. 907.) Motion of Atlantic Coast Independent Distributors Association, Inc., for leave to file brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Morris B. Abram* on the motion. *Edward F. Howrey, Terrence C. Sheehy* and *George W. Mead* for respondents in opposition.

No. 49. NATIONAL LABOR RELATIONS BOARD *v.* FLEETWOOD TRAILER CO., INC. C. A. 9th Cir. (Certiorari granted, 386 U. S. 990.) Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* on the motion.

No. 33. UNITED MINE WORKERS OF AMERICA, DISTRICT 12 *v.* ILLINOIS STATE BAR ASSOCIATION ET AL. Sup. Ct. Ill. (Certiorari granted, 386 U. S. 941.) Motions of American Federation of Labor & Congress of Industrial Organizations, National Lawyers Guild and State Bar of California for leave to file briefs, as *amici curiae,* granted. Motion of NAACP Legal Defense & Educational Fund, Inc., et al. for leave to file brief, as *amici curiae,* granted. Motions of NAACP Legal Defense & Educational Fund, Inc., et al. and State Bar of California for leave to participate in oral argument, as *amici curiae,* denied. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for American Federation of Labor & Congress of Industrial Organizations, *Victor Rabinowitz, Allan Brotsky* and *Donald L. A. Kerson* for National Lawyers Guild, *Joseph A. Ball, John J. Goldberg* and *Samuel O. Pruitt, Jr.,* for State Bar of California, *Jack Greenberg, James M. Nabrit III* and *Melvyn Zarr* for NAACP Legal Defense & Educational Fund, Inc., et al., on the motions. *Edmund Burke, Edward L. Carey, Harrison Combs, Willard P. Owens* and *M. E. Boiarsky* for petitioner, and *Bernard H. Bertrand* for respondents, in opposition.

No. 67. TERRY ET AL. *v.* OHIO. Sup. Ct. Ohio. (Certiorari granted, 387 U. S. 929.) Motions of petitioner Terry for leave to proceed further herein *in forma pauperis* and to dispense with printing record granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Jack G. Day* on the motions.

No. 386, Misc. SIMS *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Motion of American Trial Lawyers Association for leave to file brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Israel Steingold* on the motion.

No. 43. ALBRECHT *v.* HERALD CO., DBA GLOBE-DEMOCRAT PUBLISHING CO. C. A. 8th Cir. (Certiorari granted, 386 U. S. 941.) Further consideration of motion of respondent to dismiss writ of certiorari postponed to hearing of case on the merits. *Lon Hocker* on the motion. *Donald S. Siegel* and *Gray L. Dorsey* for petitioner in opposition.

No. 85. UNITED STATES *v.* JACKSON ET AL. Appeal from D. C. Conn. (Probable jurisdiction noted, 387 U. S. 929.) Motion of appellee Jackson for leave to proceed further herein *in forma pauperis* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Steven Duke* and *Stephen I. Traub* on the motion.

No. 86. UNITED STATES *v.* THIRD NATIONAL BANK IN NASHVILLE ET AL. Appeal from D. C. M. D. Tenn. (Probable jurisdiction noted, 388 U. S. 905.) Motion of Comptroller of the Currency to remove case from summary calendar granted. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Joseph J. O'Malley* on the motion for appellee Comptroller of the Currency.

No. 90 et al. PERMIAN BASIN AREA RATE CASES. C. A. 10th Cir. (Certiorari granted, 388 U. S. 906.) Motion of Associated Gas Distributors Group for leave to file brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *J. David Mann, Jr.,* and *John E. Holtzinger, Jr.,* on the motion.

No. 147. K–91, INC. *v.* GERSHWIN PUBLISHING CORP. ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 246. MOSES ET AL. *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash.;

No. 247. PUYALLUP TRIBE *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL. Sup. Ct. Wash.;

No. 319. KAUTZ ET AL. *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL. Sup. Ct. Wash.; and

No. 387. ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION *v.* NORDWICK, EXECUTOR, ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 241, Misc. NEVADA TAX COMMISSION *v.* THOMPSON, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. and D. C. Nev. Motion for leave to file petition for writ of certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Harvey Dickerson,* Attorney General of Nevada, for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harold C. Wilkenfeld* for respondent Thompson et al.

No. 196, Misc. VNUK, AKA ANTHONY *v.* PITCHESS, SHERIFF. Motion for leave to file petition for writ of habeas corpus denied. *G. G. Baumen* on the motion.

No. 54, Misc. NELMS *v.* UNITED STATES; and

No. 391, Misc. DOW, AKA COREY *v.* ATTORNEY GENERAL OF THE UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States, in opposition in both cases.

No. 179, Misc. IN RE DISBARMENT OF LOMBARD. It having been reported to the Court that Earl J. Lombard of Washington, District of Columbia, has been disbarred from the practice of law by the United States Court of Appeals for the District of Columbia Circuit, duly entered on the eighteenth day of May, 1967, and this Court by order of June 5, 1967, having suspended the said Earl J. Lombard from the practice of law in this Court and directing that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Earl J. Lombard be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 156, Misc. KENNEDY *v.* COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH. Motion for leave to file petition for writ of habeas corpus and other relief denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent in opposition.

No. 221, Misc. UTICA MUTUAL INSURANCE CO. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK ET AL. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Charles J. Barnhill* on the motion. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for National Labor Relations Board in opposition.

No. 152, Misc. WELSH *v.* CALIFORNIA ET AL.;

No. 172, Misc. GAITO *v.* DUGGAN, DISTRICT ATTORNEY, ET AL.;

No. 186, Misc. HECTOR *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT;

No. 228, Misc. IN RE BARASH;

No. 243, Misc. BAKER *v.* MCNAUL;

No. 270, Misc. BLACKBURN *v.* FLORIDA;

No. 289, Misc. MCGARRITY *v.* NELSON, ACTING WARDEN;

No. 293, Misc. MASON *v.* WARDEN, SOUTHERN MICHIGAN STATE PRISON;

No. 354, Misc. MEYER *v.* FIELD, MENS COLONY SUPERINTENDENT;

No. 381, Misc. DENSON *v.* LANE, WARDEN;

No. 400, Misc. COTTLO *v.* CALIFORNIA ET AL.;

No. 401, Misc. SPEARMINT *v.* OHIO ET AL.;

No. 458, Misc. BAKER *v.* BENNETT, WARDEN; and

No. 522, Misc. OUGHTON *v.* MEIER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 145, Misc. FISK *v.* CURRIE, CHIEF JUSTICE, SUPREME COURT OF WISCONSIN;

No. 178, Misc. CHOPE *v.* THORNTON, U. S. DISTRICT JUDGE;

No. 239, Misc. BLACKWELL *v.* CURRIE, CHIEF JUSTICE, SUPREME COURT OF WISCONSIN, ET AL.;

No. 321, Misc. BALLOU *v.* ALDRICH ET AL., U. S. CIRCUIT JUDGES;

No. 340, Misc. LUOMALA *v.* KUNZEL, U. S. DISTRICT JUDGE; and

No. 419, Misc. RUCKER *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 240, Misc. WORKMAN *v.* TURNER, WARDEN; and No. 416, Misc. FORESTER *v.* FIELD, MENS COLONY SUPERINTENDENT, ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari denied.

No. 368, Misc. BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS ET AL. *v.* GOLDBERG, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *J. C. Davis, W. O. Shultz II* and *James C. McCoy,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* on the motion. *David R. Richards* for Gilmore et al., in opposition.

Probable Jurisdiction Noted or Postponed.

No. 111, Misc. CAMERON ET AL. *v.* JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL. Appeal from D. C. S. D. Miss. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Arthur Kinoy, William M. Kunstler, Benjamin E. Smith, Bruce C. Waltzer* and *Morton Stavis* for appellants. *Joe T. Patterson,* Attorney General of Mississippi, and *Will S. Wells* and *William A. Allain,* Assistant Attorneys General, for appellees. Reported below: 262 F. Supp. 873.

No. 410. DUNCAN *v.* LOUISIANA. Appeal from Sup. Ct. La. Probable jurisdiction noted and case set for oral argument immediately following No. 52 (386 U. S. 1003). *Richard B. Sobol, Alvin J. Bronstein* and *Anthony G. Amsterdam* for appellant. Reported below: 250 La. 253, 195 So. 2d 142.

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No. 405. POWELL *v.* TEXAS. Appeal from County Court at Law No. 1, Travis County. Probable jurisdiction noted. *Lawrence Speiser* for appellant. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *Robert L. Lattimore,* Assistant Attorney General, and *A. J. Carubbi, Jr.,* for appellee.

No. 196. SCHNEIDER *v.* SMITH, COMMANDANT, UNITED STATES COAST GUARD. Appeal from D. C. W. D. Wash. Motion to dispense with printing the jurisdictional statement granted. Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. *John Caughlan* for appellant. *Solicitor General Marshall, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson* for appellee. Reported below: 263 F. Supp. 496.

No. 107. UNITED STATES *v.* HABIG ET AL. Appeal from D. C. S. D. Ind. Probable jurisdiction noted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. *Lester M. Ponder* for appellees. Reported below: 270 F. Supp. 929.

No. 324. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* MISSOURI STATE TAX COMMISSION ET AL. Appeal from Sup. Ct. Mo. Probable jurisdiction noted. *William H. Allen, Christopher S. Bond* and *Charles L. Bacon* for appellants. *Norman H. Anderson,* Attorney General of Missouri, and *John H. Denman,* Assistant Attorney General, for appellees. Reported below: 426 S. W. 2d 362.

Certiorari Granted. (See also No. 26, Misc., *ante,* p. 10; and No. 51, Misc., *ante,* p. 12.)

No. 276. HOPKINS *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Allen Sharp* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 374 F. 2d 726.

No. 187. MENOMINEE TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Charles A. Hobbs* and *Angelo A. Iadarola* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 179 Ct. Cl. 496, 388 F. 2d 998.

No. 60. FEDERAL POWER COMMISSION *v.* SUNRAY DX OIL CO. ET AL.;

No. 61. UNITED GAS IMPROVEMENT CO. *v.* SUNRAY DX OIL CO. ET AL.;

No. 62. BROOKLYN UNION GAS CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 80. FEDERAL POWER COMMISSION *v.* STANDARD OIL CO. OF TEXAS, A DIVISION OF CHEVRON OIL CO., ET AL.;

No. 97. UNITED GAS IMPROVEMENT CO. *v.* SUNRAY DX OIL CO. C. A. 10th Cir.;

No. 111. SHELL OIL CO. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK;

No. 143. SKELLY OIL CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.;

No. 144. FEDERAL POWER COMMISSION *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.; and

No. 231. SUPERIOR OIL CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. The cases are consolidated and a total of nine hours is

allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

Solicitor General Marshall, Ralph S. Spritzer, Richard A. Posner, Richard A. Solomon, Howard E. Wahrenbrock and *Cyril S. Wofsy* for petitioner in No. 60.

William T. Coleman, Jr., Robert W. Maris, Richardson Dilworth and *Harold E. Kohn* for petitioner in Nos. 61 and 97.

Edwin F. Russell, Harry G. Hill, Jr., and *Barbara M. Suchow* for Brooklyn Union Gas Co.; *Bertram D. Moll* and *Morton L. Simons* for Long Island Lighting Co.; *Samuel Graff Miller* for Philadelphia Electric Co., and *Kent H. Brown* for Public Service Commission of New York, petitioners in No. 62.

Solicitor General Marshall and *Mr. Solomon* for petitioner in No. 80.

Oliver L. Stone and *Thomas G. Johnson* for petitioner in No. 111.

Sherman S. Poland for Skelly Oil Co.; *Martin N. Erck* for Humble Oil & Refining Co., and *Bernard A. Foster, Jr.,* for Dougherty et al., petitioners in No. 143.

Solicitor General Marshall, Mr. Solomon, Peter H. Schiff and *Joel Yohalem* for petitioner in No. 144.

Herbert W. Varner and *Murray Christian* for petitioner in No. 231.

Homer E. McEwen, Jr., for Sunray DX Oil Co.; *Mr. Erck* for Humble Oil & Refining Co.; *Vernon W. Woods* for Union Producing Co.; *Richard F. Remmers* for Sohio Petroleum Co.; *William K. Tell, Jr.,* and *James D. Annett* for Texaco Inc.; *Warren M. Sparks* for Gulf Oil Corp.; *Kiel Boone* for Cox; *Phillip D. Endom, Robert E. May* and *Francis H. Caskin* for Sun Oil Co., and *Thomas G. Crouch, Robert W. Henderson* and *Donald K. Young* for Hunt, respondents in Nos. 60, 61 and 62. *Solicitor*

General Marshall and *Mr. Solomon* for the Federal Power Commission, respondent in Nos. 61 and 62.

Francis R. Kirkham and *Justin R. Wolf* for respondent Standard Oil Co. of Texas in No. 80. *Mr. McEwen* for Sunray DX Oil Co.; *Messrs. Tell* and *Annett* for Texaco Inc.; *Messrs. Endom, May* and *Caskin* for Sun Oil Co.; *Mr. Remmers* for Sohio Petroleum Co.; *Mr. Erck* for Humble Oil & Refining Co.; *Robert V. Smith* for Patchin-Wilmoth Industries, Inc.; *J. Evans Attwell* and *W. H. Drushel, Jr.,* for Clark Fuel Producing Co.; *Mr. Boone* for Cox; *Messrs. Crouch, Henderson* and *Young* for Hunt; and *Mr. Poland* for Coates, respondents in Nos. 80 and 97.

Messrs. Simons, Brown and *Moll* for respondents in Nos. 111, 143 and 144.

Solicitor General Marshall, Messrs. Solomon, Schiff and *Yohalem* for the Federal Power Commission; *Messrs. Brown* and *Simons* for Public Service Commission of New York; and *Mr. Moll* for Long Island Lighting Co., respondents in No. 231.

Reported below: Nos. 60, 61 and 62, 370 F. 2d 181; Nos. 80 and 97, 376 F. 2d 578; Nos. 111, 143, 144 and 231, 126 U. S. App. D. C. 26, 373 F. 2d 816.

No. 59. Banks *v.* Chicago Grain Trimmers Association, Inc., et al. C. A. 7th Cir. Motion of petitioner for leave to intervene granted. Certiorari granted. Mr. Justice Marshall took no part in the consideration or decision of this motion and petition. *Harold A. Liebenson* for petitioner. *Thomas P. Smith* for respondents. *Solicitor General Marshall* for the Deputy Commissioner (Department of Labor). Reported below: 369 F. 2d 344. [For earlier orders herein, see 386 U. S. 1002, 387 U. S. 939.]

No. 65. POAFPYBITTY ET AL. *v.* SKELLY OIL CO. Sup. Ct. Okla. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Charles Hill Johns* and *Houston Bus Hill* for petitioners. *John H. Cantrell* and *S. W. Wells* for respondent. *Solicitor General Marshall* for the United States, as *amicus curiae.*

No. 219. PEORIA TRIBE OF INDIANS OF OKLAHOMA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jack Joseph* and *Louis L. Rochmes* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl* and *S. Billingsley Hill* for the United States. Reported below: 177 Ct. Cl. 762, 369 F. 2d 1001.

No. 232. UNITED STATES *v.* O'BRIEN; and

No. 233. O'BRIEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Solicitor General Marshall* for the United States in No. 232. *Marvin M. Karpatkin, Howard S. Whiteside* and *Melvin L. Wulf* for petitioner in No. 233. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in No. 233. Reported below: 376 F. 2d 538.

No. 267. UNITED STATES *v.* NEIFERT-WHITE CO. C. A. 9th Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Marshall, Acting Assistant Attorney General Eardley, Alan S. Rosenthal* and *Richard S. Salzman* for the United States. *Michael J. Hughes* for respondent. Reported below: 372 F. 2d 372.

No. 339. NEWMAN ET AL. *v.* PIGGIE PARK ENTERPRISES, INC., ET AL. C. A. 4th Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Matthew J. Perry, Lincoln C. Jenkins, Jr., Jack Greenberg, James M. Nabrit III* and *Michael Meltsner* for petitioners. Reported below: 377 F. 2d 433.

No. 73. IN RE RUFFALO. C. A. 6th Cir. Certiorari granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Craig Spangenberg* for petitioner. *Henry C. Robinson* for Mahoning County Bar Association, and *Samuel T. Gaines* and *P. Paul Pusateri* for Ohio State Bar Association. Reported below: 370 F. 2d 447.

No. 178. NATIONAL LABOR RELATIONS BOARD *v.* UNITED INSURANCE CO. OF AMERICA ET AL.; and

No. 179. INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted. Cases are consolidated. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner in No. 178. *Bernard G. Segal* and *Irving R. Segal* for respondent United Insurance Co. of America in both cases. *Isaac N. Groner* and *Alan Y. Cole* for petitioner in No. 179. Reported below: 371 F. 2d 316.

No. 149. DYKE ET AL. *v.* TAYLOR IMPLEMENT MANUFACTURING CO., INC. Sup. Ct. Tenn. Certiorari granted and case set for oral argument immediately following No. 92 (386 U. S. 1003). *Bernard Kleiman, Elliot Bredhoff, Michael Gottesman* and *Tom J. Taylor* for petitioners. *Foster D. Arnett* for respondent. Reported below: 219 Tenn. 472, 410 S. W. 2d 881.

No. 305. Securities and Exchange Commission *v.* New England Electric System et al. C. A. 1st Cir. Certiorari granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Former Solicitor General Marshall, Acting Solicitor General Spritzer, Richard A. Posner, Philip A. Loomis, Jr.,* and *Roger S. Foster* for petitioner. *John R. Quarles, Richard B. Dunn, Richard W. Southgate* and *John J. Glessner III* for respondents. Reported below: 376 F. 2d 107.

No. 257. Federal Maritime Commission et al. *v.* Aktiebolaget Svenska Amerika Linien (Swedish American Line) et al.; and

No. 258. American Society of Travel Agents, Inc. *v.* Aktiebolaget Svenska Amerika Linien (Swedish American Line) et al. C. A. D. C. Cir. Certiorari granted. Cases are consolidated. Mr. Justice Marshall took no part in the consideration or decision of these petitions. *Solicitor General Marshall, Assistant Attorney General Turner, Irwin A. Seibel, Robert N. Katz* and *Walter H. Mayo III* for petitioners Federal Maritime Commission et al. in No. 257. *Robert J. Sisk, Harold S. Barron, Neil Peck* and *Glen A. Wilkinson* for petitioner American Society of Travel Agents, Inc., in both cases. *Edward R. Neaher* and *Carl S. Rowe* for respondents in both cases. Reported below: 125 U. S. App. D. C. 359, 372 F. 2d 932.

No. 291, Misc. Johnson *v.* Massachusetts. Sup. Jud. Ct. Mass. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *John M. Harrington, Jr.,* for petitioner. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Brian E. Concannon,* Special Assistant Attorney General, for respondent. Reported below: 352 Mass. 311, 225 N. E. 2d 360.

No. 261. CITY AND COUNTY OF SAN FRANCISCO *v.* SKELLY OIL CO. ET AL.;

No. 262. CITY OF SAN DIEGO *v.* SKELLY OIL CO. ET AL.;

No. 266. STANDARD OIL CO. OF TEXAS, A DIVISION OF CHEVRON OIL CO. *v.* FEDERAL POWER COMMISSION; and

No. 388. MOBIL OIL CORP. ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari granted. Cases are consolidated with other "Permian Basin Area Rate Cases" (388 U. S. 906; *supra,* at 805) and set for argument on Monday, December 4, 1967. Briefs of those parties supporting the order of the Federal Power Commission shall be filed on or before November 1, 1967, and of those attacking said order shall be filed on or before November 20, 1967. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Thomas M. O'Connor* for petitioner in No. 261. *Edward T. Butler* for petitioner in No. 262. *Francis R. Kirkham* and *Justin R. Wolf* for petitioner in No. 266. *Tom P. Hamill, William H. Tabb* and *Carroll L. Gilliam* for petitioners in No. 388. Reported below: 375 F. 2d 6.

No. 309. AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. *v.* CARROLL ET AL.; and

No. 310. CARROLL ET AL. *v.* AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari granted. The cases are consolidated and two hours are allotted for oral argument. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Henry Kaiser, Eugene Gressman, George Kaufmann, Ronald Rosenberg* and *David I. Ashe* for petitioners in No. 309 and respondents in No. 310. *Godfrey P. Schmidt* for respondents in No. 309 and petitioners in No. 310. Reported below: 372 F. 2d 155.

No. 325. WATTS ET AL. *v.* SEWARD SCHOOL BOARD ET AL. Sup. Ct. Alaska. Motion to dispense with printing the petition granted. Certiorari granted. *George Kaufmann* for petitioners. *Theodore M. Pease, Jr.*, for respondents. Reported below: 421 P. 2d 586; 423 P. 2d 678.

No. 335. HANOVER SHOE, INC. *v.* UNITED SHOE MACHINERY CORP.; and

No. 463. UNITED SHOE MACHINERY CORP. *v.* HANOVER SHOE, INC. C. A. 3d Cir. Certiorari granted. The cases are consolidated and two hours are allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *James V. Hayes, Breck P. McAllister* and *Robert F. Morten* for petitioner in No. 335 and respondent in No. 463. *Ralph M. Carson, Robert D. Salinger, Philip C. Potter, Jr.*, and *Roland W. Donnem* for respondent in No. 335 and petitioner in No. 463. Reported below: 377 F. 2d 776.

No. 109, Misc. BRUTON *v.* UNITED STATES. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 66, Misc. (*infra*). MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 375 F. 2d 355.

No. 66, Misc. GARNER *v.* YEAGER, WARDEN, ET AL. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket.

No. 19, Misc. ANDERSON *v.* JOHNSON, WARDEN. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *George F. McCanless,* Attorney General of Tennessee, and *Henry C. Foutch,* Assistant Attorney General, for respondent. Reported below: 371 F. 2d 84.

No. 36, Misc. IN RE WHITTINGTON. Ct. App. Ohio, Fairfield County. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Judson C. Kistler* for petitioner. *E. Raymond Morehart* for the State of Ohio. [For earlier order herein, see 387 U. S. 940.] Reported below: 13 Ohio App. 2d 11, 233 N. E. 2d 333.

No. 445. AVCO CORP. *v.* AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ET AL. C. A. 6th Cir. Certiorari granted. *William Waller* and *John B. Hollister* for petitioner. Reported below: 376 F. 2d 337.

No. 55, Misc. BARBER *v.* PAGE, WARDEN. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *G. T. Blankenship,* Attorney General of Oklahoma, and *Charles L. Owens,* Assistant Attorney General, for respondent. Reported below: 381 F. 2d 479.

Certiorari Denied. (See also No. 170, *ante,* p. 7; Nos. 176 and 177, *ante,* p. 14; No. 235, *ante,* p. 8; No. 273, *ante,* p. 8; No. 327, *ante,* p. 9; No. 57, Misc., *ante,* p. 13; No. 74, Misc., *ante,* p. 13; No. 190, Misc., *ante,* p. 11; No. 269, Misc., *ante,* p. 6; and Misc. Nos. 240 and 416, *supra.*)

No. 112. GIAN-CURSIO ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *F. Lee Bailey* for petitioners.

No. 116. HALLINAN *v.* ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Vincent Hallinan* for petitioner. *John F. Duff* for respondent Roman Catholic Archbishop of San Francisco, and *Noel J. Dyer* for respondent University of San Francisco. Reported below: 247 Cal. App. 2d 410, 55 Cal. Rptr. 542.

No. 118. COMPANIA ANONIMA VENEZOLANO DE NAVEGACION *v.* MATTHEWS ET AL. C. A. 5th Cir. Certiorari denied. *Leon Sarpy* and *Paul A. Nalty* for petitioner. *John P. Dowling* for respondent Matthews. Reported below: 371 F. 2d 971.

No. 125. GENERAL PLYWOOD CORP. *v.* UNITED STATES PLYWOOD CORP.; and

No. 140. UNITED STATES PLYWOOD CORP. *v.* GENERAL PLYWOOD CORP. C. A. 6th Cir. Certiorari denied. *John A. Blair* and *Everett R. Casey* for petitioner in No. 125 and respondent in No. 140. *Morris Relson* and *James M. Heilman* for petitioner in No. 140 and respondent in No. 125. Reported below: 370 F. 2d 500.

No. 128. DOFF ET AL. *v.* BRUNSWICK CORP. C. A. 9th Cir. Certiorari denied. *Marcus Mattson* for respondent. Reported below: 372 F. 2d 801.

No. 132. RODERICK, TRUSTEE, ET AL. *v.* CHUGACH ELECTRIC ASSOCIATION. C. A. 9th Cir. Certiorari denied. *Edgar Paul Boyko* for petitioners. *Robert W. Graham* for respondent. Reported below: 370 F. 2d 441.

No. 136. MINICHIELLO *v.* ROYAL BUSINESS FUNDS CORP. Ct. App. N. Y. Certiorari denied. *Reginald Leo Duff* for petitioner. *Morton L. Ginsberg* and *David W. Peck* for respondent. Reported below: 18 N. Y. 2d 521, 223 N. E. 2d 793.

No. 137. LEE *v.* ST. JOE PAPER CO. C. A. 2d Cir. Certiorari denied. *Reginald Leo Duff* for petitioner. *David W. Peck* and *Irving Rozen* for respondent. Reported below: 371 F. 2d 797.

No. 142. PACIFIC SPORTFISHING, INC., ET AL. *v.* BERRY. C. A. 9th Cir. Certiorari denied. *Carl J. Schuck* for petitioners. *Ben Margolis* and *William B. Murrish* for respondent. Reported below: 372 F. 2d 213.

No. 146. RING *v.* STRELECKI, DIRECTOR OF MOTOR VEHICLES, ET AL. Super. Ct. N. J. Certiorari denied. *Carl E. Ring* for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, *Alan B. Handler,* First Assistant Attorney General, and *Alan D. Kirby* and *Richard Newman,* Deputy Attorneys General, for respondents.

No. 150. FISHER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Fletcher Jackson* for petitioner. *Joe Purcell,* Attorney General of Arkansas, and *R. D. Smith III,* Assistant Attorney General, for respondent. Reported below: 241 Ark. 545, 408 S. W. 2d 894.

No. 152. LAHITTE ET VIR *v.* ACME REFRIGERATION SUPPLIES, INC., ET AL. Sup. Ct. La. Certiorari denied.

No. 153. KIMBRELL *v.* PERRY ET AL. Sup. Ct. Tenn. Certiorari denied. *W. A. Harwell* for respondents. Reported below: 219 Tenn. 548, 411 S. W. 2d 538.

No. 162. TIDEWATER PATENT DEVELOPMENT CO., INC. *v.* KITCHEN ET AL., TRADING AS K. M. KITCHEN BEAUTY SUPPLY CO. C. A. 4th Cir. Certiorari denied. *George B. Finnegan, Jr.,* and *William D. Denson* for petitioner. *Samuel J. Stoll* for respondents. Reported below: 371 F. 2d 1004.

No. 157. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Edward V. Dylla* for petitioner. Reported below: 409 S. W. 2d 408, 409.

No. 161. COHEN, TRUSTEE IN BANKRUPTCY *v.* JAMES TALCOTT, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Aaron Cohen, pro se,* and *Harry R. Levy* for petitioner. *Morris M. Wexler* for respondents. Reported below: 369 F. 2d 439.

No. 175. PROVIDENT SECURITY LIFE INSURANCE CO. ET AL. *v.* DEPINTO ET AL.; and

No. 191. DEPINTO ET AL. *v.* PROVIDENT SECURITY LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. *William Lee McLane* and *Nola McLane* for petitioners in No. 175, and together with *Thaddeus Rojek, Harold E. Kohn* and *William T. Coleman, Jr.,* for respondents in No. 191. *Denison Kitchel* and *John P. Frank* for respondents in No. 175 and petitioners in No. 191. Reported below: 374 F. 2d 37.

No. 182. KLIGERMAN ET AL. *v.* LYNCH, PRESIDENT OF THE SENATE OF NEW JERSEY, ET AL. Sup. Ct. N. J. Certiorari denied. *Patrick T. McGahn, Jr.,* for petitioners. *Thomas F. Connery, Jr.,* for respondents.

No. 184. RIFFE *v.* WILSHIRE OIL CO. OF TEXAS. C. A. 10th Cir. Certiorari denied. *Gerald G. Stamper* for petitioner. *Richard H. Shaw* for respondent. Reported below: 381 F. 2d 646.

No. 185. COYNE, ADMINISTRATOR *v.* JOHN MOHR & SONS, INC. C. A. 3d Cir. Certiorari denied. *Edward J. Balzarini* and *Joseph W. Conway* for petitioner. *Norman J. Cowie* for respondent. Reported below: 372 F. 2d 36.

No. 186. HENSLEY *v.* FORT WORTH & DENVER RAILWAY CO. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. *Denning Schattman* for petitioner. *Thos. H. Law* for respondent. Reported below: 408 S. W. 2d 761.

No. 189. NOVO INDUSTRIAL CORP. *v.* STANDARD SCREW CO. C. A. 7th Cir. Certiorari denied. *Thomas F. McWilliams* for petitioner. *Thomas A. Reynolds, Jr., Robert F. Davis* and *John H. Lewis, Jr.*, for respondent. Reported below: 374 F. 2d 824.

No. 206. COE MANUFACTURING CO. *v.* JEDDELOH BROTHERS SWEED MILLS, INC., ET AL. C. A. 9th Cir. Certiorari denied. *James T. Hoffmann* for petitioner. *J. Pierre Kolisch* for respondents. Reported below: 375 F. 2d 85.

No. 207. JACKSON ET AL. *v.* WESTERN GEOTHERMAL, INC., ET AL. Sup. Ct. Nev. Certiorari denied. *Roy B. Woolsey* and *Gilbert W. Boyne* for petitioners. *Owen Jameson* for respondent Western Geothermal, Inc. Reported below: 83 Nev. 31, 422 P. 2d 551.

No. 210. CONTINENTAL CASUALTY CO. *v.* FLOAT-AWAY DOOR CO. ET AL. C. A. 5th Cir. Certiorari denied. *E. Smythe Gambrell* and *Charles A. Moye, Jr.*, for petitioner. *Edward E. Dorsey* for respondent Float-Away Door Co. Reported below: 372 F. 2d 701.

No. 214. TROY CANNON CONSTRUCTION CO., INC. *v.* JOB ET AL. C. A. 8th Cir. Certiorari denied. *J. M. Costello* and *William G. Porter* for petitioner. *Walter J. Bradsky* for respondent Job, and *Robert W. Gunderson* for respondent Grand Electric Cooperative, Inc. Reported below: 370 F. 2d 633.

No. 211. UNITED BOND & MORTGAGE CORP. *v.* CROWN CENTRAL PETROLEUM CORP. C. A. 4th Cir. Certiorari denied. *N. Welch Morrisette, Jr.*, for petitioner. *Irvine F. Belser* for respondent. Reported below: 374 F. 2d 510.

No. 213. CAHN *v.* NICHOLAS, TRUSTEE. C. A. 5th Cir. Certiorari denied. *Richard R. Booth* for petitioner.

No. 218. PUREX CORP., LTD., ET AL. *v.* ST. LOUIS NATIONAL STOCKYARDS CO. C. A. 7th Cir. Certiorari denied. *Lon Hocker* for petitioners. *John C. Shepherd* for respondent. Reported below: 374 F. 2d 998.

No. 220. WALKER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. *Clarence H. Pease* for petitioner. Reported below: 247 Cal. App. 2d 554, 55 Cal. Rptr. 726.

No. 222. SISKO *v.* SOUTHERN RESIN & FIBERGLASS CORP. C. A. 5th Cir. Certiorari denied. *Francis D. Thomas, Jr.*, and *George N. Hibben* for petitioner. *Charles Buchanan Smith* for respondent. Reported below: 373 F. 2d 866.

No. 226. COLLINS ET AL. *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioners. *George F. McCanless*, Attorney General of Tennessee, and *Thomas E. Fox*, Assistant Attorney General, for respondent.

No. 238. TAX REVIEW BOARD OF PHILADELPHIA *v.* ESSO STANDARD DIVISION OF HUMBLE OIL & REFINING CO. Sup. Ct. Pa. Certiorari denied. *Levy Anderson* for petitioner. *Park B. Dilks, Jr.*, for respondent. Reported below: 424 Pa. 355, 227 A. 2d 657.

No. 228. NICHOLSON *v.* LOWENSTEIN. Sup. Ct. Ill. Certiorari denied. *William A. Cain* for petitioner.

No. 230. SORENSEN *v.* SWANSON. Sup. Ct. Neb. Certiorari denied. *Ralph R. Bremers* and *William L. Walker* for petitioner. Reported below: 181 Neb. 312, 148 N. W. 2d 197.

No. 239. ISAACS ET AL. *v.* CITY OF OKLAHOMA CITY ET AL. Sup. Ct. Okla. Certiorari denied. *Ted R. Fisher* for petitioners. *Roy H. Semtner* and *Walter Powell* for City of Oklahoma City, *James B. White* for Oklahoma City Urban Renewal Authority, *Finis Smith* and *Darven Brown* for Tulsa Urban Renewal Authority, and *Charles E. Norman* for City of Tulsa, respondents.

No. 240. ARKWRIGHT MUTUAL INSURANCE CO. *v.* BARGAIN CITY, U. S. A., INC. C. A. 3d Cir. Certiorari denied. *George E. Beechwood* for petitioner. *Paul L. Jaffe* for respondent. Reported below: 373 F. 2d 701.

No. 244. NATOLI *v.* HAMILTON ET AL. Sup. Ct. Pa. Certiorari denied. *Jacob J. Kilimnik* for petitioner. *Brady O. Bryson* for respondents. Reported below: 424 Pa. 643, 227 A. 2d 501.

No. 245. GROGAN ET AL. *v.* WACHTER. Sup. Ct. Mo. Certiorari denied. *Harry H. Craig* for petitioners. *Harold I. Elbert* for respondent.

No. 248. O'BRIEN *v.* SOCONY MOBIL OIL CO. (SUCCESSOR TO VIRGINIA-CAROLINA CHEMICAL CORP.). Sup. Ct. N. J. and/or Sup. Ct. App. Va. Certiorari denied. *James F. X. O'Brien* for petitioner. *John S. Battle, Jr.*, for respondent. Reported below: 44 N. J. 25, 206 A. 2d 878; 207 Va. 707, 152 S. E. 2d 278.

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No. 249. ANCHOR HOCKING GLASS CORP. *v.* CORNING GLASS WORKS. C. A. 3d Cir. Certiorari denied. *Arthur G. Connolly, Edmund P. Wood* and *William J. Wier, Jr.*, for petitioner. *Clair John Killoran* and *Clarence R. Patty, Jr.*, for respondent. Reported below: 374 F. 2d 473.

No. 251. COLLINS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless*, Attorney General of Tennessee, and *Thomas E. Fox*, Assistant Attorney General, for respondent.

No. 264. FRAZIER *v.* NORTH CAROLINA STATE BAR. Sup. Ct. N. C. Certiorari denied. *Samuel S. Mitchell, Romallus O. Murphy, Moses Burt, Jr., Herman L. Taylor, John H. Wheeler* and *Charles Morgan, Jr.*, for petitioner. *John H. Anderson* for respondent. Reported below: 269 N. C. 625, 153 S. E. 2d 367.

No. 277. JACK NEILSON, INC. *v.* THOMAS JORDAN, INC. C. A. 5th Cir. Certiorari denied. *Nathan Greenberg* for petitioner. Reported below: 374 F. 2d 508.

No. 280. KENNEY *v.* PANCAKE KITCHENS, INC., ET AL. Sup. Ct. App. Va. Certiorari denied. *Robert M. Alexander* for petitioner.

No. 285. DELL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 77 Ill. App. 2d 318, 222 N. E. 2d 357.

No. 286. FLORMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 77 Ill. App. 2d 158, 222 N. E. 2d 191.

No. 289. ALVAREZ ET AL. *v.* PAN AMERICAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Joseph A. McGowan* for petitioners. *James A. Dixon* and *Sam Daniels* for respondent. Reported below: 375 F. 2d 992.

No. 295. CALLIS ET AL. *v.* LONG ISLAND RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Lee S. Kreindler* and *Paul S. Edelman* for petitioners. *William L. F. Gardiner* for respondent. Reported below: 372 F. 2d 442.

No. 304. NORTHWEST AIRLINES, INC. *v.* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. C. A. 8th Cir. Certiorari denied. *Henry Halladay* for petitioner. *Edward M. Glennon* and *Allen E. Gramza* for respondents. Reported below: 373 F. 2d 136.

No. 308. HOELSKEN ET AL., DBA ACTIVE RUBBISH SERVICE *v.* PUBLIC UTILITIES COMMISSION OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. *Anthony F. Zarlengo* for petitioners. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Robert Lee Kessler,* Assistant Attorney General, for Public Utilities Commission of Colorado, and *Thomas F. Kilroy* for Schlagel, respondents. Reported below: —— Colo. ——, 425 P. 2d 39.

No. 312. LUGASH ET AL. *v.* SANTA ANITA MANUFACTURING CORP. C. A. 9th Cir. Certiorari denied. *Frederick E. Mueller* and *Robert W. Fulwider* for petitioners. *C. A. Miketta* and *William Poms* for respondent. Reported below: 369 F. 2d 964.

No. 314. SOUTHERN RAILWAY CO. *v.* BRYAN. C. A. 5th Cir. Certiorari denied. *Charles J. Bloch* and *Richard S. Arnold* for petitioner. Reported below: 375 F. 2d 155.

No. 294. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *R. Eugene Pincham* for petitioner. Reported below: 36 Ill. 2d 505, 224 N. E. 2d 225.

No. 329. OVE SKOU REDERI A/S ET AL. *v.* MARSHALL ET AL. C. A. 5th Cir. Certiorari denied. *Robert F. Adams* for petitioners. *Michael J. Salmon* for respondents. Reported below: 378 F. 2d 193.

No. 331. SIMON *v.* WEINGOLD, PUBLIC ADMINISTRATOR. C. A. 2d Cir. Certiorari denied. *J. Stanley Shaw* for petitioner. *Paul J. Reid* for respondent.

No. 333. SEVILLE SYNDICATE, INC., ET AL. *v.* KOZLOWSKI. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Irving Anolik* for petitioners. *Isadore Nathanson* for respondent.

No. 340. NIVENS ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Walter B. Nivens, pro se, Charles V. Bell* and *Calvin Brown* for petitioners. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent. Reported below: 270 N. C. 1, 153 S. E. 2d 749.

No. 341. VLASAK *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *Robert R. Disbro* and *Richard M. Markus* for petitioner. *John T. Corrigan* for respondent.

No. 364. ST. JOE PAPER CO. *v.* HARTFORD ACCIDENT & INDEMNITY CO. ET AL. C. A. 5th Cir. Certiorari denied. *Chester Bedell* and *C. Harris Dittmar* for petitioner. *Charles Cook Howell, Jr.,* for Hartford Accident & Indemnity Co., and *Earl B. Hadlow* for Fidelity & Casualty Co. of New York, respondents. Reported below: 359 F. 2d 579; 376 F. 2d 33.

No. 342. BLAIR MANUFACTURING CO. *v.* HAMPTON ET AL. C. A. 8th Cir. Certiorari denied. *James J. Fitzgerald, Jr.*, for petitioner. *John J. Hanley* for respondents. Reported below: 374 F. 2d 969.

No. 351. FALLA Y ALVAREZ *v.* PAN-AMERICAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Samuel Sheradsky* for petitioner. *James A. Dixon* and *Sam Daniels* for respondent. Reported below: 374 F. 2d 92.

No. 355. ALL CONCESSIONS, INC. *v.* CITY OF PEABODY. Sup. Jud. Ct. Mass. Certiorari denied. *Edward J. Davis* for petitioner. Reported below: 351 Mass. 706, 222 N. E. 2d 686.

No. 360. HOFF RESEARCH & DEVELOPMENT LABORATORIES, INC. *v.* PHILIPPINE NATIONAL BANK ET AL. Ct. App. N. Y. Certiorari denied. *Arnold Davis* for petitioner. *Matthew E. McCarthy* for respondents.

No. 367. ATKINS *v.* SCHMUTZ MANUFACTURING CO., INC. C. A. 6th Cir. Certiorari denied. *Frank C. Maloney III* for petitioner. *John P. Sandidge* for respondent. Reported below: 372 F. 2d 762.

No. 369. EPHRAIM FREIGHTWAYS, INC. *v.* RED BALL MOTOR FREIGHT, INC. C. A. 10th Cir. Certiorari denied. *Thomas F. Kilroy* and *John H. Lewis* for petitioner. *Harry C. Ames, Jr.*, for respondent. Reported below: 376 F. 2d 40.

No. 377. ZILK ET AL. *v.* DEATON'S FOUNTAIN SERVICE. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* for petitioners. *James M. Naylor* and *Frank A. Neal* for respondent. Reported below: 377 F. 2d 545.

No. 366. AMERICAN INVESTORS FUND, INC. *v.* FOGEL ET AL. C. A. 2d Cir. Certiorari denied. *Clendon H. Lee* for petitioner.

No. 375. LICAVOLI *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Moses Krislov, P. D. Maktos* and *John Maktos* for petitioner.

No. 381. LOCAL UNION No. 721, UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS, AFL–CIO *v.* NEEDHAM PACKING CO., DBA SIOUX CITY DRESSED BEEF. Sup. Ct. Iowa. Certiorari denied. *Eugene Cotton, Richard F. Watt* and *Harry H. Smith* for petitioner. *Stuart Rothman, Robert D. Larsen, Jesse E. Marshall* and *James A. Gilker* for respondent. Reported below: —— Iowa ——, 151 N. W. 2d 540.

No. 392. BRUSH ET AL., DBA BRUSH & BLOCH *v.* REPUBLIC OF CUBA ET AL. C. A. 2d Cir. Certiorari denied. *Jac M. Wolff* for petitioners. *Leonard B. Boudin* and *Victor Rabinowitz* for respondents. Reported below: 375 F. 2d 1011.

No. 395. MOTOROLA, INC. *v.* ARMSTRONG, EXECUTRIX. C. A. 7th Cir. Certiorari denied. *Foorman L. Mueller, Eugene Gressman* and *Francis G. Cole* for petitioner. *Dana M. Raymond, George B. Turner* and *George N. Hibben* for respondent. Reported below: 374 F. 2d 764.

No. 403. SOUTHERN RAILWAY CO. *v.* CHAMBERS ET AL. C. A. 6th Cir. Certiorari denied. *Charles A. Horsky* for petitioner. *Frank J. Dougherty, Jr.,* for respondents. Reported below: 376 F. 2d 815.

No. 404. DESTASIO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Michael A. Querques* for petitioner. Reported below: 49 N. J. 247, 229 A. 2d 636.

No. 398. THOR-DAHL A/S *v.* CRESCENT WHARF & WAREHOUSE CO. Ct. App. Cal., 2d App. Dist. Certiorari denied. *L. Robert Wood* for petitioner. *Henry E. Kappler* for respondent. Reported below: 248 Cal. App. 2d 812, 57 Cal. Rptr. 73.

No. 408. MONROE SANDER CORP. *v.* LIVINGSTON, PRESIDENT OF DISTRICT 65, RETAIL, WHOLESALE & DEPARTMENT STORE UNION, AFL–CIO. C. A. 2d Cir. Certiorari denied. *Julius Weiss* and *Winthrop A. Johns* for petitioner. Reported below: 377 F. 2d 6.

No. 409. STANDARD ELECTRICA, S. A. *v.* HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT. C. A. 2d Cir. Certiorari denied. *Seymour Simon* for petitioner. *James M. Estabrook* for respondent. Reported below: 375 F. 2d 943.

No. 413. ROGERS *v.* ZINGHEIM. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Edward R. Minor* for petitioner. Reported below: 249 Cal. App. 2d 736, 57 Cal. Rptr. 809.

No. 414. BUMGARNER ET AL. *v.* JOE BROWN CO., INC. C. A. 10th Cir. Certiorari denied. *George Camp* for petitioners. *Robert J. Emery* for respondent. Reported below: 376 F. 2d 749.

No. 420. GLAZER ET AL. *v.* GLAZER. C. A. 5th Cir. Certiorari denied. *John W. Douglas, Alfred H. Moses* and *Edward J. Grenier, Jr.*, for petitioners. *R. Emmett Kerrigan* and *René H. Himel, Jr.*, for respondent. Reported below: 374 F. 2d 390.

No. 422. GOLDSMITH *v.* GOLDSMITH. Ct. App. N. Y. Certiorari denied. *Clifton F. Weidlich* for petitioner. *Gerald I. Lustig* for respondent.

No. 424. TAYLOR *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *David Kaplan* for petitioner. Reported below: 413 S. W. 2d 614.

No. 426. SCOTT, AKA MONTAGUE *v.* WKJG, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Albert L. Jeffers* for petitioner. *Eugene L. Girden* for respondents. Reported below: 376 F. 2d 467.

No. 429. TRAVELERS INDEMNITY CO. *v.* GREYHOUND LINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. *John A. Hickman* for petitioner. *W. James Kronzer* for respondents Craig et al. Reported below: 377 F. 2d 325.

No. 431. CONTINENTAL CASUALTY CO. *v.* PFEIFER. Ct. App. Md. Certiorari denied. *William A. Mann* for petitioner. *Jerrold V. Powers* for respondent. Reported below: 246 Md. 628, 229 A. 2d 422.

No. 435. SATERIALE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 247 Cal. App. 2d 314, 55 Cal. Rptr. 500.

No. 438. RHINEHART *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Arval A. Morris* for petitioner. Reported below: 70 Wash. 2d 649, 424 P. 2d 906.

No. 440. BAPTIST *v.* BANKERS INDEMNITY CO. C. A. 2d Cir. Certiorari denied. *Frank F. Ober* for petitioner. Reported below: 377 F. 2d 211.

No. 473. SOUTHERN RAMBLER SALES, INC. *v.* AMERICAN MOTORS CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Charles A. O'Niell, Jr.*, for petitioner. *C. Murphy Moss, Jr.*, for respondents. Reported below: 375 F. 2d 932.

MR. JUSTICE MARSHALL took no part in the consideration or decision of the petitions in the following cases (beginning with No. 76 on this page and extending through No. 453 on p. 846):

No. 76. BENN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Thomas L. Stapleton* for respondent. Reported below: 366 F. 2d 778.

No. 81. TOMASZCK ET AL. *v.* UNITED STATES;

No. 84. LAJOY *v.* UNITED STATES; and

No. 114. SCHANG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frank G. Whalen* for petitioners in No. 81. *Maurice J. Walsh* for petitioner in No. 84. *Eugene T. Devitt* for petitioner in No. 114. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States in all three cases. Reported below: 373 F. 2d 307.

No. 83. CROWE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *John Merwin Bader* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 373 F. 2d 797.

No. 94. AIKEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *George W. Shadoan* and *Frederick T. Stant, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 373 F. 2d 294.

No. 96. JERSEY STATE BANK *v.* ROYAL INDEMNITY CO. ET AL. Ct. Cl. Certiorari denied. *Louis S. Papa* for petitioner. *William F. Kelly* and *Richard H. Nicolaides* for respondent Royal Indemnity Co. Reported below: 178 Ct. Cl. 46, 371 F. 2d 462.

No. 103. RAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James D. Sparks* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and

Beatrice Rosenberg for the United States. Reported below: 374 F. 2d 638.

No. 119. Ti Ti Peat Humus Co., Inc. *v.* Wirtz, Secretary of Labor. C. A. 4th Cir. Certiorari denied. *Huger Sinkler* for petitioner. *Solicitor General Marshall, Charles Donahue, Bessie Margolin* and *Robert E. Nagle* for respondent. Reported below: 373 F. 2d 209.

No. 120. Edwards, Executor *v.* Phillips, District Director of Internal Revenue. C. A. 10th Cir. Certiorari denied. *Barnabas F. Sears* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Jeanine Jacobs* for respondent. Reported below: 373 F. 2d 616.

No. 124. Estate of Berry et al. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *Charles D. Savage, Thomas A. Roach* and *Robert D. Larsen* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 372 F. 2d 476.

No. 126. Murray et ux. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. *Scott P. Crampton, Stanley Worth* and *Joseph A. McMenamin* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 370 F. 2d 568.

No. 133. Kolod et al. *v.* United States. C. A. 10th Cir. Certiorari denied. *Edward Bennett Williams, Harold Ungar* and *W. H. Erickson* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 371 F. 2d 983.

No. 134. Phillips *v.* United States. C. A. 7th Cir. Certiorari denied. *R. Eugene Pincham, Charles B. Evins, Earl E. Strayhorn* and *Sam Adam* for petitioner. *Solicitor General Marshall, Assistant Attorney General*

Vinson and *Beatrice Rosenberg* for the United States. Reported below: 375 F. 2d 75.

No. 135. JONES *v.* UNITED STATES; and

No. 223. MITTELMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herbert Monte Levy* for petitioner in No. 135. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States in both cases. Reported below: 374 F. 2d 414.

No. 138. BLANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 375 F. 2d 249.

No. 151. ZWICK ET AL. *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 2d Cir. Certiorari denied. *Arthur Slavin* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Eardley, Morton Hollander* and *Harvey L. Zuckman* for respondents. Reported below: 373 F. 2d 110.

No. 156. AKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *W. S. Moore* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 372 F. 2d 291.

No. 159. B & L FARMS CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* for petitioners. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Crombie J. D. Garrett* for the United States. Reported below: 368 F. 2d 571.

No. 160. D. R. SMALLEY & SONS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Donald A. Moon* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Eardley* and *Morton Hollander* for the United States. Reported below: 178 Ct. Cl. 593, 372 F. 2d 505.

No. 165. KROL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* and *Julius*

Lucius Echeles for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 776.

No. 166. KAPATOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frank A. Lopez* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 167. SCHERER & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Joseph A. Perkins* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 370 F. 2d 12.

No. 171. MURPHY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Moses L. Kove* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 374 F. 2d 651.

No. 173. ROBERTS ET AL. *v.* UNITED STATES; and

No. 192. UNITED STATES *v.* SANDRA & DENNIS FISHING CORP. ET AL. C. A. 1st Cir. Certiorari denied. *Harry Kisloff* for petitioners in No. 173. *Solicitor General Marshall, Acting Assistant Attorney General Eardley, Morton Hollander* and *Richard S. Salzman* for the United States in both cases. *Robert J. Hallisey* for Sandra & Dennis Fishing Corp. (P & I Insurer), and *Mr. Kisloff* for individual respondents in No. 192. Reported below: 372 F. 2d 189.

No. 183. ROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *Richard B. Buhrman* for the United States. Reported below: 377 F. 2d 544.

No. 188. PAN CARGO SHIPPING CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Nicholas J.*

Healy for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Eardley* and *Morton Hollander* for the United States. Reported below: 373 F. 2d 525.

No. 194. LOCAL UNION No. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 212. LOCAL 1367, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Clarence F. Rhea* for petitioner in No. 194. *Warner F. Brock* and *Arthur Mandell* for petitioners in No. 212. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board in both cases, and *Robert L. Carter* and *Barbara A. Morris* for respondents Business League of Gadsden et al., in No. 194. Reported below: No. 194, 368 F. 2d 12; No. 212, 368 F. 2d 1010.

No. 195. BIRNBAUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Ben Herzberg* and *David W. Peck* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 373 F. 2d 250.

No. 198. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Thaddeus D. Williams* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 376 F. 2d 98.

No. 200. BLUE CAB CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Charles L. Bucy* and *Paul Levenfeld* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. *Sheldon M. Charone* for Local 782, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen & Helpers of America, intervenor below. Reported below: 126 U. S. App. D. C. 1, 373 F. 2d 661.

No. 202. DiMichele *v.* United States. C. A. 3d Cir. Certiorari denied. *Lester J. Schaffer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 375 F. 2d 959.

No. 203. Ayotte *v.* United States. C. A. 6th Cir. Certiorari denied. *Gerald M. Franklin* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 208. Lipsitz *v.* Perez, Commanding General, Fort Jackson. C. A. 4th Cir. Certiorari denied. *Theodore W. Law, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 372 F. 2d 468.

No. 209. Union Petroleum Corp. *v.* United States. C. A. 10th Cir. Certiorari denied. *Hugh Q. Buck* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 376 F. 2d 569.

No. 215. Overnite Transportation Co. *v.* National Labor Relations Board et al. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for National Labor Relations Board, and *David Previant* and *Hugh J. Beins* for Chauffeurs, Teamsters & Helpers Local 171, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, respondents. Reported below: 372 F. 2d 765.

No. 217. Schafitz *v.* Federal Communications Commission. C. A. D. C. Cir. Certiorari denied. *Carl*

L. Shipley for petitioner. *Solicitor General Marshall* and *Henry Geller* for respondent.

No. 234. CONTINENTAL OIL CO. *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. *Samuel W. McIntosh* and *A. T. Smith* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *S. Billingsley Hill* for Udall, and *Henry P. Sailer* for Phillips Petroleum Co. et al., respondents.

No. 241. SARKES TARZIAN, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Joseph Alton Jenkins* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 374 F. 2d 734.

No. 242. UTICA MUTUAL INSURANCE CO. *v.* VINCENT, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Charles J. Barnhill* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 375 F. 2d 129.

No. 253. MCCOWAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 122.

No. 254. KAPLAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Maurice C. Inman, Jr.,* and *Arthur L. Martin* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 375 F. 2d 895.

No. 255. UNITED STATES *v.* U. S. THERMO CONTROL CO. ET AL. Ct. Cl. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Philip R. Miller* for the United States. *Daniel M. Gribbon* and

William H. Allen for respondents. Reported below: 178 Ct. Cl. 561, 372 F. 2d 964.

No. 250. REMLER CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Manuel Auerbach* and *Michael Leo Looney* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 179 Ct. Cl. 459.

No. 256. CADDO PARISH SCHOOL BOARD ET AL. *v.* UNITED STATES ET AL.;

No. 282. EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. *v.* DAVIS ET AL.; and

No. 301. BOARD OF EDUCATION OF THE CITY OF BESSEMER ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, and *Albin P. Lassiter* for petitioners in No. 256. *John F. Ward, Jr.,* for petitioners in No. 282. *Reid B. Barnes, William G. Somerville, Jr.,* and *John C. Satterfield* for petitioners in No. 301. *Solicitor General Marshall, Assistant Attorney General Doar, Louis F. Claiborne* and *David L. Norman* for the United States in Nos. 256 and 301. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Charles H. Jones, Jr., Demetrius C. Newton, A. P. Tureaud, Oscar W. Adams, Jr., Orzell Billingsley, Jr., David H. Hood* and *Johnnie A. Jones* for individual respondents in all three cases. Reported below: 372 F. 2d 836, 949, 380 F. 2d 385.

No. 270. FURR'S, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *William L. Kerr* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 381 F. 2d 562.

No. 263. FLORENCE PRINTING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. *D. Laurence McIntosh* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli*

and *Norton J. Come* for National Labor Relations Board, and *Gerhard P. Van Arkel* and *George Kaufmann* for Charleston Typographical Union No. 43, respondents. Reported below: 376 F. 2d 216.

No. 265. CHARLES TOWN, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *George T. Altman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Gilbert E. Andrews* and *Albert J. Beveridge III* for respondent. Reported below: 372 F. 2d 415.

No. 269. SOLITE CORP. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *T. Howard Spainhour* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Grant W. Wiprud* and *Thomas L. Stapleton* for the United States. Reported below: 375 F. 2d 684.

No. 274. K. B. & J. YOUNG'S SUPER MARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Ralston Lercara Courtney* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 377 F. 2d 463.

No. 292. REINACH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Jerome Kamerman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Harry Baum* and *Elmer J. Kelsey* for respondent. Reported below: 373 F. 2d 900.

No. 297. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *P. Walter Jones* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 375 F. 2d 243.

No. 299. BORDEN CABINET CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Arthur C. Nordhoff* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Nor-*

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ton J. Come for respondent. Reported below: 375 F. 2d 891.

No. 278. J. GORDON TURNBULL, INC. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 279. TURNBULL, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Wentworth T. Durant* for petitioners in each case. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Crombie J. D. Garrett* for respondent in both cases. Reported below: No. 278, 373 F. 2d 87; No. 279, 373 F. 2d 91.

No. 300. POLLOCK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Kasanof* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 303. CINCINNATI GAS & ELECTRIC CO. ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 6th Cir. Certiorari denied. *Walter E. Beckjord* for petitioners. *Solicitor General Marshall, Richard A. Solomon, Peter H. Schiff, Drexel D. Journey* and *Israel Convisser* for respondent. Reported below: 376 F. 2d 506.

No. 307. PERRY PUBLICATIONS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Harrison C. Thompson, Jr.*, for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for respondent. Reported below: 375 F. 2d 118.

No. 311. PERMA-HOME CORP. ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 378 F. 2d 641.

No. 318. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Paul Gordon* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson,*

Beatrice Rosenberg and *Julia P. Cooper* for the United States. Reported below: 374 F. 2d 871.

No. 315. SNYDER *v.* TURLEY, WARDEN. C. A. 3d Cir. Certiorari denied. *Louis Lipschitz* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 320. SERMAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Dan W. Duffy* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 321. OGLE PROTECTION SERVICE, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *David E. Burgess* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 375 F. 2d 497.

No. 343. MALTBY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Robert Vogel* for petitioner. *Solicitor General Marshall* for the United States.

No. 349. HOFFMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Thomas H. King* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 175 Ct. Cl. 457.

No. 350. LOCAL UNION No. 742, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Bernard M. Mamet* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for respondent. Reported below: 126 U. S. App. D. C. 290, 377 F. 2d 929.

No. 352. DISTRICT LODGE No. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Stephen C. Vladeck* and *Judith P. Vladeck*

for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 376 F. 2d 52.

No. 354. IMHOFF *v.* UNITED STATES. Ct. Cl. Certiorari denied. *John I. Heise, Jr.*, for petitioner. *Solicitor General Marshall* for the United States. Reported below: 177 Ct. Cl. 1.

No. 356. PROVENZANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Joseph F. Walsh* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 358. INTRAVAIA ET AL. *v.* WIRTZ, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall* for respondent. Reported below: 375 F. 2d 62.

No. 359. EASTMAN *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. *Bernard I. Rosen* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 373 F. 2d 481.

No. 361. LIONBERGER, DBA LIONBERGER'S AUTO PARTS *v.* UNITED STATES. Ct. Cl. Certiorari denied. *William T. Stephens* and *Grant R. Sykes* for petitioner. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for the United States. Reported below: 178 Ct. Cl. 151, 371 F. 2d 831.

No. 365. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Charles E. Gray* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 375 F. 2d 877.

No. 396. CALIFORNIA CITIZENS BAND ASSOCIATION, INC. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner,*

Henry Geller and *John H. Conlin* for the United States et al. Reported below: 375 F. 2d 43.

No. 376. FISHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Fred Elledge, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 377 F. 2d 285.

No. 379. SOSA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Sam Adam* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 379 F. 2d 525.

No. 389. TYNAN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Myron G. Ehrlich* for Tynan, and *Charles B. Murray* for Hanrahan et al., petitioners. *Solicitor General Marshall* for the United States. Reported below: 126 U. S. App. D. C. 206, 376 F. 2d 761.

No. 390. MASS *v.* BRENNER, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. *Robert J. Patch* for petitioner. *Solicitor General Marshall* for respondent.

No. 407. KRAKOVER, TRUSTEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Fred M. Winner* and *Warren O. Martin* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 377 F. 2d 104.

No. 412. RUNDLE *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. *Moses Davis* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 126 U. S. App. D. C. 335, 379 F. 2d 112.

No. 470. BOARD OF MANAGERS OF THE ARKANSAS TRAINING SCHOOL FOR BOYS ET AL. *v.* GEORGE ET AL. C. A. 8th Cir. Certiorari denied. *Joe Purcell,* Attorney General of Arkansas, *R. D. Smith III,* Assistant Attorney General, and *Jack L. Lessenberry,* Special Assistant At-

torney General, for petitioners. Reported below: 377 F. 2d 228.

No. 411. AMINO BROTHERS CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *John A. Biersmith* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 178 Ct. Cl. 515, 372 F. 2d 485.

No. 423. NIGHTINGALE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Vincent M. Casey* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 378 F. 2d 896.

No. 425. MATTIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Frederick B. Lacey* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 379 F. 2d 725.

No. 447. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 12 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Norman Leonard* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 378 F. 2d 125.

No. 453. GRIMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles W. Tessmer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 379 F. 2d 791.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in the following cases (beginning with No. 110 on this page and extending through No. 468 on p. 849):

No. 110. WORRELL *v.* MATTERS ET AL. Sup. Ct. Pa. Certiorari denied. *William P. Thorn, Marvin Karpatkin* and *Leo Pfeffer* for petitioner. *William C. Sennett,* Attorney General of Pennsylvania, *John P. McCord,*

Deputy Attorney General, and *Edward Friedman* for respondent the Commonwealth of Pennsylvania; *David Berger* for respondent the School District of Philadelphia, and *William B. Ball* for respondents Grubb et al. Reported below: 424 Pa. 202, 226 A. 2d 53.

No. 129. AMP INC. *v.* GENERAL MOTORS, INC. C. C. P. A. Certiorari denied. *William J. Keating* and *Truman S. Safford* for petitioner. *Warren E. Finken* and *George E. Frost* for respondent. Reported below: 54 C. C. P. A. (Pat.) 917, 367 F. 2d 436.

No. 131. DEAL ET AL. *v.* CINCINNATI BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. *Norris Muldrow* and *Robert L. Carter* for petitioners. *C. R. Beirne* and *William A. McClain* for respondents. Reported below: 369 F. 2d 55.

No. 139. SOUTH SHORE PACKING CORP. *v.* CITY OF VERMILION. Sup. Ct. Ohio. Certiorari denied. *John B. Otero* for petitioner. *David C. George* for respondent.

No. 168. CARABBIA *v.* OHIO. Ct. App. Ohio, Mahoning County. Certiorari denied. *Don L. Hanni* for petitioner. *Thomas R. Zebrasky* for respondent.

No. 190. VAIARELLA *v.* JAMES F. SHANAHAN CORP. Super. Ct. Mass., Essex County. Certiorari denied. *Morris D. Katz* for petitioner. *Solomon Sandler* for respondent.

No. 193. WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION *v.* D. C. TRANSIT SYSTEM, INC. C. A. D. C. Cir. Certiorari denied. *Russell W. Cunningham* for petitioner. *Harvey M. Spear* and *Manuel J. Davis* for respondent. Reported below: 126 U. S. App. D. C. 210, 376 F. 2d 765.

No. 199. NOWELL *v.* NOWELL. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. *Edgar W. Bassick III* for petitioner. *Lawrence W. Anderson* for respondent. Reported below: 408 S. W. 2d 550.

No. 243. BLOUNT BROTHERS CONSTRUCTION CO. *v.* J. P. GREATHOUSE STEEL ERECTORS, INC. C. A. D. C.

Cir. Certiorari denied. *Frederick A. Ballard* for petitioner. *Edward M. Statland* for respondent. Reported below: 126 U. S. App. D. C. 110, 374 F. 2d 324.

No. 252. SUAREZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Angus M. Stephens, Jr.*, and *Barry L. Garber* for petitioner. Reported below: 189 So. 2d 656.

No. 275. WILLIS *v.* O'BRIEN, JUDGE. Sup. Ct. App. W. Va. Certiorari denied. *Jeremy C. McCamic* for petitioner. Reported below: 151 W. Va. 628, 153 S. E. 2d 178.

No. 287. ABBOUD *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 181 Neb. 84, 147 N. W. 2d 152.

No. 288. FOY *v.* NORFOLK & WESTERN RAILWAY CO. ET AL. C. A. 4th Cir. Certiorari denied. *Howard I. Legum* and *Louis B. Fine* for petitioner. *Thomas R. McNamara* for Norfolk & Western Railway Co., and *Robert R. MacMillan* for Brotherhood of Railroad Trainmen et al., respondents. Reported below: 377 F. 2d 243.

No. 291. METHODIST RIVER OAKS APARTMENTS, INC. *v.* CITY OF WACO ET AL. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. *Thomas P. Brown III* for petitioner. *William Earl Bracken, Jr.*, for respondents. Reported below: 409 S. W. 2d 485.

No. 293. BUCCIERI ET AL. *v.* ILLINOIS CRIME INVESTIGATING COMMISSION. Sup. Ct. Ill. Certiorari denied. *Charles A. Bellows, John Powers Crowley* and *Anna Lavin* for petitioners. *William G. Clark*, Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka*, Assistant Attorneys General, for respondent. Reported below: 36 Ill. 2d 556, 224 N. E. 2d 236.

No. 362. NIEDZIEJKO ET AL. *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE. Sup. Ct. Wis. Certiorari denied. *Dominick H. Frinzi* for petitioners. *Harry G. Slater* for respondent. Re-

ported below: 33 Wis. 2d 488, 148 N. W. 2d 44, 149 N. W. 2d 547.

No. 437. OCEAN DRILLING & EXPLORATION CO. *v.* BERRY BROTHERS OIL FIELD SERVICE, INC. C. A. 5th Cir. Certiorari denied. *George B. Matthews* and *Daniel Huttenbrauck* for petitioner. *J. J. Davidson, Jr.,* for respondent. Reported below: 377 F. 2d 511.

No. 451. NOWELL *v.* NOWELL. Sup. Ct. Conn. Certiorari denied. *John T. Bonner* for petitioner. *Edgar W. Bassick III* for respondent. Reported below: 155 Conn. 713, 229 A. 2d 701.

No. 468. SMITH *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Howard R. Lonergan* for petitioner. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: 248 Ore. 56, 426 P. 2d 463.

No. 93. PUBLIC SERVICE ELECTRIC & GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 3d Cir. Motion of Northwest Jersey Natural Gas, Inc., et al. for leave to file brief, as *amici curiae,* granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Edward S. Kirby* for petitioner. *Solicitor General Marshall, Richard A. Solomon, Peter H. Schiff* and *William H. Arkin* for the Federal Power Commission; *Richard J. Connor, Thomas F. Ryan, Jr., Thomas F. Brosnan, Lawrence H. Gall* and *William N. Bonner, Jr.,* for Transcontinental Gas Pipe Line Corp., and *William K. Tell, Jr.,* and *James D. Annett* for Texaco Inc., respondents. *William T. Coleman, Jr., Robert W. Maris, Vincent P. McDevitt, Samuel G. Miller, David K. Kadane, Bertram D. Moll, Arthur J. Sills,* Attorney General of New Jersey, *William Gural,* Deputy Attorney General, *Scott Scammell, John R. Sailer* and *Robert C. Koury* on the motion. Reported below: 371 F. 2d 1.

No. 122. CUSTER CHANNEL WING CORP. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Keith L. Seegmiller* for petitioners. *Solicitor General Marshall* and *Philip A. Loomis, Jr.*, for the United States. Reported below: 376 F. 2d 675.

No. 148. SUDDUTH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Morris Lavine* for petitioner. *Roger Arnebergh, Philip E. Grey* and *Michael T. Sauer* for respondent. Reported below: 65 Cal. 2d 543, 421 P. 2d 401.

No. 169. KITCHEN *v.* REESE ET AL. Sup. Ct. La. Motion of Kenneth Franzheim II et al. to be added as parties respondent and motion of Lillie Weir Franzheim McCullar to be added as a party respondent granted. Certiorari denied. *H. Alva Brumfield* and *Sylvia Roberts* for petitioner. *Morris Wright* and *Joseph V. Ferguson II* for respondent Reese. *John L. Toler* on the motions. Reported below: 250 La. 177, 195 So. 2d 114.

No. 180. EDWARDS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *William H. Dempsey, Jr.*, and *Wade H. Sides, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 24.

No. 141. FOWLER ET AL. *v.* BENTON. Ct. App. Md. Motion to dispense with printing the petition granted. Certiorari denied. Reported below: 245 Md. 540, 226 A. 2d 556.

No. 172. MERRITT-CHAPMAN & SCOTT CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Leslie A. Hynes* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for the United States. Reported below: 178 Ct. Cl. 883.

No. 268. ATLANTIC COAST LINE RAILROAD CO. *v.* GEORGIA, SOUTHERN & FLORIDA RAILWAY CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *William H. Manness, Prime F. Osborn, Phil C. Beverly* and *Albert B. Russ, Jr.,* for petitioner. *W. Graham Claytor, Jr., James A. Bistline* and *Henry P. Sailer* for respondent. Reported below: 373 F. 2d 493.

No. 290. SPINDEL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Motion of petitioner to supplement the record granted. Certiorari denied. *Abraham Glasser* for petitioner. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Robert A. Greeley,* Special Assistant Attorney General, for respondent. Reported below: 351 Mass. 673, 223 N. E. 2d 511.

No. 296. WINFIELD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Motion to dispense with printing the petition granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Solicitor General Marshall* for respondent.

No. 302. Rederi A/B Disa *v.* Cunard Steamship Co., Ltd. C. A. 2d Cir. Certiorari denied. *William P. Kain, Jr.,* and *Thomas F. Molanphy* for petitioner. *Herbert Brownell* for respondent. Reported below: 376 F. 2d 125.

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

This contractual controversy is bound in the end to be resolved either by arbitration or by a judicial trial, but the court below has required the parties to go through the inconvenience and expense of arbitration before they can obtain a binding decision that the arbitration forum is in fact the proper one. Since this gross waste of time and effort is neither required by the applicable statutes nor consistent with fair and efficient judicial procedure, I would grant certiorari and reverse.

The dispute over which tribunal should determine the merits of this case arises in this way. Cunard, the respondent, chartered a ship owned by petitioner and also acted as stevedore in unloading the ship when it reached New York. A longshoreman employee of Cunard was injured during Cunard's stevedoring operation and sued petitioner, the ship's owner. Petitioner owner then claimed that Cunard was liable to indemnify it for any damages it might have to pay Cunard's employee. If the claim of indemnity is considered to be a dispute arising under the charter contract, that contract governs and the controversy must be arbitrated in London. If, however, the controversy arises, not under the charter, but under the stevedore's warranty of workmanlike service implied by law, *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.,* 350 U. S. 124 (1956), then the case must be tried by the District Court in New York. The District Judge decided that the dispute arose under the charter and stayed the judicial proceedings pending

arbitration. The Court of Appeals, while expressing considerable doubt as to whether arbitration was in fact proper, nevertheless followed what it considered to be the requirements of *Schoenamsgruber* v. *Hamburg Line,* 294 U. S. 454 (1935), and ruled that the District Judge's order was not yet appealable. I think decent and expeditious judicial procedure requires that the principles governing appealability announced in *Schoenamsgruber* be repudiated and that the Court of Appeals be held obligated to determine the proper tribunal now, either on the ground that the order is a "final" judgment and appealable as such, 28 U. S. C. § 1291, or on the ground that it is an interlocutory decision amounting in all substance and effect to an "injunction" and therefore appealable under 28 U. S. C. § 1292 (a)(1).

Section 1292 (a)(1) permits appeals from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ." An order should be appealable within the meaning of this statute if in substantial effect it is equivalent to an injunction, and as a matter of fact we have so held. *Ettelson* v. *Metropolitan Insurance Co.,* 317 U. S. 188 (1942). It is true that some doubt has been cast on the *Ettelson* test by *City of Morgantown* v. *Royal Insurance Co.,* 337 U. S. 254 (1949), and *Baltimore Contractors* v. *Bodinger,* 348 U. S. 176 (1955). But these more recent cases have introduced confusion and technicality into the law, requiring resolution of this statutory question in terms of the fiction of separate law, equity, and admiralty "sides" of the United States District Court. I think the time has come to abandon this outmoded fiction about "sides" of the court and return to the sound principles announced in *Ettelson, supra.* Here as in *Ettelson* petitioner is "in no different position than if a state equity court had restrained [it] from proceeding in [a] law action." *Ettelson, supra,* at 192. Since the stay entered

in this case was an injunction in every practical sense, I would hold that it was an injunction in the statutory sense and allow the present appeal.

I also think this order was "final" within the meaning of 28 U. S. C. § 1291. Our cases dealing with the meaning of finality have provided no satisfactory definition of this term, as this Court has itself repeatedly recognized. *McGourkey* v. *Toledo & Ohio R. Co.*, 146 U. S. 536 (1892); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1950). Certainly we have time and again departed from the statement in *Catlin* v. *United States*, 324 U. S. 229, 233 (1945), that the decision to be final and appealable must be one which "leaves nothing for the court to do but execute the judgment," and we have held numerous orders final and appealable which had left open major questions in litigation but were nevertheless "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949). See also *Roberts* v. *U. S. District Court*, 339 U. S. 844 (1950); *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). The same practical test of finality has been applied to determine whether the judgment of a state court is "final" within the meaning of 28 U. S. C. § 1257. *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963).

Accordingly, I do not regard as conclusive the fact that in cases of this kind "[t]he parties are still before the court and further proceedings may be moved after the arbitrators have acted." Compare *Lowry & Co.* v. *S. S. Le Moyne D'Iberville*, 372 F. 2d 123, 124 (C. A. 2d Cir. 1967). The order in the present case stayed the

judicial proceedings petitioner had commenced in New York and required the parties to go to London and conduct an arbitration that may prove costly and time consuming. Under these circumstances the question whether petitioner had a right to prompt determination of its claim in a judicial forum is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen, supra.* The court below was correct, of course, in noting that if the arbitration award proves satisfactory to petitioner, the question of arbitrability will then be moot, but in that event petitioner's right—if it has one—to avoid the costs and inconveniences incident to a foreign arbitration will have been irretrievably lost. It was this very danger that was the controlling consideration in *Cohen, supra,* 337 U. S., at 546.

It is also true that postponing review will prove to have been the more efficient approach if the District Judge's ruling is ultimately affirmed. But the probability of such an outcome can never be assessed from the present vantage point. There is at least a strong possibility that when review is finally had, the ruling will be found erroneous by the United States courts. In that case it will be necessary to proceed at long last to trial. At the moment all we can say is that we must risk either an unnecessary appeal or an unnecessary arbitration. The former may be somewhat bothersome for the appellate courts, but the latter will be such a serious burden for both the parties that I would unhesitatingly choose to avoid it. I would grant the writ, reverse the judgment below, and require a ruling now on the only controversy between the parties that is ripe for decision at this time—should the case be arbitrated or tried in court?

No. 272. Rose *v.* McNamara, Secretary of Defense. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Warren E. Magee, Hans A. Nathan, William H. Quasha, Howard B. McClellan, Stuart H. Robeson* and *Roger E. Brooks* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Eardley* and *Morton Hollander* for respondent. Reported below: 126 U. S. App. D. C. 179, 375 F. 2d 924.

No. 281. Wing Wa Lee *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Milton T. Simmons* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 375 F. 2d 723.

No. 283. Knox *v.* Ohio. Sup. Ct. Ohio. Motion to defer consideration of the petition and other relief denied. Certiorari denied.

No. 336. Local 254, Building Service Employees International Union, AFL–CIO *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Arthur V. Getchell* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 376 F. 2d 131.

No. 316. General Motors Corp. *v.* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Harlan and Mr. Justice Stewart are of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Aloysius F. Power, Harry S. Benjamin, Jr., Eugene L. Hartwig, George Cherpelis* and *K. Douglas Mann* for petitioner. *Stephen I. Schlossberg, John A. Fillion, Bernard F. Ashe, Jordan Rossen, Joseph L. Rauh, Jr.,* and *John Silard* for International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), and *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, respondents. Reported below: 127 U. S. App. D. C. 97, 381 F. 2d 265.

No. 347. Roberts *v.* Florida; and

No. 371. Nash *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied without prejudice to applications for writs of habeas corpus in the appropriate United States District Courts. Mr. Justice Douglas is of the opinion that certiorari should be granted in No. 347. *Stanley Jay Bartel* for petitioner in No. 347. *Milton E. Grusmark* for petitioner in No. 371. *Earl Faircloth,* Attorney General of Florida, and *James T. Carlisle,* Assistant Attorney General, for respondent in both cases. Reported below: No. 347, 188 So. 2d 392; No. 371, 188 So. 2d 391.

No. 419. King *v.* United Benefit Fire Insurance Co. C. A. 10th Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Jefferson G. Greer* for petitioner. *Clayton B. Pierce* for respondent. Reported below: 377 F. 2d 728.

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No. 326. LOWE *v.* TAYLOR STEEL PRODUCTS CO. ET AL. C. A. 8th Cir. Motion for leave to file a substituted petition for certiorari granted. Certiorari denied. Reported below: 373 F. 2d 65.

No. 382. DANIELSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Sidney B. Gambill* for petitioners. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent. Reported below: 378 F. 2d 771.

No. 417. LEMONGELLO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted on the issues of double jeopardy and the propriety of declaring a mistrial in these circumstances. *Frederick Klaessig* for petitioner.

No. 427. BRADICK *v.* ISRAEL ET AL. C. A. 2d Cir. Motion of respondent Israel to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Nicholas Atlas* and *Anthony H. Atlas* for petitioner. Reported below: 377 F. 2d 262.

No. 446. GAMAGE *v.* BROWN, SECRETARY OF THE AIR FORCE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Alfred L. Scanlan* and *Roger Kent* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for respondent. Reported below: 126 U. S. App. D. C. 269, 377 F. 2d 154.

No. 432. HOFFA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Morris A. Shenker, Joseph A. Fanelli, Daniel B. Maher* and *Bernard J. Mellman* for Hoffa, *Jacques M. Schiffer* for Parks, *Cecil D. Branstetter* for Campbell, and *Harold E. Brown* for King, petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 376 F. 2d 1020.

No. 443. COULTER ELECTRONICS, INC. *v.* A. B. LARS LJUNGBERG & CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Myron C. Cass* and *I. Irving Silverman* for petitioner. *Anthony R. Chiara* for respondent. Reported below: 376 F. 2d 743.

No. 449. MOONEY AIRCRAFT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Motion to dispense with printing the petition granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Hal Rachal* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Herman M. Levy* for respondent. Reported below: 375 F. 2d 402.

No. 454. MORGAN *v.* HAYS, JUDGE OF THE SUPERIOR COURT OF ARIZONA, ET AL. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Mark Wilmer* for petitioner. *Rex E. Lee* for respondents. Reported below: 102 Ariz. 150, 426 P. 2d 647.

No. 5, Misc. GARRETT *v.* LARSEN, SHERIFF. Sup. Ct. Utah. Certiorari denied. *Phil L. Hansen,* Attorney General of Utah, for respondent.

No. 6, Misc. MacLeod *v.* Virginia. Sup. Ct. App. Va. Certiorari denied. *Harry P. Friedlander* for petitioner. *William J. Hassan* for respondent.

No. 7, Misc. Collins *v.* Field, Mens Colony Superintendent. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 8, Misc. Marichez *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael* and *John J. O'Toole,* Assistant Attorneys General, for respondent.

No. 9, Misc. Esparza *v.* Dunbar, Corrections Director, et al. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *George R. Nock,* Deputy Attorneys General, for respondents.

No. 11, Misc. Jones et al. *v.* Georgia. Sup. Ct. Ga. Certiorari denied. *Aaron Kravitch* for petitioners. *Andrew J. Ryan, Jr.,* for respondent.

No. 17, Misc. Adell *v.* Illinois. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent.

No. 41, Misc. Cox *v.* Burke, Warden. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent.

No. 22, Misc. CLARK *v.* LOUISIANA; and

No. 23, Misc. HOWARD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Guy Johnson* for petitioner in No. 22, Misc. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *Jim Garrison* for respondent in both cases. Reported below: 249 La. 1061, 193 So. 2d 246.

No. 24, Misc. SPANBAUER *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent. Reported below: 374 F. 2d 67.

No. 37, Misc. MOORE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for respondent. Reported below: 35 Ill. 2d 399, 220 N. E. 2d 443.

No. 39, Misc. RIDEAU *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Fred H. Sievert, Jr.,* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *Frank T. Salter, Jr.,* for respondent. Reported below: 249 La. 1111, 193 So. 2d 264.

No. 40, Misc. PUCHALSKI *v.* YEAGER, WARDEN. C. A. 3d Cir. Certiorari denied. *Guy W. Calissi* for respondent. Reported below: 372 F. 2d 96.

No. 47, Misc. BUCHANAN *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. *Richard A. Procter* for petitioner. *G. T. Blankenship,* Attorney General of Oklahoma, and *Charles L. Owens,* Assistant Attorney General, for respondents. Reported below: 370 F. 2d 199.

No. 46, Misc. ALBRIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Assistant Attorney General, for respondent.

No. 56, Misc. SMITH *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Stephen D. Martin, Jr.,* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for respondent.

No. 59, Misc. JONES *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 61, Misc. MONTAGUE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Peter P. Rosato* for petitioner. *Jerome K. Karver* for respondent. Reported below: 19 N. Y. 2d 121, 224 N. E. 2d 873.

No. 62, Misc. MCLAUGHLIN *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz* and *Betty R. Brown,* Assistant Attorneys General, for respondent.

No. 67, Misc. BURTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Elizabeth Miller,* Deputy Attorney General, for respondent.

No. 68, Misc. MUELLER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 32 Wis. 2d 70, 145 N. W. 2d 84.

No. 69, Misc. SCHAKE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 81, Misc. McCRIMMON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 37 Ill. 2d 40, 224 N. E. 2d 822.

No. 83, Misc. WYLEY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. *Mathias J. DeVito* for petitioner. *Francis B. Burch,* Attorney General of Maryland, *Robert F. Sweeney,* Deputy Attorney General, and *Carville M. Downes* for respondent. Reported below: 372 F. 2d 742.

No. 85, Misc. WEBER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Charles O. Porter* for petitioner. Reported below: 246 Ore. 312, 423 P. 2d 767.

No. 86, Misc. BOSTIC *v.* JOHNSON, JUSTICE OF THE PEACE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89, Misc. CLEMMONS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90, Misc. BENNETT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *David Kanner* for petitioner. Reported below: 424 Pa. 650, 227 A. 2d 823.

No. 94, Misc. LAW *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Joseph L. Tita* for petitioner. Reported below: 370 F. 2d 369.

No. 95, Misc. ANAYA *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 372 F. 2d 683.

No. 97, Misc. FRONTUTO *v.* CALIFORNIA; and

No. 236, Misc. BERNAL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 98, Misc. McKee *v.* Pate, Warden. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Philip J. Rock,* Assistant Attorneys General, for respondent. Reported below: 371 F. 2d 405.

No. 100, Misc. Walker *v.* National Maritime Union et al. C. A. 2d Cir. Certiorari denied. *Abraham E. Freedman* for respondent National Maritime Union.

No. 103, Misc. Colvin *v.* Beto, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 104, Misc. Opheim *v.* Nichol, Chief Judge, U. S. District Court. C. A. 8th Cir. Certiorari denied.

No. 105, Misc. Sumida et al. *v.* James et al. Sup. Ct. Hawaii. Certiorari denied. *Joseph A. Ryan* for petitioners Sumida et al. *J. Harold Hughes* for respondents. Reported below: 49 Haw. 508 and 519, 421 P. 2d 296 and 299.

No. 106, Misc. Wall *v.* Wainwright, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 108, Misc. Zamorano *v.* Oliver, Warden. Sup. Ct. Cal. Certiorari denied.

No. 112, Misc. Johnson *v.* Ohio. Ct. Common Pleas of Ohio, Hamilton County. Certiorari denied. *Melvin G. Rueger* for respondent.

No. 113, Misc. Tillman *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. *Thomas Wade Bruton,* Attorney General of North Carolina, for respondent. Reported below: 269 N. C. 276, 152 S. E. 2d 159.

No. 114, Misc. MANNING *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 115, Misc. WHISMAN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Reuben A. Garland* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General, for respondent. Reported below: 223 Ga. 124, 153 S. E. 2d 548.

No. 119, Misc. COX *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 376 F. 2d 824.

No. 120, Misc. ARGO *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 122, Misc. CUNNINGHAM *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 125, Misc. FLETCHER *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 128, Misc. FOY *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 43 Ala. App. 524, 194 So. 2d 856.

No. 129, Misc. ROBBINS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. *James M. H. Cullender* for petitioner. Reported below: 77 N. M. 644, 427 P. 2d 10.

No. 134, Misc. IVORY *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 130, Misc. WILLIAMS *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 377 F. 2d 505.

No. 136, Misc. PEOPLES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. *Harvey Dickerson,* Attorney General of Nevada, for respondent. Reported below: 83 Nev. 115, 423 P. 2d 883.

No. 137, Misc. LESTER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 140, Misc. JUPITER *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 142, Misc. LENTZ *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Clyde C. Randolph, Jr.,* for petitioner. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Theodore C. Brown, Jr.,* for respondent. Reported below: 270 N. C. 122, 153 S. E. 2d 864.

No. 149, Misc. STANLEY *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 150, Misc. WILLIAMS *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 151, Misc. RICHARDSON *v.* INGRAM CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Harry Alan Sherman* and *S. Eldridge Sampliner* for petitioner. *Edmund K. Trent* for respondents. Reported below: 374 F. 2d 502.

No. 154, Misc. SAUNDERS *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. *Jose del Castillo* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondents.

No. 157, Misc. BERRY *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 158, Misc. MCGEE *v.* SECOND DISTRICT CRIMINAL COURT OF DALLAS COUNTY ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 161, Misc. SIRES *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 70 Wash. 2d 572, 424 P. 2d 897.

No. 167, Misc. DEDMON *v.* OLIVER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 169, Misc. CARTER *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 170, Misc. COCHRAN *v.* HUNT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 173, Misc. LYONS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 177, Misc. PEDERSON ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Sydney W. Goff* for petitioners. *Darrell F. Smith,* Attorney General of Arizona, and *Gary K. Nelson,* Assistant Attorney General, for respondent. Reported below: 102 Ariz. 60, 424 P. 2d 810.

No. 182, Misc. BRYANT *v.* PEYTON, PENITENTIARY SUPERINTENDENT. Sup. Ct. App. Va. Certiorari denied.

No. 192, Misc. LAVERGNE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien* and *John T. Murphy,* Deputy Attorneys General, for respondent.

No. 185, Misc. PECK *v.* TORONTO ET AL. Ct. App. Md. Certiorari denied. Reported below: 246 Md. 268, 228 A. 2d 252.

No. 187, Misc. FREDERICK *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 188, Misc. LINKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 189, Misc. THOMAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 65 Cal. 2d 698, 423 P. 2d 233.

No. 191, Misc. ROBERTS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 195, Misc. BAKER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 49 N. J. 103, 228 A. 2d 339.

No. 203, Misc. HUBBARD *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 374 F. 2d 856.

No. 204, Misc. BERRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 206, Misc. WHITE *v.* COOPER ET AL. C. A. 9th Cir. Certiorari denied.

No. 210, Misc. HIZEL *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 181 Neb. 680, 150 N. W. 2d 217.

No. 211, Misc. BEAVERS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 373 F. 2d 95.

No. 212, Misc. HALL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 216, Misc. LEE *v.* GRAUBERGER, DEPUTY COUNTY ATTORNEY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 218, Misc. ANTOINE *v.* LYKES BROTHERS STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *William R. Tete* for petitioner. Reported below: 376 F. 2d 443.

No. 223, Misc. AGARD *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 224, Misc. BARRERA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 373 F. 2d 333.

No. 225, Misc. WILKS *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 226, Misc. FINLEY *v.* CHANDLER. C. A. 9th Cir. Certiorari denied. Reported below: 377 F. 2d 548.

No. 227, Misc. SANTOS *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 229, Misc. WAMPLER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Robert F. Hedgepath,* Assistant Attorney General, for respondent.

No. 232, Misc. NEWSTROM *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 235, Misc. LoPICCOLO *v.* LaVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 377 F. 2d 221.

No. 238, Misc. HARSHAW *v.* JOHNSON, CLERK, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 242, Misc. BECKUS *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. *Robert G. Pelletier* for petitioner. *James S. Erwin,* Attorney General of Maine, and *John W. Benoit,* Assistant Attorney General, for respondent. Reported below: 229 A. 2d 316.

No. 245, Misc. KAHAFER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 246, Misc. HICKMAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 249, Misc. KEELEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 252, Misc. GASPERO *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. *James J. Orlow* for petitioner. Reported below: 378 F. 2d 372.

No. 253, Misc. OKSANEN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 276 Minn. 103, 149 N. W. 2d 27.

No. 276, Misc. THOMPSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam, R. Eugene Pincham, Charles B. Evins* and *Earl E. Strayhorn* for petitioner. Reported below: 36 Ill. 2d 478, 224 N. E. 2d 264.

No. 258, Misc. BUNDY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 181 Neb. 160, 147 N. W. 2d 500.

No. 259, Misc. MCKELVEY *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 263, Misc. GRAVES *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 373 F. 2d 324.

No. 264, Misc. DIXON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 37 Ill. 2d 416, 226 N. E. 2d 608.

No. 271, Misc. SMITH *v.* KANSAS. C. A. 10th Cir. Certiorari denied.

No. 272, Misc. MOORE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Joe Purcell,* Attorney General of Arkansas, and *R. D. Smith III,* Assistant Attorney General, for respondent. Reported below: 241 Ark. 745, 410 S. W. 2d 399.

No. 274, Misc. TAYLOR ET AL. *v.* GULF STATES UTILITIES CO. ET AL. C. A. 5th Cir. Certiorari denied. *Fred G. Benton, Sr.,* for petitioners. *Frank S. Normann* for respondents W. R. Meadows, Inc., et al. Reported below: 375 F. 2d 949.

No. 282, Misc. AHRENS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 250 La. 391, 196 So. 2d 250.

No. 283, Misc. SILVERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 70 Wash. 2d 430, 423 P. 2d 539.

No. 284, Misc. ALEXANDER *v.* GREEN, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 287, Misc. KONVALIN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 181 Neb. 554, 149 N. W. 2d 755.

No. 290, Misc. PARLER *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 298, Misc. CHARLES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 66 Cal. 2d 330, 425 P. 2d 545.

No. 299, Misc. BELTON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Willie J. Davis,* Assistant Attorney General, for respondent. Reported below: 352 Mass. 263, 225 N. E. 2d 53.

No. 303, Misc. ABEL *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 304, Misc. SHIPP *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 308, Misc. VAZQUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan, H. Richard Uviller* and *Eric A. Seiff* for respondent.

No. 310, Misc. BERRY *v.* CHAGAS ET AL. C. A. 5th Cir. Certiorari denied. *Stephen L. Mayo* for petitioner. *Ernest May* for respondent Chagas. Reported below: 369 F. 2d 637.

No. 302, Misc. Fox *v.* Higgins et al. Sup. Ct. N. D. Certiorari denied. *Robert Vogel* for respondents. Reported below: 149 N. W. 2d 369.

No. 311, Misc. McCoy *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 70 Wash. 2d 964, 425 P. 2d 874.

No. 312, Misc. Tinsley *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 313, Misc. Smith *v.* Kentucky. Ct. App. Ky. Certiorari denied. *Edwin W. Paul* for petitioner. *Robert Matthews,* Attorney General of Kentucky, and *David Murrell* and *Holland N. McTyeire,* Assistant Attorneys General, for respondent. Reported below: 412 S. W. 2d 256.

No. 317, Misc. Hudgens *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. *W. Edward Morgan* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 102 Ariz. 1, 423 P. 2d 90.

No. 320, Misc. Hargrove *v.* Maroney, Correctional Superintendent. C. A. 3d Cir. Certiorari denied. Reported below: 375 F. 2d 1015.

No. 323, Misc. Fair *v.* De la Parte, State Senator, et al. Sup. Ct. Fla. Certiorari denied.

No. 324, Misc. Danielsen *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 276 Minn. 428, 150 N. W. 2d 567.

No. 326, Misc. Anglin *v.* Maryland. Ct. App. Md. Certiorari denied.

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No. 327, Misc. SCHOMPERT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 19 N. Y. 2d 300, 226 N. E. 2d 305.

No. 331, Misc. OLSHEN *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 378 F. 2d 993.

No. 335, Misc. PRATT, CONSERVATOR *v.* BAKER, EXECUTOR. Sup. Ct. Ill. Certiorari denied.

No. 336, Misc. LABARTH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 19 N. Y. 2d 649, 859, 862, 225 N. E. 2d 213, 227 N. E. 2d 404, 408.

No. 339, Misc. RUSSELL ET AL. *v.* CATHOLIC CHARITIES ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 70 Wash. 2d 451, 423 P. 2d 640.

No. 342, Misc. ALEXANDER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *John T. Corrigan* and *Charles W. Fleming* for respondent.

No. 345, Misc. SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. *Joseph A. Ryan* for petitioner.

No. 348, Misc. YANITY ET AL. *v.* BENWARE ET AL. C. A. 2d Cir. Certiorari denied. *Lauren D. Rachlin* for petitioners. *Richard Lipsitz* for respondents. Reported below: 376 F. 2d 197.

No. 350, Misc. RIVERS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 363, Misc. NICHOLSON ET AL. *v.* SIGLER, WARDEN. Sup. Ct. Neb. Certiorari denied. Reported below: 181 Neb. 690, 150 N. W. 2d 251.

No. 351, Misc. TIPSY *v.* WARDEN, SAN QUENTIN STATE PRISON, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 352, Misc. JARRELS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 353, Misc. BISHOP *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Edwin B. Barnett* for petitioner. *Arlen Specter* for respondent. Reported below: 425 Pa. 175, 228 A. 2d 661.

No. 355, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 356, Misc. PECK *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 357, Misc. WATROBA *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 358, Misc. MENDEZ *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 361, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 362, Misc. KIPER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 364, Misc. MOUNT *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied. *Stephen M. Feldman* for petitioner. *Arlen Specter* for respondent. Reported below: 425 Pa. 312, 228 A. 2d 640.

No. 367, Misc. MCFARLAND *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 376 F. 2d 852.

No. 365, Misc. ANDREWS *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 369, Misc. BOSLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *John Cutler* for petitioner. Reported below: 414 S. W. 2d 468.

No. 370, Misc. NELSON *v.* DARLING SHOP OF BIRMINGHAM, INC., ET AL. Sup. Ct. Ala. Certiorari denied. *W. H. Collier* for petitioner.

No. 371, Misc. ALLISON *v.* NELSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 66 Cal. 2d 282, 425 P. 2d 193.

No. 372, Misc. LEE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 249 Cal. App. 2d 234, 57 Cal. Rptr. 281.

No. 374, Misc. O'NEILL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 379 F. 2d 656.

No. 376, Misc. SADDLER ET UX. *v.* SAFEWAY STORES, INC. C. A. D. C. Cir. Certiorari denied. *King David* for petitioners.

No. 377, Misc. JACKSON *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 380, Misc. BARQUERA *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 374 F. 2d 177.

No. 383, Misc. MOORE *v.* RODRIGUEZ, ACTING WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 376 F. 2d 817.

No. 378, Misc. CAREY *v.* GEORGE WASHINGTON UNIVERSITY. C. A. D. C. Cir. Certiorari denied.

No. 384, Misc. ARMSTRONG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 385, Misc. CARR *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *Fred Blanton, Jr.*, for petitioner. *MacDonald Gallion*, Attorney General of Alabama, *John G. Bookout*, Chief Assistant Attorney General, and *Robert F. Miller*, Assistant Attorney General, for respondent. Reported below: 43 Ala. App. 642, 198 So. 2d 791.

No. 388, Misc. ROBERTS *v.* PEPERSACK, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied.

No. 389, Misc. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 392, Misc. SALTON *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 380 F. 2d 25.

No. 396, Misc. MICKEL *v.* SOUTH CAROLINA STATE EMPLOYMENT SERVICE ET AL. C. A. 4th Cir. Certiorari denied. *Donald James Sampson* for petitioner. *Robert T. Thompson* for respondent Exide Battery Co. Reported below: 377 F. 2d 239.

No. 403, Misc. HANFORD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 405, Misc. VILLA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 412, Misc. TURNER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 409, Misc. GOGERTY *v.* GLADDEN, WARDEN. Sup. Ct. Ore. Certiorari denied. *Lawrence A. Aschenbrenner* for petitioner.

No. 411, Misc. BANDHAUER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 66 Cal. 2d 524, 426 P. 2d 900.

No. 413, Misc. SILVER *v.* PROCUNIER, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied.

No. 418, Misc. COHEN *v.* NEWSWEEK, INC. C. A. 8th Cir. Certiorari denied. Reported below: 374 F. 2d 470.

No. 427, Misc. SALGADO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No 429, Misc. KAPSALIS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 430, Misc. PILLOWS *v.* FIELD, MENS COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 433, Misc. ALEXANDER *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 441, Misc. JENKINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 250 Cal. App. 2d 460, 58 Cal. Rptr. 401.

No. 444, Misc. MANNING *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Ryan* for petitioner. Reported below: 378 F. 2d 357.

No. 455, Misc. OUTTEN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 465, Misc. RUSSEL *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 476, Misc. FURTAK *v.* MCMANN, WARDEN, ET AL. Sup. Ct. N. Y. Certiorari denied.

No. 513, Misc. FURTAK *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT. C. A. 2d Cir. Certiorari denied.

MR. JUSTICE MARSHALL took no part in the consideration or decision of the petitions in the following cases (beginning with No. 12, Misc., on this page and extending through No. 489, Misc., on p. 887):

No. 12, Misc. WALKS ON TOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 372 F. 2d 422.

No. 13, Misc. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 20, Misc. AMATA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States.

No. 25, Misc. PEREZ *v.* UNITED STATES; and

No. 33, Misc. URQUIDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States in both cases. Reported below: 371 F. 2d 654.

No. 38, Misc. CODUTO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Marshall* for the United States.

No. 29, Misc. PILARSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Marshall,*

Assistant Attorney General Vinson, Beatrice Rosenberg and *Mervyn Hamburg* for the United States. Reported below: 372 F. 2d 128.

No. 32, Misc. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John Powers Crowley* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 372 F. 2d 76.

No. 44, Misc. NEWMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Alvin D. Edelson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States.

No. 48, Misc. LOFLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall* for the United States.

No. 60, Misc. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James M. Murphy* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 373 F. 2d 576.

No. 63, Misc. ADAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 375 F. 2d 635.

No. 71, Misc. SPENCER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 373 F. 2d 529.

No. 72, Misc. WOOTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 76, Misc. HAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Marshall,*

Assistant Attorney General Vinson and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 889.

No. 75, Misc. CHAPMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jay Goldberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 705.

No. 79, Misc. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 373 F. 2d 813.

No. 82, Misc. BROOKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall* for the United States.

No. 84, Misc. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 375 F. 2d 763.

No. 87, Misc. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 88, Misc. BEUFVE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joe L. Harrell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 374 F. 2d 123.

No. 96, Misc. AGY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 94.

No. 99, Misc. STEPHENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosen-*

berg for the United States. Reported below: 376 F. 2d 23.

No. 107, Misc. GILLESPIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 376 F. 2d 414.

No. 110, Misc. SHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 374 F. 2d 888.

No. 126, Misc. CARDARELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 375 F. 2d 222.

No. 127, Misc. ROSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 97.

No. 131, Misc. BARNES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 133, Misc. MINOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Harold B. Anderson* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 375 F. 2d 170.

No. 147, Misc. HINGUANZO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *J. Edward Day* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 135, Misc. HILBRICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George L. Saunders, Jr.,* for petitioner. *Solicitor General Marshall, Assistant Attor-*

ney General Vinson and *Beatrice Rosenberg* for the United States. Reported below: 371 F. 2d 826.

No. 138, Misc. STEWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Marshall* for the United States.

No. 144, Misc. RICE *v.* STOEPLER, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Harry Marselli* for respondent.

No. 153, Misc. HUNTER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 184, Misc. SCURRY *v.* SARD, CORRECTIONS DIRECTOR, ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for respondents.

No. 201, Misc. GRAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 205, Misc. SCOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Stephen F. Lichtenstein* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 374 F. 2d 1003.

No. 207, Misc. WHITFIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 5.

No. 250, Misc. WILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall* for the United States.

No. 208, Misc. ADAMS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Leroy Nesbitt* for peti-

tioners. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 824.

No. 209, Misc. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James P. Mozingo III* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 377 F. 2d 908.

No. 213, Misc. DERENGOWSKI *v.* UNITED STATES MARSHAL ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent United States Marshal. Reported below: 377 F. 2d 223.

No. 219, Misc. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 378 F. 2d 44.

No. 231, Misc. MONTANEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 371 F. 2d 79.

No. 233, Misc. RONAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Jeanine Jacobs* for respondent. Reported below: 374 F. 2d 511.

No. 278, Misc. STEVENSON *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall* for the United States.

No. 292, Misc. SCHMIDT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Marshall* for the United States. Reported below: 376 F. 2d 751.

No. 254, Misc. GROLEAU ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Bea-*

trice Rosenberg for the United States. Reported below: 375 F. 2d 882.

No. 257, Misc. BURICH *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Marshall* for the United States. Reported below: 177 Ct. Cl. 139, 366 F. 2d 984.

No. 265, Misc. WOODRING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 619.

No. 275, Misc. BRAVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 249.

No. 277, Misc. GUNZBURGER *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. *Solicitor General Marshall* for respondent.

No. 280, Misc. DEARINGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 378 F. 2d 346.

No. 285, Misc. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 377 F. 2d 742.

No. 296, Misc. STIGALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 854.

No. 328, Misc. GUFFEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg*

and *Robert G. Maysack* for the United States. Reported below: 377 F. 2d 991.

No. 297, Misc. TOMAIOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 378 F. 2d 26.

No. 300, Misc. CRUZ *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. *Harvey L. McCormick* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 375 F. 2d 453.

No. 315, Misc. TOLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 322, Misc. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 325, Misc. POPE *v.* PARKER, WARDEN. C. A. 3d Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for respondent.

No. 333, Misc. HAMANN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall* and *Assistant Attorney General Rogovin* for respondent.

No. 346, Misc. GRAVENMIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 380 F. 2d 30.

No. 347, Misc. NORMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Milton A. Kallis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United

States. Reported below: 126 U. S. App. D. C. 387, 379 F. 2d 164.

No. 334, Misc. PETERSON *v.* CLARK, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall* for respondent.

No. 360, Misc. VIDA *v.* SARTWELL, WARDEN. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 390, Misc. MORTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 376 F. 2d 606.

No. 410, Misc. HELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 489, Misc. WALTENBERG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in the following cases (beginning with No. 21, Misc., on this page and extending through No. 164, Misc., on p. 888):

No. 21, Misc. EVANS ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *G. Wray Gill, Sr.,* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *Jim Garrison* for respondent. Reported below: 249 La. 861, 192 So. 2d 103.

No. 52, Misc. LITTLETON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *George Cowden,* First Assistant Attorney General, *Robert Lattimore* and *Howard M. Fender,*

Assistant Attorneys General, and *A. J. Carubbi, Jr.*, for respondent. Reported below: 419 S. W. 2d 355.

No. 101, Misc. MEARS, AKA SCOTT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. *Melvin Schaengold* for petitioner. *Harvey Dickerson,* Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 83 Nev. 3, 422 P. 2d 230.

No. 164, Misc. ELI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Daniel B. Hunter* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *S. Clark Moore,* Deputy Attorney General, for respondent. Reported below: 66 Cal. 2d 63, 424 P. 2d 356.

No. 77, Misc. HANSEN *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari, vacate the judgment, and remand the case to the District Court for consideration of petitioner's claims in light of *Klopfer* v. *North Carolina,* 386 U. S. 213.

No. 116, Misc. SILVERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Sigmund J. Beck* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 828.

No. 118, Misc. TUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Thomas M. Collins* for petitioner. *Solicitor General Marshall, Assistant Attorney General*

Vinson and *Philip R. Monahan* for the United States. Reported below: 375 F. 2d 363.

No. 338, Misc. STARNER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 378 F. 2d 808.

Rehearing Denied.

No. 37, October Term, 1966. CURTIS PUBLISHING CO. *v.* BUTTS, 388 U. S. 130;

No. 57, October Term, 1966. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., 387 U. S. 397;

No. 59, October Term, 1966. NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., 387 U. S. 397;

No. 60, October Term, 1966. UNITED STATES ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., 387 U. S. 397;

No. 150, October Term, 1966. ASSOCIATED PRESS *v.* WALKER, 388 U. S. 130;

No. 616, October Term, 1966. WENZLER *v.* PITCHESS, SHERIFF, ET AL., 388 U. S. 912;

No. 1093, October Term, 1966. ORDER OF RAILWAY CONDUCTORS & BRAKEMEN ET AL. *v.* UNITED STATES ET AL., 388 U. S. 455;

No. 1112, October Term, 1966. FOSTER *v.* LYKES BROS. STEAMSHIP CO., INC., 387 U. S. 908;

No. 1164, October Term, 1966. LANDAU *v.* FORDING, CHIEF OF POLICE, ET AL., 388 U. S. 456; and

No. 1190, October Term, 1966. NUCCIO ET AL. *v.* UNITED STATES, 387 U. S. 906. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

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No. 1216, October Term, 1966. ALLYN *v.* FLANNERY ET AL., 388 U. S. 912;

No. 1237, October Term, 1966. CORSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 387 U. S. 919;

No. 1239, October Term, 1966. JACKSON COUNTY PUBLIC WATER SUPPLY DISTRICT, No. 1 *v.* ONG AIRCRAFT CORP. ET AL., 387 U. S. 919;

No. 1242, October Term, 1966. GREEN *v.* ILLINOIS, 387 U. S. 930;

No. 1243, October Term, 1966. JACKSON *v.* NEW YORK, 387 U. S. 930;

No. 1256, October Term, 1966. DULAINE *v.* UNITED STATES, 387 U. S. 920;

No. 1303, October Term, 1966. CITY OF NEW ORLEANS ET AL. *v.* UNITED STATES ET AL., 387 U. S. 944;

No. 1319, October Term, 1966. BROOKS *v.* HUNTER ET AL., 388 U. S. 910;

No. 1325, October Term, 1966. GROSSMAN ET AL. *v.* STUBBS ET AL., 388 U. S. 910;

No. 1339, October Term, 1966. SPEVACK *v.* PIKE, 388 U. S. 913;

No. 514, Misc., October Term, 1966. POTTER ET AL. *v.* CALIFORNIA, 388 U. S. 924;

No. 939, Misc., October Term, 1966. KUSHMER *v.* UNITED STATES, 387 U. S. 914;

No. 1178, Misc., October Term, 1966. BELTOWSKI *v.* MINNESOTA, 387 U. S. 911;

No. 1194, Misc., October Term, 1966. FERGUSON ET AL. *v.* UNITED STATES, 388 U. S. 922;

No. 1267, Misc., October Term, 1966. MOCCIO *v.* NEW YORK, 387 U. S. 946; and

No. 1319, Misc., October Term, 1966. HAYES, AKA HASAN *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT, 387 U. S. 935. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 1337, Misc., October Term, 1966. THOMPSON *v.* THOMPSON ET AL., 388 U. S. 914;

No. 1471, Misc., October Term, 1966. HALL *v.* UNITED STATES, 387 U. S. 923;

No. 1494, Misc., October Term, 1966. HENDRICKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, 386 U. S. 1041;

No. 1509, Misc., October Term, 1966. BELTOWSKI *v.* LARSON, JUDGE, 387 U. S. 912;

No. 1523, Misc., October Term, 1966. OSBORNE *v.* UNITED STATES, 387 U. S. 946;

No. 1547, Misc., October Term, 1966. BROWN *v.* UNITED STATES, 387 U. S. 947;

No. 1563, Misc., October Term, 1966. BROWN *v.* INDIANA, 387 U. S. 925;

No. 1565, Misc., October Term, 1966. CEPERO *v.* INDUSTRIAL COMMISSION OF PUERTO RICO, 387 U. S. 424;

No. 1572, Misc., October Term, 1966. PATTERSON ET AL. *v.* VIRGINIA ELECTRIC & POWER CO., 387 U. S. 426;

No. 1576, Misc., October Term, 1966. LLANES *v.* UNITED STATES, 388 U. S. 917;

No. 1600, Misc., October Term, 1966. GILMORE *v.* REAGAN ET AL., 387 U. S. 937;

No. 1606, Misc., October Term, 1966. CEPERO *v.* COLON ET AL., 387 U. S. 425;

No. 1624, Misc., October Term, 1966. WILLIAMS *v.* WILSON, WARDEN, 387 U. S. 939;

No. 1633, Misc., October Term, 1966. LUXEM *v.* CALIFORNIA, 388 U. S. 923;

No. 1674, Misc., October Term, 1966. HENSLEY ET AL. *v.* UNITED STATES, 388 U. S. 923; and

No. 1677, Misc., October Term, 1966. SKOLNICK *v.* FEDERAL CIRCUIT JUDGES OF SEVENTH JUDICIAL CIRCUIT, 387 U. S. 928. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 1678, Misc., October Term, 1966. SKOLNICK *v.* CUMMINGS ET AL., 387 U. S. 928;

No. 1742, Misc., October Term, 1966. LADD *v.* SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, 388 U. S. 921; and

No. 1766, Misc. October Term, 1966. MCKINNEY *v.* WILSON, WARDEN, ET AL., 388 U. S. 903. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 8, October Term, 1966. CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.; and

No. 23, October Term, 1966. UNITED STATES ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., 387 U. S. 326. Motion of Atchison, Topeka & Santa Fe Railway Co. et al. for leave to file supplement to petition granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

No. 216, October Term, 1966. NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL., 388 U. S. 175. Motion of Aerojet-General Corp. for leave to file brief, as *amicus curiae,* in support of petition granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Roderick M. Hills, Norbert A. Schlei* and *James N. Adler* on the motion.

No. 993, October Term, 1966. TANNENBAUM *v.* NEW YORK, 388 U. S. 439. Motion of New York Civil Liberties Union for leave to file brief, as *amicus curiae,* in support of petition for rehearing, granted. Rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Marvin M. Karpatkin* on the motion.

No. 911, October Term, 1966. DAVANT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 386 U. S. 1022;

No. 953, October Term, 1966. MILLER *v.* COUNTY OF LOS ANGELES, 386 U. S. 990;

No. 1228, October Term, 1966. TOOL RESEARCH & ENGINEERING CORP. *v.* HONCOR CORP., 387 U. S. 919;

No. 1298, October Term, 1966. HEIDRICH *v.* UNITED STATES, 387 U. S. 943;

No. 1015, Misc., October Term, 1966. WINGFIELD *v.* PEYTON, PENITENTIARY SUPERINTENDENT, 388 U. S. 922;

No. 1306, Misc., October Term, 1966. CALLOWAY *v.* OHIO ET AL., 386 U. S. 998; and

No. 1308, Misc., October Term, 1966. STILTNER *v.* WASHINGTON ET AL., 387 U. S. 922. Motions for leave to file petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 1101, October Term, 1966. EVANSON ET AL. *v.* NORTHWEST HOLDING CO., 386 U. S. 1004, 387 U. S. 938;

No. 557, Misc., October Term, 1965. PISCITELLO *v.* NEW YORK, 384 U. S. 1022, 385 U. S. 894; and

No. 1264, Misc., October Term, 1966. KNOLL ET AL. *v.* SOCONY MOBIL OIL CO., INC., ET AL., 386 U. S. 977, 1043. Motions for leave to file second petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 1186, October Term, 1966. SCHACKMAN ET AL. *v.* ARNEBERGH, CITY ATTORNEY FOR THE CITY OF LOS ANGELES, ET AL., 387 U. S. 427; and

No. 385, Misc., October Term, 1966. SMITH *v.* CALIFORNIA, 388 U. S. 913. Motions for leave to supplement petitions for rehearing granted. Rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and petitions.

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No. 249, October Term, 1966. WALKER ET AL. *v.* CITY OF BIRMINGHAM, 388 U. S. 307. Motions of American Jewish Congress and American Federation of Labor & Congress of Industrial Organizations for leave to file briefs, as *amici curiae,* in support of petition granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and petition. *Joseph B. Robison* for American Jewish Congress; *J. M. Breckenridge* and *Earl McBee* for respondent in opposition. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for American Federation of Labor & Congress of Industrial Organizations.

OCTOBER 16, 1967.

Miscellaneous Orders.

No. 69. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. (Certiorari granted, 388 U. S. 909.) Joint motion to remove case from summary calendar granted and a total of one and one-half hours allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Walter Herzfeld* for petitioner. *Robert N. Katz* for Federal Maritime Commission, *Acting Solicitor General Spritzer* for the United States, *R. Frederic Fisher* for Pacific Maritime Commission, and *Owen Jameson* for Marine Terminals Corp., respondents.

No. 577, Misc. JONES *v.* REAGAN, GOVERNOR OF CALIFORNIA, ET AL.;

No. 605, Misc. GREAR *v.* MAXWELL, WARDEN; and

No. 644, Misc. WAITE *v.* BURKE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 425, Misc. BURFORD *v.* DAUGHERTY, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Charles R. Nesbitt* on the motion. *Irvine E. Ungerman* for respondent Stuart et al. in opposition.

No. 529, Misc. TRUESDALE *v.* CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied. *Clement Theodore Cooper* on the motion. *Acting Solicitor General Spritzer* filed a memorandum in opposition.

Probable Jurisdiction Noted.

No. 416. FLAST ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. S. D. N. Y. Motion of National Council of Churches for leave to file brief, as *amicus curiae*, granted. Probable jurisdiction noted. *Norman Dorsen* and *Charles H. Tuttle* on the motion. *Leo Pfeffer* and *Joseph B. Robison* for appellants. *Acting Solicitor General Spritzer* for respondents. Reported below: 271 F. Supp. 1.

Certiorari Granted. (See also No. 201, *ante*, p. 15; No. 306, *ante*, p. 28; No. 330, *ante*, p. 18; No. 27, Misc., *ante*, p. 20; No. 162, Misc., *ante*, p. 22; and No. 174, Misc., *ante*, p. 24.)

No. 127. READING CO. *v.* BROWN, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 3d Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Thomas Raeburn White, Jr.*, for petitioner. *Owen B. Rhoads* for Brown, and *Solicitor General Marshall, Assistant Attorney General Rogovin, Crombie J. D. Garrett* and *Edward Lee Rogers* for the United States, respondents. Reported below: 370 F. 2d 624.

No. 71. CARAFAS *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *James J. Cally* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Barry Mahoney,* Assistant Attorney General, for respondent.

No. 286, Misc. MATHIS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition and motion. *Nicholas J. Capuano* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 376 F. 2d 595.

Certiorari Denied. (See also No. 572, Misc., *ante,* p. 26.)

No. 346. PARSONS *v.* GULF & SOUTH AMERICAN STEAMSHIP CO., INC. Sup. Ct. La. Certiorari denied. *H. Alva Brumfield* for petitioner. *Benjamin W. Yancey, William E. Wright* and *G. Edward Merritt* for respondent.

No. 357. MIRRO-DYNAMICS CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert H. Wyshak* and *Lillian W. Wyshak* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Harold C. Wilkenfeld* and *Thomas Silk* for the United States. Reported below: 374 F. 2d 14.

No. 370. INTER-AMERICAN CITIZENS FOR DECENCY COMMITTEE ET AL. *v.* MCBEATH. C. A. 5th Cir. Certiorari denied. *David Hume* for petitioners. *Robert S. Trotti* for respondent. Reported below: 374 F. 2d 359.

No. 386. STEWART-WARNER CORP. *v.* BISHMAN MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari denied. *Dugald S. McDougall* and *Augustus G. Douvas* for petitioner. *Andrew E. Carlsen* and *Walther E. Wyss* for respondents. Reported below: 380 F. 2d 336.

No. 391. JOSEPH BANCROFT & SONS CO. *v.* SHELLEY KNITTING MILLS, INC. C. A. 3d Cir. Certiorari denied. *Thomas N. O'Neill, Jr.*, and *C. Brewster Rhoads* for petitioner. *Harry Shapiro* for respondent. Reported below: 374 F. 2d 28.

No. 397. COHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Richard H. Foster* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 378 F. 2d 751.

No. 418. STUYVESANT INSURANCE CO. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry B. Rothblatt* and *Emma A. Rothblatt* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 379 F. 2d 277.

No. 421. CAMPBELL, CHIEF JUDGE, U. S. DISTRICT COURT *v.* SOUTHERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Philip H. Corboy* for petitioner. *Charles A. Horsky* and *Norman J. Gundlach* for respondent.

No. 455. STIEF *v.* J. A. SEXAUER MANUFACTURING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *B. Nathaniel Richter, Charles A. Lord* and *Seymour I. Toll* for petitioner. *Benjamin H. Siff* for J. A. Sexauer Manufacturing Co., Inc., and *S. Hazard Gillespie* and *J. Roger Carroll* for Diamond Alkali Co., respondents. Reported below: 380 F. 2d 453.

No. 441. WALLACE *v.* BRENNER, COMMISSIONER OF PATENTS. C. C. P. A. Certiorari denied. *Acting Solicitor General Spritzer* for respondent. Reported below: 54 C. C. P. A. (Pat.) 1312, 376 F. 2d 968.

No. 448. FLEMMING *v.* ADAMS ET AL. C. A. 10th Cir. Certiorari denied. *Robert A. Schiff* for petitioner. Reported below: 377 F. 2d 975.

No. 450. LOGAN LANES, INC. *v.* BRUNSWICK CORP. C. A. 9th Cir. Certiorari denied. *Dennis McCarthy* for petitioner. *Robert L. Stern* and *Louis F. Racine, Jr.*, for respondent. Reported below: 378 F. 2d 212.

No. 93, Misc. CHAMLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Cleary* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 57.

No. 132, Misc. FORD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 143, Misc. LEPISCOPO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 376 F. 2d 846.

No. 222, Misc. RAYMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 376 F. 2d 581.

No. 237, Misc. KAYTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 247, Misc. TRUJILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 377 F. 2d 266.

No. 337, Misc. JALBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 375 F. 2d 125.

No. 426, Misc. WEIS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 92 Ariz. 254, 375 P. 2d 735.

No. 435, Misc. PETERMAN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 35 Wis. 2d 790, 151 N. W. 2d 677.

No. 445, Misc. CRAIG *v.* BOLSINGER, PROTHONOTARY. C. A. 3d Cir. Certiorari denied.

No. 449, Misc. SIFRE *v.* DELGADO, WARDEN. Sup. Ct. P. R. Certiorari denied.

No. 466, Misc. SHIKARA *v.* COMMISSIONER OF MENTAL HEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 471, Misc. SWIERE *v.* HARMS MARINE SERVICE, INC. Sup. Ct. Tex. Certiorari denied. *John T. Lindsey* for petitioner. *Clarence S. Eastham* for respondent. Reported below: See 411 S. W. 2d 602.

MR. JUSTICE MARSHALL took no part in the consideration or decision of the petitions in the following cases (beginning with No. 106 on this page and extending through No. 478, Misc., on p. 901):

No. 106. OBER ET AL. *v.* NAGY ET AL. Sup. Ct. Ohio. Certiorari denied. *John R. Vintilla* for petitioners. *Ellis V. Rippner* and *Richard W. Schwartz* for respondents. *Solicitor General Marshall* for the United States, as *amicus curiae*.

No. 221. IOWA TRIBE OF THE IOWA RESERVATION IN OKLAHOMA ET AL. *v.* UNITED STATES; and

No. 457. UNITED STATES *v.* SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA ET AL. Ct. Cl. Certiorari denied. *Nicholas Conover English* for petitioners, and *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Edmund B. Clark* for the United States in No. 221. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *Edmund B. Clark* for the United States, and *George B. Pletsch* for respondents in No. 457. Reported below: 179 Ct. Cl. 8, 383 F. 2d 991.

No. 334. FRANK IX & SONS VIRGINIA CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Benjamin Nadel* and *Norman Nadel* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent. Reported below: 375 F. 2d 867.

No. 439. BUTCHERS UNION LOCAL No. 127, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 525. CAMPBELL SOUP CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Charles P. Scully* for petitioner in No. 439. *Gilford G. Rowland* for petitioner Campbell Soup Co. in No. 525. *Acting Solicitor General Spritzer, Arnold*

Ordman, Dominick L. Manoli and *Norton J. Come* for respondent in both cases. Reported below: 378 F. 2d 259.

No. 444. COMMISSIONER OF INTERNAL REVENUE *v.* FREDERICK STEEL CO. C. A. 6th Cir. Certiorari denied. *Solicitor General Marshall* for petitioner. *Ralph P. Wanlass* for respondent. Reported below: 375 F. 2d 351.

No. 591. BIANCHI ET AL. *v.* GRIFFING ET AL., BOARD OF SUPERVISORS OF SUFFOLK COUNTY. C. A. 2d Cir. Certiorari denied. *Frederic Block* for Bianchi, and *Richard C. Cahn* for Sammis et al., petitioners.

No. 194, Misc. CAPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 376 F. 2d 814.

No. 404, Misc. SCHAWARTZBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 379 F. 2d 551.

No. 478, Misc. BIVENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 457, Misc. MEYER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 109. DOKES ET UX. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner* and *Anthony G. Amsterdam* for petitioners. *Joe Purcell,* Attorney General of Arkansas, and *R. D. Smith III,* Assistant Attorney General, for respondent. Reported below: 241 Ark. 720, 409 S. W. 2d 827.

No. 115. HELLER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *David M. Reilly* for petitioner. *William I. Mark* for respondent. Reported below: 154 Conn. 743, 226 A. 2d 521.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS joins, dissenting.

A policeman saw petitioner seated in an improperly parked car at 1:50 a. m. The policeman spoke to petitioner, but received no reply. He detected a strong odor of alcohol on petitioner's breath. He took petitioner to a nearby police station. Petitioner requested permission to call an attorney. The request was refused. He was questioned, but refused to answer. He said he would answer questions if he could call a lawyer.

According to the police, petitioner was unsteady on his feet and his clothes were disarranged. No medical or chemical test for drunkenness was administered to petitioner or requested by him. Petitioner refused, in the absence of counsel, to submit to the performance tests routinely used by police in such cases.

Petitioner was placed in a cell. He was awakened at 7:05 a. m. and signed a form to the effect that he had been warned of his right to counsel, to remain silent, and to be free on bail. Ten minutes later, he telephoned his attorney.

Petitioner was thereafter brought to trial before a judge of the Seventh Circuit Court of Connecticut. He was represented by counsel. He demanded and was denied a jury trial. He also asserted that his rights under the Sixth and Fourteenth Amendments to the United States Constitution had been violated because he was denied counsel at the time of his detention and examination at the police station. These claims were denied, and judgment was entered that defendant was guilty of the crime

of being "found intoxicated." Conn. Gen. Stat. Rev. § 53–246.

The maximum penalty for this offense under Connecticut law is a $20 fine or a jail sentence of 30 days. Petitioner was sentenced to a fine of $20 and a jail sentence of 10 days. Execution of the jail sentence was suspended. On appeal, the judgment was affirmed by the Appellate Division of the Circuit Court of Connecticut (4 Conn. Cir. 174, 228 A. 2d 815), and a petition for certification to the Supreme Court of Connecticut was denied by that court (154 Conn. 743, 226 A. 2d 521). A petition for certiorari was duly filed with this Court, limited to the right-to-counsel question.

We should grant the petition. Sharply and clearly it presents the following important questions: (1) Whether a prosecution for being "found intoxicated," subjecting the defendant to as much as 30 days' imprisonment, is within the category of serious state criminal prosecutions to which the federal constitutional guarantee of assistance of counsel applies, under the decisions of this Court. See *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); (2) Whether, if the answer to this question is in the negative, we should now hold that the constitutional guarantee of counsel applies to the present case and to other relatively "minor" offenses or misdemeanors carrying significant penalties for their violation; and (3) Whether denial of a request for counsel in the circumstances here presented, after arrest and without reference to police interrogation or to any admission by the accused, violates the Constitution and invalidates a conviction.

In connection with this last point, we should consider whether a person who is arrested and jailed is entitled to telephone his lawyer and to consult with him, even in the absence of a showing that denial of a request to this effect has resulted in specific prejudice. In our

society, we reject the theory that the police may seize and hold a citizen *incommunicado*. This is fundamental to our constitutional system. I would think that a person, plucked from the streets and put in a cell, is entitled—as of right—to let his family know that he is in jail and to call for assistance. Cf. *Haynes* v. *Washington,* 373 U. S. 503 (1963).

The present case, however, does not depend upon establishing an absolute right to call a lawyer after arrest. Petitioner's lawyer, had petitioner's request to call him been granted, might have performed an important function, which was not capable of performance five or six hours later. He might have insisted upon medical or chemical tests; he might have summoned a private physician. At the very least, he could have informed the arrested person's family and friends that the accused had not disappeared without a trace, but was held, safely if unhappily, in jail.

In contrast with petitioner's need for an attorney is the absence of any legitimate state interest in forbidding petitioner to call one. I believe the issue thus posed is both important and certain to recur. I would grant certiorari to resolve that issue now.

No. 528, Misc. OQUENDO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 313. SELINGER *v.* BIGLER, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *David R. Frazer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Joseph M. Howard* and *Burton Berkley* for respondents. Reported below: 377 F. 2d 542.

No. 372. MAIUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *William J. Dammarell* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 378 F. 2d 716.

No. 317. RODRIGUEZ *v.* ALCOA STEAMSHIP CO., INC. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harvey B. Nachman* and *Stanley L. Feldstein* for petitioner. *Antonio M. Bird, J. Ward O'Neill* and *Francis X. Byrn* for respondent. Reported below: 376 F. 2d 35.

No. 337. EASTON, DBA GEORGE EASTON FURNITURE CO. *v.* WEIR ET AL. Dist. Ct. App. Fla., 2d Dist. Motion to dispense with printing petition granted. Certiorari denied. *Ross H. Stanton, Jr.,* for respondents. Reported below: 188 So. 2d 1.

No. 430. G. I. DISTRIBUTORS, INC. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and the judgment reversed on the basis of *Redrup* v. *New York,* 386 U. S. 767. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would deny certiorari upon the sole ground that the issues in this case have become moot. See *Jacobs* v. *New York,* 388 U. S. 431; *Tannenbaum* v. *New York,* 388 U. S. 439. *Osmond K. Fraenkel* for petitioner. *Thomas J. Mackell* and *Peter J. O'Connor* for respondent. Reported below: 20 N. Y. 2d 104, 228 N. E. 2d 787.

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No. 163, Misc. NASH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *George L. Saunders, Jr.*, for petitioner. *William G. Clark*, Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka*, Assistant Attorneys General, for respondent. Reported below: 36 Ill. 2d 275, 222 N. E. 2d 473.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

Petitioner was convicted of murder on the testimony of William Triplett, an accomplice in the crime. The prosecutor promised Triplett leniency if he testified against the petitioner. Triplett, however, testified that he had not been promised anything. The prosecutor knew this testimony was false, and the jury heard Triplett's entire testimony under the erroneous impression that he had not received promises of leniency. Later in the trial, and over the prosecutor's objection, petitioner called Triplett's lawyer and the prosecutor as witnesses. Both admitted that the prosecutor promised Triplett leniency if he would testify.

I think this case is governed by the principle of *Napue* v. *Illinois*, 360 U. S. 264 (1959).* It is true that in the present case, the prosecutor was called by the defense and compelled to admit that he offered leniency to the witness if he testified. So, here, the jury ultimately

*In response to a question by the prosecutor, a principal state witness in *Napue* testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration but did nothing to correct the false testimony. (Earlier, the witness had been forced by defense counsel to admit that someone, tentatively described as a public defender, "was going to do what he could" to help the witness.) The Court held that the prosecutor's knowing acquiescence in the witness' lie deprived the defendant of a fair trial under the Fourteenth Amendment even though the jury had been apprised that the witness might have been lying about whether he had any interest in testifying.

knew not only that the witness lied, but also that the prosecutor knew he was lying.

It may be that upon hearing the prosecutor's admission, the jury could properly discount Triplett's testimony. However, the jury heard him under the impression that he was not receiving benefit for his testimony, and the subsequent admission by the prosecutor, later in the trial, might not adequately overcome the jury's initial impression of the testimony. Accordingly, in these circumstances, I must conclude that petitioner was prejudiced by the prosecutor's acquiescence in the misrepresentation by his witness.

In any event, it is by no means clear that petitioner must show that the prosecutor's knowing acquiescence in a material falsehood prejudiced him. There is no place in our system of criminal justice for prosecutorial misconduct. See *Giles* v. *Maryland,* 386 U. S. 66 (1967) (opinion of BRENNAN, J.); *Miller* v. *Pate,* 386 U. S. 1 (1967); *Napue* v. *Illinois, supra; Alcorta* v. *Texas,* 355 U. S. 28 (1957); *White* v. *Ragen,* 324 U. S. 760 (1945); *Pyle* v. *Kansas,* 317 U. S. 213 (1942); and *Mooney* v. *Holohan,* 294 U. S. 103 (1935). See also *Giles* v. *Maryland, supra,* at 96 (opinion of FORTAS, J.); and *Brady* v. *Maryland,* 373 U. S. 83 (1963). Especially in a capital case, a false denial by the critical State's witness that he was promised leniency in return for his testimony, knowingly acquiesced in by the prosecutor, requires reversal of a state conviction, even though the prosecutor was later compelled to admit that the denial was untrue.

I would grant certiorari and reverse. *Napue* v. *Illinois, supra.*

No. 428, Misc. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Paul Levenfeld* for petitioner. Reported below: 37 Ill. 2d 167, 226 N. E. 2d 1.

No. 318, Misc. GRENE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 993.

No. 332, Misc. FERRARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Leon B. Polsky* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 377 F. 2d 16.

Rehearing Denied.

No. 513, October Term, 1966. IMMIGRATION AND NATURALIZATION SERVICE *v.* LAVOIE, 387 U. S. 572. Rehearing denied. The *per curiam* opinion heretofore issued in this case on June 5, 1967, is hereby amended to provide that the judgment of the United States Court of Appeals for the Ninth Circuit be vacated rather than reversed, and that the case be remanded to that court in order that it may pass upon the issues in the case not covered by its prior opinion.* MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition and order.

No. 1385, Misc., October Term, 1966. WILLIAMS *v.* UNITED STATES, 386 U. S. 1038. Rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

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*[REPORTER'S NOTE: The opinion is reported as so amended at 387 U. S. 572.]

No. 1335, October Term, 1966. PARKS *v.* SIMPSON TIMBER CO. ET AL., 388 U. S. 459. Rehearing denied. The *per curiam* opinion issued in this case on June 12, 1967, is hereby amended to provide that the judgment of the United States Court of Appeals for the Ninth Circuit be vacated rather than reversed, and that the case be remanded to that court in order that it may pass upon the issues in the case not covered by its prior opinion.* The judgment heretofore entered in this case is hereby amended in the same maner. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition and order.

OCTOBER 23, 1967.

Miscellaneous Orders.

No. 31, Orig. UTAH *v.* UNITED STATES. Motion of Morton International, Inc., for leave to intervene and file an answer is referred to the Special Master. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *L. M. McBride, Frank A. Wollaeger, Myer Feldman* and *Martin Jacobs* on the motion. [For earlier orders herein, see 387 U. S. 902, 388 U. S. 902.]

No. 163. NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL. *v.* RINGSBY TRUCK LINES, INC., ET AL. Appeal from D. C. Colo. The United States and the Interstate Commerce Commission requested to address themselves further to issue of mootness in this case, in particular to statement in their memorandum that the issue with respect to restraining order entered by the District Court "is not moot because it would affect appellants' claims for restitution of charges paid under the increased rates." MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

*[REPORTER'S NOTE: The opinion is reported as so amended at 388 U. S. 459.]

No. 39. AVERY *v.* MIDLAND COUNTY ET AL. Sup. Ct. Tex. (Certiorari granted, 388 U. S. 905.) Motion of Solicitor General for leave to participate in oral argument, as *amicus curiae,* granted and thirty minutes allotted for that purpose. Counsel for respondents allotted an additional thirty minutes for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Acting Solicitor General Spritzer* on the motion.

No. 43. ALBRECHT *v.* HERALD CO., DBA GLOBE-DEMOCRAT PUBLISHING CO. C. A. 8th Cir. (Certiorari granted, 386 U. S. 941; see also, *ante,* p. 805.) Motion of respondent to remove case from summary calendar denied. *Lon Hocker* on the motion.

No. 703. BARBER *v.* PAGE, WARDEN. C. A. 10th Cir. (Certiorari granted, *ante,* p. 819.) Motion of petitioner for appointment of counsel granted. It is ordered that *Ira C. Rothgerber, Jr., Esquire,* of Denver, Colorado, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 168, Misc. ELLIOTT, ADMINISTRATOR *v.* SIERZENGA ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 424, Misc. CULLY *v.* PENNSYLVANIA. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted.

No. 482. UNITED STATES *v.* JOHNSON ET AL. Appeal from D. C. N. D. Ga. Probable jurisdiction noted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for the United States. Reported below: 269 F. Supp. 706.

Certiorari Granted. (See also No. 164, *ante,* p. 47; No. 259, *ante,* p. 48; No. 284, *ante,* p. 31; No. 338, *ante,* p. 45; No. 368, *ante,* p. 50; No. 50, Misc., *ante,* p. 53; No. 92, Misc., *ante,* p. 35; and No. 193, Misc., *ante,* p. 40.)

No. 478. AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 ET AL. *v.* LOGAN VALLEY PLAZA, INC., ET AL. Sup. Ct. Pa. Certiorari granted. *Lester Asher* and *Bernard Dunau* for petitioners. *Robert Lewis* for respondents. Reported below: 425 Pa. 382, 227 A. 2d 874.

No. 363. UNITED STATES ET AL. *v.* SOUTHWESTERN CABLE CO. ET AL.; and

No. 428. MIDWEST TELEVISION, INC., ET AL. *v.* SOUTHWESTERN CABLE CO. ET AL. C. A. 9th Cir. Certiorari granted. Cases are consolidated and two hours are allotted for oral argument. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. *Solicitor General Marshall, Assistant Attorney General Turner, Ralph S. Spritzer, Howard E. Shapiro, Henry Geller* and *Daniel R. Ohlbaum* for the United States et al. in No. 363. *Ernest W. Jennes* and *Charles A. Miller* for petitioners in No. 428. *Morton H. Wilner, Arthur Scheiner* and *Harold F. Reis* for Southwestern Cable Co., and *Frank U. Fletcher, Robert L. Heald* and *Edward F. Kenehan* for Mission Cable TV, Inc., et al., respondents in both cases. Reported below: 378 F. 2d 118.

No. 486. STERN *v.* SOUTH CHESTER TUBE CO. C. A. 3d Cir. Certiorari granted. *David Freeman* and *Richard H. Wels* for petitioner. *Richard P. Brown, Jr.,* and *Ralph Earle II* for respondent. Reported below: 378 F. 2d 205.

No. 465. EDWARDS *v.* PACIFIC FRUIT EXPRESS CO. C. A. 9th Cir. Certiorari granted. *David S. Levinson* for petitioner. *Alan C. Furth* for respondent. Reported below: 378 F. 2d 54.

Certiorari Denied. (See also No. 393, *ante,* p. 51; No. 460, *ante,* p. 46; and No. 481, *ante,* p. 52.)

No. 344. MENSIK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Kinsey T. James* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Carolyn R. Just* for respondent.

No. 434. AERONAUTICAL RADIO, INC. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Charles R. Cutler* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for the National Mediation Board, and *David Previant* and *Herbert S. Thatcher* for the International Brotherhood of Teamsters, respondents. Reported below: 127 U. S. App. D. C. 77, 380 F. 2d 624.

No. 458. ENGLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George T. Williams* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 376 F. 2d 381.

No. 461. HARDY SALT CO. *v.* ILLINOIS ET AL. C. A. 8th Cir. Certiorari denied. *John L. Davidson, Jr.,* for petitioner. *William G. Clark,* Attorney General of Illinois, *C. Donald Robertson,* Attorney General of West Virginia, and *Lee A. Freeman* for respondents. Reported below: 377 F. 2d 768.

No. 459. AIRDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 380 F. 2d 103.

No. 462. FAIN ET AL. *v.* DUNCAN. C. A. 6th Cir. Certiorari denied. *Cecil D. Branstetter* for petitioners. *Maclin P. Davis, Jr.,* for respondent. Reported below: 377 F. 2d 49.

No. 464. BIAZEVICH ET AL., DBA M. V. LIBERATOR, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Stanley E. Tobin* and *Carl M. Gould* for Boat Owners and Individuals, and *Robert W. Gilbert* for Seine & Line Fishermen's Union of San Pedro, petitioners. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 374 F. 2d 974.

No. 466. DIESEL TANKER, A. C. DODGE, INC. *v.* STEWART ET AL. C. A. 2d Cir. Certiorari denied. *Christopher E. Heckman* for petitioner. *Wilbur H. Hecht* for respondents. Reported below: 376 F. 2d 850.

No. 469. COASTAL PETROLEUM CO. *v.* KIRK, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. *Frank Bezoni, C. Dean Reasoner* and *E. Tillman Stirling* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *T. T. Turnbull,* Assistant Attorney General, for respondents.

No. 477. MORRILL *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 6th Cir. Certiorari denied. *Farland Robbins* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley, Morton Hollander* and *Robert V. Zener* for respondents.

No. 476. DAVIS ET AL., EXECUTORS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Arthur A. Armstrong* for petitioners. *Acting Solicitor General Spritzer* and *Assistant Attorney General Rogovin* for respondent. Reported below: 375 F. 2d 517.

No. 484. CARBONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* and *Robert Kasanof* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 378 F. 2d 420.

No. 406, Misc. HARRIS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 414 S. W. 2d 131.

No. 487. AMERICANA CORP. *v.* HABER ET AL. C. A. 9th Cir. Certiorari denied. *Henry E. Kappler* for petitioner. *Howard I. Friedman* for respondents. Reported below: 378 F. 2d 854.

No. 80, Misc. THOMAS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for respondent.

No. 273, Misc. CHATTERTON *v.* DUTTON, WARDEN. Sup. Ct. Ga. Certiorari denied. *David L. Lomenick* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General, for respondent. Reported below: 223 Ga. 243, 154 S. E. 2d 213.

No. 307, Misc. GARRISON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 246 Cal. App. 2d 343, 54 Cal. Rptr. 731.

No. 397, Misc. COSBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert A. Maloney* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 377 F. 2d 559.

No. 399, Misc. WOODARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Richard S. T. Marsh* and *Donald B. Robertson* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 485. GOFF *v.* GOFF. Sup. Ct. Tenn. Certiorari denied. *Marvin Brooks Norfleet* for petitioner. *Tom P. Mitchell* for respondent.

No. 423, Misc. CREPEAULT *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. *James L. Oakes,* Attorney General of Vermont, and *Alan W. Cheever* and *Frank G. Mahady,* Assistant Attorneys General, for respondent. Reported below: 126 Vt. 338, 229 A. 2d 245.

No. 431, Misc. IRONS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 436, Misc. HANEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 249 Cal. App. 2d 810, 58 Cal. Rptr. 36.

No. 485, Misc. ANDERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 469, Misc. MCLAUGHLIN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *F. Lee Bailey* for petitioner. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Willie J. Davis,* Assistant Attorney General, for respondent. Reported below: 352 Mass. 218, 224 N. E. 2d 444.

No. 452, Misc. GILDAY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *John Kuttas* for petitioner. *John P. S. Burke* for respondent. Reported below: 351 Mass. 655, 223 N. E. 2d 391.

No. 486, Misc. KERRY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 249 Cal. App. 2d 246, 57 Cal. Rptr. 289.

No. 488, Misc. REED *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 499, Misc. SOSA ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Caryl Warner* for petitioners. Reported below: 251 Cal. App. 2d 9, 58 Cal. Rptr. 912.

No. 521, Misc. LEWIS *v.* OHIO. Ct. App. Ohio, 8th Jud. Dist. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* for respondent.

No. 621, Misc. CREIGHTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Anthony F. Marra* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Michael Juviler* for respondent.

No. 507, Misc. JACKSON *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

MR. JUSTICE MARSHALL took no part in the consideration or decision of the petitions in the following cases (beginning with No. 456 and extending through No. 448, Misc., on this page):

No. 456. NATIONAL LABOR RELATIONS BOARD *v.* BATA SHOE CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Madeline Balk* and *Frederick T. Gray* for Bata Shoe Co., Inc., and *Joseph L. Rauh, Jr.,* and *John Silard* for United Shoe Workers of America, AFL–CIO, respondents. Reported below: 377 F. 2d 821.

No. 165, Misc. BARNES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *David O. Belew, Jr.,* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 374 F. 2d 126.

No. 214, Misc. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 377 F. 2d 118.

No. 244, Misc. PETTETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Paul W. Steer* and *James J. Ryan* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 341, Misc. DANIEL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 448, Misc. WHITE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 91. FORT *v.* CITY OF MIAMI. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Irma Robbins Feder* and *Richard Yale Feder* for petitioner. *Jack R. Rice, Jr.*, for respondent.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

The petitioner created six fiberglass statues which he offered for sale in his backyard. Two police officers approached his home, confiscated the statues, and arrested him for violating a municipal ordinance that prohibits the knowing possession of obscene figures or images for sale.[1]

The petitioner was convicted, his conviction was affirmed, and the Florida District Court of Appeal denied certiorari. Unable to obtain review in any higher Florida court,[2] he brought to this Court the federal

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[1] Section 38 of Chapter 43 of the Miami Code provides that it shall be unlawful for any person to commit an act which is recognized by the laws of the State as a misdemeanor. Under c. 61–7, Laws 1961, Fla. Stat. § 847.011 (1)(a), it is a misdemeanor to have in one's "possession, custody, or control with intent to sell . . . any obscene, lewd, lascivious, filthy, indecent, [or] immoral . . . figure [or] image."

[2] The Florida Supreme Court may review by certiorari a decision of a district court of appeal "in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law." Fla. Const., Art. V, § 4 (2); Fla. App. R. 4.5c (6). Although the State suggests that the petitioner might have invoked this "conflict jurisdiction" in order to obtain review of his conviction in the Florida Supreme Court, the petitioner states that no Florida decision of which he is aware conflicts with that of the District Court of Appeal, and the State's response to the petition for certiorari refers to no decision that even purports to pass upon the issues here involved. Under these circumstances, I am satisfied that the judgment of the District Court of Appeal in this case was "rendered by the highest court of a State in which a decision could be had," as required by 28 U. S. C. § 1257.

constitutional claims he had unsuccessfully advanced at every stage of the state litigation.

It is clear that the ordinance under which he was convicted is unconstitutional on its face. That ordinance adopts the definition of obscenity embodied in a Florida statute: [3]

> "For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Members of this Court have expressed differing views as to the extent of a State's power to suppress "obscene" material through criminal or civil proceedings. But it is at least established that a State is without power to do so upon the sole ground that the material "appeals to prurient interest." [4]

The petitioner in this case was charged, tried, and convicted under a statutory provision which contains no

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[3] Chapter 61–7, Laws 1961; Fla. Stat. § 847.011 (10).

[4] The "prurient interest" language of the Florida statute may be traced to a sentence in this Court's opinion in *Roth* v. *United States*, 354 U. S. 476, 489. That language, however, cannot be taken to establish a constitutionally sufficient "test" of obscenity. The prevailing opinion by MR. JUSTICE BRENNAN in *Memoirs* v. *Massachusetts*, 383 U. S. 413, recognized that a State may not suppress matter as "obscene" unless "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value," stressing that the "three elements must coalesce." 383 U. S., at 418. MR. JUSTICE WHITE dissented in that case, nonetheless expressing the opinion that a legislature is not free to ban works of art or literature "simply because they deal with sex or because they appeal to the prurient interest." *Id.*, at 462. See *Redrup* v. *New York*, 386 U. S. 767.

other criterion of "obscenity." This conviction therefore rests upon a law incompatible with the guarantees of the First and Fourteenth Amendments of the United States Constitution.

I would grant the petition for certiorari and reverse the judgment.

No. 436. SCHLINSKY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *David M. Scheffer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 379 F. 2d 735.

No. 442. FEASTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *MacDonald Gallion,* Attorney General of Alabama, and *Willis C. Darby, Jr.,* for petitioners. *Acting Solicitor General Spritzer* for the United States. Reported below: 376 F. 2d 147.

No. 198, Misc. LAWRENCE *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *Sam Houston Clinton, Jr.,* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore, Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent. Reported below: 412 S. W. 2d 40.

No. 30, Misc. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Daniel J. Kremer,* Deputy Attorneys General, for respondent.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

While petitioner was in custody on a murder charge, he sent a note to an inspector in the District Attorney's office requesting a meeting. The inspector met petitioner in a room on the mezzanine of the county jail. Faced with a possible death penalty,[1] petitioner said he would give some information "if he were allowed to plead guilty [before a certain judge] and receive a life sentence." The inspector testified and recounted this offer of compromise to the jury.[2]

Before the inspector's evidence was introduced, but while the inspector was on the stand, petitioner asked

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[1] Petitioner was charged with two counts of murder. At his first trial he was sentenced to death on both counts. The California Supreme Court reversed the conviction. *People* v. *Hamilton,* 55 Cal. 2d 881, 362 P. 2d 473 (1961). At his second trial he was found guilty on both counts again and sentenced to death on one and life imprisonment on the other. The California Supreme Court upheld the conviction and the life sentence but reversed the death penalty. *People* v. *Hamilton,* 60 Cal. 2d 105, 383 P. 2d 412 (1963). Subsequently, petitioner was sentenced to life imprisonment on both counts. He filed two petitions for habeas corpus in the California Supreme Court. Both were denied without opinion. This petition for certiorari seeks review of the second denial.

[2] At a subsequent point in the trial, petitioner's counsel read to the jury a transcript of an interrogation of petitioner by the police, conducted on the night he was apprehended. In his statement petitioner said he was going to "plead guilt" but that he "never intended to kill neither one of them." The California Supreme Court did not refer to this statement or rely upon it in determining that the admission of petitioner's offer to plead guilty made to the inspector almost three months later was harmless error.

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for an offer of proof by the prosecutor out of the jury's presence. The request was denied. Immediately after the inspector told about the offer to plead guilty, petitioner moved to strike the evidence. The motion was denied.

It is not uncommon for defendants or their lawyers to negotiate with prosecutors about pleading guilty. It is entirely possible that, in the hopelessness and loneliness of jail, faced with a charge of murder, a prisoner may discuss a bargain-deal with the prosecutor even if he is not guilty of the offense. In any event, the defendant's attempt to negotiate may well be accepted by the jury as a convincing admission of guilt. There is, in reality, no way in which the jury can be persuaded that the ugly inference of guilt is not to be drawn from his statement, however equivocal may have been his intent in making it. Usually, the accused cannot take the stand to explain the circumstances without peril.

We should consider whether we should not, in any event, prohibit the use of a statement made for bargaining purposes. We should not attach such a penalty to discussion of the possibility of a guilty plea. The general rule is that such evidence would not be admissible in a civil suit even where the stake is as little as a few dollars.[3] We should at least consider the bearing of the practice upon the constitutional guarantee of a fair trial where the issue is murder and the possible penalty is death.[4]

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[3] 4 Wigmore, Evidence §§ 1061–1062 (3d ed. 1940). See also Fed. Rule Civ. Proc. 68 and 7 Moore, Federal Practice §§ 68.01–68.06 (1966).

[4] The California Supreme Court agreed that petitioner's offer to plead guilty was inadmissible by analogy with a provision of the California Code making inadmissible evidence of guilty pleas which were withdrawn. Nonetheless, the Supreme Court held that this was "harmless error" because it thought a different result would not have been "reasonably probable" without the error. Therefore the conviction was not reversed. *People* v. *Hamilton,* 60 Cal. 2d, at

There is another important issue here. Although the prosecutor used the offer to plead guilty as he would have used a confession, there was no separate hearing on the question of voluntariness. Nor did the trial judge make a specific finding that the statement was voluntary. I think we should consider whether the procedure outlined in *Jackson* v. *Denno,* 378 U. S. 368 (1964), and *Sims* v. *Georgia,* 385 U. S. 538 (1967), was required in this case.

No. 452. MARTIN MARIETTA CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Terrence C. Sheehy* and *Clark C. Vogel* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Turner, Irwin A. Seibel, James McI. Henderson* and *Charles C. Moore, Jr.,* for respondent. Reported below: 376 F. 2d 430.

No. 301, Misc. BAILEY *v.* DEQUEVEDO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Peter O. Clauss* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Eardley, John C. Eldridge* and *Robert V. Zener* for respondent. Reported below: 375 F. 2d 72.

No. 479. HILTON HOTELS (U. K.) LTD. *v.* FRUMMER. Ct. App. N. Y. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Sidney H. Willner* for petitioner. *Irving A. Scheinberg* for respondent. Reported below: 19 N. Y. 2d 533, 227 N. E. 2d 851.

112–114, 119–121, 383 P. 2d, at 415–416, 420–421. The admission of the evidence here in violation of the Fourteenth Amendment would be critically important to the trial, and the error could not be considered harmless under the standards announced by the Court in *Chapman* v. *California,* 386 U. S. 18 (1967).

OCTOBER 30, 1967.

Dismissal Under Rule 60.

No. 588, Misc. YATES *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Petition for writ of certiorari dismissed October 30, 1967, pursuant to Rule 60 of the Rules of this Court. Reported below: 378 F. 2d 57.

NOVEMBER 6, 1967.

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 30, 1967, and ending June 30, 1968, 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.

Miscellaneous Orders.

No. 498. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* FOUR COUNTIES WATER USERS ASSOCIATION ET AL. Sup. Ct. Colo. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 882, Misc. IN RE DISBARMENT OF POWELL. It is ordered that Diana Kearny Powell of Washington, District of Columbia, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 548. SNOHOMISH COUNTY *v.* SEATTLE DISPOSAL CO. ET AL. Sup. Ct. Wash. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 580, Misc. SAUNDERS *v.* KROPP, WARDEN; and No. 595, Misc. WOOLLASTON *v.* PENNSYLVANIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 528. BERGUIDO ET AL., EXECUTORS *v.* EASTERN AIRLINES, INC. C. A. 3d Cir. Motion of petitioners for consolidation with *Alitalia-Linee Aeree Italiane, S. p. A.* v. *Lisi et al.*, No. 70 (see *post*, p. 926) denied. *B. Nathaniel Richter* and *Seymour I. Toll* on the motion. *Owen B. Rhoads, F. Hastings Griffin, Jr., Daniel L. Stonebridge* and *John J. Martin* for respondent in opposition. *Theodore E. Wolcott* for respondents in No. 70 in opposition.

Probable Jurisdiction Noted.

No. 508. LEVY, ADMINISTRATRIX *v.* LOUISIANA THROUGH THE CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS ET AL. Appeal from Sup. Ct. La. Probable jurisdiction noted. *Norman Dorsen, Adolph J. Levy, Lawrence J. Smith* and *Melvin L. Wulf* for appellant. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *William A. Porteous, Jr.*, for appellees. Reported below: 250 La. 25, 193 So. 2d 530.

No. 510. PICKERING *v.* BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY. Appeal from Sup. Ct. Ill. Probable jurisdiction noted. Case set for oral argument immediately following No. 325 (see *ante*, p. 818). Reported below: 36 Ill. 2d 568, 225 N. E. 2d 1.

Certiorari Granted. (See also No. 467, *ante,* p. 81; and No. 306, Misc., *ante,* p. 89.)

No. 70. ALITALIA-LINEE AEREE ITALIANE, S. P. A. *v.* LISI ET AL. C. A. 2d Cir. Motions of International Air Transport Association, Air Transport Association of America, Republic of Italy, and United Kingdom of Great Britain and Northern Ireland for leave to file briefs, as *amici curiae,* granted. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and petition. *Austin P. Magner* and *George N. Tompkins, Jr.,* for petitioner. *Theodore E. Wolcott* for respondents. *Harold L. Warner, Jr., Carl S. Rowe* and *Paul G. Pennoyer, Jr.,* for International Air Transport Association, *John E. Stephen* and *Joseph F. Healy, Jr.,* for Air Transport Association of America, *Alfred C. Clapp* for Republic of Italy, and *Edwin Longcope* for United Kingdom of Great Britain and Northern Ireland, as *amici curiae,* in support of the petition. *Solicitor General Marshall, Acting Assistant Attorney General Eardley, J. Nicholas McGrath, Jr., Morton Hollander* and *Richard S. Salzman* for the United States, as *amicus curiae,* in opposition to the petition. Reported below: 370 F. 2d 508.

No. 497. HANNER *v.* DEMARCUS ET UX. Sup. Ct. Ariz. Certiorari granted. *Philip M. Haggerty* for petitioner. *Robert John Walton* for respondents. Reported below: 102 Ariz. 105, 425 P. 2d 837.

Certiorari Denied.

No. 492. HEFFELMAN *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. *Jess Larson* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Weisl* and *Roger P. Marquis* for respondent. Reported below: 378 F. 2d 109.

No. 298. MALE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

No. 472. WATSON *v.* GULF STEVEDORE CORP. C. A. 5th Cir. Certiorari denied. *Bill Allen* for petitioner. *Carl O. Bue, Jr.,* for respondent. Reported below: 374 F. 2d 946.

No. 474. GORDON *v.* UNITED STATES; and

No. 571. SCATA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Morris Berick* for petitioner in No. 474, and *W. Paul Flynn* for petitioner in No. 571. *Solicitor General Griswold, Ralph S. Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 379 F. 2d 788.

No. 488. BAY ET AL. *v.* MECOM, TRUSTEE, ET AL. Sup. Ct. Tex. Certiorari denied. *Joseph W. Cash* for petitioners. *G. Kibby Munson* for respondents. Reported below: 393 S. W. 2d 819.

No. 490. LEE *v.* RITSCH ET AL. C. A. 5th Cir. Certiorari denied.

No. 499. BROTHERHOOD OF RAILROAD TRAINMEN *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. ET AL. C. A. D. C. Cir. Certiorari denied. *Francis M. Shea, Richard T. Conway, James R. Wolfe* and *Charles I. Hopkins, Jr.,* for St. Louis Southwestern Railway Co., and *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for Seward, respondents. Reported below: 127 U. S. App. D. C. 56, 380 F. 2d 603.

No. 493. ORIGONI *v.* BULLETIN CO., INC. C. A. D. C. Cir. Certiorari denied. *Michael F. X. Dolan* for petitioner. *William J. Curtin* and *John R. McConnell* for respondent.

No. 494. CARNES *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Charles Robinson* for petitioner. Reported below: 115 Ga. App. 387, 154 S. E. 2d 781.

No. 495. WRIGHT *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Thomas C. Binkley* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 379 F. 2d 275.

No. 500. BROTHERHOOD OF RAILROAD TRAINMEN *v.* MISSOURI PACIFIC RAILROAD CO. ET AL.; and

No. 501. BROTHERHOOD OF RAILROAD TRAINMEN *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. C. A. D. C. Cir. Certiorari denied. *John H. Haley, Jr., Milton Kramer* and *Clifton Hildebrand* for petitioner in No. 500. *David Leo Uelmen* and *Mr. Kramer* for petitioner in No. 501. *Francis M. Shea, Richard T. Conway, James R. Wolfe, Charles I. Hopkins, Jr.,* and *Robert W. Yost* for Missouri Pacific Railroad Co. et al., and *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for Seward et al., respondents in No. 500. *Messrs. Shea, Conway, Wolfe, Hopkins* and *James P. Reedy* for respondent Chicago, Milwaukee, St. Paul & Pacific Railroad Co. in No. 501. Reported below: 127 U. S. App. D. C. 58, 380 F. 2d 605.

No. 521. HOOPER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Allan Sherry* for petitioner.

No. 505. WOLCOFF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 379 F. 2d 521.

No. 506. COMTEL CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *George G. Tyler* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Crombie J. D. Garrett* and *Elmer J. Kelsey* for respondent. Reported below: 376 F. 2d 791.

No. 507. BUCKLEY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 379 F. 2d 424.

No. 509. IN RE STECKER. C. A. 3d Cir. Certiorari denied. *M. Gene Haeberle* for petitioner. *A. Morton Shapiro* for the State of New Jersey. Reported below: 381 F. 2d 379.

No. 512. PIONEER PLASTICS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Vernon C. Stoneman* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 379 F. 2d 301.

No. 514. MCCARTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Maria Louisa Green* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 379 F. 2d 285.

No. 519. MILLER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Max Cohen* for petitioners. *Acting Solicitor General Spritzer* for the United States. Reported below: 379 F. 2d 483.

No. 524. CORRINGTON *v.* WEBB, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. *Herbert M. Ansell* for petitioner. *Acting Solicitor General Spritzer* for respondents. Reported below: 375 F. 2d 298.

No. 527. AHO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles R. Maloney* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 374 F. 2d 885.

No. 529. PROTECTION MUTUAL INSURANCE CO. *v.* PLANTERS MANUFACTURING CO. C. A. 5th Cir. Certiorari denied. *Ronald A. Jacks* for petitioner. *William H. Maynard* for respondent. Reported below: 380 F. 2d 869.

No. 535. MARCHESE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Burton Marks* for Marchese, and *Russell E. Parsons* for Del Bono, petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 378 F. 2d 16.

No. 537. LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 375 F. 2d 1011.

No. 530. FRANCOSTEEL CORP. *v.* N. V. NEDERLANDSCH AMERIKAANSCHE, STOOMVART-MAATSCHAPPIJ. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Lyman Henry* for petitioner. *R. Frederic Fisher* for respondent. Reported below: 249 Cal. App. 2d 880, 57 Cal. Rptr. 867.

No. 531. BESSENYEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Orrin G. Judd* and *Earle K. Moore* for petitioner. *Acting Solicitor General Spritzer* and *Assistant Attorney General Rogovin* for respondent. Reported below: 379 F. 2d 252.

No. 533. RIFKIN TEXTILES CORP. *v.* UNITED STATES. C. C. P. A. Certiorari denied. *Menahem Stim* and *Allen S. Stim* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 54 C. C. P. A. (Cust.) 138.

No. 536. PRESTON CORP. ET AL. *v.* RAESE. C. A. 4th Cir. Certiorari denied. *William H. Arkin* for petitioners. Reported below: 377 F. 2d 263.

No. 538. CARTER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. *Errol S. Willes* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Fred T. Gallagher,* Assistant Attorney General, for respondent. Reported below: 193 So. 2d 215.

No. 540. UNITED STATES *v.* INGHAM, EXECUTRIX, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Marshall, Carl Eardley, John C. Eldridge* and *Richard S. Salzman* for the United States. *Lee S. Kreindler* for Ingham, and *John J. Martin* for Eastern Air Lines, Inc., respondents. Reported below: 373 F. 2d 227.

No. 541. DAVENPORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Norman D. Lane* for petitioner. *Acting Solicitor General Spritzer* for the United States.

No. 543. DETROIT EDISON CO. ET AL. *v.* EAST CHINA TOWNSHIP SCHOOL DISTRICT NO. 3 ET AL. C. A. 6th Cir. Certiorari denied. *Harvey Fischer, Richard Ford, P. W. McQuillen* and *P. M. Brown* for petitioners. *Richard B. Gushee* for respondents. Reported below: 378 F. 2d 225.

No. 545. GRAIN ELEVATOR, FLOUR & FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Henry Kaiser, George Kaufmann, Ronald Rosenberg, Irving M. Friedman* and *Harold A. Katz* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli, Norton J. Come, Solomon I. Hirsh* and *Eugene B. Granof* for respondent. Reported below: 126 U. S. App. D. C. 219, 376 F. 2d 774.

No. 547. NORTHWEST ENGINEERING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Walter S. Davis* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for National Labor Relations Board, and *Bernard Kleiman, Elliot Bredhoff, Michael Gottesman* and *George Cohen* for United Steelworkers of America, AFL–CIO, respondents. Reported below: 126 U. S. App. D. C. 215, 376 F. 2d 770.

No. 549. SIEGELSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Fred Queller* and *Robert L. Cohen* for petitioner. *Frank S. Hogan* and *Michael Juviler* for respondent.

No. 550. SIMPSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Vincent P. DiGiorgio* for petitioner.

No. 551. TEXAS *v.* CENTRAL POWER & LIGHT CO. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *J. C. Davis* and *W. O. Shultz II,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for petitioner. *H. K. Howard* for respondent. *Arthur J. Sills,* Attorney General, *Alan B. Handler,* First Assistant Attorney General, and *Elias Abelson* and *William J. Walsh,* Deputy Attorneys General, for the State of New Jersey, as *amicus curiae,* in support of the petition. Reported below: 410 S. W. 2d 18.

No. 552. ZIMMER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Melvin L. Wulf* and *Elwaine F. Pomeroy* for petitioner. *Robert C. Londerholm,* Attorney General of Kansas, *Richard H. Seaton,* Assistant Attorney General, and *Robert D. Hecht* for respondent. Reported below: 198 Kan. 479, 426 P. 2d 267.

No. 620. BROTHERHOOD OF RAILROAD TRAINMEN *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. C. A. D. C. Cir. Certiorari denied. *David Leo Uelman* and *Milton Kramer* for petitioner. *Francis M. Shea, Richard T. Conway, Benjamin W. Boley, James R. Wolfe, Charles I. Hopkins, Jr.,* and *James P. Reedy* for respondent Chicago, Milwaukee, St. Paul & Pacific Railroad Co., and *Acting Solicitor General Spritzer* for respondent Seward. Reported below: 127 U. S. App. D. C. 289, 383 F. 2d 216.

No. 480, Misc. EBELL *v.* MCGEE, ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 401. MORA ET AL. *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Stanley Faulkner* and *Selma W. Samols* for petitioners. *Solicitor General Marshall* for respondents. Reported below: —— U. S. App. D. C. ——, 387 F. 2d 862.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The petitioners were drafted into the United States Army in late 1965, and six months later were ordered to a West Coast replacement station for shipment to Vietnam. They brought this suit to prevent the Secretary of Defense and the Secretary of the Army from carrying out those orders, and requested a declaratory judgment that the present United States military activity in Vietnam is "illegal." The District Court dismissed the suit, and the Court of Appeals affirmed.

There exist in this case questions of great magnitude. Some are akin to those referred to by MR. JUSTICE DOUGLAS in *Mitchell* v. *United States,* 386 U. S. 972. But there are others:

I. Is the present United States military activity in Vietnam a "war" within the meaning of Article I, Section 8, Clause 11, of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the Joint Congressional ("Tonkin Gulf") Resolution of August 10, 1964?

(a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

These are large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates. I intimate not even tentative views upon any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The questions posed by MR. JUSTICE STEWART cover the wide range of problems which the Senate Committee on Foreign Relations recently explored,[1] in connection with the SEATO Treaty of February 19, 1955,[2] and the Tonkin Gulf Resolution.[3]

Mr. Katzenbach, representing the Administration, testified that he did not regard the Tonkin Gulf Resolution to be "a declaration of war" [4] and that while the Resolution was not "constitutionally necessary" it was "polit-

[1] Hearings on S. Res. No. 151, 90th Cong., 1st Sess. (1967).

[2] [1955] 6 U. S. T. 81, T. I. A. S. No. 3170.

[3] 78 Stat. 384.

[4] Hearings on S. Res. No. 151, *supra*, n. 1, at 87.

ically, from an international viewpoint and from a domestic viewpoint, extremely important." [5] He added:

> "The use of the phrase 'to declare war' as it was used in the Constitution of the United States had a particular meaning in terms of the events and the practices which existed at the time it was adopted . . . .
>
> "[I]t was recognized by the Founding Fathers that the President might have to take emergency action to protect the security of the United States, but that if there was going to be another use of the armed forces of the United States, that was a decision which Congress should check the Executive on, which Congress should support. It was for that reason that the phrase was inserted in the Constitution.
>
> "Now, over a long period of time, . . . there have been many uses of the military forces of the United States for a variety of purposes without a congressional declaration of war. But it would be fair to say that most of these were relatively minor uses of force . . . .
>
> . . . . . .
>
> "A declaration of war would not, I think, correctly reflect the very limited objectives of the United States with respect to Vietnam. It would not correctly reflect our efforts there, what we are trying to do, the reasons why we are there, to use an outmoded phraseology, to declare war." [6]

The view that Congress was intended to play a more active role in the initiation and conduct of war than the above statements might suggest has been espoused by Senator Fulbright (Cong. Rec., Oct. 11, 1967, pp. 14683–14690), quoting Thomas Jefferson who said:

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[5] *Id.*, at 145.

[6] *Id.*, at 80–81.

> "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." [7]

These opposed views are reflected in the *Prize Cases*, 2 Black 635, a five-to-four decision rendered in 1863. Mr. Justice Grier, writing for the majority, emphasized the arguments for strong presidential powers. Mr. Justice Nelson, writing for the minority of four, read the Constitution more strictly, emphasizing that what is war in actuality may not constitute war in the constitutional sense. During all subsequent periods in our history—through the Spanish-American War, the Boxer Rebellion, two World Wars, Korea, and now Vietnam—the two points of view urged in the *Prize Cases* have continued to be voiced.

A host of problems is raised. Does the President's authority to repel invasions and quiet insurrections, do his powers in foreign relations and his duty to execute faithfully the laws of the United States, including its treaties, justify what has been threatened of petitioners? What is the relevancy of the Gulf of Tonkin Resolution and the yearly appropriations in support of the Vietnam effort?

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[7] 15 Papers of Jefferson 397 (Boyd ed., Princeton 1958). In The Federalist No. 69, at 465 (Cooke ed. 1961), Hamilton stated:

"[T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature."

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The London Treaty (59 Stat. 1546), the SEATO Treaty (6 U. S. T. 81, 1955), the Kellogg-Briand Pact (46 Stat. 2343), and Article 39 of Chapter VII of the UN Charter deal with various aspects of wars of "aggression."

Do any of them embrace hostilities in Vietnam, or give rights to individuals affected to complain, or in other respects give rise to justiciable controversies?

There are other treaties or declarations that could be cited. Perhaps all of them are wide of the mark. There are sentences in our opinions which, detached from their context, indicate that what is happening is none of our business:

> "Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson* v. *Eisentrager,* 339 U. S. 763, 789.

We do not, of course, sit as a committee of oversight or supervision. What resolutions the President asks and what the Congress provides are not our concern. With respect to the Federal Government, we sit only to decide actual cases or controversies within judicial cognizance that arise as a result of what the Congress or the President or a judge does or attempts to do to a person or his property.

In *Ex parte Milligan,* 4 Wall. 2, the Court relieved a person of the death penalty imposed by a military tribunal, holding that only a civilian court had power to try him for the offense charged. Speaking of the purpose of the Founders in providing constitutional guarantees, the Court said:

> "They knew . . . the nation they were founding, be its existence short or long, would be involved in war;

> how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*." *Id.*, 125.

The fact that the political branches are responsible for the threat to petitioners' liberty is not decisive. As Mr. Justice Holmes said in *Nixon* v. *Herndon*, 273 U. S. 536, 540:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court."

These petitioners should be told whether their case is beyond judicial cognizance. If it is not, we should then reach the merits of their claims, on which I intimate no views whatsoever.

No. 513. GRANZA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Clyde W. Woody* and *Marian S. Rosen* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 377 F. 2d 746.

No. 496. WIEN ALASKA AIRLINES, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Phillip D. Bostwick* and *Lawrence R. Schneider* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *Morton Hollander* for the United States. Reported below: 375 F. 2d 736.

No. 502. BROTHERHOOD OF RAILROAD TRAINMEN *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *John H. Haley, Jr., Milton Kramer* and *Clifton Hildebrand* for petitioner. *Francis M. Shea, Richard T. Conway, Ralph J. Moore, Jr., James R. Wolfe* and *Charles I. Hopkins, Jr.*, for respondent. Reported below: 127 U. S. App. D. C. 37, 380 F. 2d 584.

No. 532. WELCH *v.* AMERICAN PRESIDENT LINES, LTD. C. A. 9th Cir. Motion of American Trial Lawyers Association, Admiralty Section, for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Martin J. Jarvis* for petitioner. *Graydon S. Staring* for respondent. *Paul S. Edelman* for American Trial Lawyers Association, Admiralty Section, as *amicus curiae,* in support of the petition. Reported below: 377 F. 2d 501.

No. 402, Misc. HACKATHORN *v.* DECKER, SHERIFF. C. A. 5th Cir. Certiorari denied. *Fred S. Abney* for petitioner. *Henry Wade* for respondent. Reported below: 369 F. 2d 150.

No. 473, Misc. BARONE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 250 Cal. App. 2d 776, 58 Cal. Rptr. 783.

No. 544. MOUTON, COLLECTOR OF REVENUE OF LOUISIANA, ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Chapman L. Sanford* and *Emmett E. Batson* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Harold C. Wilkenfeld* for the United States, and *Eugene D. Saunders* for Chrysler Corp., respondents. Reported below: 378 F. 2d 350.

No. 542. HAYES *v.* CITY OF COLUMBUS. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE FORTAS dissents for the reasons stated in his dissent from the denial of certiorari in *Heller* v. *Connecticut, ante,* p. 902. *James C. Britt* for petitioner. *Alba L. Whiteside* for respondent.

No. 28, Misc. BRADSHAW *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *W. S. Moore* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent. Reported below: 192 So. 2d 387.

No. 73, Misc. TARRANCE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *William P. Schuler,* Assistant Attorney General, for respondent. Reported below: 250 La. 491, 196 So. 2d 804.

No. 294, Misc. DENMAN ET AL. *v.* WERTZ ET AL. C. A. 3d Cir. Certiorari denied. *David Stahl* and *Robert E. Dauer* for respondent Schoettle et al., and *Maurice Louik* and *Craig T. Stockdale* for respondent Brown. Reported below: 372 F. 2d 135.

No. 481, Misc. BRUNETTE *v.* ANDERSON, JUDGE. Dist. Ct. Idaho, 6th Jud. Dist. Certiorari denied.

No. 305, Misc. TAHL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 65 Cal. 2d 719, 423 P. 2d 246.

No. 437, Misc. WOOTEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 380 F. 2d 230.

No. 475, Misc. HISQUIERDO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 477, Misc. FARLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 381 F. 2d 357.

No. 483, Misc. MYLES *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 484, Misc. ELLIOTT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 490, Misc. NAWROCKI *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 496, Misc. POSEY *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 497, Misc. TATREAU *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 506, Misc. ADAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 37 Ill. 2d 489, 229 N. E. 2d 519.

No. 509, Misc. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 512, Misc. KULIS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 383 F. 2d 405.

No. 519, Misc. LEWIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 525, Misc. AGUILAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No 533, Misc. BROWN *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 536, Misc. PERRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Phylis Skloot Bamberger* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 380 F. 2d 356.

No. 545, Misc. SEITERLE *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied. *Earl Klein* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent.

No. 583, Misc. POOL *v.* LEONE, DBA DOMINIC LEONE CONSTRUCTION CO., ET AL. C. A. 10th Cir. Certiorari denied. *Michael A. Williams* for petitioner. *John C. Mott* for respondents. Reported below: 374 F. 2d 961.

No. 538, Misc. DENTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 382 F. 2d 361.

No. 574, Misc. BILOTTI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for Bilotti and *Albert H. Buschmann* for Wasser, petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Jerome M. Feit* for the United States. Reported below: 380 F. 2d 649.

No. 556, Misc. DOVICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *F. Lee Bailey* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Jerome M. Feit* for the United States. Reported below: 380 F. 2d 325.

No. 467, Misc. RUBIO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 380 F. 2d 29.

No. 295, Misc. O'BRIEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 377 F. 2d 541.

No. 534, Misc. MENDOZA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 619, Misc. REID ET AL. *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 635, Misc. GARCIA *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied. *Frank S. Hogan* and *Michael Juviler* for respondent.

No. 555, Misc. NOLAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 380 F. 2d 1016.

No. 640, Misc. MCCHAREN *v.* L & A CONSTRUCTION CO. ET AL. Sup. Ct. Miss. Certiorari denied. *Dixon L. Pyles* for petitioner. Reported below: 198 So. 2d 240.

No. 602, Misc. PLATTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome M. Feit* and *Robert G. Maysack* for the United States. Reported below: 378 F. 2d 396.

No. 671, Misc. BANKS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Irwin W. Barkan* for petitioner.

Rehearing Denied.

No. 7, Misc. COLLINS *v.* FIELD, MENS COLONY SUPERINTENDENT, *ante,* p. 860;

No. 101, Misc. MEARS AKA SCOTT *v.* NEVADA, *ante,* p. 888;

No. 115, Misc. WHISMAN *v.* GEORGIA, *ante,* p. 865;

No. 125, Misc. FLETCHER *v.* PENNSYLVANIA, *ante,* p. 865;

No. 355, Misc. FURTAK *v.* NEW YORK, *ante,* p. 875;

No. 361, Misc. FURTAK *v.* NEW YORK, *ante,* p. 875;

No. 476, Misc. FURTAK *v.* MCMANN, WARDEN, ET AL., *ante,* p. 879; and

No. 513, Misc. FURTAK *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT, *ante,* p. 879. Petitions for rehearing denied.

No. 1067, October Term, 1966. MILLER BREWING CO. *v.* JONES, DIRECTOR OF REVENUE OF ILLINOIS, 386 U. S. 684, 387 U. S. 938. Motion for leave to file second petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

NOVEMBER 9, 1967.

Nos. 778, 779, 830–836. PENN-CENTRAL MERGER AND N & W INCLUSION CASES. Appeal from D. C. S. D. N. Y.

Applications for a stay of enforcement of an order of the Interstate Commerce Commission [1] authorizing a merger of the Pennsylvania R. Co. and the New York Central R. Co., pending this Court's determination of appeals from a decision of a three-judge court in the Southern District of New York, 279 F. Supp. 316, sustaining both the Commission's order authorizing the merger and its order [2] directing the Norfolk & Western R. Co. to include in its system the Erie-Lackawanna R. Co., the Delaware & Hudson R. Corp., and the Boston & Maine Corp., have been submitted to MR. JUSTICE HARLAN as the Associate Justice assigned to the Second Circuit. The applicants for a stay include four railroad companies,[3] holders of New York, New Haven & Hartford R. Co. bonds,[4] a Pennsylvania city,[5] and a Pennsylvania R. Co. stockholder.[6]

MR. JUSTICE HARLAN, pursuant to our Rule 50 (6), has referred these applications to the Court for disposition.

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[1] Order of June 9, 1967, 330 I. C. C. 328.

[2] Order of June 9, 1967, 330 I. C. C. 780, as modified by Order of September 1, 1967, 331 I. C. C. 22.

[3] Baltimore & Ohio R. Co.; Chesapeake & Ohio R. Co.; Norfolk & Western R. Co.; Western Maryland R. Co.

[4] Oscar Gruss & Son; New York, New Haven & Hartford R. Co. First Mortgage 4% Bondholders Committee.

[5] City of Scranton.

[6] Milton J. Shapp, who also appears as a citizen of Pennsylvania.

Papers supporting the stay applications have been submitted by the Delaware & Hudson R. Corp. and the Erie-Lackawanna R. Co. In addition, the Baltimore & Ohio R. Co. for itself and certain other railroad carriers [7] has docketed an appeal from the part of the Southern District of New York judgment which upheld the Commission's order authorizing the Penn-Central merger. Similarly, the Norfolk & Western R. Co. has docketed an appeal from that part of the judgment which upheld the order directing it to include in its system the three railroads named above.[8] These appellants have filed a joint motion to accelerate consideration of their appeals. Motions to consolidate and to accelerate consideration of the appeals have been filed by the Delaware & Hudson Corp. and the Erie-Lackawanna R. Co. The United States and the Interstate Commerce Commission and various other parties [9] have indicated that they do not oppose a stay of the merger if consideration of the appeals is substantially accelerated.

Upon consideration of these applications, motions, and other papers, a stay of enforcement of the order of the Interstate Commerce Commission, and the motions to consolidate and accelerate, are hereby granted subject to and in accordance with the following expedited schedule. See *Hannah* v. *Larche,* 361 U. S. 910; *Erie-Lackawanna R. Co.* v. *United States,* 385 U. S. 914. Any parties to the proceedings below who desire to appeal and have not already done so shall file notices of appeal and shall docket their cases on or before November 17, 1967.

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[7] Chesapeake & Ohio R. Co.; Norfolk & Western R. Co.; Western Maryland R. Co.

[8] The Boston & Maine Corp. has also filed a notice of appeal with respect to this part of the judgment.

[9] Pennsylvania R. Co.; New York Central R. Co.; Boston & Maine Corp.; Trustees of the New York, New Haven & Hartford R. Co.; States of Connecticut and Rhode Island.

Appellants who have filed notices of appeal but who have not perfected such appeals shall docket their cases on or before the same date. Appellees shall file their motions in response to the jurisdictional statements on or before November 27, 1967. Appellants shall file their replies to those motions on or before November 30, 1967. All appeals will be consolidated, and all matters involved are set for oral argument on December 4, 1967, without further exchange of briefs beyond that indicated hereafter. A total of four hours is allotted for argument, with two hours allotted to those supporting the judgment below and two hours to those attacking that judgment. Four attorneys will be permitted to participate in the oral argument on each side, the division of time to be settled among counsel. The case is to be submitted upon the oral arguments, the jurisdictional papers before the Court, the briefs filed below (copies to be filed in this Court on or before November 20, 1967), and the typewritten record.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.

Howard J. Trienens, Richard J. Flynn, George L. Saunders, Jr., Lloyd N. Cutler, Daniel K. Mayers, Edward K. Wheeler, Robert B. Claytor, Kenneth H. Ekin, Norman C. Melvin and *John S. Shannon* for Baltimore & Ohio Railroad Co. et al.; *Myron S. Isaacs* and *Homer Kripke* for Oscar Gruss & Son; *Lawrence W. Pollack* for New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee and *Harvey Gelb, Israel Packel* and *Gordon P. MacDougall* for the City of Scranton and Milton J. Shapp on the Applications for Stay. *Messrs. Trienens, Flynn, Saunders, Cutler, Mayers* and *Wheeler* and *Albert Ritchie* for appellants on the Motion to Advance. *Harry G. Silleck, Jr.*, for Delaware & Hudson Railroad Corp., and *Thomas D. Barr* and *Eldon Olson* for Erie-Lackawanna Railroad Co. on

Motions to Consolidate and to Advance. *Solicitor General Griswold* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission; *Henry P. Sailer* for Pennsylvania Railroad Co. and New York Central Railroad Co.; *James A. Belson* for Boston & Maine Corp.; *Joseph Auerbach, James Wm. Moore, Robert W. Blanchette, Arthur Blasberg, Jr., Robert G. Bleakney, Jr.,* and *Morris Raker* for Trustees of New York, New Haven & Hartford Railroad Co.; and *Samuel Kanell,* Special Assistant to the Attorney General of Connecticut, for the States of Connecticut and Rhode Island in response to Applications for Stay and Motions to Advance.

Reported below: 279 F. Supp. 316. [See 386 U. S. 372.]

NOVEMBER 10, 1967.

No. —. MCSURELY ET AL. *v.* RATLIFF. The application for emergency relief presented to MR. JUSTICE STEWART, and by him referred to the Court, granted to the extent that the seized documents shall remain in their present custody pending further proceedings in the United States District Court for the Eastern District of Kentucky.

This order is conditioned upon the applicants' presentation, within five days, to such District Court of any objections they may have to the validity of the subpoena *duces tecum* issued by the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate and shall remain in effect pending the ruling of such District Court upon any such objections as may be presented. *Arthur Kinoy, William M. Kunstler, Morton Stavis* and *Dan Jack Combs* for applicants. *Solicitor General Griswold* for the United States in opposition.

NOVEMBER 13, 1967.

Assignment Order.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Customs and Patent Appeals beginning December 5, 1967, and ending December 6, 1967, 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.

Miscellaneous Orders.

No. —. STASSI *v.* UNITED STATES. Motion to fix place of custody of petitioner denied. *C. Anthony Friloux, Jr.,* on the motion.

No. 63. SIBRON *v.* NEW YORK. Appeal from Ct. App. N. Y. (probable jurisdiction noted, 386 U. S. 954);

No. 67. TERRY ET AL. *v.* OHIO. Sup. Ct. Ohio (certiorari granted, 387 U. S. 929); and

No. 74. PETERS *v.* NEW YORK. Appeal from Ct. App. N. Y. (probable jurisdiction noted, 386 U. S. 980). Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to participate in the oral argument, as *amicus curiae,* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Melvyn Zarr* and *Anthony Amsterdam* on the motion.

No. 528. BERGUIDO ET AL., EXECUTORS *v.* EASTERN AIRLINES, INC. C. A. 3d Cir. The Solicitor General is invited to file a brief expressing the views of the United States. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.

No. 90 et al. PERMIAN BASIN AREA RATE CASES. C. A. 10th Cir. (Certiorari granted, 388 U. S. 906; see also, *ante,* pp. 805, 817.) Motion of Philadelphia Electric Co. for leave to file brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Vincent P. McDevitt* and *Samuel Graff Miller* on the motion.

No. 694, Misc. MUIR *v.* FLORIDA; and

No. 907, Misc. ELI *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 456, Misc. PHILLIPS ET VIR *v.* KINGSLEY ET AL.; and

No. 460, Misc. SHEA *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Denied. (See also No. 35, Misc., *ante,* p. 154; and No. 503, Misc., *ante,* p. 154.)

No. 546. SILVER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley, Rufus W. Peckham, Jr.,* and *Samuel Resnicoff* for petitioner. *Solicitor General Griswold* for the United States.

No. 553. MIDWEST-RALEIGH, INC., ET AL. *v.* EASTERN GAS & FUEL ASSOCIATES. C. A. 4th Cir. Certiorari denied. *George B. Mickum III* and *John E. Nolan, Jr.,* for petitioners. *Russell L. Furbee* for respondent. Reported below: 374 F. 2d 451.

No. 558. LANFRANCONI *v.* TIDEWATER OIL CO. C. A. 2d Cir. Certiorari denied. *John P. Connarn* for petitioner. *John T. Fey* for respondent. Reported below: 376 F. 2d 91.

No. 554. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, CARPENTERS DISTRICT COUNCIL OF DENVER & VICINITY, AFL–CIO *v.* HENSEL PHELPS CONSTRUCTION CO. C. A. 10th Cir. Certiorari denied. *Wayne D. Williams* and *Howard E. Erickson* for petitioner. *Charles E. Grover* for respondent. Reported below: 376 F. 2d 731.

No. 556. MCINTYRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Howard R. Lonergan* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 380 F. 2d 746.

No. 557. V. E. B. CARL ZEISS JENA ET AL. *v.* CLARK, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. *Harry I. Rand* for petitioners. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for respondent.

No. 560. WINN-DIXIE GREENVILLE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *O. R. T. Bowden* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 379 F. 2d 958.

No. 573. MICHUNOVICH, TREASURER OF YELLOWSTONE COUNTY, ET AL. *v.* WESTERN AIR LINES, INC. Sup. Ct. Mont. Certiorari denied. *Forrest H. Anderson,* Attorney General of Montana, *Donald A. Garrity,* Assistant Attorney General, and *William A. Douglas,* Special Assistant Attorney General, for petitioners. *Art Jardine* for respondent. Reported below: 149 Mont. 347, 428 P. 2d 3.

No. 561. MARINE INSURANCE CO., LTD. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph T. McGowan* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley, John C. Eldridge* and *Robert E. Kopp* for the United States. Reported below: 378 F. 2d 812.

No. 563. HENDERSON, EXECUTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wright Matthews* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Meyer Rothwacks* and *Elmer J. Kelsey* for the United States. Reported below: 375 F. 2d 36.

No. 565. FRIEDMAN ET AL. *v.* WALLACH ET AL. Sup. Ct. Mo. Certiorari denied. *David K. Breed* for petitioners. Reported below: 420 S. W. 2d 289.

No. 566. ROYAL AMERICAN INDUSTRIES, INC., ET AL. *v.* MURPHY ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. *Robert M. Ervin* for petitioners. *Phillip Goldman* for respondents. Reported below: 188 So. 2d 884.

No. 569. CHINA UNION LINES, LTD. *v.* STATES STEAMSHIP CO. C. A. 9th Cir. Certiorari denied. *Francis L. Tetreault* for petitioner. *Graydon S. Staring* for respondent. Reported below: 378 F. 2d 356.

No. 577. ALLIS *v.* ALLIS ET AL. C. A. 5th Cir. Certiorari denied. *Allen Butler* for petitioner. *Paul Carrington* for respondents. Reported below: 378 F. 2d 721.

No. 578. BOSWELL, TRUSTEE *v.* SOSEBEE ET AL. Sup. Ct. Ark. Certiorari denied. *Griffin Smith* for petitioner. *William J. Smith* for respondents. Reported below: 242 Ark. 396, 414 S. W. 2d 380.

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No. 197. KAPLAN ET AL. *v.* LEHMAN BROTHERS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Anthony Bradley Eben* and *Peyton Ford* for petitioners. *Hammond E. Chaffetz* for respondents Lehman Brothers et al., and *John T. Chadwell* and *Richard M. Keck* for respondent New York Stock Exchange. Reported below: 371 F. 2d 409.

MR. CHIEF JUSTICE WARREN, dissenting.

This is no ordinary case. It is of utmost importance to millions of investors, and concerns practices which have an impact on the entire economy of the Nation. It presents for consideration basic principles of antitrust law not previously decided by this Court, and, consequently, is not controlled by precedent. It comes here without representation of the public interest by an agency charged with enforcement of the antitrust laws.

This case draws into question the legality under the Sherman Act of the practice of the New York Stock Exchange in adopting rules fixing minimum rates for the commissions charged by Exchange members for the purchase and sale of securities on the Exchange. Petitioners brought this action pursuant to § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, derivatively on behalf of five mutual fund investment companies of which they are shareholders and representatively on behalf of other shareholders against the New York Stock Exchange and five of its member firms. Their complaint charges that the practice of the Exchange in fixing minimum commission rates for transactions in securities listed on the Exchange constitutes a price-fixing conspiracy under § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. They sought treble damages, a declaratory judgment, and an injunction, the effect of which would be to restrain the Exchange from interfering with the rights of individual Exchange members to set their

own competitive rates of commission. The District Court granted summary judgment for the Exchange and member firms. The Court of Appeals for the Seventh Circuit affirmed.

Members of the New York Stock Exchange transact over 90% of all brokerage business in stocks in the United States. Based on the current trading volume, the investing public is now paying over $1,200,000,000 annually, at the uniform minimum rate, for the privilege of trading on the Exchange. More than 12,000,000 persons own shares listed on the Exchange. Mutual investment funds pay about $100,000,000 annually in commissions to trade on the Exchange, and over 3,000,000 persons own shares in mutual funds.

Only members can trade on the New York Stock Exchange, and its constitution severely limits membership. Exchange rules set uniform minimum commission rates to be charged by members for transactions on the Exchange. The same commission rate is charged, based on the value of the round lot (100 shares), for each transaction regardless of size; the commission on an order for 10,000 shares is 100 times that on an order for 100 shares. Exchange rules prohibit any "member, allied member, member firm or member corporation" from making "a proposition for the transaction of business at less than the minimum rates of commission." Before a member is allowed trading privileges he must sign a pledge to abide by the constitution and rules of the Exchange, and any member or allied member adjudged guilty of violating the constitution or a rule may be suspended or expelled by the Board of Governors.

This Court has long held that rates fixed by agreement are unreasonable *per se*. *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 489 (1950); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940); *United States* v. *Trenton Potteries Co.*, 273 U. S.

392, 396–398 (1927). Therefore, the Exchange practice here attacked, just as that in *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963), would, "had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act." *Id.,* at 347. Here, as in *Silver,* the other federal regulatory scheme is the Securities Exchange Act of 1934, and the clear question presented is whether there is anything "built into the regulatory scheme which performs the antitrust function . . . ." *Id.,* at 358.

Section 19 (b) of the Securities Exchange Act, 48 Stat. 898, 15 U. S. C. § 78s (b), authorizes the SEC by certain procedures "to alter or supplement the rules" of the Exchange "in respect of such matters as . . . (9) the fixing of reasonable rates of commission . . . ." Respondents contend that this provision sufficiently demonstrates the SEC performs a supervisory function in respect of the Exchange's rate-fixing to exempt the practice from review under the antitrust laws. Petitioners claim that for many reasons the possibility of SEC review is an insufficient substitute for application of the antitrust laws. For example, the SEC's review of rates is discretionary. Further, the regulatory scheme fails specifically to enjoin the SEC, in determining what rates are reasonable, to "enforce the competitive standard," *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 351 (1963), and furthermore neither the SEC nor the Exchange has ever articulated any standard of reasonableness. Petitioners also claim that the underlying data used by the SEC in reviewing each of the five rate increases since 1934 have been essentially those supplied by the Exchange, and have been very limited in scope and content. Finally, they claim that if and when the SEC exercises its discretion to review rates, it is not required to hold a hearing, and because the matter is committed to the

SEC's discretion, there is no effective judicial remedy to require it to initiate a rate proceeding.

If, as petitioners claim, the regulatory scheme provides no assurance that antitrust policy will be implemented, perhaps a repeal of the antitrust law may be implied "if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange, supra,* at 357. However, "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States* v. *Philadelphia National Bank, supra,* at 350. Moreover, petitioners claim that nothing about the Securities Exchange Act or the workings of the Exchange requires that the Exchange set minimum rates.

The court below, in a two-page opinion, held that a repeal of the antitrust laws was required to make the Securities Exchange Act work, and that "the self-regulatory function of the exchange has been exercised by virtue of § 19 (b)," 371 F. 2d, at 411. In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated by this Court's opinion in *Silver.*

The importance of the New York Stock Exchange in the functioning and livelihood of this Nation cannot be gainsaid. Ever-increasing millions of persons and billions of dollars are affected by the Exchange's practices. Without expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below. In my judgment, the claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing,

but also as to the fulfillment of the goal of investor protection embodied in the securities laws.

I would grant certiorari and invite the Solicitor General to participate in argument so that the public interest may be fully explored.

No. 579. FERRELL *v.* FULTON, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. *Hilton R. Carr, Jr., Herbert A. Warren, Jr.,* and *E. David Rosen* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for respondent.

No. 580. TENNESSEE PACKERS, INC., FROSTY MORN DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *George V. Gardner* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *George B. Driesen* for respondent. Reported below: 379 F. 2d 172.

No. 511. BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL would grant the writ for the reasons stated in the dissent in *Transportation-Communication Employees Union* v. *Union Pacific R. Co.,* 385 U. S. 157, 168 (1966). *Charles T. Boyd, Harold C. Heiss* and *Donald W. Bennett* for petitioner. *Charles A. Horsky* for respondent. Reported below: 380 F. 2d 59.

No. 641. HALL *v.* NATIONAL FARMERS ORGANIZATION, INC. C. A. 7th Cir. Certiorari denied. *William D. Hall,* petitioner, *pro se. Lee D. Sinclair* and *Alan W. Boyd* for respondent.

No. 582. TRIPLE "AAA" Co., INC., ET AL. *v.* WIRTZ, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. *John B. Ogden* for petitioners. *Acting Solicitor General Spritzer, Charles Donahue, Bessie Margolin* and *Robert E. Nagle* for respondent. Reported below: 378 F. 2d 884.

No. 564. GEAREY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Marvin M. Karpatkin, Rhoda H. Karpatkin, Melvin L. Wulf* and *Alan H. Levine* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome M. Feit* and *Ronald L. Gainer* for the United States. Reported below: 379 F. 2d 915.

No. 572. MOORMAN ET UX. *v.* THOMAS ET AL. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David R. Lewis* for petitioners. *W. Warren Cole, Jr.*, for respondents. Reported below: 199 So. 2d 719.

No. 575. NATIONAL LABOR RELATIONS BOARD *v.* PURITY FOOD STORES, INC. (SAV-MORE FOOD STORES). C. A. 1st Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Harold Katz* for respondent. Reported below: 376 F. 2d 497.

No. 268, Misc. CHERO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 316, Misc. BROWN *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. *John T. Corrigan* for respondent.

No. 576. LEVY *v.* CORCORAN, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Charles Morgan, Jr., Melvin L. Wulf, Alan H. Levine, Lawrence Speiser, Ralph J. Temple* and *Anthony G. Amsterdam* for petitioner. *Acting Solicitor General Spritzer* for respondent. Reported below: —— U. S. App. D. C. ——, 389 F. 2d 929.

No. 609. MOIST ET AL. *v.* BELK, RECEIVER FOR BROOKDALE CEMETERY ASSOCIATION, ET AL. C. A. 6th Cir. Motion for security for costs and for supersedeas bond denied. Certiorari denied. *August F. Brandt* for petitioners. *A. Albert Sugar* for respondent Belk, *Arthur M. Lang* for respondents Lewis et al., *Robert E. Plunkett* for respondent Beattie; and *Constantine A. Tsangadas, John R. Starrs* and *Ralph W. McKenney,* respondents, *pro se.* Reported below: 380 F. 2d 721.

No. 16, Misc. WATSON ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent. Reported below: 190 So. 2d 161.

No. 199, Misc. DESIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frank A. Lopez* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 454, Misc. SCHACK *v.* MEADOWS, U. S. ATTORNEY. C. A. 5th Cir. Certiorari denied.

No. 472, Misc. NEELY *v.* CAVELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 319, Misc. STONE *v.* HALL, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for respondent.

No. 394, Misc. CORDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 377 F. 2d 522.

No. 395, Misc. WOODY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Justin R. Wolf* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 126 U. S. App. D. C. 353, 379 F. 2d 130.

No. 504, Misc. GAINES *v.* CALIFORNIA. Super. Ct. Cal., County of Contra Costa. Certiorari denied.

No. 505, Misc. THOMPSON *v.* CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 508, Misc. BEY *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 510, Misc. BRUNETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 378 F. 2d 18.

No. 531, Misc. REALMUTO *v.* WALLACK, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 537, Misc. FALGOUT *v.* COLORADO. C. A. 10th Cir. Certiorari denied.

No. 581, Misc. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 363 F. 2d 333.

No. 539, Misc. GALLEGOES ET AL. *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 544, Misc. KENNER *v.* WAYNE COUNTY PROSECUTOR ET AL. C. A. 6th Cir. Certiorari denied.

No. 549, Misc. BANAS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 34 Wis. 2d 468, 149 N. W. 2d 571.

No. 560, Misc. LADUTKO *v.* GREEN, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 561, Misc. L'ITALIEN *v.* MASSACHUSETTS. Super. Ct. Mass. Certiorari denied. *David B. Kaplan* for petitioner. *John P. S. Burke* for respondent.

No. 562, Misc. WEAVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 379 F. 2d 799.

No. 567, Misc. FITZGERALD *v.* OLIVER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 568, Misc. STEVENSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 380 F. 2d 590.

No. 601, Misc. LEWIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Sol Zalel Rosen* for petitioner. *Acting Solicitor General Spritzer* for the United States. Reported below: 127 U. S. App. D. C. 269, 382 F. 2d 817.

No. 570, Misc. GOBIE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 380 F. 2d 57.

No. 571, Misc. TURNER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 249 Cal. App. 2d 909, 57 Cal. Rptr. 854.

No. 579, Misc. TILLMAN *v.* OLIVER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 582, Misc. BOLES *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 379 F. 2d 614.

No. 586, Misc. HUARNECK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael Juviler* for respondent.

No. 587, Misc. DIAMOND *v.* RUNDLE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 590, Misc. FARRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 381 F. 2d 368.

No. 598, Misc. DORSEY *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 599, Misc. KNIGHTEN *v.* FIELD, MENS COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 604, Misc. SCHACK *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 606, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 608, Misc. SATERFIELD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 65 Cal. 2d 752, 423 P. 2d 266.

No. 609, Misc. CHERO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 266, Misc. NELSON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: 246 Ore. 321, 424 P. 2d 223.

No. 379, Misc. WILKINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Fred Blanton, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Doar, Louis F. Claiborne* and *David L. Norman* for the United States. Reported below: 376 F. 2d 552.

Rehearing Denied.

No. 169. KITCHEN *v.* REESE ET AL., *ante*, p. 850;

No. 287. ABBOUD *v.* NEBRASKA, *ante*, p. 848;

No. 362. NIEDZIEJKO ET AL. *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, *ante*, p. 848;

No. 185, Misc. PECK *v.* TORONTO ET AL., *ante*, p. 868;

No. 331, Misc. OLSHEN *v.* MCMANN, WARDEN, *ante*, p. 874;

No. 372, Misc. LEE *v.* CALIFORNIA, *ante*, p. 876; and

No. 378, Misc. CAREY *v.* GEORGE WASHINGTON UNIVERSITY, *ante*, p. 877. Petitions for rehearing denied.

No. 427, Misc. SALGADO *v.* CALIFORNIA, *ante,* p. 878; and

No. 522, Misc. OUGHTON *v.* MEIER, WARDEN, *ante,* p. 808. Petitions for rehearing denied.

No. 282. EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. *v.* DAVIS ET AL., *ante,* p. 840. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

DECEMBER 4, 1967.

Miscellaneous Orders.

No. 47. GINSBERG *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 2d Jud. Dept. (probable jurisdiction noted, 388 U. S. 904); and

No. 64. UNITED ARTISTS CORP. *v.* CITY OF DALLAS. Appeal from Ct. Civ. App. Tex., 5th Sup. Jud. Dist. (probable jurisdiction noted, 387 U. S. 903). Motion for leave to file brief of American Civil Liberties Union et al., as *amici curiae,* granted. Motion of Authors League of America, Inc., for leave to file brief, as *amicus curiae,* in No. 64 granted. *Osmond K. Fraenkel, Edward J. Ennis, Melvin L. Wulf* and *Alan H. Levine* for American Civil Liberties Union et al. on the motion urging reversal in both cases. *Irwin Karp* for Authors League of America, Inc., on the motion urging reversal in No. 64. *N. Alex Bickley* and *Ted P. MacMaster* for the City of Dallas in opposition to the motions in No. 64.

No. 995, Misc. IN RE DISBARMENT OF ELLIS. It is ordered that John Flather Ellis of Washington, District of Columbia, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 133. KOLOD ET AL. *v.* UNITED STATES, *ante*, p. 834. The Solicitor General is requested to file a response to petition for rehearing within thirty days. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

The Solicitor General is invited to file a brief in each of the following cases expressing the views of the United States:

No. 378. O'REILLY *v.* BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA. Sup. Ct. Cal.;

No. 661. ALLEN ET AL. *v.* STATE BOARD OF ELECTIONS ET AL. Appeal from D. C. E. D. Va.; and

No. 665. PAUL H. ASCHKAR & CO. *v.* KAMEN & CO. ET AL. C. A. 9th Cir.

No. 726. MATHIS *v.* UNITED STATES. C. A. 5th Cir. (Certiorari granted, *ante*, p. 896.) Motion of petitioner for the appointment of counsel granted. It is ordered that *Nicholas J. Capuano, Esquire*, of Miami, Florida, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 408, Misc. STEPPE *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. *Earl Faircloth*, Attorney General of Florida, and *Jesse J. McCrary, Jr.*, Assistant Attorney General, for respondent.

No. 690, Misc. BLAIR *v.* KROPP, WARDEN;

No. 711, Misc. SMITH *v.* PATE, WARDEN;

No. 713, Misc. BOWMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.;

No. 741, Misc. BARTZ *v.* FLORIDA; and

No. 756, Misc. BAILEY *v.* KROPP, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75. LEE, CORRECTIONS COMMISSIONER, ET AL. *v.* WASHINGTON ET AL. Appeal from D. C. M. D. Ala. Motion of appellants for leave to file supplemental brief after argument granted. *MacDonald Gallion,* Attorney General of Alabama, *Gordon Madison,* Assistant Attorney General, *Nicholas S. Hare,* Special Assistant Attorney General, for Lee et al., and *J. M. Breckenridge* for Austin, appellants, on the motion. [For earlier order, see 387 U. S. 928.]

No. 661, Misc. BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP *v.* UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL. (See No. 624, *infra,* p. 974.) Motion to dispense with printing extra copies of Appendix C to petition granted. Motion for leave to file petition for writ of mandamus denied. *Armistead B. Rood* on the motions. Briefs in opposition to the latter motion were filed by *James Garfield, James Wm. Moore* and *Robert W. Blanchette* for Smith et al., Trustees of the property of New York, New Haven & Hartford Railroad Co.; *Robert W. Meserve* for Boston & Providence Railroad Corp. Stockholders Committee; *Acting Solicitor General Spritzer* for the United States; and by *Charles Y. Wadsworth* for Boston & Providence Railroad Corp. Reported below: See 260 F. Supp. 415.

Probable Jurisdiction Noted.

No. 597. UNITED STATES *v.* UNITED SHOE MACHINERY CORP. Appeal from D. C. Mass. Probable jurisdiction noted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. *Acting Solicitor General Spritzer, Assistant Attorney General Turner, Howard E. Shapiro* and *Margaret H. Brass* for the United States. *Ralph M. Carson, Conrad W. Oberdorfer, Taggart Whipple, Robert D. Salinger* and *Louis L. Stanton, Jr.,* for appellee. Reported below: 266 F. Supp. 328.

Certiorari Granted. (See also No. 4, Misc., *ante,* p. 214.)

No. 600. RED LION BROADCASTING CO., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. *Roger Robb* and *H. Donald Kistler* for petitioners. *Solicitor General Griswold, Assistant Attorney General Turner, Henry Geller* and *Robert D. Hadl* for respondents. *Amicus curiae* briefs were filed by *Lawrence J. McKay, Raymond L. Falls, Jr.,* and *Thomas E. Ervin* for National Broadcasting Co., Inc., and *Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Leon R. Brooks* and *Herbert Wechsler* for Columbia Broadcasting System, Inc. Reported below: 127 U. S. App. D. C. 129, 381 F. 2d 908.

No. 154. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether the introduction of admissions made to an undercover agent planted in petitioner's jail cell constituted a violation of petitioner's constitutional rights to counsel and against self-incrimination.

"2. Whether inculpatory admissions, obtained under circumstances like those here involved, can ever constitute harmless error."

F. Lee Bailey and *Alan M. Dershowitz* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent. Reported below: 245 Cal. App. 2d 112, 53 Cal. Rptr. 720.

No. 645. JONES ET UX. *v.* ALFRED H. MAYER CO. ET AL. C. A. 8th Cir. Certiorari granted. *Sol Rabkin, Joseph B. Robison, Robert L. Carter* and *Paul Hartman* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Doar, Louis F. Claiborne* and *Richard A. Posner* for the United States, as *amicus curiae,* in support of the petition. Reported below: 379 F. 2d 33.

No. 616. JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Harold Stern* for petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Pugh* and *Crombie J. D. Garrett* for the United States. Reported below: 379 F. 2d 211.

No. 563, Misc. HARRISON *v.* UNITED STATES. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Alfred V. J. Prather* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Jerome M. Feit* for the United States. Reported below: —— U. S. App. D. C. ——, 387 F. 2d 203.

No. 639. GLONA *v.* AMERICAN GUARANTEE & LIABILITY INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari granted and case set for oral argument immediately following No. 508 (see *ante,* p. 925). *Benjamin E. Smith* for petitioner. *Frank S. Normann* for respondents. Reported below: 379 F. 2d 545.

No. 618. FORTNIGHTLY CORP. *v.* UNITED ARTISTS TELEVISION, INC. C. A. 2d Cir. Motion of National Community Television Association, Inc., for leave to file a brief, as *amicus curiae,* granted. Certiorari granted and case set for oral argument immediately following Nos. 363 and 428 (see *ante,* p. 911). The Solicitor General is invited to file a brief expressing the views of the United States. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. *Robert C. Barnard, R. Michael Duncan* and *E. Stratford Smith* for petitioner. *Louis Nizer, Gerald Meyer* and *Lawrence S. Lesser* for respondent. *Bruce E. Lovett* for National Community Television Association, Inc., as *amicus curiae,* in support of the petition. Reported below: 377 F. 2d 872.

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No. 630. UNITED STATES ET AL. *v.* COLEMAN ET AL. C. A. 9th Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Acting Solicitor General Spritzer, Assistant Attorney General Weisl, Robert S. Rifkind, Roger P. Marquis* and *George R. Hyde* for the United States et al. *George W. Nilsson, W. Howard Gray, Howard A. Twitty* and *Edward A. McCabe* for respondents. Reported below: 363 F. 2d 190 and 379 F. 2d 555.

Certiorari Denied. (See also No. 353, *ante,* p. 327; and No. 619, *ante,* p. 214.)

No. 348. BENEFICIAL FINANCE CO., INC. *v.* VINE. C. A. 2d Cir. Certiorari denied. *Wilkie Bushby* and *Joseph Schreiber* for petitioner. *Lawrence M. Powers* for respondent. Reported below: 374 F. 2d 627.

No. 353.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL. C. A. D. C. Cir. Certiorari denied. *Joseph L. Rauh, Jr., John Silard, Harriett R. Taylor, Isaac N. Groner, Harold C. Heiss, Donald W. Bennett, Alex Elson, Willard J. Lassers* and *Aaron S. Wolff* for petitioners. *Francis M. Shea, Richard T. Conway, James R. Wolfe* and *Charles I. Hopkins, Jr.,* for respondents. Reported below: 127 U. S. App. D. C. 23, 380 F. 2d 570.

No. 534. BENCOMO *v.* BENCOMO. Sup. Ct. Fla. Certiorari denied. *Daniel L. Ginsberg* for petitioner. *Sam I. Silver* for respondent. Reported below: 200 So. 2d 171.

No. 589. SALARDINO ET AL. *v.* CITY AND COUNTY OF DENVER. Sup. Ct. Colo. Certiorari denied. *William Hurt Erickson* for petitioners. *Max P. Zall* for respondent.

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*[REPORTER'S NOTE: For *per curiam* opinion vacating this order, see *ante,* p. 327.]

No. 581. JAPANESE WAR NOTES CLAIMANTS ASSOCIATION OF THE PHILIPPINES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Lawrence C. Moore* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 178 Ct. Cl. 630, 373 F. 2d 356.

No. 583. GRAHAM ET UX. *v.* HODGES ET AL.; and

No. 584. FELTON *v.* HODGES ET AL. C. A. 5th Cir. Certiorari denied. *Henry R. Carr* and *Phillip A. Hubbart* for petitioners in each case. *Earl Faircloth,* Attorney General of Florida, and *Robert A. Chastain,* Assistant Attorney General, for respondents in both cases. Reported below: No. 583, 374 F. 2d 340; No. 584, 374 F. 2d 337.

No. 585. SCHWEITZER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Nicholas R. Doman* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Harold C. Wilkenfeld* and *Jeanine Jacobs* for respondent. Reported below: 376 F. 2d 30.

No. 586. WOOD, WIRE & METAL LATHERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* DUNLOP ET AL. C. A. D. C. Cir. Certiorari denied. *Mozart G. Ratner* for petitioner Wood, Wire & Metal Lathers International Union, AFL–CIO, and *Jerome H. Simonds* for petitioner Employing Lathers Association of Greater New York & Vicinity et al. Reported below: 127 U. S. App. D. C. 227, 382 F. 2d 176.

No. 587. LITTON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *H. E. Widener, Jr.,* for petitioner.

No. 595. GARVIN ET AL. *v.* CHILDERS. C. A. 6th Cir. Certiorari denied. *Marshall Funk* for petitioners. *Maxey B. Harlin* for respondent.

No. 590. GRAY *v.* PORTER. Ct. App. Md. Certiorari denied. Reported below: 245 Md. 713, 228 A. 2d 441.

No. 592. SWANSON *v.* FLORIDA BAR ET AL. C. A. 5th Cir. Certiorari denied. *Will O. Murrell* for petitioner. *William H. Adams III* for respondents. Reported below: 381 F. 2d 730.

No. 598. LINCOLN MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Burton Y. Weitzenfeld* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 382 F. 2d 411.

No. 599. COUNTY OF WAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Aloysius J. Suchy* and *William F. Koney* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Joseph Kovner* and *Edward Lee Rogers* for the United States. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistant Attorneys General, for the State of Michigan, and *Julius C. Pliskow* for the City of Detroit, as *amici curiae,* in support of the petition. Reported below: 378 F. 2d 671.

No. 603. SANTOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Henry Rothblatt* and *Emma Alden Rothblatt* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome M. Feit* and *Kirby W. Patterson* for the United States. Reported below: 381 F. 2d 993.

No. 612. DEL GUERCIO *v.* JAMES. Ct. App. N. Y. Certiorari denied. *John C. Marbach* for petitioner. *Reuben Sirlin* for respondent.

No. 605. HOBAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley, Rufus W. Peckham, Jr.,* and *Samuel Resnicoff* for petitioner. *Solicitor General Griswold* for the United States.

No. 606. WILKIN *v.* SUNBEAM CORP. C. A. 10th Cir. Certiorari denied. *Dale M. Stucky* for petitioner. *Walther E. Wyss, George R. Clark* and *Malcolm Miller* for respondent. Reported below: 377 F. 2d 344.

No. 607. PRECISE IMPORTS CORP. ET AL. *v.* KELLY, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioners. *Acting Solicitor General Spritzer* for respondents. Reported below: 378 F. 2d 1014.

No. 608. KNOHL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Murray I. Gurfein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 379 F. 2d 427.

No. 610. LINCOLN NATIONAL LIFE INSURANCE CO. *v.* RATAY. C. A. 3d Cir. Certiorari denied. *Alexander Black* for petitioner. *Samuel J. Goldstein* for respondent. Reported below: 378 F. 2d 209.

No. 613. GEORGE EPCAR CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Edwin Jason Dryer* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *John C. Eldridge* for the United States. Reported below: 377 F. 2d 225.

No. 615. ARO CORP. *v.* CITRON. C. A. 3d Cir. Certiorari denied. *George B. Newitt* and *J. Robert Maxwell* for petitioner. *Eugene F. Buell* for respondent. Reported below: 377 F. 2d 750.

No. 617. General Precision, Inc. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *David L. Benetar* for petitioner. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 381 F. 2d 61.

No. 621. Barbato, Trustee in Bankruptcy *v.* Livingston National Bank. C. A. 3d Cir. Certiorari denied. *Allan L. Tumarkin* for petitioner. *Herman D. Michels* and *Roger L. Toner* for respondent. Reported below: 380 F. 2d 116.

No. 622. Brandywine-Main Line Radio, Inc., et al. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. *Roger Robb* and *H. Donald Kistler* for petitioners. *Acting Solicitor General Spritzer* and *Henry Geller* for respondents.

No. 624. Boston & Providence Railroad Stockholders Development Group *v.* Bartlett, Trustee in Bankruptcy, et al. C. A. 1st Cir. (See No. 661, Misc., *supra,* p. 967.) Certiorari denied. *Armistead B. Rood* for petitioner. *James Garfield, James Wm. Moore* and *Robert W. Blanchette* for respondents Smith et al., Trustees of the property of New York, New Haven & Hartford Railroad Co., *Robert W. Meserve* for respondent Boston & Providence Railroad Corp. Stockholders Committee, *Charles Y. Wadsworth* for respondent Boston & Providence Railroad Corp., and *Acting Solicitor General Spritzer* for respondent United States. Reported below: See 260 F. Supp. 415.

No. 625. Drew *v.* Lawrimore et al. C. A. 4th Cir. Certiorari denied. *E. N. Zeigler* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 380 F. 2d 479.

No. 626. Deane Hill Country Club, Inc. *v.* City of Knoxville et al. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioner. *Milton P. Rice,* Assistant Attorney General of Tennessee, for respondent McCanless. Reported below: 379 F. 2d 321.

No. 631. Louisiana Power & Light Co. *v.* City of Thibodaux. C. A. 5th Cir. Certiorari denied. *Malcolm L. Monroe* and *Andrew P. Carter* for petitioner. *Paul M. Hebert* for respondent. Reported below: 373 F. 2d 870.

No. 634. Brennan *v.* Udall, Secretary of the Interior. C. A. 10th Cir. Certiorari denied. *John J. Wilson* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Williams, Roger P. Marquis* and *S. Billingsley Hill* for respondent. Reported below: 379 F. 2d 803.

No. 640. Portland Cement Co. of Utah *v.* United States. C. A. 10th Cir. Certiorari denied. *Gerald R. Miller* for petitioner. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Pugh* and *Grant W. Wiprud* for the United States. Reported below: 378 F. 2d 91.

No. 642. Zusmann, Trustee in Bankruptcy *v.* National Acceptance Co. C. A. 5th Cir. Certiorari denied. *Morris W. Macey* for petitioner. *Nolan B. Harmon* for respondent. Reported below: 379 F. 2d 351.

No. 647. Goon Mee Heung *v.* Immigration and Naturalization Service. C. A. 1st Cir. Certiorari denied. *Joseph F. O'Neil* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for respondent. Reported below: 380 F. 2d 236.

No. 633. Crosby Valve & Gage Co., formerly Crosby Steam Gage & Valve Co. *v.* Commissioner of Internal Revenue. C. A. 1st Cir. Certiorari denied. *Matthew Brown* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Harry Baum* and *Albert J. Beveridge III* for respondent. Reported below: 380 F. 2d 146.

No. 643. Agajan et al. *v.* Clark, Attorney General. C. A. D. C. Cir. Certiorari denied. *A. Noble McCartney* for petitioners. *Acting Solicitor General Spritzer* for respondent. Reported below: 127 U. S. App. D. C. 158, 381 F. 2d 937.

No. 644. Frohmann *v.* United States. C. A. 8th Cir. Certiorari denied. *Albert J. Haller* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 380 F. 2d 832.

No. 646. Helmsley *v.* City of Detroit et al. C. A. 6th Cir. Certiorari denied. *James P. Mattimoe* for petitioner. *Julius C. Pliskow* for City of Detroit et al., and *Aloysius J. Suchy* and *William F. Koney* for County of Wayne et al., respondents. Reported below: 380 F. 2d 169.

No. 650. Manion *v.* Holzman et al. C. A. 7th Cir. Certiorari denied. *Francis D. Morrissey* for petitioner. Reported below: 379 F. 2d 843.

No. 651. Gladstone et al. *v.* Board of Education of the City of New York. Ct. App. N. Y. Certiorari denied. *Morris Weissberg* for petitioners. *J. Lee Rankin* and *Stanley Buchsbaum* for respondent. Reported below: 19 N. Y. 2d 1004, 228 N. E. 2d 821.

No. 652. BARD ET AL. *v.* DASHO ET AL. C. A. 7th Cir. Certiorari denied. *Allen E. Throop* for Bard et al., and *Samuel Weisbard* for Lauhoff, petitioners. *Malcolm M. Gaynor* for respondents. Reported below: 380 F. 2d 262.

No. 654. FARKAS *v.* TEXAS INSTRUMENTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. *William D. Neary* for respondent Texas Instruments, Inc. Reported below: 375 F. 2d 629.

No. 655. LONE STAR STEEL CO. *v.* MCGEE. C. A. 5th Cir. Certiorari denied. *Spencer C. Relyea III* for petitioner. *Franklin Jones, Sr.,* for respondent. Reported below: 380 F. 2d 640.

No. 662. ETS-HOKIN & GALVAN, INC. *v.* MAAS TRANSPORT, INC., ET AL. C. A. 8th Cir. Certiorari denied. *Jesse Feldman* for petitioner. *Dean Winkjer* for Maas Transport, Inc., and *Frank F. Jestrab* for Lawrence Transportation, respondents. Reported below: 380 F. 2d 258.

MR. JUSTICE MARSHALL took no part in the consideration or decision of the petitions in the following cases (beginning with No. 88 on this page and extending through No. 603, Misc., on p. 978):

No. 88. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Raymond W. Bergan* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 471. PEELER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. René Hawkins* for petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Grant W. Wiprud* and *Thomas L. Stapleton* for the United States. Reported below: 377 F. 2d 531.

No. 475. WOOD ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Clarence P. Brazill, Jr.,* for peti-

tioners. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Grant W. Wiprud* and *Thomas L. Stapleton* for the United States. Reported below: 377 F. 2d 300.

No. 604. ROYALTON STONE CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 750. COMMISSIONER OF INTERNAL REVENUE *v.* ROYALTON STONE CORP. ET AL. C. A. 2d Cir. Certiorari denied. *John G. Putnam, Jr.*, for petitioners in No. 604. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Grant W. Wiprud* for petitioner in No. 750 and for respondent in No. 604. Reported below: 379 F. 2d 298.

No. 683. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William R. Frazier* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Pugh* and *Grant W. Wiprud* for the United States. Reported below: 377 F. 2d 550.

No. 43, Misc. KENT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 70, Misc. BLACKWELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *William J. Garber* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 540, Misc. O'BERY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 126 U. S. App. D. C. 387, 379 F. 2d 164.

No. 603, Misc. SCHACK *v.* BOARDMAN, U. S. ATTORNEY. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 145. BECKER ET AL. *v.* PHILCO CORP. C. A. 4th Cir. Certiorari denied. *Robert Sheriffs Moss* for petitioners. *Laidler B. Mackall* and *Karl E. Wolf* for respondent. Reported below: 372 F. 2d 771.

MR. CHIEF JUSTICE WARREN, dissenting.

This is an important case affecting the rights of millions of workers to vindicate their reputations and to make a living in the military-private industrial complex. See *Greene* v. *McElroy*, 360 U. S. 474, 507, n. 31 (1959).

According to petitioners, this case presents the following question:

> "Is a government contractor endowed with the attributes of a Federal Agency and is it and are its employees clothed with unqualified or absolute privilege to falsely and maliciously defame other employees in reporting a loss, compromise, or suspected compromise of classified information, solely by reason of (1) having contracted with the United States Government to furnish it with supplies or services which are required and necessary to the National Defense, and (2) in connection therewith having entered into a security agreement with the United States Government under the terms of which it has agreed to report the *loss, compromise, or suspected compromise* of classified information." Petition for Cert., p. 2.

Petitioners brought this action against respondent Philco Corporation, their employer, for an alleged defamation made in a report to the Department of Defense under the terms of a contract for the manufacture of defense items. The complaint alleged that the report contained both false and malicious statements concerning petitioners and resulted in the withdrawal of their security clearances and thus the loss of their jobs. On re-

spondent's motion for summary judgment, the District Court dismissed the complaint, holding the communication absolutely privileged. 234 F. Supp. 10 (D. C. E. D. Va. 1964). Placing unjustified reliance on the authority of the principal opinion in *Barr* v. *Matteo,* 360 U. S. 564 (1959), the Court of Appeals for the Fourth Circuit affirmed. 372 F. 2d 771 (1967). In granting an absolute privilege to government employees at the expense of the individual's right to be free from defamation, *Barr* v. *Matteo* extended the earlier decisions of this Court to what I and others considered to be the breaking point. That opinion did not command a majority of this Court then, and only one of those who joined it is on this Court today. The conclusion there was reached by balancing

> "on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damages suits brought on account of action taken in the exercise of their official responsibilities." *Barr* v. *Matteo, supra,* at 565.

The deprivation of the employees' rights in the present case is justified in the following manner: By Executive Order, the Secretary of Defense is empowered through regulations to safeguard classified information.[1] Pursuant to that power, the Secretary has issued an Industrial Security Manual which requires contractors to protect all classified information by maintaining a system of

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[1] Exec. Order No. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended by Exec. Order No. 10909, 3 CFR 1959–1963 Comp., p. 437.

security controls and to report any loss, compromise, or suspected compromise of that information to the Department of Defense.[2] The Secretary enters into a Security Agreement with his contractors to implement the provisions of the Manual. The Secretary does not attempt to clothe the contractor with any immunity from a civil action for damages caused by defamatory reports.

From this scheme to protect classified information, the court below took the additional and unwarranted step of conferring an absolute privilege on the corporation:

> "So it was that the company and such of its employees as were confidants were answerable for keeping the nation's secrets, as fully as if they were

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[2] The Department of Defense Industrial Security Manual for Safeguarding Classified Information (Sept. 21, 1956, rev. Dec. 31, 1962) provides in part:

"6. Reports

"The contractor shall submit immediately to the cognizant security officer—

. . . . .

"*b.* A report, classified if appropriate, of any loss, compromise or suspected compromise of classified information.

. . . . .

"14.1. Loss, Compromise or Suspected Compromise of Classified Information

. . . . .

"*d.* In the event of loss, compromise, or suspected compromise of classified information outside of a facility the contractor shall establish procedures requiring that the person discovering the loss, compromise or suspected compromise shall immediately—

"(1) Notify the local office of the Federal Bureau of Investigation and furnish sufficient information to assist in identification of the information (if the loss, compromise or suspected compromise occurs outside the United States, the nearest United States authorities shall be notified in lieu of the Federal Bureau of Investigation); and

"(2) Report the loss to the contractor by the fastest means of communication.

"*e.* The military department assigned security cognizance shall conduct such further inquiry as may be required."

> governed by the oath of a Federal official. Closely performing his duties and charged with equal responsibility and loyalty, we think the company and its trusted personnel were imbued with the official's character, and partake of his immunity to liability, whenever and wherever he would enjoy the absolute privilege." 372 F. 2d 771, 774.

No authority is quoted for this statement for the obvious reason that there is none.

I do not cast any doubt on the general powers of the Secretary of Defense in safeguarding classified information, nor on the Executive Order, nor on the Industrial Security Manual, nor on the Security Agreement entered into in this case. None of these are pertinent to our decision. Nor is the truth or falsity of the allegation that Philco maliciously or falsely defamed the petitioners of any relevance.[3] All the case involves is whether a private corporation under a Security Agreement with the Government is entitled to an absolute privilege to report with "actual malice" information to the Government that results in the deprivation of the workers' employment and reputation.

We have not granted to private citizens a blanket immunity from legal liability for defaming public officials. Instead, we have held that a public official may recover for defamatory falsehoods relating to his official conduct if he can prove the statement was made with "actual malice." *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). I can see absolutely no justification for granting to a corporation contracting with the Government a greater privilege to defame than we have accorded to private citizens in commenting upon the

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[3] However, since this matter arises on motion for summary judgment, we are required to take the allegations of the complaint as true.

conduct of public officials. This seems to me to be a complete inversion of First Amendment rights. A qualified privilege is clearly sufficient in both situations to protect the paramount public interest in the free flow of information.

I disagreed with *Barr* v. *Matteo,* but even in that case it was said there were "other sanctions than civil tort suits available to deter the executive official" from making defamatory statements in press releases. 360 U. S. 564, 576. None of those "other sanctions" are present in the instant case. While a defamatory press release might subject the government official to both public censure and internal discipline from his superiors, the secrecy surrounding Philco's communication insulates the defamer from such sanctions. Since the Department of Defense has no disciplinary power over the employees of a private corporation for defamatory statements, internal sanctions are unlikely. It will also be much more difficult for the Department of Defense to recognize a malicious and false libel prepared by a private concern doing business with the Government. It follows then that even assuming, *arguendo,* that internal reports made by a governmental employee to his superior should have an absolute privilege since the superior will be able to evaluate the accuracy of a statement concerning conditions within his own department, this does not justify extending the privilege to communications from private corporations. Thus, the privilege has been conferred in this case without the normal concomitants of such protection, leaving the employees' reputation highly vulnerable to injury by a corporate executive who has no direct responsibility to the public.

It is difficult for me to understand why the importance of this case is not apparent to the Court. Personally, I cannot countenance this indiscriminate extension of

Barr v. *Matteo*. I would grant certiorari and invite the Government to make known its opinion of what the national interest might be.

MR. JUSTICE DOUGLAS, dissenting.

I agree with THE CHIEF JUSTICE that this is an important case which warrants the attention of the Court. It puts into focus several important issues, among them an aspect of the modern corporation which has become vital in the Federal Government's procurement program. Professor Galbraith has referred to it in his recent book The New Industrial State:

> "Increasingly it will be recognized that the mature corporation, as it develops, becomes part of the larger administrative complex associated with the state. In time the line between the two will disappear. Men will look back in amusement at the pretense that once caused people to refer to General Dynamics and North American Aviation and A. T. & T. as *private* business.
>
> "Though this recognition will not be universally welcomed, it will be healthy. There is always a presumption in social matters in favor of reality as opposed to myth. The autonomy of the technostructure is, to repeat yet again, a functional necessity of the industrial system. But the goals this autonomy serves allow some range of choice. If the mature corporation is recognized to be part of the penumbra of the state, it will be more strongly in the service of social goals. It cannot plead its inherently private character or its subordination to the market as cover for the pursuit of different goals of particular interest to itself. The public agency has an unquestioned tendency to pursue goals that reflect its own interest and convenience and to adapt social objective thereto. But it cannot plead this as a superior right. There may well be danger in

this association of public and economic power. But it is less if it is recognized." *Id.*, at 393–394.

I think the time has come for us to explore this problem; and the setting of the present case shows how pressing the problem is.

No. 657. KANSAS CITY SOUTHERN RAILWAY CO. *v.* JOHNSTON. Sup. Ct. Okla. Certiorari denied. *Clyde J. Watts* for petitioner. *Payne H. Ratner* for respondent.

No. 664. BALL ET AL. *v.* EASTERN COAL CORP. ET AL. Ct. App. Ky. Certiorari denied. *Jean L. Auxier* for petitioners. *Albert S. Kemper, Jr.*, for Eastern Coal Corp., and *Edward L. Carey, Harrison Combs* and *M. E. Boiarsky* for United Mine Workers of America et al., respondents. Reported below: 415 S. W. 2d 620.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in the following cases (beginning with No. 323 on this page and extending through No. 314, Misc., on p. 986):

No. 323. BENNETT ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Hiram W. Kwan* for petitioners.

No. 394. HALE *v.* TOWN OF VINTON. Sup. Ct. App. Va. Certiorari denied. *Stuart A. Barbour, Jr.*, for petitioner.

No. 588. JACKSON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *James J. Bierbower* and *Harry A. Inman* for petitioners. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Eardley* and *Alan S. Rosenthal* for the United States. Reported below: 179 Ct. Cl. 29.

No. 601. WYOMING ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. *James E. Barrett,* Attorney General, and *Sterling C. Case,* First Assistant Attorney General, for the State of Wyoming, and *A. G. McClintock* and *James B. Diggs*

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for Gulf Oil Corp., petitioners. *Acting Solicitor General Spritzer, Assistant Attorney General Weisl, Roger P. Marquis* and *Edmund B. Clark* for Udall et al., and *James H. Anderson* and *E. T. Lazear* for Union Pacific Railroad Co., respondents. Reported below: 379 F. 2d 635.

No. 596. BRULAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 383 F. 2d 345.

No. 629. BOLES, WARDEN *v.* SHEFTIC ET AL. C. A. 4th Cir. Certiorari denied. *C. Donald Robertson,* Attorney General of West Virginia, and *Morton I. Taber* and *Leo Catsonis,* Assistant Attorneys General, for petitioner. Reported below: 377 F. 2d 423.

No. 636. WARNER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Joseph Smith* for petitioner.

No. 197, Misc. HILLERY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for respondent. Reported below: 65 Cal. 2d 795, 423 P. 2d 208.

No. 314, Misc. DUNN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Derald E. Granberg* and *Gloria F. DeHart,* Deputy Attorneys General, for respondent.

No. 593. ARCENEAUX ET AL. *v.* PFISTER. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *W. Scott Wilkinson* for petitioners. *C. Ellis Henican* and *C. Ellis Henican, Jr.,* for respondent. Reported below: 376 F. 2d 821.

No. 483. Detenber et al., Administratrices *v.* American Universal Insurance Co. C. A. 6th Cir. Certiorari denied. *Josephine P. Hughett* and *Henry G. Fischer* for petitioners. *John P. Sandidge* for respondent. Reported below: 372 F. 2d 50.

Mr. Justice Black, dissenting.

I would grant certiorari here and reverse the action of the District Court and the Court of Appeals for rendering a summary judgment against petitioners in flagrant disregard of the right to trial by jury guaranteed by the Seventh Amendment to the Constitution. The case arose in this way. Two children riding in a car were killed in a collision with a bus. The car was driven by one Clark, who was protected by a policy of liability insurance issued by the respondent, American Universal Insurance Company. The insurance company undertook the defense of Clark in a suit for damages brought by petitioners on behalf of the deceased children. Clark claimed that the lawyer for the insurance company conducted his defense in bad faith and assigned to petitioners his claim for damages against the company.

During the settlement negotiations prior to the suit against Clark and the bus company, the insurance company lawyer urged lack of actionable negligence by Clark, and Clark later testified (in depositions taken in relation to the present action) that he went to trial with the understanding that his defense would be lack of negligence. On the day of trial of the action for damages against Clark a lawyer appeared for the insurance company and filed an amended answer in which the lawyer—on behalf of his client Clark—asserted the defense of assumption of risk, charging that the deceased children had known Clark was drunk and should not have ridden with him. The insurance company lawyer never discussed with his client Clark the alternative defenses available to him or

the significance of the filing of the amended complaint. Indeed Clark was never even advised of the fact that an amended complaint had been filed, in which he was pleading his own drunkenness in an effort to escape liability for damages. As the Court of Appeals noted in the present case, no satisfactory explanation has ever been offered for these omissions. At trial, the lawyer not only abandoned the position that the accident had been caused solely by the negligence of the bus driver but made every effort to put Clark in the worst possible light. He offered evidence that Clark had been speeding and had gone through a stop sign at the intersection, and in his summation he urged the jury to disbelieve his own client's testimony to the contrary. In addition, he permitted Clark's guilty plea in a related criminal action to be introduced without objection, and he gave Clark no opportunity to explain it. This was contrary to a specific agreement between insurance company counsel and Clark's personal lawyer (who did not take part in the trial of the civil case). The general tenor of this so-called "defense" is indicated by the insurance company lawyer's closing argument to the jury:

> "I have attempted to prove that this young man was drunk when he was driving that car on Saturday night, the 15th of April. I have attempted to prove that he was operating it recklessly, and that doesn't sound like a lawyer on a man's side to try to prove his own client is drunk, does it?
>
> . . . . . .
>
> "[N]o one has come to this boy's aid and told you that he stopped at that stop sign. . . . David Oursler gave a statement and he said, 'I am sure Michael didn't stop.' These things I knew and they convinced me, as they must you, that this young man was at fault in that accident.
>
> . . . . . .

> "The thing that is bothering me worse than anything else in trying to defend him was a judgment of the Jefferson Circuit Court. Right here across the street Judge Knight entered a judgment, for this young man in person, being charged with wilful, felonious, negligent, reckless, careless and wanton operation of an automobile, . . . and there in person [Clark] pleaded guilty to that offense. . . . [T]his young man was found guilty of negligent homicide. Now, presented with that situation, believing as I do believe, I felt then and I feel now that a jury of twelve honest people is going to reach the conclusion that this young man, by witnesses and by his own admissions, caused this accident."

This defense was theoretically in Clark's interest since it purported to offer him hope of avoiding liability entirely. But it was a dangerous defense for Clark since if the jury refused to charge the plaintiffs with assumption of the risk, the damages would certainly be higher—and the amount apportioned against Clark rather than against the bus company would certainly be greater—than if the no-negligence defense had been attempted. The insurance company's interest, however, was obviously different since from its point of view the assumption-of-risk approach had no disadvantages. Its liability was limited to $10,000 under the policy and if the strategy inflated the damages above this figure, Clark would be responsible to pay the additional amount out of his own pocket.

I agree with the courts below that this is a cause of action created by the law of Kentucky, and I accept the finding that under the law of Kentucky bad faith " 'is not simply bad judgment. It is not merely negligence. . . . It implies conscious doing of wrong. . . . It partakes of the nature of fraud.' " *Harrod* v. *Meridian Mutual Insurance Co.*, 389 S. W. 2d 74, 76 (Ky. 1964). The basis

for my disagreement is that I cannot see how this evidence of bad faith on the part of the insurance company lawyer can be considered insufficient to make a case for the jury.

This record establishes for me a rather convincing case of bad faith; at the very least I think a jury of 12 ordinary men, with a common-sense understanding of such matters, could reasonably conclude that the insurance company's conduct in this case amounted to conscious wrongdoing. By ordering summary judgment for the defendant, the courts below simply imposed their own notions as to the most plausible inference to be drawn from this record, thereby denying the petitioners their constitutionally protected right to have their case decided by 12 ordinary citizens.

No. 602. JONES, TUTRIX *v.* AETNA CASUALTY & SURETY CO. Sup. Ct. La. Motions of Louisiana Trial Lawyers Association and American Trial Lawyers Association for leave to file briefs, as *amici curiae,* in support of the petition granted. Certiorari denied. *Samuel C. Gainsburgh* for petitioner. *Richard H. Switzer* for respondent. *Raymond H. Kierr* for Louisiana Trial Lawyers Association, and *Samuel Langerman* for American Trial Lawyers Association on the motions. Reported below: 250 La. 932, 199 So. 2d 926.

No. 18, Misc. GRANT *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for respondent.

No. 656. GATES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion for leave to dispense with printing petition granted. Certiorari denied.

No. 614. R. A. HOLMAN & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Milton V. Freeman, Edgar H. Brenner, Daniel A. Rezneck* and *Sidney P. Howell, Jr.*, for petitioners. *Acting Solicitor General Spritzer, Philip A. Loomis, Jr., David Ferber* and *Edward B. Wagner* for respondent. Reported below: 366 F. 2d 446; 377 F. 2d 665.

No. 160, Misc. ELDRIDGE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Robert C. Londerholm,* Attorney General of Kansas, for respondent. Reported below: 197 Kan. 694, 421 P. 2d 170.

No. 53, Misc. ROGERS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Willie J. Davis,* Assistant Attorney General, for respondent. Reported below: 351 Mass. 522, 222 N. E. 2d 766.

No. 146, Misc. HOLLAND *v.* WEAKLEY, REFORMATORY SUPERINTENDENT, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 260, Misc. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 382, Misc. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 377 F. 2d 321.

No. 281, Misc. India *v.* New York. Ct. App. N. Y. Certiorari denied. *Sam Polur* for petitioner. *Aaron E. Koota* and *William I. Siegel* for respondent.

No. 398, Misc. Coyote *v.* United States. C. A. 10th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for the United States.

No. 439, Misc. Peterson *v.* Hoover, Director, Federal Bureau of Investigation. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer* for respondent.

No. 446, Misc. Kennedy *v.* United States. C. A. 6th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 377 F. 2d 989.

No. 450, Misc. Day *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. *James H. Bateman* and *William C. Wilson* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Robert F. Hedgepath,* Assistant Attorney General, for respondent.

No. 470, Misc. Robinson *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. *James H. Epps III* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox* and *Paul E. Jennings,* Assistant Attorneys General, for respondent.

No. 532, Misc. McIntyre *v.* United States. C. A. 8th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 380 F. 2d 822.

No. 474, Misc. ADAMS *v.* CAMERON, HOSPITAL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer* for respondent.

No. 493, Misc. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Calvin L. Brown* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 381 F. 2d 380.

No. 498, Misc. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 379 F. 2d 628.

No. 500, Misc. WRIGHT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 515, Misc. SAUNDERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *J. Perry Langford* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent. Reported below: 66 Cal. 2d 536, 426 P. 2d 908.

No. 516, Misc. HENRY *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. *H. H. Gearinger* for petitioner. *Acting Solicitor General Spritzer* for respondent. Reported below: 381 F. 2d 191.

No. 535, Misc. RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George W. Jansen* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome M. Feit* and *Kirby W. Patterson* for the United States. Reported below: 380 F. 2d 17.

No. 541, Misc. POWERS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 542, Misc. BRAUN *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 543, Misc. PENRICE *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 550, Misc. LEWIS *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for respondent.

No. 551, Misc. WHITE *v.* LANSON CHEMICAL CORP. ET AL. C. A. 7th Cir. Certiorari denied.

No. 552, Misc. FAIR *v.* DEKLE, SUPERVISOR OF ELECTIONS. C. A. 5th Cir. Certiorari denied.

No. 564, Misc. HENNESSY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 198 So. 2d 37.

No. 575, Misc. DICKERSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 591, Misc. PEEBLES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 592, Misc. SCOTT *v.* CALIFORNIA SUPREME COURT ET AL. C. A. 9th Cir. Certiorari denied.

No. 610, Misc. BENNER *v.* BENNER. Sup. Ct. Pa. Certiorari denied.

No. 613, Misc. HOLLAND *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 614, Misc. JORDAN *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 615, Misc. JORDAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 616, Misc. ORTEGA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 623, Misc. JOHNSON *v.* NORFOLK & WESTERN RAILWAY CO. Sup. Ct. App. Va. Certiorari denied. *Henry E. Howell, Jr.*, for petitioner. *Thomas R. McNamara* for respondent. Reported below: 207 Va. 980, 154 S. E. 2d 134.

No. 626, Misc. CASSESE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 631, Misc. MCNEAL *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 632, Misc. KING *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 636, Misc. RUCKER *v.* PARKER ET AL. C. A. 6th Cir. Certiorari denied.

No. 639, Misc. FINLEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 643, Misc. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 250 Cal. App. 2d 367, 58 Cal. Rptr. 269.

No. 645, Misc. WEED *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States. Reported below: 380 F. 2d 914.

No. 633, Misc. SAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Jerome M. Feit* for the United States.

No. 654, Misc. WEEKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. Reported below: 417 S. W. 2d 716.

No. 662, Misc. DEWELLES *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Robert H. Wyshak* and *Lillian W. Wyshak* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Crombie J. D. Garrett* and *Benjamin M. Parker* for the United States et al. Reported below: 378 F. 2d 37.

No. 123, Misc. REESE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. *Sam J. D'Amico* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for respondent.

No. 124, Misc. WHITE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE FORTAS is of the opinion that certiorari should be granted. *Earl Faircloth,* Attorney General of Florida, and *Fred T. Gallagher,* Assistant Attorney General, for respondent.

Rehearing Denied.

No. 141. FOWLER ET AL. *v.* BENTON, *ante,* p. 851;

No. 148. SUDDUTH *v.* CALIFORNIA, *ante,* p. 850; and

No. 491. SAYLES *v.* WIEGAND, PRESIDENT, BOARD OF DIRECTORS OF METROPOLIS BUILDING ASSOCIATION, ET AL., *ante,* p. 45. Motions to dispense with printing petitions for rehearing granted. Petitions for rehearing denied.

No. 91. FORT *v.* CITY OF MIAMI, *ante*, p. 918;

No. 115. HELLER *v.* CONNECTICUT, *ante*, p. 902;

No. 139. SOUTH SHORE PACKING CORP. *v.* CITY OF VERMILION, *ante*, p. 847;

No. 176. PRICE, DBA HOWARD PRICE & CO. *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL., *ante*, p. 14;

No. 177. WETHERALL ET AL. *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL., *ante*, p. 14;

No. 207. JACKSON ET AL. *v.* WESTERN GEOTHERMAL, INC., ET AL., *ante*, p. 823;

No. 275. WILLIS *v.* O'BRIEN, JUDGE, *ante*, p. 848;

No. 284. PINTO, PRISON FARM SUPERINTENDENT *v.* PIERCE, *ante*, p. 31;

No. 306. ASSOCIATED PRESS *v.* WALKER, *ante*, p. 28;

No. 395. MOTOROLA, INC. *v.* ARMSTRONG, EXECUTRIX, *ante*, p. 830;

No. 455. STIEF *v.* J. A. SEXAUER MANUFACTURING CO., INC., ET AL., *ante*, p. 897;

No. 83, Misc. WYLEY *v.* WARDEN, MARYLAND PENITENTIARY, *ante*, p. 863;

No. 100, Misc. WALKER *v.* NATIONAL MARITIME UNION ET AL., *ante*, p. 864;

No. 167, Misc. DEDMON *v.* OLIVER, WARDEN, ET AL., *ante*, p. 867;

No. 338, Misc. STARNER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT, *ante*, p. 889;

No. 485, Misc. ANDERSON *v.* CALIFORNIA, *ante*, p. 916;

No. 507, Misc. JACKSON *v.* WILSON, WARDEN, ET AL., *ante*, p. 917;

No. 509, Misc. MARTINEZ *v.* CALIFORNIA, *ante*, p. 943; and

No. 538, Misc. DENTO *v.* UNITED STATES, *ante*, p. 944. Petitions for rehearing denied.

No. 106. Ober et al. *v.* Nagy et al., *ante*, p. 900;

No. 122. Custer Channel Wing Corp. et al. *v.* United States, *ante*, p. 850;

No. 124. Estate of Berry et al. *v.* Commissioner of Internal Revenue, *ante*, p. 834;

No. 138. Blane *v.* United States, *ante*, p. 835;

No. 313. Selinger *v.* Bigler, Special Agent, Internal Revenue Service, et al., *ante*, p. 904;

No. 320. Serman et al. *v.* United States, *ante*, p. 843;

No. 376. Fisher *v.* United States, *ante*, p. 845;

No. 257, Misc. Burich *v.* United States, *ante*, p. 885;

No. 277, Misc. Gunzburger *v.* Gardner, Secretary of Health, Education, and Welfare, *ante*, p. 885;

No. 301, Misc. Bailey *v.* DeQuevedo, *ante*, p. 923;

No. 318, Misc. Grene *v.* United States, *ante*, p. 908; and

No. 325, Misc. Pope *v.* Parker, Warden, *ante*, p. 886. Petitions for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of these petitions.

No. 381. Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL–CIO *v.* Needham Packing Co., dba Sioux City Dressed Beef, *ante*, p. 830. Motion of United Steelworkers of America, AFL–CIO, et al., for leave to file a brief, as *amici curiae*, in support of rehearing granted. Petition for rehearing denied. *Elliot Bredhoff, Michael H. Gottesman, George H. Cohen, Bernard Kleiman* and *Stephen I. Schlossberg* on the motion.

No. 21, Misc. Evans et al. *v.* Louisiana, *ante*, p. 887; and

No. 52, Misc. Littleton *v.* Texas, *ante*, p. 887. Motions for leave to file petitions for rehearing denied.

No. 406. MERCER ET AL. *v.* HEMMINGS ET AL., *ante*, p. 46. Motions of American Institute of Certified Public Accountants, Inc., Howard Johnson Co., Equitable Securities Corp., W. R. Grace & Co., and General Foods Corp., for leave to file briefs, as *amici curiae*, in support of petition for rehearing granted. Petition for rehearing denied. *David B. Isbell* for American Institute of Certified Public Accountants, Inc., *John T. Noonan* for Howard Johnson Co., *Marvin Schwartz* for Equitable Securities Corp., *Leo A. Larkin* for W. R. Grace & Co., and *Robert MacCrate* for General Foods Corp.

DECEMBER 11, 1967.

Dismissals Under Rule 60.

No. 624, Misc. STOTTS *v.* UNITED STATES. C. A. 10th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 769, Misc. RABURN *v.* NASH, JUDGE. Sup. Ct. N. M. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 78 N. M. 385, 431 P. 2d 874.

No. 796, Misc. MOORE *v.* CALIFORNIA ET AL. Super. Ct. Cal., County of Ventura. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *DeWitt F. Blase* for petitioner.

Miscellaneous Orders.

No. 359, Misc. SANCHEZ *v.* CALIFORNIA. Sup. Ct. Cal. Motion to defer consideration of petition for writ of certiorari granted. *Charles F. Prael* on the motion. Reported below: 65 Cal. 2d 814, 423 P. 2d 800.

No. 29, Orig. TEXAS ET AL. *v.* COLORADO. Motion for leave to file bill of complaint granted and the State of Colorado allowed sixty days to answer. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Waggoner Carr,* Attorney General, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *J. Arthur Sandlin, Vince Taylor* and *Roger Tyler,* Assistant Attorneys General, for the State of Texas, and *Boston E. Witt,* Attorney General, *F. Harlan Flint, Claud S. Mann* and *Paul L. Bloom,* Special Assistant Attorneys General, for the State of New Mexico, on the motion. *Duke W. Dunbar,* Attorney General of Colorado, *James D. Geissinger,* Assistant Attorney General, and *Raphael J. Moses, Glenn G. Saunders, John M. Dickson, Donald H. Hamburg* and *George A. Brown,* Special Assistant Attorneys General, for defendant in opposition. Former *Solicitor General Marshall* and *Solicitor General Griswold* filed memoranda for the United States. [For earlier order herein, see 387 U. S. 939.]

No. 70. ALITALIA-LINEE AEREE ITALIANE, S. P. A. *v.* LISI ET AL. C. A. 2d Cir. (Certiorari granted, *ante,* p. 926.) Motion of Arnold Holtzman for leave to file brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Stuart M. Speiser* on the motion. *Austin P. Magner* and *George N. Tompkins, Jr.,* for petitioner in opposition to the motion.

No. 773, Misc. WALTON *v.* NELSON, WARDEN;

No. 779, Misc. DEUEL *v.* GIRARD, YOUTH CAMP SUPERINTENDENT; and

No. 835, Misc. STEELE *v.* NELSON, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 32, Orig. MISSOURI *v.* NEBRASKA. Motion for leave to file bill of complaint granted and the State of Nebraska allowed sixty days to answer.

IT IS ORDERED that Honorable Gilbert H. Jertberg, Senior Judge for the United States Court of Appeals for the Ninth Circuit be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

Norman H. Anderson, Attorney General of Missouri, and *Brick P. Storts III* and *Howard L. McFadden,* Assistant Attorneys General, on the motion. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Howard H. Moldenhauer* and *Joseph R. Moore,* Special Assistant Attorneys General, for defendant in opposition.

No. 689, Misc. JACKOVICK *v.* RHAY, PENITENTIARY SUPERINTENDENT. D. C. E. D. Wash. Motion for leave to file petition for writ of certiorari and other relief denied.

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No. 227. Federal Power Commission *v.* Pan American Petroleum Corp. et al. C. A. 10th Cir. Motion for consecutive oral arguments denied. (See *ante,* p. 811, where consolidation ordered and certiorari granted in No. 60 et al.) Mr. Justice Marshall took no part in the consideration or decision of this motion. *Cecil N. Cook* and *Neal Powers, Jr.,* for respondent Cockrell et al., *Bruce R. Merrill* and *Thomas H. Burton* for respondent Continental Oil Co., and *Cecil E. Munn* for respondent General American Oil Co. of Texas on the motion. Reported below: 376 F. 2d 161.

No. 876. Harrison *v.* United States. C. A. D. C. Cir. (Certiorari granted, *ante,* p. 969.) Motion of petitioner for appointment of counsel granted. It is ordered that *Alfred V. J. Prather, Esquire,* of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 386, Misc. Sims *v.* Gardner, Secretary of Health, Education, and Welfare. C. A. 6th Cir. Motion to consolidate this case with *Hopkins* v. *Gardner, Secretary of Health, Education, and Welfare,* No. 276 (see *ante,* p. 811), denied. Mr. Justice Marshall took no part in the consideration or decision of this motion. *H. H. Gearinger* on the motion. Reported below: 378 F. 2d 70. [For earlier order herein, see *ante,* p. 804.]

No. 829, Misc. Ryan *v.* Florida. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

No. 659, Misc. Hill *v.* Wert. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (See also No. 384, *ante,* p. 329; No. 632, *ante,* p. 320; and No. 659, *ante,* p. 323.)

No. 637. CHAN KWAN CHUNG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari granted. *William H. Dempsey, Jr., Esquire,* a member of the Bar of this Court, is invited to appear and present oral argument, as *amicus curiae,* in support of the judgment below. *Abraham Lebenkoff* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 381 F. 2d 542.

No. 695. GREEN ET AL. *v.* COUNTY SCHOOL BOARD OF NEW KENT COUNTY ET AL. C. A. 4th Cir. Certiorari granted. *Jack Greenberg, James M. Nabrit III, S. W. Tucker* and *Henry L. Marsh III* for petitioners. *Frederick T. Gray* for respondents. Reported below: 382 F. 2d 338.

No. 566, Misc. SABBATH *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 380 F. 2d 108.

Certiorari Denied. (See also No. 675, *ante,* p. 331; No. 650, Misc., *ante,* p. 330; and No. 829, Misc., *supra.*)

No. 666. TRIWAY INVESTMENT CO. ET AL. *v.* OREGON, BY AND THROUGH ITS STATE HIGHWAY COMMISSION, ET AL. Sup. Ct. Ore. Certiorari denied. *Donald C. Walker* for petitioner Triway Investment Co., and petitioner *Reuben G. Lenske, pro se.* Reported below: 247 Ore. 253, 427 P. 2d 419.

No. 205. Ross *v.* Virginia. Sup. Ct. App. Va. Certiorari denied. *Roland D. Ealey* for petitioner. *Reno S. Harp III* for respondent.

No. 663. National Surety Corp. *v.* United States for the Use of Way Panama, S. A. C. A. 5th Cir. Certiorari denied. *Dayton G. Wiley* for petitioner. *Fred Much* for respondent. Reported below: 378 F. 2d 294.

No. 667. International Longshoremen's & Warehousemen's Union et al. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Norman Leonard* for petitioners. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 378 F. 2d 33.

No. 672. Chiodo et al. *v.* General Waterworks Corp. C. A. 10th Cir. Certiorari denied. *Calvin A. Behle, George W. Latimer, Keith E. Taylor* and *Adam M. Duncan* for petitioners. *Peter W. Billings* and *Peter Keber* for respondent. Reported below: 380 F. 2d 860.

No. 674. Thomas et al. *v.* Consolidation Coal Co. (Pocahontas Fuel Co. Division) et al. C. A. 4th Cir. Certiorari denied. *D. Grove Moler* for petitioners. *Harry G. Camper, Jr.*, for Consolidation Coal Co., and *Edward L. Carey, Harrison Combs* and *M. E. Boiarsky* for International Union, United Mine Workers of America, et al., respondents. Reported below: 380 F. 2d 69.

No. 676. Detroit & Toledo Shore Line Railroad Co. et al. *v.* Court of Common Pleas of Lucas County et al. Sup. Ct. Ohio. Certiorari denied. *John M. Curphey* for petitioners. *Charles H. Brady* for respondents. Reported below: 11 Ohio St. 2d 193, 228 N. E. 2d 313.

No. 677. TIGHE *v.* ROECKER ET AL. C. A. 5th Cir. Certiorari denied. *Bowman Stirling Tighe* for petitioner. Reported below: 379 F. 2d 400.

No. 681. FIDUCIARY COUNSEL, INC. *v.* WIRTZ, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied. *Carl L. Shipley* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander, Jack H. Weiner, Charles Donahue* and *George T. Avery* for respondent. Reported below: 127 U. S. App. D. C. 276, 383 F. 2d 203.

No. 684. J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 380 F. 2d 292.

No. 687. SCHREFFLER *v.* PRUDENTIAL INSURANCE CO. OF AMERICA. C. A. 5th Cir. Certiorari denied. *Thomas H. Anderson* for petitioner. *James A. Dixon* for respondent. Reported below: 376 F. 2d 397.

No. 692. BYRNE *v.* CHICAGO TITLE & TRUST CO. ET AL. C. A. 7th Cir. Certiorari denied. *Frank L. Paul* for respondent First National Bank of Chicago et al., *Frank A. Karaba, pro se,* and for respondent Hendricks, and *Thomas B. Gilmore* for respondent MacKinnon.

No. 696. ALPHA ENTERPRISES, INC. *v.* CITY OF HOUSTON ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. *Presley E. Werlein, Jr., Charles A. Easterling* and *F. Joseph Donohue* for petitioner. *Homer T. Bouldin* for respondents. Reported below: 411 S. W. 2d 417.

No. 697. TURNER ET AL., DBA ATLANTA'S PLAYBOY CLUB *v.* HMH PUBLISHING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *Henry M. Hatcher, Jr.*, for petitioners. *Milton I. Shadur, Abner J. Mikva, William H. Klein* and *R. Howard Goldsmith* for respondents. Reported below: 380 F. 2d 224.

No. 123. LYNN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harry Steiner* for petitioner. *Thomas P. Ford, Jr.*, for respondent.

No. 649. ADLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Daniel H. Greenberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 380 F. 2d 917.

No. 682. BOEDEKER *v.* ABRAMSON, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Robert F. Ritchie* for petitioner. *Philip I. Palmer* for Abramson, and *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Crombie J. D. Garrett* for the United States, respondents. Reported below: 379 F. 2d 741.

No. 387, Misc. COCKRELL ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Burton Marks* for petitioners. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Rose-Marie Gruenwald,* Deputy Attorney General, for respondent.

No. 690. CARABBIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *John F. Ray, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for the United States. Reported below: 381 F. 2d 133.

No. 685. UNGAR *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Morton Liftin* for petitioner. *John G. Bonomi* for respondent. Reported below: 26 App. Div. 2d 544, 282 N. Y. S. 2d 158.

No. 693. DECOSTA *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Eugene Gressman* for petitioner. *Eugene L. Girden, Knight Edwards* and *Roland R. Lagueux* for respondents. Reported below: 377 F. 2d 315.

No. 181, Misc. LEONTI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Irving Tenenbaum* for petitioner. *William Cahn* for respondent. Reported below: 18 N. Y. 2d 384, 222 N. E. 2d 591.

No. 366, Misc. ORR *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Isidore Dollinger* and *Daniel J. Sullivan* for respondent.

No. 607, Misc. WHITE *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 511, Misc. MANIGO *v.* NEW YORK CITY HOUSING AUTHORITY. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Nancy E. LeBlanc* for petitioner. *Harry Levy* and *Harold Weintraub* for respondent.

Nos. 414, Misc., and 422, Misc. JUVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome M. Feit* and *Marshall Tamor Golding* for the United States in both cases. Reported below: 378 F. 2d 433.

No. 559, Misc. TERLIKOWSKI *v.* UNITED STATES; and No. 716, Misc. SLAWEK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States in both cases. Reported below: 379 F. 2d 501.

No. 594, Misc. BROWN *v.* CIRCUIT COURT OF ST. LOUIS COUNTY. Sup. Ct. Mo. Certiorari denied.

No. 600, Misc. WULAND *v.* FREY. C. A. 7th Cir. Certiorari denied.

No. 630, Misc. SIMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States.

No. 634, Misc. O'MALLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Robert H. Reiter* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome Feit* and *Robert G. Maysack* for the United States. Reported below: 378 F. 2d 401.

No. 651, Misc. MATLACK *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 49 N. J. 491, 231 A. 2d 369.

No. 647, Misc. CAUEFIELD ET AL. *v.* FIDELITY & CASUALTY CO. OF NEW YORK ET AL. C. A. 5th Cir. Certiorari denied. *J. D. DeBlieux* for petitioners. Reported below: 378 F. 2d 876.

No. 648, Misc. THOMPSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 656, Misc. HENRY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 658, Misc. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 67 Cal. 2d 105, 429 P. 2d 586.

No. 660, Misc. FEIST *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 665, Misc. SAWYER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 674, Misc. MODESTO *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied. *Russell E. Parsons* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 66 Cal. 2d 695, 427 P. 2d 788.

No. 637, Misc. BASKIN *v.* BASKIN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted.

No. 667, Misc. ANDREWS *v.* FIELD, MENS COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 675, Misc. HILL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 679, Misc. DUMAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 676, Misc. BANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 687, Misc. FALGOUT *v.* TRUJILLO, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 251, Misc. BANKS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Albert Datz* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

Rehearing Denied.

No. 564. GEAREY *v.* UNITED STATES, *ante,* p. 959;

No. 168, Misc. ELLIOTT, ADMINISTRATOR *v.* SIERZENGA ET AL., *ante,* p. 910;

No. 452, Misc. GILDAY *v.* MASSACHUSETTS, *ante,* p. 916; and

No. 577, Misc. JONES *v.* REAGAN, GOVERNOR OF CALIFORNIA, ET AL., *ante,* p. 894. Petitions for rehearing denied.

No. 271, Misc. SMITH *v.* KANSAS, *ante,* p. 871. Motion for leave to file petition for rehearing denied.

DECEMBER 12, 1967.

Dismissal Under Rule 60.

No. 774. UNITED STATES *v.* BECKHAM. Ct. Cl. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge* and *Robert V. Zener* for the United States. *Paul R. Harmel* for respondent. Reported below: 179 Ct. Cl. 539, 375 F. 2d 782.

DECEMBER 18, 1967.

Miscellaneous Orders.

No. 21. ZSCHERNIG ET AL. *v.* MILLER, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Ore. Motion of appellants for leave to file supplemental memorandum after argument granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Peter A. Schwabe, Jr.,* on the motion. [For earlier order herein, see 386 U. S. 1030.]

No. 237. BIGGERS *v.* TENNESSEE. Sup. Ct. Tenn. (Certiorari granted, 388 U. S. 909.) Motion of respondent for leave to file supplemental brief granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

No. 618. FORTNIGHTLY CORP. *v.* UNITED ARTISTS TELEVISION, INC. C. A. 2d Cir. (Certiorari granted, *ante,* p. 969.) Motion of the United States, as *amicus curiae,* to postpone oral argument denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Solicitor General Griswold* on the motion. *Louis Nizer, Gerald Meyer* and *Lawrence S. Lesser* for respondent in opposition.

No. 405. POWELL *v.* TEXAS. Appeal from County Court at Law No. 1, Travis County. (Probable jurisdiction noted, *ante,* p. 810.) Motions of American Civil Liberties Union et al. and Philadelphia Diagnostic & Relocation Services Corp. for leave to file briefs, as *amici curiae,* granted. *Peter Barton Hutt* on the motion for American Civil Liberties Union et al.

No. 305. SECURITIES AND EXCHANGE COMMISSION *v.* NEW ENGLAND ELECTRIC SYSTEM ET AL. C. A. 1st Cir. (Certiorari granted, *ante,* p. 816.) Motion of Municipal Electric Association of Massachusetts for leave to file a brief, as *amicus curiae,* granted. Its motion to present oral argument, as *amicus curiae,* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter. *George Spiegel* and *Worth Rowley* on the motions. *John R. Quarles, Richard B. Dunn, Richard W. Southgate* and *John J. Glessner III* for respondents in opposition.

No. 478. AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 ET AL. *v.* LOGAN VALLEY PLAZA, INC., ET AL. Sup. Ct. Pa. (Certiorari granted, *ante,* p. 911.) Motion of Retail Clerks International Association, AFL–CIO, for leave to file a brief, as *amicus curiae,* granted. *S. G. Lippman* and *Tim Bornstein* on the motion. *Robert Lewis* for respondents in opposition.

No. 155, Misc. IN RE DISBARMENT OF QUIMBY. It is hereby ordered, in light of the order of the United States District Court for the District of Columbia, dated November 13, 1967, that Charles H. Quimby III file by January 17, 1968, a further response to the order to show cause heretofore entered by this Court on May 29, 1967 [see 387 U. S. 927].

No. 728, Misc. OYLER *v.* PENNSYLVANIA. Motion for leave to file petition for writ of mandamus denied.

No. 1038, Misc. In re Disbarment of O'Malley. It is ordered that William R. O'Malley of Wickliffe, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 261, Misc. Homer *v.* Beto, Corrections Director, et al. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (See also No. 216, *ante,* p. 425; No. 678, *ante,* p. 404; and No. 14, Misc., *ante,* p. 413.)

No. 247. Puyallup Tribe *v.* Department of Game of Washington et al.; and

No. 319. Kautz et al. *v.* Department of Game of Washington et al. Sup. Ct. Wash. Motion to dispense with printing petition in No. 319 granted. Certiorari granted. Cases are consolidated and a total of two hours is allotted for oral argument. Mr. Justice Marshall took no part in the consideration or decision of this motion and these petitions. *Arthur Knodel* for petitioner in No. 247. *John J. O'Connell,* Attorney General of Washington, *Joseph L. Coniff,* Special Assistant Attorney General, and *Mike Johnson* and *Ed Mackie,* Assistant Attorneys General, for respondents in both cases. Briefs *amicus curiae,* in support of the petitions in both cases, were filed by *Allan G. Shepard,* Attorney General of Idaho, and *T. J. Jones III,* Special Counsel, for Idaho Fish & Game Department, and *Solicitor General Griswold* for the United States. Briefs *amicus curiae,* in support of the petition in No. 247, were filed by *Robert Y. Thornton,* Attorney General, for the State of Oregon, and *Arthur Lazarus, Jr.,* for Association on American Indian Affairs, Inc. Reported below: No. 247, 70 Wash. 2d 245, 422 P. 2d 754; No. 319, 70 Wash. 2d 275, 422 P. 2d 771. [For earlier order herein, see *ante,* p. 806.]

Certiorari Denied. (See also No. 246, *ante,* p. 428; No. 670, *ante,* p. 427; and No. 708, Misc., *ante,* p. 427.)

No. 658. TYREE *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Marshall I. Nurenberg* for petitioner. *John F. Dolan* for respondent. Reported below: 382 F. 2d 524.

No. 698. FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA *v.* STRAND. C. A. 8th Cir. Certiorari denied. *William Craig, Paul D. Wilson* and *Jack E. Horsley* for petitioner. *James R. Stoner* for respondent. Reported below: 382 F. 2d 224.

No. 706. SMITH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *Bernard H. Cantor* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

No. 708. SHINALL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *Robert L. Carter, Barbara A. Morris, Jack H. Young* and *Raymond A. Brown* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *Guy N. Rogers,* Assistant Attorney General, for respondent. Reported below: 199 So. 2d 251.

No. 709. PLISCO *v.* UNION RAILROAD CO. C. A. 3d Cir. Certiorari denied. *James E. McLaughlin* and *John J. Hickton* for petitioner. Reported below: 379 F. 2d 15.

No. 713. BREAULT ET AL. *v.* FEIGENHOLTZ, EXECUTOR, ET AL. C. A. 7th Cir. Certiorari denied. *John J. Yowell, G. Kent Yowell* and *Philip B. Kurland* for petitioners. *Hirsch E. Soble* for respondent Feigenholtz. Reported below: 380 F. 2d 90.

No. 712. MALINOU, PUBLIC ADMINISTRATOR *v.* CAIRNS ET AL. Sup. Ct. R. I. Certiorari denied. *Martin Malinou*, petitioner, *pro se*. *Henry M. Swan* for respondents. Reported below: —— R. I. ——, 231 A. 2d 785.

No. 714. JONES LUMBER CO. *v.* DEL NORTE COUNTY. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Jonathan U. Newman* for petitioner. *Louis R. Baker* for respondent. Reported below: 251 Cal. App. 2d 645, 59 Cal. Rptr. 644.

No. 715. KAHN *v.* UNITED STATES; and

No. 718. SACHS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* for petitioner in No. 715. *Don H. Reuben, Lawrence Gunnels, Alan M. Dershowitz* and *William T. Kirby* for petitioners in No. 718. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States in both cases. Reported below: 381 F. 2d 824.

No. 716. JACKSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Richard P. Jahn* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Rogovin* for respondent. Reported below: 380 F. 2d 661.

No. 723. MANSFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* and *Max Reinstein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 381 F. 2d 961.

No. 730. BACSKO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Frederick Klaessig* for petitioner. Reported below: 50 N. J. 49, 231 A. 2d 811.

No. 548. SNOHOMISH COUNTY *v.* SEATTLE DISPOSAL CO. ET AL. Sup. Ct. Wash. Certiorari denied. *John Wilson* for petitioner. *Orville H. Mills* for respondents. *Solicitor General Griswold* filed a memorandum for the United States, by invitation of the Court, *ante*, p. 925. Reported below: 70 Wash. 2d 668, 425 P. 2d 22.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE WHITE concurs, dissenting.

The Supreme Court of Washington held in a 6–3 decision that the State lacks power to apply a local zoning ordinance for control of garbage dumps and sewage landfills to respondent Seattle Disposal Company, a non-Indian lessee of two parcels of land within the Tulalip Tribes Reservation.

One section of the Act relevant to our problem—now codified as 28 U. S. C. § 1360—gave civil jurisdiction over Indians and Indian lands to California, Minnesota, Nebraska, Oregon, and Wisconsin [1] with the following proviso:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute . . . ."

The federal question arises in the following manner. By Public Law 280, c. 505, § 7, 67 Stat. 590, Congress

[1] These five States—and Alaska by later amendment—are the only States specifically given jurisdiction without the need for state legislation. Washington obtained jurisdiction by way of the "any other State" clause in § 7 of the Act, quoted in part in text below, which was not codified.

gave consent "to any other State not having jurisdiction with respect to criminal offenses or civil causes of action [involving Indians and Indian lands], or with respect to both, *as provided for in this Act*,[2] to assume jurisdiction . . . by affirmative legislative action . . . ." (Italics added.)

Pursuant to Public Law 280, the State of Washington undertook to assume jurisdiction over Indians and their lands upon their consent. In the state enactment, jurisdiction was limited by Wash. Rev. Code § 37.12.060, which incorporated verbatim the restrictions quoted above that are found in 28 U. S. C. § 1360.

In the case before us the Washington Supreme Court held that the Tulalip Tribes' lands in issue were either held in trust or subject to a restraint against alienation imposed by 25 U. S. C. §§ 403a and 403a–2, which limit the length of leases made by the Tulalip Tribes and require approval of the Secretary of the Interior of leasing practices.[3] The majority then held that under both 28 U. S. C. § 1360 and the state statute incorporating language from § 1360, zoning regulations were "encumbrances" on Indian lands because they limit the use thereof. One Washington state court decision, our decision in *Squire* v. *Capoeman*, 351 U. S. 1, and opinions of the Department of Interior were relied on by the majority in formulating this definition of "encumbrance."

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[2] The italicized language is a reference to the proviso in § 1360, quoted in this opinion.

[3] One of the arguments petitioner makes is that that parcel of Indian land not held in trust by the Government was not, as held below, subject to restraint against alienation. I have found little merit in this contention, since the Tulalip Tribes purchased the parcel in question after 1956, with the effect that 25 U. S. C. § 403a–2 is controlling and indirectly restricts the power to make leases.

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The majority also held that since 25 U. S. C. §§ 403a, 403b, and 415 authorized the Tulalip Tribes to make leases, their non-Indian lessees were entitled to the benefit of the restriction on state jurisdiction. Otherwise, reasoned the majority, the State would be interfering with the Indians' right to make leases, and the State could not accomplish indirectly—by subjecting respondent Disposal Company to zoning regulations—what it was prohibited from doing by acting directly on the Indians. For this proposition one South Dakota decision and our decision in *United States* v. *Allegheny County,* 322 U. S. 174, were relied on.

The dissent was of the view that a zoning regulation directed at protecting public health and welfare was not an "encumbrance" as that term is used in § 1360 and the state equivalent. In that view, Indian activities which directly injure the citizenry of the State at large, or reasonably appear to do so, should be subjected to state control. Otherwise, state programs to check stagnation of water supply and pollution of the air would be frustrated. The dissent thought that the term "encumbrance" in § 1360 should be construed in conjunction with 25 U. S. C. § 231, which provides, *inter alia,* that the Secretary of the Interior permit state agents to enter on Indian lands to enforce sanitation and quarantine regulations. Finally, said the dissent, the non-Indian lessee could not rely on any immunity from state regulations which the Indians themselves might enjoy. *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342, where a non-Indian lessee of mineral rights on Indian lands was held not immune from state taxation of gross production, was cited.

A substantial federal question is presented. It is apparent from a reading of the opinion of the Washington Supreme Court that the State has assumed juris-

diction over Indians as extensive as permitted by Public Law 280. There is nothing to suggest that when the State copied the limitation on state jurisdiction found in § 1360 into the state statute, the State intended to impose greater restrictions than § 1360 imposes. The questions presented, then, are whether zoning controls over burning or dumping of garbage constitute an "encumbrance" on Indian lands under § 1360 and whether a non-Indian lessee can enjoy any immunity from state zoning that the Indians enjoy.

Subjecting respondent lessee to state regulations on garbage and sewage disposal seems no more a burden or encumbrance on the Indians' right to lease their lands than the state tax on oil production of the non-Indian lessee in *Oklahoma Tax Comm'n* was a burden or encumbrance on the rights of the Indians there involved to make oil leases. In *Oklahoma Tax Comm'n* we said: "These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land." 336 U. S., at 353. The same proposition, in a different context, may be true here, since all petitioner demands is that respondent Disposal Company obtain a refuse disposal use permit before commencing operations.

There may also be merit to the dissent's view that the immunity of Indian lands to a state "encumbrance" cannot frustrate state programs to check air and water pollution. The States should, perhaps, be able to prevent sewage dumped on Indians' lands from draining into streams which flow into water supplies outside Indian lands. The same is true of smoke from garbage burned on Indian lands that contributes to smog over nearby cities. State controls in this area may be permissible by virtue of 25 U. S. C. § 231, whether or not

they are achieved under the label "zoning" rather than "sanitation regulations."

The Solicitor General, in a memorandum expressing the views of the United States, asserts that the decision below was correct because it accorded with an administrative regulation of the Department of the Interior. This regulation [4] provides that no local zoning ordinance shall be applicable to land leased from an Indian tribe where, as here, the land is held in trust by or is subjected to a restriction against alienation by the United States. The Supreme Court of Washington did not rely on this regulation,[5] and whether it is valid or unduly restricts the state authority conferred by Public Law 280 and 25 U. S. C. § 231 is an important federal question this Court should decide. I would grant certiorari.

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[4] 25 CFR § 1.4 provides:

"(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

"(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. . . ."

[5] The court below did rely on a 1942 decision of the Department of the Interior, 58 I. D. 52, holding that a Minnesota county could not apply a nonresidential zoning ordinance to certain Indian lands. But this decision was rendered before Public Law 280 was enacted.

No. 725. JULIAN, TRUSTEE IN BANKRUPTCY *v.* FARMERS BANK OF CLINTON, MISSOURI. C. A. 8th Cir. Certiorari denied. *Phineas Rosenberg* for petitioner. *Dick H. Woods* for respondent. Reported below: 383 F. 2d 314.

No. 727. EALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Milton Lorenzo McGhee* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 719. SCHERER *v.* BRENNAN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 379 F. 2d 609.

No. 720. HENRY *v.* DELHI-TAYLOR OIL CORP. Sup. Ct. Tex. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *B. R. Chastain* for petitioner. *William H. Keys* for respondent. Reported below: 416 S. W. 2d 390.

No. 721. DUGAS *v.* NIPPON YUSEN KAISHA. C. A. 5th Cir. Motion of American Trial Lawyers Association for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *H. Alva Brumfield* for petitioner. *Arthur J. Mandell* for American Trial Lawyers Association, as *amicus curiae,* in support of the petition. Reported below: 378 F. 2d 271.

No. 461, Misc. MILONE *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *Solicitor General Griswold* for respondent.

No. 722. NOYD *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL. C. A. 10th Cir. Application for stay presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. *Marvin M. Karpatkin, Ernest Angell, Melvin L. Wulf, Norman Dorsen* and *Rhoda H. Karpatkin* for petitioner. *Solicitor General Griswold* for respondents. *Tolbert H. McCarroll* for American Humanist Association, as *amicus curiae*, in support of the petition. Reported below: 378 F. 2d 538.

No. 724. MIRRA *v.* UNITED STATES. C. A. 2d Cir. Motion to dispense with printing opinion of the District Court in petition granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Jerome Lewis* and *Abraham Glasser* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 379 F. 2d 782.

No. 728. GRANEY ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *William H. Deck* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Robert H. Solomon* for the United States. Reported below: 377 F. 2d 992.

No. 330, Misc. HARRIS *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Andrea Sheridan Ordin,* Deputy Attorney General, for respondent.

No. 202, Misc. CURRIE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Isidore Dollinger* and *Daniel J. Sullivan* for respondent.

No. 373, Misc. ALLEN *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Derald E. Granberg* and *William D. Stein,* Deputy Attorneys General, for respondent.

No. 523, Misc. YOUNG *v.* CROCKER, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 530, Misc. BLAKEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Jerome M. Feit* and *Robert G. Maysack* for the United States.

No. 558, Misc. WINHOVEN ET AL. *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Bradley A. Stoutt,* Deputy Attorney General, for respondent.

No. 612, Misc. GREEN, AKA YOUNGBLOOD *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 70 Wash. 2d 955, 425 P. 2d 913.

No. 673, Misc. TAYLOR *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 381 F. 2d 717.

No. 680, Misc. ALVIDREZ *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 684, Misc. NADOLSKI *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 685, Misc. PATSKANICK ET VIR *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board.

No. 688, Misc. GARZA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 693, Misc. ROSE *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 706, Misc. BUTTERFIELD *v.* GAZELLE. C. A. D. C. Cir. Certiorari denied.

No. 707, Misc. HAGGARD *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 382 F. 2d 288.

No. 710, Misc. WILKERSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 712, Misc. ROWLAND *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 738, Misc. KAUFFMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Richard S. Lowe* for respondent.

No. 751, Misc. SINGLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harvey Erickson* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 381 F. 2d 1.

No. 58, Misc. VELA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore, Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent.

THE CHIEF JUSTICE, with whom MR. JUSTICE DOUGLAS joins, dissenting.

This case is another further extension of *Spencer* v. *Texas,* 385 U. S. 554, in which the error is more egregious. For the reasons stated in my concurring opinion in *Burgett* v. *Texas, ante,* p. 116, I would grant the petition for writ of certiorari.

Rehearing Denied.

No. 152. LAHITTE ET VIR *v.* ACME REFRIGERATION SUPPLIES, INC., ET AL., *ante,* p. 821;

No. 535. MARCHESE ET AL. *v.* UNITED STATES, *ante,* p. 930;

No. 402, Misc. HACKATHORN *v.* DECKER, SHERIFF, *ante,* p. 940;

No. 418, Misc. COHEN *v.* NEWSWEEK, INC., *ante,* p. 878;

No. 572, Misc. RAYMOND *v.* TOFFANY, COMMISSIONER OF MOTOR VEHICLES OF NEW YORK, *ante,* p. 26; and

No. 606, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante,* p. 964. Petitions for rehearing denied.

No. 41. UMANS *v.* UNITED STATES, *ante,* p. 80; and

No. 401. MORA ET AL. *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL., *ante,* p. 934. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

JANUARY 15, 1968.

Miscellaneous Orders.

No. 33, Orig. ARKANSAS *v.* TENNESSEE. Motion for leave to file bill of complaint granted and the State of Tennessee allowed sixty days to answer.

IT IS ORDERED that the Honorable Gunnar H. Nordbye, Senior Judge of the United States District Court for the District of Minnesota, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

Joe Purcell, Attorney General of Arkansas, and *Don Langston,* Assistant Attorney General, on the motion. *George F. McCanless,* Attorney General of Tennessee, *C. Hayes Cooney,* Assistant Attorney General, and *Harry W. Laughlin, James L. Garthright, Jr.,* and *J. Martin Regan,* Special Counsel, for defendant.

No. 60. Federal Power Commission *v.* Sunray DX Oil Co. et al.;

No. 61. United Gas Improvement Co. *v.* Sunray DX Oil Co. et al.;

No. 62. Brooklyn Union Gas Co. et al. *v.* Federal Power Commission et al.;

No. 80. Federal Power Commission *v.* Standard Oil Co. of Texas, a Division of Chevron Oil Co., et al.; and

No. 97. United Gas Improvement Co. *v.* Sunray DX Oil Co. C. A. 10th Cir. (Certiorari granted, *ante,* p. 811.) Motion of Pan American Petroleum Corp. for leave to file a brief, as *amicus curiae,* granted. Mr. Justice Marshall took no part in the consideration or decision of this motion. *J. P. Hammond, Harold H. Young, Jr., Wm. J. Grove, Carroll L. Gilliam* and *Phillip R. Ehrenkranz* on the motion.

No. 70. Alitalia-Linee Aeree Italiane, S. p. A. *v.* Lisi et al. C. A. 2d Cir. Motions of United Kingdom of Great Britain and Northern Ireland, Republic of Italy, and Canada for leave to file briefs, as *amici curiae,* granted. Mr. Justice Marshall took no part in the consideration or decision of these motions. *Edwin Longcope* for United Kingdom of Great Britain and Northern Ireland, *Alfred C. Clapp* for Republic of Italy, and *Robert MacCrate* for Canada, on the motions. [For earlier orders herein, see *ante,* pp. 926, 1000.]

No. 73. In re Ruffalo. C. A. 6th Cir. (Certiorari granted, *ante,* p. 815.) Motion of Ohio State Bar Association and Mahoning County Bar Association for leave to argue orally granted. Mr. Justice Fortas took no part in the consideration or decision of this motion. *Thomas V. Koykka* on the motion.

No. 127. READING CO. *v.* BROWN, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 3d Cir. (Certiorari granted, *ante,* p. 895.) Motion of the United States to remove case from summary calendar granted and a total of one and one-half hours allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Solicitor General Griswold* for the United States on the motion.

No. 149. DYKE ET AL. *v.* TAYLOR IMPLEMENT MANUFACTURING CO., INC. Sup. Ct. Tenn. (Certiorari granted, *ante,* p. 815.) Motion of petitioners to remove case from summary calendar denied. *Bernard Kleiman* on the motion.

No. 154. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. (Certiorari granted, *ante,* p. 968.) Motions of petitioner for leave to proceed further herein *in forma pauperis* and to dispense with printing appendix granted. *F. Lee Bailey* on the motions.

No. 178. NATIONAL LABOR RELATIONS BOARD *v.* UNITED INSURANCE CO. OF AMERICA ET AL.; and

No. 179. INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. (Certiorari granted, *ante,* p. 815.) Motion of American Retail Federation for leave to file a brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Shayle P. Fox* on the motion.

No. 405. POWELL *v.* TEXAS. Appeal from County Court at Law No. 1, Travis County. (Certiorari granted, *ante,* p. 810.) Motion of National Council on Alcoholism for leave to file a brief, as *amicus curiae,* granted. *Paul O'Dwyer* on the motion.

No. 232. UNITED STATES *v.* O'BRIEN; and

No. 233. O'BRIEN *v.* UNITED STATES. C. A. 1st Cir. (Certiorari granted, *ante,* p. 814.) Motion to remove cases from summary calendar granted and a total of one and one-half hours allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Marvin Karpatkin, Howard S. Whiteside* and *Melvin L. Wulf* on the motion for respondent in No. 232 and for petitioner in No. 233.

No. 363. UNITED STATES ET AL. *v.* SOUTHWESTERN CABLE CO. ET AL.; and

No. 428. MIDWEST TELEVISION, INC., ET AL. *v.* SOUTHWESTERN CABLE CO. ET AL. (Certiorari granted, *ante,* p. 911.) C. A. 9th Cir. Motion of All-Channel Television Society for leave to file a brief, as *amicus curiae,* granted. Motion of San Diego Telecasters, Inc., to substitute Western Telecasters, Inc., as a party petitioner in No. 428 granted. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Michael Finkelstein* on the motion for All-Channel Television Society. *Arthur Scheiner* for Southwestern Cable Co., and *Robert L. Heald* for Mission Cable TV, Inc., et al. in opposition. *Ernest W. Jennes, Charles A. Miller, Arthur H. Schroeder* and *John P. Bankson, Jr.,* on the motion for San Diego Telecasters, Inc.

No. 508. LEVY, ADMINISTRATRIX *v.* LOUISIANA THROUGH THE CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS ET AL. Appeal from Sup. Ct. La. (Probable jurisdiction noted, *ante,* p. 925.) Motion of NAACP Legal Defense & Educational Fund, Inc., et al. for leave to file a brief, as *amici curiae,* granted. *Harry D. Krause, Jack Greenberg* and *Leroy D. Clark* on the motion.

No. 465. EDWARDS *v.* PACIFIC FRUIT EXPRESS CO. C. A. 9th Cir. (Certiorari granted, *ante*, p. 912.) Motion of Brotherhood of Railway Carmen of America, et al., for leave to file a brief, as *amici curiae*, granted. *Clifton Hildebrand* on the motion for Brotherhood of Railway Carmen of America.

No. 479, Misc. PACK *v.* BUNNELL, STATE HOSPITAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari denied. *John J. O'Connell*, Attorney General of Washington, and *Paul J. Murphy* and *Stephen C. Way*, Assistant Attorneys General, for respondent.

No. 840, Misc. HARRIS *v.* PATE, WARDEN;

No. 845, Misc. KNOWLES *v.* LEE, COMMISSIONER, STATE BOARD OF CORRECTIONS, ET AL.;

No. 862, Misc. DAVIS *v.* FLORIDA; and

No. 898, Misc. VAN NEWKIRK *v.* DISTRICT ATTORNEY, RICHMOND COUNTY, NEW YORK. Motions for leave to file petitions for writs of habeas corpus denied.

No. 698, Misc. MARCELIN *v.* NEW YORK;

No. 737, Misc. AUSTIN *v.* NELSON, WARDEN, ET AL.; and

No. 745, Misc. MCCRAY *v.* ARRAJ, CHIEF JUDGE, U. S. DISTRICT COURT. Motions for leave to file petitions for writs of mandamus denied.

No. 718. SACHS ET AL. *v.* UNITED STATES, *ante*, p. 1015. The United States is requested to file, within thirty days, a response to petition for rehearing. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 478. Amalgamated Food Employees Union Local 590 et al. *v.* Logan Valley Plaza, Inc., et al. Sup. Ct. Pa. (Certiorari granted, *ante,* p. 911.) Motions of American Federation of Labor & Congress of Industrial Organizations, and American Civil Liberties Union for leave to file briefs, as *amici curiae,* granted. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* on the motion for American Federation of Labor & Congress of Industrial Organizations. *Marvin M. Karpatkin* and *Melvin L. Wulf* on the motion for American Civil Liberties Union. *Robert Lewis* for respondents in opposition.

Probable Jurisdiction Noted.

No. 660. Board of Education of Central School District No. 1 et al. *v.* Allen, Commissioner of Education of New York, et al. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *Marvin E. Pollock* and *Alan H. Levine* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for Allen, and *Porter R. Chandler* and *Richard E. Nolan* for Rock et al., appellees. Reported below: 20 N. Y. 2d 109, 228 N. E. 2d 791.

No. 742. Maryland et al. *v.* Wirtz, Secretary of Labor, et al. Appeal from D. C. Md. Probable jurisdiction noted. Mr. Justice Marshall took no part in the consideration or decision of this case. *Francis B. Burch,* Attorney General of Maryland, *Thomas A. Garland, Loring E. Hawes* and *Alan M. Wilner,* Assistant Attorneys General; *Crawford C. Martin,* Attorney General of Texas, *George Cowden* and *Hawthorne Phillips,* Assistant Attorneys General, *A. J. Carubbi, Jr.,* and *Cecil Morgan* for appellants. *Solicitor General Griswold* for appellees. Reported below: 269 F. Supp. 826.

No. 797. AMERICAN COMMERCIAL LINES, INC., ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.;

No. 804. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.;

No. 808. AMERICAN WATERWAYS OPERATORS, INC. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.; and

No. 809. INTERSTATE COMMERCE COMMISSION *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. Appeal from D. C. W. D. Ky. Probable jurisdiction noted. Cases are consolidated and two hours allotted for oral argument.

T. Randolph Buck, Robert E. Webb, J. Raymond Clark and *Harry C. Ames, Jr.,* for appellants in No. 797; *Peter T. Beardsley, Bryce Rea, Jr.,* and *Thomas M. Knebel* for appellants in No. 804; *A. Alvis Layne* and *Robert L. Wright* for appellant in No. 808; and *Robert W. Ginnane, Fritz R. Kahn* and *Leonard S. Goodman* for appellant in No. 809.

Stanfield Johnson, Elbert R. Leigh, James H. McGlothlin, James A. Bistline, Thormund A. Miller, William M. Maloney, Harry J. Breithaupt, Donal L. Turkal, Carl Helmetag, Jr., Joseph E. Stopher and *R. Lee Blackwell* for appellee railroads.

Solicitor General Griswold filed a memorandum for the United States in all four cases.

Reported below: 268 F. Supp. 71.

No. 813. SHAPIRO, COMMISSIONER OF WELFARE OF THE STATE OF CONNECTICUT *v.* THOMPSON. Appeal from D. C. Conn. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Harold M. Mulvey,* Attorney General of Connecticut, and *Francis J. MacGregor,* Assistant Attorney General, for appellant. *Thomas C. Lynch,* Attorney General, and *Elizabeth Palmer,* Deputy Attorney General, for the State of California, as *amicus curiae,* in support of appellant. Reported below: 270 F. Supp. 331.

No. 755. First Agricultural National Bank of Berkshire County *v.* State Tax Commission. Appeal from Sup. Jud. Ct. Mass. Motion of Colorado Bankers Association for leave to file a brief, as *amicus curiae,* granted. Probable jurisdiction noted. *John P. Weitzel* for appellant. *James Lawrence White* on the motion. Reported below: 353 Mass. 172, 229 N. E. 2d 245.

Certiorari Granted. (See also No. 130, *ante,* p. 575; No. 400, *ante,* p. 577; No. 480, *ante,* p. 568; and No. 825, *ante,* p. 581.)

No. 174. Lee et al. *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari granted. *Edward R. Kirkland* for petitioners. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent. Reported below: 191 So. 2d 84.

No. 517. St. Amant *v.* Thompson. Sup. Ct. La. Certiorari granted. *Moses C. Scharff* for petitioner. Reported below: 250 La. 405, 196 So. 2d 255.

No. 760. Commissioner of Internal Revenue *v.* Gordon et ux. C. A. 2d Cir. Certiorari granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin, Harris Weinstein, Gilbert E. Andrews* and *Martin T. Goldblum* for petitioner. *Harry R. Horrow* for respondents. Reported below: 382 F. 2d 499.

No. 740. Monroe et al. *v.* Board of Commissioners of the City of Jackson et al. C. A. 6th Cir. Certiorari granted and case set for oral argument immediately following No. 695, *ante,* p. 1003. *Jack Greenberg, James M. Nabrit III, Avon N. Williams, Jr.,* and *Z. Alexander Looby* for petitioners. *Russell Rice, Sr.,* for respondents. Reported below: 380 F. 2d 955.

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No. 733. PERMA LIFE MUFFLERS, INC., ET AL. *v.* INTERNATIONAL PARTS CORP. ET AL. C. A. 7th Cir. Certiorari granted. *Raymond R. Dickey* and *Bernard Gordon* for petitioners. *John T. Chadwell, Glenn W. McGee* and *David Silbert* for respondents. Reported below: 376 F. 2d 692.

No. 796. NATIONAL LABOR RELATIONS BOARD *v.* INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 379 F. 2d 702.

No. 781. BAAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted and case set for oral argument immediately following No. 760, *supra*. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Harry R. Horrow* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 382 F. 2d 485.

No. 805. RANEY ET AL. *v.* BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari granted and case set for oral argument immediately following No. 740, *supra*. *Jack Greenberg* and *Michael Meltsner* for petitioners. *Robert V. Light* and *Herschel H. Friday* for respondents. Reported below: 381 F. 2d 252.

No. 678, Misc. BUMPER *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *T. W. Bruton,* Attorney General of North Carolina, and *Harry W. McGalliard,* Deputy Attorney General, for respondent. Reported below: 270 N. C. 521, 155 S. E. 2d 173.

No. 802. PEYTON, PENITENTIARY SUPERINTENDENT *v.* ROWE ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument immediately following No. 71, *ante,* p. 896. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for petitioner. *Thomas S. Currier* for respondents. Reported below: 383 F. 2d 709.

No. 344, Misc. WITHERSPOON *v.* ILLINOIS ET AL. Sup. Ct. Ill. Motion of Illinois Division, American Civil Liberties Union, for leave to file a brief, as *amicus curiae,* granted. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket, limited to the following question: Whether the operation of the Illinois statute providing that the State could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprived the petitioner of a jury which fairly represented a cross section of the community, and assured the State of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Elmer Gertz on the motion for Illinois Division, American Civil Liberties Union. *Albert E. Jenner, Jr., Thomas P. Sullivan* and *John C. Tucker* for petitioner. *William G. Clark,* Attorney General, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for the State of Illinois, and *John J. Stamos, Elmer C. Kissane* and *Joel M. Flaum,* for Woods, respondents. Reported below: 36 Ill. 2d 471, 224 N. E. 2d 259.

Certiorari Denied. (See also No. 730, Misc., *ante,* p. 568; and No. 479, Misc., *supra.*)

No. 518. STEPPS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Jack Holt, Jr.,* for petitioner. *Joe Purcell,* Attorney General of Arkansas, for respondent. Reported below: 242 Ark. 587, 414 S. W. 2d 620.

No. 668. AMPLEX OF MARYLAND, INC. *v.* OUTBOARD MARINE CORP. C. A. 4th Cir. Certiorari denied. *Harold Buchman* for petitioner. *Roberts B. Owen* and *Nestor S. Foley* for respondent. *Solicitor General Griswold, Assistant Attorney General Turner* and *Robert S. Rifkind* for the United States, as *amicus curiae,* in support of the petition. Reported below: 380 F. 2d 112.

No. 680. BREGMAN, VOCCO & CONN, INC. *v.* DONALDSON PUBLISHING CO. C. A. 2d Cir. Certiorari denied. *Frederick W. R. Pride, Leo P. Larkin, Jr., Max Chopnick, Jerome E. Malino* and *Theodore R. Jackson* for petitioner. *Lewis A. Dreyer* for respondent. Reported below: 375 F. 2d 639.

No. 731. CROUSE *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. *Clay S. Crouse,* petitioner, *pro se. Solicitor General Griswold, Assistant Attorney General Weisl* and *Kathryn H. Baldwin* for respondent.

No. 734. GLADNEY *v.* REVIEW COMMITTEE. C. A. 5th Cir. Certiorari denied. *Paul K. Kirkpatrick, Jr.,* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 380 F. 2d 929.

No. 744. WALKER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Lawrence J. Simmons* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 179 Ct. Cl. 723.

No. 735. KLEIN ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Bert A. Bandstra* for petitioners. *Solicitor General Griswold* and *Acting Assistant Attorney General Williams* for the United States. Reported below: 179 Ct. Cl. 910, 375 F. 2d 825.

No. 739. METLOX MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Frank Simpson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 378 F. 2d 728.

No. 741. DOYLE ET AL. *v.* BRENNER, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. *Albert L. Jacobs* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 127 U. S. App. D. C. 283, 383 F. 2d 210.

No. 743. BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Victor Van Bourg* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 382 F. 2d 593.

No. 745. ROBERGE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Rogovin, Gilbert E. Andrews* and *Loring W. Post* for respondent. Reported below: 377 F. 2d 558.

No. 746. GLIMCO *v.* PARSONS, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 747. McLane et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Thaddeus Rojek* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Gilbert E. Andrews* for respondent. Reported below: 377 F. 2d 557.

No. 751. Kohler et al. *v.* Washington. Super. Ct. Wash., County of King and/or Sup. Ct. Wash. Certiorari denied. *Clarence W. Pierce* and *Michael R. Alfieri* for petitioners. Reported below: 70 Wash. 2d 599, 424 P. 2d 656.

No. 753. Birns *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. *Jack G. Day* for petitioner. *John T. Corrigan, Harvey R. Monck* and *Charles W. Fleming* for respondent.

No. 758. Gates *v.* P. F. Collier, Inc. C. A. 9th Cir. Certiorari denied. *Wilbur K. Watkins, Jr.*, for petitioner. *Peter Megargee Brown* for respondent. Reported below: 378 F. 2d 888.

No. 761. International Atlas Services, Inc., a Division of Atlas Corp., formerly International Aircraft Services, Inc. *v.* Twentieth Century Aircraft Co. et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. *John D. Gray* for petitioner. *Leonard H. Monroe* for respondents. Reported below: 251 Cal. App. 2d 434, 59 Cal. Rptr. 495.

No. 763. Housing Authority of the City of Los Angeles *v.* Holtzendorff et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Jack E. Hildreth* and *Richard R. Rogan* for petitioner. *Herman F. Selvin* for respondents. Reported below: 250 Cal. App. 2d 596, 58 Cal. Rptr. 886.

No. 762. Lowe *v.* Monk, Administrator, et al. C. A. 5th Cir. Certiorari denied. *Charles E. Muskett* for petitioner. Reported below: 379 F. 2d 555.

No. 767. Sanders et al. *v.* Erreca et al. C. A. 9th Cir. Certiorari denied. *Hyman Goldman* for petitioners. *Harry S. Fenton, R. B. Pegram* and *Joseph A. Montoya* for respondents. Reported below: 377 F. 2d 960.

No. 769. Skyline Homes, Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Larry S. Davidow* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Leonard M. Wagman* for respondent. Reported below: 381 F. 2d 706.

No. 770. Amerada Petroleum Corp. *v.* Marshall. C. A. 5th Cir. Certiorari denied. *Joseph W. Morris* and *Cecil E. Munn* for petitioner. Reported below: 381 F. 2d 661.

No. 771. Cameron *v.* Hauck. C. A. 5th Cir. Certiorari denied. *John D. Cofer, Hume Cofer* and *Luther E. Jones* for petitioner. Reported below: 383 F. 2d 966.

No. 772. International Telephone & Telegraph Corp. *v.* National Labor Relations Board et al.; and

No. 773. Professional Employees of I. T. T. Federal Laboratories et al. *v.* McCulloch et al. C. A. 3d Cir. Certiorari denied. *Thomas L. Morrissey* for petitioner in No. 772, and *Merritt T. Viscardi* for petitioners in No. 773. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondents National Labor Relations Board et al., and *Sidney Reitman* for respondent Local 400, International Union of Electrical, Radio & Machine Workers of America, AFL–CIO, in both cases. Reported below: 382 F. 2d 366, 374.

No. 775. CHEMICAL CLEANING, INC., ET AL. *v.* DOW CHEMICAL CO. C. A. 5th Cir. Certiorari denied. *M. Ted Raptes* for petitioners. *Charles J. Merriam* for respondent. Reported below: 379 F. 2d 294.

No. 777. BILLINGSLEY *v.* MACKAY. C. A. 5th Cir. Certiorari denied. *William D. Neary* for petitioner. *Philip I. Palmer* for respondent. Reported below: 382 F. 2d 290.

No. 780. LOFFLAND BROTHERS CO. *v.* ROBERTS ET AL. C. A. 5th Cir. Certiorari denied. *Robert B. Acomb, Jr.*, for petitioner. Reported below: 386 F. 2d 540.

No. 782. INTERNATIONAL CABLE T. V. CORP. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. *Dirks B. Foster* for petitioner. *Mary Moran Pajalich* and *J. Thomasan Phelps* for Public Utilities Commission of California, and *William E. Mussman* for Pacific Telephone & Telegraph Co., respondents.

No. 783. CITY OF HAMMOND *v.* MCLEAN, TRUSTEE, ET AL.; and

No. 784. WOODMAR REALTY CO. *v.* MCLEAN, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *G. Edward McHie* for petitioner in No. 783, and *Owen W. Crumpacker, Harold Abrahamson* and *Milton K. Joseph* for petitioner in No. 784. *Porter R. Draper* for respondents in both cases. Reported below: 384 F. 2d 776.

No. 786. BARNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Harris A. Gilbert* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 383 F. 2d 287.

No. 789. KRIEGER-RAGSDALE & Co., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Harry P. Dees* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *George B. Driesen* for respondent. Reported below: 379 F. 2d 517.

No. 792. CRAWFORD ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Alan Y. Cole, Isaac N. Groner, Jerry D. Anker* and *Earl C. Berger* for petitioners. *Solicitor General Griswold* for the United States. *Harry N. Rosenfield* for National Education Association, as *amicus curiae*, in support of the petition. Reported below: 179 Ct. Cl. 128, 376 F. 2d 266.

No. 794. CARGILL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Edward Bennett Williams* and *Robert L. Weinberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 381 F. 2d 849.

No. 799. BOARD OF PARDONS AND PAROLES OF TEXAS ET AL. *v.* BLACK. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore, Howard M. Fender, Robert E. Owen, Gilbert J. Pena* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for petitioners. Reported below: 382 F. 2d 758.

No. 811. LANNOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 381 F. 2d 858.

No. 785. STUMO *v.* UNITED AIR LINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. *George F. Archer* for petitioner. *Stuart Bernstein* for respondents United Air Lines, Inc., et al. Reported below: 382 F. 2d 780.

No. 803. UNITED STATES GYPSUM CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO. C. A. 5th Cir. Certiorari denied. *Harold D. Burgess* for petitioner. *Bernard Kleiman, Elliot Bredhoff, Michael H. Gottesman, George H. Cohen* and *Jerome A. Cooper* for respondent. Reported below: 384 F. 2d 38.

No. 806. PAGE ET AL. *v.* PAN AMERICAN PETROLEUM CORP. ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. *Sam J. Lee* for petitioners. Reported below: 412 S. W. 2d 797.

No. 814. PHILLIPS PETROLEUM CO. *v.* BRENNER, COMMISSIONER OF PATENTS, ET AL. C. A. D. C. Cir. Certiorari denied. *Sidney Neuman, Robert L. Austin* and *Paul L. Gomory* for petitioner. *Solicitor General Griswold* for Brenner, *Harry L. Kirkpatrick* for Goodrich-Gulf Chemicals, Inc., and *John D. Upham, L. Bruce Stevens, Jr.,* and *Ellsworth H. Mosher* for Monsanto Co., respondents. Reported below: 127 U. S. App. D. C. 319, 383 F. 2d 514.

No. 819. WEINBERG *v.* BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR ET AL. Sup. Ct. Ala. Certiorari denied. *M. Roland Nachman, Jr.,* for respondents. Reported below: 281 Ala. 200, 201 So. 2d 38.

No. 821. BELL ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Robert J. Woolsey* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 380 F. 2d 682.

No. 810. ROGERS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Bernard Cohen* for petitioner.

No. 822. JEMISON *v.* BROWN ET AL. Sup. Ct. Ala. Certiorari denied. *Charles S. Conley* for petitioner. *W. McLean Pitts* for respondents. Reported below: 281 Ala. 281, 202 So. 2d 44.

No. 827. FLORIDICE CO., INC., ET AL. *v.* WIRTZ, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *Charles W. Pittman* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 381 F. 2d 613.

No. 829. AETNA CASUALTY & SURETY CO. ET AL. *v.* OSBORNE-MCMILLAN ELEVATOR CO., INC. Sup. Ct. Wis. Certiorari denied. *Donald N. Clausen* for petitioners. *Peter Dorsey* and *William A. Whitlock* for respondent. Reported below: 35 Wis. 2d 517, 151 N. W. 2d 113.

No. 843. RUTHERFORD ET AL. *v.* AMERICAN MEDICAL ASSOCIATION, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Frank O. Walther* for petitioners. *Don H. Reuben* and *Lawrence Gunnels* for respondents American Medical Association, Inc., et al., *James J. Costello* for respondents Board of Trustees of the University of Illinois et al., and *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent employees of the United States. Reported below: 379 F. 2d 641.

No. 837. AIKEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James J. Hanrahan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 383 F. 2d 437.

No. 828. BROTHMAN ET AL. *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. *Ernest Goodman* and *Chester J. Antieau* for petitioners. *Thomas F. Shea* for respondent.

No. 838. SMOLEN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *Melvin L. Wulf* for petitioner. Reported below: See 4 Conn. Cir. 385, 232 A. 2d 339.

No. 847. MARCELLO ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Jack Wasserman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Loring W. Post* for respondent. Reported below: 380 F. 2d 499.

No. 848. GAILLARD ET UX. *v.* FIELD, ADMINISTRATRIX. C. A. 10th Cir. Certiorari denied. *William Walter Hentz, Jr.*, for petitioners. *George L. Verity* for respondent. Reported below: 381 F. 2d 25.

No. 852. COX, ADMINISTRATRIX *v.* NORTHWEST AIRLINES, INC.; and

No. 853. NORTHWEST AIRLINES, INC. *v.* COX, ADMINISTRATRIX. C. A. 7th Cir. Certiorari denied. *James A. Dooley* for petitioner in No. 852 and for respondent in No. 853. *Owen Rall* for petitioner in No. 853 and for respondent in No. 852. Reported below: 379 F. 2d 893.

No. 854. FEINBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jay Leo Rothschild* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for the United States. Reported below: 383 F. 2d 60.

No. 873. COSTA *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *F. Lee Bailey* for petitioner. Reported below: 155 Conn. 304, 232 A. 2d 913.

No. 865. E. W. Buschman Co. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Edward Statland* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 380 F. 2d 255.

No. 870. State Farm Mutual Automobile Insurance Co. *v.* Walker et al. C. A. 7th Cir. Certiorari denied. *Frederick P. Bamberger* for petitioner. Reported below: 382 F. 2d 548.

No. 881. Shue *v.* United States. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 385 F. 2d 416.

No. 7. Purolator Products, Inc. *v.* Federal Trade Commission. C. A. 7th Cir. Motion to amend petition for writ of certiorari granted. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this motion and petition. *Sumner S. Kittelle* and *Allan Trumbull* for petitioner. *James McI. Henderson* and *Charles C. Moore, Jr.*, for respondent. *Solicitor General Marshall* and *Assistant Attorney General Turner* for the United States, as *amicus curiae*. Reported below: 352 F. 2d 874.

No. 147. K-91, Inc. *v.* Gershwin Publishing Corp. et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Richard F. Wolfson* for petitioner. *Simon H. Rifkind* and *Jay H. Topkis* for respondents. *Solicitor General Griswold, Assistant Attorney General Turner* and *Howard E. Shapiro* for the United States, as *amicus curiae,* in opposition to the petition. Reported below: 372 F. 2d 1.

MR. JUSTICE MARSHALL took no part in the consideration or decision of the petitions in the following cases (beginning with No. 155 on this page and extending through No. 883 on p. 1047):

No. 155. BAGLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Stanton E. Tefft* for petitioner. *Solicitor General Marshall, Assistant Attorney General Rogovin, Gilbert E. Andrews* and *Edward Lee Rogers* for the United States. Reported below: 374 F. 2d 204.

No. 387. ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION *v.* NORDWICK, EXECUTOR, ET AL. C. A. 9th Cir. Certiorari denied. *Marvin J. Sonosky, Frederick Bernays Wiener* and *John M. Schiltz* for petitioners. *Otis L. Packwood* for respondents. *Solicitor General Griswold* filed a memorandum for the United States, by invitation of the Court, *ante,* p. 806. Reported below: 378 F. 2d 426.

No. 732. BRAMLETT ET AL. *v.* LEBER, GOVERNOR OF THE CANAL ZONE AND PRESIDENT, PANAMA CANAL CO. C. A. 5th Cir. Certiorari denied. *Thomas Morton Gittings, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl, Alan S. Rosenthal* and *Richard S. Salzman* for respondent. Reported below: 383 F. 2d 110.

No. 737. CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Louis L. Rochmes* for petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Williams, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 179 Ct. Cl. 473.

No. 752. ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF ALABAMA, ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, *Gordon Madison,* Assistant Attorney Gen-

eral, *Reid B. Barnes,* Special Assistant Attorney General, and *William G. Somerville, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Doar* and *David L. Rose* for respondent. Reported below: 385 F. 2d 804.

No. 812. TRANSOCEAN AIR LINES, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jeptha P. Marchant, pro se, Joseph A. Perkins, pro se,* and *John H. Gunn* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 386 F. 2d 79.

No. 883. ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN. C. A. D. C. Cir. Certiorari denied. *Francis M. Shea, Richard T. Conway* and *James R. Wolfe* for petitioners. *Milton Kramer, Martin W. Fingerhut* and *John H. Haley, Jr.,* for respondent. Reported below: 127 U. S. App. D. C. 298, 383 F. 2d 225.

No. 756. WEGER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *A. L. Wirin, Fred Okrand* and *Laurence Sperber* for petitioner. Reported below: 251 Cal. App. 2d 584, 59 Cal. Rptr. 661.

No. 736. ZERINGUE ET AL. *v.* TEXAS & PACIFIC RAILWAY CO. ET AL. Sup. Ct. La. Motion to dispense with printing petition granted. Certiorari denied. *Albert Russell Roberts* for petitioners. Reported below: 250 La. 749, 199 So. 2d 183.

No. 807. SEAY *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Albert Sidney Johnston, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 380 F. 2d 358.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted in the following cases (beginning with No. 594 and extending through No. 795 on this page):

No. 594. LEVIN *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Frank B. Cahn II* and *Paul A. Dorf* for petitioner. *Francis B. Burch,* Attorney General of Maryland, and *Fred Oken,* Assistant Attorney General, for respondent.

No. 710. GREEN *v.* BOARD OF ELECTIONS OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *Leonard B. Boudin, Victor Rabinowitz* and *David Rein* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for respondents. Reported below: 380 F. 2d 445.

No. 717. INMAN *v.* CITY OF MIAMI ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Tobias Simon* and *Alfred I. Hopkins* for petitioner. *S. R. Sterbenz* for respondent City of Miami. Reported below: 197 So. 2d 50.

No. 795. KAUFMAN *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Morton Liftin* for petitioner. *John G. Bonomi* and *Michael Franck* for respondent. Reported below: See 25 App. Div. 2d 48, 266 N. Y. S. 2d 958.

No. 776. NATIONAL COMMITTEE OF GIBRAN *v.* SHIYA. C. A. 2d Cir. Motion of Republic of Lebanon for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *William H. Dempsey* and *James F. Sams* for petitioner. *Joseph M. Cunningham* for respondent. *Lenox G. Cooper* and *Worth Rowley* for Republic of Lebanon, as *amicus curiae,* in support of the petition. Reported below: 381 F. 2d 602.

No. 498. Colorado River Water Conservation District et al. *v.* Four Counties Water Users Association et al. Sup. Ct. Colo. Certiorari denied. Mr. Justice Black and Mr. Justice Fortas are of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Kenneth Balcomb, Edward Mulhall, Jr.,* and *Robert L. McCarty* for petitioners. *Clarence L. Ireland* for Four Counties Water Users Association, and *J. Fred Schneider* for Matheson, respondents. *Solicitor General Griswold* filed a memorandum for the United States, by invitation of the Court, *ante,* p. 924. Reported below: —— Colo. ——, ——, 425 P. 2d 259, 262.

No. 766. Miller *v.* Shell Oil Co. C. A. 10th Cir. Motion to strike respondent's brief in opposition denied. Certiorari denied. *William R. Federici* for respondent.

No. 851. Pacific Scientific Co. *v.* Aerotec Industries of California et al. C. A. 9th Cir. Motion of Strategic Industries Association for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Francis R. Kirkham, Francis N. Marshall* and *C. Russell Hale* for petitioner. *Casimir A. Miketta* for respondents. Reported below: 381 F. 2d 795.

No. 860. Levy *v.* Resor, Secretary of the Army, et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Charles Morgan, Jr., Anthony G. Amsterdam, Alan H. Levine* and *Melvin L. Wulf* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondents. Reported below: 384 F. 2d 689.

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No. 788. McCollough *v.* Travelers Insurance Co. et al. C. A. 5th Cir. Motion of American Trial Lawyers Association, Admiralty Section, for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Ward Stephenson* for petitioner. *Louis V. Nelson* for respondents. *Paul S. Edelman* for American Trial Lawyers Association, Admiralty Section, as *amicus curiae,* in support of the petition. Reported below: 382 F. 2d 344.

No. 102, Misc. Ochoa *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Aidan R. Gough* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Michael Buzzell,* Deputy Attorneys General, for respondent.

No. 215, Misc. Phillips *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, and *Guy N. Rogers,* Assistant Attorney General, for respondent. Reported below: 197 So. 2d 241.

No. 220, Misc. Killmon *v.* Oregon. Sup. Ct. Ore. Certiorari denied. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: 246 Ore. 465, 425 P. 2d 746.

No. 267, Misc. Cantrell *v.* California Adult Authority et al. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Stanton Price,* Deputy Attorney General, for respondents.

No. 421, Misc. Perales et al. *v.* Housing Authority of Tulare County. Super. Ct. Cal., County of Tulare. Certiorari denied. *William M. Lewers* for petitioners.

No. 791. SOBELL *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to file copies of petitioner's Appendix in the Court of Appeals granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Marshall Perlin, William M. Kunstler, Arthur Kinoy, Benjamin O. Dreyfus* and *Vern Countryman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert L. Keuch* for the United States. Reported below: 378 F. 2d 674.

No. 877. NICHOLSON *v.* CALBECK, DEPUTY COMMISSIONER, ET AL. C. A. 5th Cir. Motion of American Trial Lawyers Association, Admiralty Section, for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Arthur J. Mandell* for petitioner. *Solicitor General Griswold* for Calbeck, and *Carl G. Stearns* for Crown Stevedoring Co. et al., respondents. *Paul S. Edelman* for American Trial Lawyers Association, Admiralty Section, as *amicus curiae,* in support of the petition. Reported below: 385 F. 2d 221.

No. 309, Misc. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 378 F. 2d 61.

No. 589, Misc. CUEVAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *S. E. Gramer* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Edward J. Horowitz,* Deputy Attorney General, for respondent. Reported below: 250 Cal. App. 2d 901, 59 Cal. Rptr. 6.

No. 415, Misc. CONSTAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent.

No. 432, Misc. BARNES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Robert Matthews,* Attorney General of Kentucky, and *John B. Browning,* Assistant Attorney General, for respondent.

No. 462, Misc. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Gene Richie* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore* and *Howard M. Fender,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent. Reported below: 414 S. W. 2d 181.

No. 487, Misc. CROW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for respondent.

No. 491, Misc. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George B. Newitt* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 445.

No. 617, Misc. FITZSIMMONS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John E. Archibold* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 453, Misc. PHILLIPS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark* and *Walter S. Turner,* Assistant Attorneys General, for respondent.

No. 514, Misc. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 597, Misc. MALRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States.

No. 611, Misc. HOLMES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Robert Matthews,* Attorney General of Kentucky, and *David Murrell,* Assistant Attorney General, for respondent.

No. 620, Misc. EPPS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 625, Misc. LUSK *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Acting Solicitor General Spritzer* for the United States.

No. 666, Misc. PERRY *v.* UNITED STATES;

No. 669, Misc. MCGUIRE *v.* UNITED STATES; and

No. 670, Misc. BLUMNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Anthony F. Marra* for petitioner in No. 666, Misc., *Jerome J. Londin* for petitioner in No. 669, Misc., and *Eugene P. Souther* for petitioner in No. 670, Misc. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in all three cases. Reported below: 381 F. 2d 306.

No. 622, Misc. HACKWORTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill, Sr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 380 F. 2d 19.

No. 681, Misc. WALDRON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Robert F. Nix,* Assistant Attorneys General, for respondent. Reported below: 380 F. 2d 94.

No. 682, Misc. STUART ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States.

No. 686, Misc. IACAPONI *v.* NEW AMSTERDAM CASUALTY CO. C. A. 3d Cir. Certiorari denied. *Harry Alan Sherman* for petitioner. *David J. Armstrong* for respondent. Reported below: 379 F. 2d 311.

No. 691, Misc. MOSER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 381 F. 2d 363.

No. 696, Misc. PILLIS *v.* PILLIS. C. A. 4th Cir. Certiorari denied.

No. 699, Misc. MELENDEZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 718, Misc. DAVIS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Leo Kaplowitz* for respondent. Reported below: 50 N. J. 16, 231 A. 2d 793.

No. 701, Misc. AYERS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 702, Misc. ROGERS *v.* STANLEY, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 703, Misc. MALBRUE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 704, Misc. JORDAN *v.* KAMP ET AL. C. A. 9th Cir. Certiorari denied.

No. 715, Misc. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John M. Hollis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 383 F. 2d 781.

No. 719, Misc. GIULIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Thomas F. Campion* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 383 F. 2d 30.

No. 720, Misc. DISPENZA *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 724, Misc. SUMRALL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Emmett Colvin, Jr.*, for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 382 F. 2d 651.

No. 725, Misc. SWILLING *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 249 S. C. 541, 155 S. E. 2d 607.

No. 721, Misc. LANA *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 726, Misc. KOTKA *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 277 Minn. 331, 152 N. W. 2d 445.

No. 729, Misc. BOGART *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Peter D. Bogart* for petitioner.

No. 732, Misc. MESA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 251 Cal. App. 2d 575, 59 Cal. Rptr. 607.

No. 733, Misc. ALBINI *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 734, Misc. PRATHER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 1 Md. App. 478, 231 A. 2d 726.

No. 735, Misc. SWITZER *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 736, Misc. TURNER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* for respondent.

No. 739, Misc. LITTLE *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 748, Misc. ASHBY *v.* HAUGH, WARDEN. Sup. Ct. Iowa. Certiorari denied. *Luther L. Hill, Jr.,* for petitioner. *Richard C. Turner,* Attorney General of Iowa, and *David A. Elderkin* and *William A. Claerhout,* Assistant Attorneys General, for respondent. Reported below: —— Iowa ——, 152 N. W. 2d 228.

No. 743, Misc. SMITH *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 750, Misc. MAXWELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Harry C. Batchelder, Jr.*, for petitioners. Reported below: 383 F. 2d 437.

No. 752, Misc. MICHAEL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Thomas Kerrigan* and *Robert P. Samoian*, Deputy Attorneys General, for respondent.

No. 755, Misc. LUCAS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 763, Misc. HURLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 774, Misc. MCDANIEL *v.* THYER MANUFACTURING CORP. ET AL. Sup. Ct. Miss. Certiorari denied. *Dixon L. Pyles* for petitioner. *John F. Bodle* and *Bruce C. Aultman* for respondents. Reported below: 200 So. 2d 447.

No. 789, Misc. WARNER ET UX. *v.* UNITED STATES. C. C. P. A. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 54 C. C. P. A. (Pat.) 1628, 379 F. 2d 1011.

No. 802, Misc. STEINPREIS ET UX. *v.* SHOOK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 377 F. 2d 282.

No. 760, Misc. CROOK *v.* CRAVEN, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 761, Misc. WILLIAMS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 248, Misc. MURRAY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

MR. JUSTICE DOUGLAS, dissenting.

For the reasons stated in my dissenting opinion in *Whitney* v. *Florida, ante,* p. 138, and particularly in light of the increasing burden on federal courts caused by habeas corpus petitions of state prisoners who are unable to obtain hearings in state courts, I would grant the writ of certiorari and remand the case to Florida with directions to give petitioner an evidentiary hearing.

No. 434, Misc. JACOBS *v.* BROUGH, WARDEN. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *William W. Greenhalgh* for petitioner. *Francis B. Burch,* Attorney General of Maryland, and *Edward F. Borgerding,* Assistant Attorney General, for respondent. Reported below: 375 F. 2d 606.

No. 468, Misc. VANDERHORST *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner. *Isidore Dollinger* and *Daniel J. Sullivan* for respondent.

No. 705, Misc. WILLIAMS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

Rehearing Denied.

No. 1217, October Term, 1966. INTERNATIONAL RAILWAYS OF CENTRAL AMERICA *v.* UNITED FRUIT CO., 387 U. S. 921. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1324, Misc., October Term, 1966. OPPENHEIM ET AL. *v.* STERLING ET AL., 386 U. S. 1011, 388 U. S. 925. Motion for leave to file second petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL., *ante*, p. 155. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 344. MENSIK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 912;

No. 441. WALLACE *v.* BRENNER, COMMISSIONER OF PATENTS, *ante*, p. 898;

No. 590. GRAY *v.* PORTER, *ante*, p. 972;

No. 674. THOMAS ET AL. *v.* CONSOLIDATION COAL CO. (POCAHONTAS FUEL CO. DIVISION) ET AL., *ante*, p. 1004;

No. 58, Misc. VELA *v.* BETO, CORRECTIONS DIRECTOR, *ante*, p. 1025;

No. 124, Misc. WHITE *v.* FLORIDA, *ante*, p. 996;

No. 199, Misc. DESIMONE *v.* UNITED STATES, *ante*, p. 960;

No. 408, Misc. STEPPE *v.* FLORIDA, *ante*, p. 966; and

No. 474, Misc. ADAMS *v.* CAMERON, HOSPITAL SUPERINTENDENT, *ante*, p. 993. Petitions for rehearing denied.

No. 503, Misc. NIELSEN *v.* NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, *ante*, p. 154;

No. 516, Misc. HENRY *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 993;

No. 552, Misc. FAIR *v.* DEKLE, SUPERVISOR OF ELECTIONS, *ante*, p. 994;

No. 555, Misc. NOLAND *v.* UNITED STATES, *ante*, p. 945;

No. 613, Misc. HOLLAND *v.* PENNSYLVANIA, *ante*, p. 994;

No. 630, Misc. SIMPSON *v.* UNITED STATES, *ante*, p. 1008;

No. 660, Misc. FEIST *v.* CALIFORNIA ET AL., *ante*, p. 1009; and

No. 688, Misc. GARZA *v.* CALIFORNIA, *ante*, p. 1024. Petitions for rehearing denied.

No. 194. LOCAL UNION NO. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL., *ante*, p. 837; and

No. 659. EAGAR ET AL. *v.* MAGMA COPPER CO., *ante*, p. 323. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 523. HACKIN *v.* ARIZONA ET AL., *ante*, p. 143. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 614. R. A. HOLMAN & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION, *ante*, p. 991. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

No. 244, Misc. PETTETT *v.* UNITED STATES, *ante,* p. 917. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 266, Misc. NELSON *v.* OREGON, *ante,* p. 964; and No. 303, Misc. ABEL *v.* BETO, CORRECTIONS DIRECTOR, *ante,* p. 872. Motions for leave to file petitions for rehearing denied.

FEDERAL RULES OF APPELLATE PROCEDURE

Effective July 1, 1968

The Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on December 4, 1967, pursuant to 18 U. S. C. §§ 3771 and 3772 and 28 U. S. C. §§ 2072 and 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date and resubmitted on January 15, 1968, *post,* p. 1064.

These rules became effective July 1, 1968, as provided in paragraph 2 of the Court's order, *post,* p. 1065.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

JANUARY 15, 1968.

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to resubmit to the Congress the attached Rules of Appellate Procedure and the attached amendments to the Rules of Civil Procedure for the United States District Courts and to the Rules of Criminal Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to Title 28, U. S. C., Secs. 2072 and 2075 and Title 18, U. S. C., Secs. 3771 and 3772. These rules and amendments have been previously reported to the Congress with my letter of December 4, 1967.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, U. S. C., Sec. 331.

Respectfully,

(Signed) EARL WARREN
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, DECEMBER 4, 1967

ORDERED:

1. That the following rules, to be known as the Federal Rules of Appellate Procedure, be, and they hereby are, prescribed, pursuant to sections 3771 and 3772 of Title 18, United States Code, and sections 2072 and 2075 of Title 28, United States Code, to govern the procedure in appeals to United States courts of appeals from the United States district courts, in the review by United States courts of appeals of decisions of the Tax Court of the United States, in proceedings in the United States courts of appeals for the review or enforcement of orders of administrative agencies, boards, commissions and officers, and in applications for writs or other relief which a United States court of appeals or judge thereof is competent to give:

[See *infra,* pp. 1069–1120.]

2. That the foregoing rules shall take effect on July 1, 1968, and shall govern all proceedings in appeals and petitions for review or enforcement of orders thereafter brought and in all such proceedings then pending, except to the extent that in the opinion of the court of appeals their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

3. That Rules 6, 9, 41, 77 and 81 of the Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended, effective July 1, 1968, as hereinafter set forth:

[See *infra,* pp. 1122–1124.]

4. That the chapter heading "IX. APPEALS," all of Rules 72, 73, 74, 75 and 76 of the Rules of Civil Procedure for the United States District Courts, and Form 27

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annexed to the said rules, be, and they hereby are, abrogated, effective July 1, 1968.

5. That Rules 45, 49, 56 and 57 of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended, effective July 1, 1968, as hereinafter set forth:

[See *infra,* pp. 1126–1127.]

6. That the chapter heading "VIII. APPEAL," all of Rules 37 and 39, and subdivisions (b) and (c) of Rule 38, of the Rules of Criminal Procedure for the United States District Courts, and Forms 26 and 27 annexed to the said rules, be, and they hereby are, abrogated, effective July 1, 1968.

7. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing new rules and amendments to and abrogation of existing rules, in accordance with the provisions of Title 18, U. S. C., § 3771, and Title 28, U. S. C., §§ 2072 and 2075.

FEDERAL RULES OF APPELLATE PROCEDURE

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FEDERAL RULES OF APPELLATE PROCEDURE

Title I. Applicability of Rules

Rule 1. Scope of rules.

(*a*) *Scope of rules.*—These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.

(*b*) *Rules not to affect jurisdiction.*—These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Rule 2. Suspension of rules.

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26 (b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Title II. Appeals From Judgments and Orders of District Courts

Rule 3. Appeal as of right—How taken.

(*a*) *Filing the notice of appeal.*—An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Ap-

peals by permission under 28 U. S. C. § 1292 (b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(*b*) *Joint or consolidated appeals.*—If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(*c*) *Content of the notice of appeal.*—The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(*d*) *Service of the notice of appeal.*—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U. S. C. § 2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

Rule 4. Appeal as of right—When taken.

(*a*) *Appeals in civil cases.*—In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by 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: (1) granting or denying a motion for judgment under Rule 50 (b); (2) granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the

expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(*b*) *Appeals in criminal cases.*—In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Rule 5. Appeals by permission under 28 U. S. C. § 1292 (b).

(*a*) *Petition for permission to appeal.*—An appeal from an interlocutory order containing the statement

prescribed by 28 U. S. C. § 1292 (b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

(*b*) *Content of petition; answer.*—The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

(*c*) *Form of papers; number of copies.*—All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(*d*) *Grant of permission; cost bond; filing of record.*—If permission to appeal is granted the appellant shall file a bond for costs as required by Rule 7, within 10 days after entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order granting permission to appeal. A notice of appeal need not be filed.

Rule 6. Appeals by allowance in bankruptcy proceedings.

(*a*) *Petition for allowance.*—Allowance of an appeal under section 24 of the Bankruptcy Act (11 U. S. C. § 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U. S. C. § 650, § 898) shall be sought by filing a petition for allowance with the clerk of the court of appeals within the time provided by Rule 4 (a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

(*b*) *Content of petition; answer.*—The petition shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and of any opinion or memorandum relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The petition and answer shall be submitted without oral argument unless otherwise ordered.

(*c*) *Form of papers; number of copies.*—All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(*d*) *Allowance of the appeal; cost bond; filing of record.*—If the appeal is allowed the appellant shall file a bond for costs as required by Rule 7, within 10 days of the entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order allowing the appeal. A notice of appeal need not be filed.

Rule 7. Bond for costs on appeal in civil cases.

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8 (b) apply to a surety upon a bond given pursuant to this rule.

Rule 8. Stay or injunction pending appeal.

(*a*) *Stay must ordinarily be sought in the first instance in district court; motion for stay in court of appeals.*— Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action.

The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

(*b*) *Stay may be conditioned upon giving of bond; proceedings against sureties.*—Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

(*c*) *Stays in criminal cases.*—Stays in criminal cases shall be had in accordance with the provisions of Rule 38 (a) of the Federal Rules of Criminal Procedure.

Rule 9. Release in criminal cases.

(*a*) *Appeals from orders respecting release entered prior to a judgment of conviction.*—An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the

district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.

(*b*) *Release pending appeal from a judgment of conviction.*—Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

Rule 10. The record on appeal.

(*a*) *Composition of the record on appeal.*—The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(*b*) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.*—Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a tran-

script of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(*c*) *Statement of the evidence or proceedings when no report was made or when the transcript is unavailable.*—If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(*d*) *Agreed statement as the record on appeal.*—In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms

to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

(*e*) *Correction or modification of the record.*—If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Rule 11. Transmission of the record.

(*a*) *Time for transmission; duty of appellant.*—The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10 (b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10 (b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(*b*) *Duty of clerk to transmit the record.*—When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

(*c*) *Temporary retention of record in district court for use in preparing appellate papers.*—Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12 (a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the

appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(*d*) *Extension of time for transmission of the record; reduction of time.*—The district court for cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(*e*) *Retention of the record in the district court by order of court.*—The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as

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the district court shall allow and copies of such parts as the parties may designate.

(*f*) *Stipulation of parties that parts of the record be retained in the district court.*—The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(*g*) *Record for preliminary hearing in the court of appeals.*—If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

Rule 12. Docketing the appeal; filing of the record.

(*a*) *Docketing the appeal.*—Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U. S. C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(*b*) *Filing of the record.*—Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 11 (c) and (e) by the clerk of the court of appeals following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(*c*) *Dismissal for failure of appellant to cause timely transmission or to docket appeal.*—If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within 14 days of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.

Title III. Review of Decisions of the Tax Court of the United States

Rule 13. Review of decisions of the Tax Court.

(*a*) *How obtained; time for filing notice of appeal.*—Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

(*b*) *Notice of appeal—How filed.*—The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(*c*) *Content of the notice of appeal; service of the notice; effect of filing and service of the notice.*—The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.

(*d*) *The record on appeal; transmission of the record; filing of the record.*—The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant

to the court of appeals to which such other appeal is taken.

Rule 14. Applicability of other rules to review of decisions of the Tax Court.

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4–9, Rules 15–20, and Rules 22 and 23 are not applicable.

Title IV. Review and Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers

Rule 15. Review or enforcement of agency orders—How obtained; intervention.

(*a*) *Petition for review of order; joint petition.*—Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part therof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(*b*) *Application for enforcement of order; answer; default; cross-application for enforcement.*—An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(*c*) *Service of petition or application.*—A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3 (d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(*d*) *Intervention.*—Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to

intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

Rule 16. The record on review or enforcement.

(*a*) *Composition of the record.*—The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

(*b*) *Omissions from or misstatements in the record.*—If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

Rule 17. Filing of the record.

(*a*) *Agency to file; time for filing; notice of filing.*—The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(*b*) *Filing—What constitutes.*—The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certi-

fied list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

Rule 18. Stay pending review.

Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the applicant had requested. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief

under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

Rule 19. Settlement of judgments enforcing orders.

When an opinion of the court is filed directing the entry of a judgment enforcing in whole or in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, he shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which he deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

Rule 20. Applicability of other rules to review or enforcement of agency orders.

All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3–14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

Title V. Extraordinary Writs

Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs.

(*a*) *Mandamus or prohibition to a judge or judges; petition for writ; service and filing.*—Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with

the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(*b*) *Denial; order directing answer.*—If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

(*c*) *Other extraordinary writs.*—Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(*d*) *Form of papers; number of copies.*—All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.

Title VI. Habeas Corpus; Proceedings in Forma Pauperis

Rule 22. Habeas corpus proceedings.

(*a*) *Application for the original writ.*—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(*b*) *Necessity of certificate of probable cause for appeal.*—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges

of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

Rule 23. Custody of prisoners in habeas corpus proceedings.

(*a*) *Transfer of custody pending review.*—Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(*b*) *Detention or release of prisoner pending review of decision failing to release.*—Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(*c*) *Release of prisoner pending review of decision ordering release.*—Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(*d*) *Modification of initial order respecting custody.*—An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken,

shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

Rule 24. Proceedings in forma pauperis.

(*a*) *Leave to proceed on appeal in forma pauperis from district court to court of appeals.*—A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit showing, in the detail prescribed by Form 4 of the Appendix of Forms, his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good

faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

(*b*) *Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings.*—A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the Tax Court of the United States) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of subdivision (a) of this rule.

(*c*) *Form of briefs, appendices and other papers.*—Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

Title VII. General Provisions

Rule 25. Filing and service.

(*a*) *Filing.*—Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of

mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(*b*) *Service of all papers required.*—Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(*c*) *Manner of service.*—Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(*d*) *Proof of service.*—Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Rule 26. Computation and extension of time.

(*a*) *Computation of time.*—In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded

in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

(*b*) *Enlargement of time.*—The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(*c*) *Additional time after service by mail.*—Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 27. Motions.

(*a*) *Content of motions; response; reply.*—Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based,

and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(*b*) *Determination of motions for procedural orders.*—Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 26 (b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(*c*) *Power of a single judge to entertain motions.*—In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(*d*) *Form of papers; number of copies.*—All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

Rule 28. Briefs.

(*a*) *Brief of the appellant.*—The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and

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other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

(*b*) *Brief of the appellee.*—The brief of the appellee shall conform to the requirements of subdivision (a)(1)–(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(*c*) *Reply brief.*—The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

(*d*) *References in briefs to parties.*—Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(*e*) *References in briefs to the record.*—References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule

30 (a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30 (c). If the record is reproduced in accordance with the provisions of Rule 30 (f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; *e. g.*, Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(*f*) *Reproduction of statutes, rules, regulations, etc.*— If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(*g*) *Length of briefs.*—Except by permission of the court, principal briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. And except by permission of the court, reply briefs shall not exceed 25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying.

(*h*) *Briefs in cases involving cross appeals.*—If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(*i*) *Briefs in cases involving multiple appellants or appellees.*—In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

Rule 29. Brief of an amicus curiae.

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

Rule 30. Appendix to the briefs.

(*a*) *Duty of appellant to prepare and file; content of appendix; time for filing; number of copies.*—The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record

are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix within 40 days of the date on which the record is filed. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(*b*) *Determination of contents of appendix; cost of producing.*—The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included

in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

(c) *Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used.*—If the appellant shall so elect, or if the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. Notice of the election by the appellant to defer preparation of the appendix shall be filed and served by him within 10 days after the date on which the record is filed. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 31 (a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 32 (a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(*d*) *Arrangement of the appendix.*—At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(*e*) *Reproduction of exhibits.*—Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

(*f*) *Hearing of appeals on the original record without the necessity of an appendix.*—A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

Rule 31. Filing and service of briefs.

(*a*) *Time for serving and filing briefs.*—The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief

of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument.

(*b*) *Number of copies to be filed and served.*—Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(*c*) *Consequence of failure to file briefs.*—If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

Rule 32. Form of briefs, the appendix and other papers.

(*a*) *Form of briefs and the appendix.*—Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent

documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12 (a)); (3) the nature of the proceeding in the court (*e. g.,* Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (*e. g.,* Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(*b*) *Form of other papers.*—Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

Rule 33. Prehearing conference.

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposi-

tion of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Rule 34. Oral argument.

(*a*) *Notice of argument; postponement.*—The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(*b*) *Time allowed for argument.*—Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(*c*) *Order and content of argument.*—The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(*d*) *Cross and separate appeals.*—A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court other-

wise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(*e*) *Non-appearance of parties.*—If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(*f*) *Submission on briefs.*—By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(*g*) *Use of physical exhibits at argument; removal.*—If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

Rule 35. Determination of causes by the court in banc.

(*a*) *When hearing or rehearing in banc will be ordered.*—A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(*b*) *Suggestion of a party for hearing or rehearing in banc.*—A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are

in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) *Time for suggestion of a party for rehearing in banc; suggestion does not stay mandate.*—If a party desires to suggest a rehearing in banc, the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Rule 36. Entry of judgment.

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 37. Interest on judgments.

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment

for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Rule 38. Damages for delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 39. Costs.

(*a*) *To whom allowed.*—Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(*b*) *Costs for and against the United States.*—In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(*c*) *Costs of briefs, appendices, and copies of records.*—The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30 (f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

(*d*) *Clerk to insert costs in mandate.*—The clerk shall prepare and certify an itemized statement of costs taxed

in the court of appeals for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the court of appeals.

(*e*) *Costs on appeal taxable in the district courts.*—Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Rule 40. Petition for rehearing.

(*a*) *Time for filing; content; answer; action by court if granted.*—A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(*b*) *Form of petition; length.*—The petition shall be in a form prescribed by Rule 32 (a), and copies shall be served and filed as prescribed by Rule 31 (b) for the service and filing of briefs. Except by permission of the

court, a petition for rehearing shall not exceed 10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying.

Rule 41. Issuance of mandate; stay of mandate.

(*a*) *Date of issuance.*—The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(*b*) *Stay of mandate pending application for certiorari.*—A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

Rule 42. Voluntary dismissal.

(*a*) *Dismissal in the district court.*—If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation

for dismissal signed by all the parties, or upon motion and notice by the appellant.

(*b*) *Dismissal in the court of appeals.*—If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Rule 43. Substitution of parties.

(*a*) *Death of a party.*—If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

(*b*) *Substitution for other causes.*—If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(*c*) *Public officers; death or separation from office.*

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Rule 44. Cases involving constitutional questions where United States is not a party.

It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

Rule 45. Duties of clerks.

(*a*) *General provisions.*—The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or as counselor in any court while

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he continues in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day and Christmas Day.

(*b*) *The docket; calendar; other records required.*— The clerk shall keep a book known as the docket, in such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and judgments shall be entered chronologically in the docket on the folio assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

(*c*) *Notice of orders or judgments.*—Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(*d*) *Custody of records and papers.*—The clerk shall have custody of the records and papers of the court. He shall not permit any original record or paper to be taken from his custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

Rule 46. Attorneys.

(*a*) *Admission to the bar of a court of appeals; eligibility; procedure for admission.*—An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing his personal statement showing his eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

> I, ..., do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that he appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(*b*) *Suspension or disbarment.*—When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(*c*) *Disciplinary power of the court over attorneys.*—A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Rule 47. Rules by courts of appeals.

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Rule 48. Title.

These rules may be known and cited as the Federal Rules of Appellate Procedure.

APPENDIX OF FORMS

FORM 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the .....
District of .....

File Number .....

A. B., Plaintiff
v.
C. D., Defendant
| Notice of Appeal

Notice is hereby given that C. D., defendant above named, hereby appeals to the United States Court of Appeals for the ..... Circuit (from the final judgment) (from the order (describing it)) entered in this action on the .... day of .....

....., 19...

(s) .....

.....
(*Address*)
Attorney for C. D.

FORM 2. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A DECISION OF THE TAX COURT

TAX COURT OF THE UNITED STATES
Washington, D. C.

A. B., Petitioner *v.* Commissioner of Internal Revenue, Respondent	Docket No. .....

Notice of Appeal

Notice is hereby given that A. B. hereby appeals to the United States Court of Appeals for the ..... Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the ..... day of ....., 19....
[relating to .....].

(s) .....
.....
(*Address*)
Counsel for A. B.

FORM 3. PETITION FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the .....
Circuit

A. B., Petitioner *v.* XYZ Commission, Respondent	Petition for Review

A. B. hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on ....., 19....

.....
Attorney for Petitioner
Address: .....

FORM 4. AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

United States District Court for the .....
District of .....

United States of America
v.
A. B.
No. .....

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis.

I, ... being first duly sworn, depose and say that I am the ....., in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

.....

SUBSCRIBED AND SWORN TO before me this .....
day of ....., 19 ....

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

.....
District Judge

AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Effective July 1, 1968

The following amendments to the Rules of Civil Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on December 4, 1967, pursuant to 28 U. S. C. §§ 2072 and 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date and resubmitted on January 15, 1968, *ante,* p. 1064.

These amendments became effective July 1, 1968, as provided in paragraph 3 of the Court's order, *ante,* p. 1065. See also paragraph 4 of the Court's order concerning rules which have been abrogated. *Ibid.*

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, and 383 U. S. 1029.

Rule 6. Time.

(*b*) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50 (b), 52 (b), 59 (b), (d) and (e), and 60 (b), except to the extent and under the conditions stated in them.

Rule 9. Pleading special matters.

(*h*) *Admiralty and maritime claims.*—A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14 (c), 26 (a), 38 (e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U. S. C. § 1292 (a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

Rule 41. Dismissal of actions.

(*a*) *Voluntary dismissal: effect thereof.*

(1) *By plaintiff; by stipulation.* Subject to the provisions of Rule 23 (e), of Rule 66, and of any statute

of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Rule 77. District courts and clerks.

(*d*) *Notice of orders or judgments.*—Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4 (a) of the Federal Rules of Appellate Procedure.

Rule 81. Applicability in general.

(*a*) *To what proceedings applicable.*

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U. S. C. §§ 7651–81. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States.

They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.

(3) In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Effective July 1, 1968

The following amendments to the Rules of Criminal Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on December 4, 1967, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date and resubmitted on January 15, 1968, *ante*, p. 1064.

These amendments became effective July 1, 1968, as provided in paragraph 5 of the Court's order, *ante*, p. 1066. See also paragraph 6 of the Court's order concerning rules which have been abrogated. *Ibid.*

For earlier publications of the Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, and 383 U. S. 1087.

Rule 45. Time.

(*b*) *Enlargement.*—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

Rule 49. Service and filing of papers.

(*c*) *Notice of orders.*—Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4 (b) of the Federal Rules of Appellate Procedure.

Rule 56. Courts and clerks.

The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.

Rule 57. Rules of court.

(*a*) *Rules by district courts.*—Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

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COASTLINE. See **Accretion; Submerged Lands Act.**

CO-DEFENDANTS. See **Procedure**, 7–8, 11.

COERCION. See **Confessions; Constitutional Law**, I, 1–2, 6.

COLLECTIVE BARGAINING AGREEMENTS. See **Federal Rules of Civil Procedure.**

COLUMBIA RIVER. See **Constitutional Law**, II.

COMMERCE. See **Constitutional Law**, II.

COMMISSIONER OF INTERNAL REVENUE. See **Taxes.**

COMMON CARRIERS. See **Railroad Mergers**, 1–3.

COMMUNIST PARTY. See **Constitutional Law**, V; **Subversive Activities Control Act.**

COMPELLED TESTIMONY. See **Constitutional Law**, I, 6; **Procedure**, 10.

COMPENSATION. See **Constitutional Law**, II.

COMPETITION. See **Antitrust Acts**, 1–2; **Interstate Commerce; Interstate Commerce Commission; Railroad Mergers**, 1–3.

COMPLAINTS BY UNION MEMBERS. See **Labor-Management Reporting and Disclosure Act of 1959**, 1–2.

CONCEALMENT BY PROSECUTION. See **Procedure**, 8.

CONDEMNATION. See **Constitutional Law**, II.

CONFESSIONS. See also **Constitutional Law**, I, 1–2, 6; III, 3; **Procedure**, 10.

1. *Coercion—Physical abuse—Rebuttal by State.*—State of Georgia has again not adequately rebutted petitioner's claim that confession resulted from coercion, and its second failure to produce police officers as witnesses supports conclusion that their testimony would not have rebutted petitioner's. Sims v. Georgia, p. 404.

2. *Coercion—"Sweatbox" punishment cell—Prison riots.*—Confession given to investigating officer by prisoner, after he was held two weeks under barbaric conditions in "sweatbox" punishment cell was involuntary and its use to convict him of prison rioting unconstitutional. Brooks v. Florida, p. 413.

CONFISCATION. See **Constitutional Law**, IV; **Federal-State Relations.**

CONSPIRACY. See **Antitrust Acts**, 1; **Procedure**, 11.

CONSTITUTIONAL LAW. See also **Abstention; Confessions**, 1–2; **Evidence; Federal-State Relations; Procedure**, 1, 9–10; **Subversive Activities Control Act.**

I. Due Process.

1. *Coercion—"Sweatbox" punishment cell.*—Confession given to investigating officer by prisoner, after he was held two weeks under barbaric conditions in "sweatbox" punishment cell was involuntary and its use to convict him of prison rioting unconstitutional. Brooks v. Florida, p. 413.

2. *Confessions—Gross coercion.*—Petitioner, already wounded by Tennessee police, confessed to a rape-murder under gunpoint threat to do so or be killed, and later signed confessions while in a prison hospital under the influence of drugs. The use of his confessions, the product of gross coercion, violated the Due Process Clause of the Fourteenth Amendment. Beecher v. Alabama, p. 35.

3. *Loyalty oaths—University of Maryland teachers.*—Since the authority to prescribe oaths for prospective teachers is provided by § 11 of the Ober Act, which is tied to §§ 1 and 13, defining

CONSTITUTIONAL LAW—Continued.

"subversive person," the oath must be considered, not in isolation, but with reference to §§ 1 and 13, which violate due process requirements since they are unconstitutionally vague and overbroad. Whitehill v. Elkins, p. 54.

4. *Presumptively void prior conviction — Use to support guilt or enhance punishment for other offense.*—Use of a prior conviction presumably obtained after denial of right to counsel, and thus presumptively void under *Gideon* v. *Wainwright*, 372 U. S. 335, either for purpose of supporting guilt or enhancing punishment for another offense would erode principle of that case and allow an unconstitutional procedure to injure a defendant twice. Burgett v. Texas, p. 109.

5. *Right to counsel—Proceeding for revocation of probation and deferred sentencing.*—The Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment requires that counsel be afforded to a felony defendant in a post-trial proceeding for revocation of his probation and imposition of deferred sentencing. Mempa v. Rhay, p. 128.

6. *Voluntariness of confession—Hearing in jury's presence.*—Previous cases in this Court have not determined that voluntariness hearings must necessarily be held out of the jury's presence, and where, as here, respondent's counsel consented to the procedure used, and the judge found the statement voluntary, respondent was deprived of no constitutional right. Pinto v. Pierce, p. 31.

II. Eminent Domain.

Port sites—Just compensation.—The interests of riparian owners are subject to the Government's power to control navigable waters and the port-site value of land condemned for a federal lock and dam project is not compensable under the Fifth Amendment. United States v. Rands, p. 121.

III. Equal Protection of the Laws.

1. *Exclusion of Negroes from juries—Presumptions.*—State's burden to explain "disparity between the percentage of Negroes on the tax digest and those on the venires" was not met by reliance on the premise that "public officers are presumed to have discharged their sworn official duties" and the assumption that the jury commissioners eliminated "prospective jurors on the basis of their competency to serve, rather than because of racial discrimination." Jones v. Georgia, p. 24.

2. *Fee for preliminary hearing transcript—Indigents.*—New York statute providing for fee for preliminary hearing transcript results

CONSTITUTIONAL LAW—Continued.

in a difference in access to instruments needed to vindicate legal rights; this difference, based on a defendant's financial ability, is contrary to the Equal Protection Clause of the Fourteenth Amendment. Roberts v. LaVallee, p. 40.

3. *Jury selection—Discrimination.*—The manner in which the juries which indicted and convicted petitioner were selected was unconstitutional. The percentage of Negroes listed on racially segregated tax digests from which jury lists were compiled was far larger than such percentages on the jury lists, and the State produced only a jury commissioner's testimony that he did not discriminate in compiling the lists. Sims v. Georgia, p. 404.

4. *Negroes serving on juries—Prima facie case.*—At an evidentiary hearing it appeared that no Negro had ever served on a grand jury panel and few, if any, on petit jury panels in the county, and that none served on the grand jury which indicted petitioner or the petit jury which convicted him. The State presented no rebuttal evidence and the State Supreme Court's statement that the acknowledged disparity "can be explained by a number of other factors" did not rebut the prima facie case of denial of equal protection of the laws. Coleman v. Alabama, p. 22.

IV. Federal-State Relations.

Foreign affairs—Oregon reciprocity statute.—As applied by Oregon, each of the three provisions of Ore. Rev. Stat. § 111.070, which provides for escheat where a nonresident alien claims personalty unless there is reciprocity with the foreign nation, involves the State in foreign affairs and international relations, matters which the Constitution entrusts solely to the Federal Government. Zschernig v. Miller, p. 429.

V. First Amendment.

Associational rights—Member of Communist Party employed at shipyard.—Section 5 (a)(1)(D) of the Subversive Activities Control Act, which provides that, when a Communist-action organization is under final order to register, it shall be unlawful for any member "to engage in any employment in any defense facility," is invalid since by its overbreadth it unconstitutionally abridges the right of association protected by the First Amendment. United States v. Robel, p. 258.

VI. Freedom of Speech and Assembly.

Union's employment of lawyers to process members' workmen's compensation claims.—The trial court's decree preventing union from hiring attorneys on salary basis to assist members in asserting

CONSTITUTIONAL LAW—Continued.

their legal rights violates the freedom of speech, assembly, and petition provisions of the First Amendment as incorporated by the Fourteenth Amendment. Mine Workers v. Illinois Bar Assn., p. 217.

VII. Freedom of the Press.

Newspaper editorials—Criticism of public official.—This Court's independent examination of the record does not reveal that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not. Beckley Newspapers v. Hanks, p. 81.

VIII. Search and Seizure.

1. *Certiorari—Record not clear and specific.*—Record in this case involving State's use of evidence to convict respondent which allegedly had been illegally seized is not sufficiently clear and specific to permit decision of the constitutional issues involved, and certiorari is dismissed. Massachusetts v. Painten, p. 560.

2. *Electronic eavesdropping — Telephone booths.* — Government's eavesdropping activities, without a warrant, violated the privacy upon which petitioner justifiably relied while using telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. Katz v. United States, p. 347.

3. *Oral statements—Physical intrusions.*—Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements, and since it protects people rather than places its reach cannot turn on the presence or absence of physical intrusion into any given enclosure. Katz v. United States, p. 347.

IX. Supremacy Clause.

Unfair labor practice charge—Denial of unemployment compensation.—Florida's Unemployment Compensation Law, as applied by the State Industrial Commission's holding that petitioner was disqualified for unemployment compensation solely because she filed an unfair labor practice charge with the NLRB, violates the Supremacy Clause of the Constitution because it frustrates enforcement of the National Labor Relations Act. Nash v. Florida Industrial Comm'n, p. 235.

CONTEMPT. See **Federal Rules of Civil Procedure.**

CONVICTIONS. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

COOPERATIVES. See **Antitrust Acts**, 1.

COUNSEL. See **Constitutional Law**, I, 4–6; VI; **Criminal Justice Act; Procedure**, 9–10.

COURT CLERKS. See **Constitutional Law**, VII.

COURT OF APPEALS. See **Jurisdiction; Mandamus; Procedure**, 2, 7, 11.

COURT ORDERS. See **Federal Rules of Civil Procedure.**

COURTS. See **Abstention; Civil Rights Act; Jurisdiction; Mandamus; Procedure**, 3, 5.

CRIMINAL JUSTICE ACT.

Appointment of trial counsel—Financial ability—Partial payment.—Trial court should have explored the possibility that petitioner could afford only partial payment for the services of trial counsel and that counsel be appointed on that basis as permitted by the Act. Wood v. United States, p. 20.

CRIMINAL LAW. See **Abstention; Confessions**, 1–2; **Constitutional Law**, I; III; V; VIII; **Criminal Justice Act; Evidence; Jurisdiction; Mandamus; Procedure**, 1, 4–5, 8–11; **Subversive Activities Control Act; Trial.**

CUSTODY. See **Trial.**

DAMAGES. See **Constitutional Law**, II.

DAMS. See **Constitutional Law**, II.

DECLARATORY JUDGMENT ACT. See **Abstention; Procedure**, 5.

DECREES. See **Federal Rules of Civil Procedure.**

DEDUCTIONS. See **Taxes.**

DEFAMATION. See **Constitutional Law**, VII.

DEFENSE. See **Trial.**

DEFENSE FACILITIES. See **Constitutional Law**, V; **Subversive Activities Control Act.**

DEFERRED SENTENCES. See **Constitutional Law**, I, 5.

DELAWARE AND HUDSON RAILROAD. See **Railroad Mergers**, 1–3.

DESCENT AND DISTRIBUTION. See **Constitutional Law**, IV; **Federal-State Relations.**

DISCLOSURE. See **Jurisdiction; Mandamus.**

DISCOVERY. See **Jurisdiction; Mandamus.**

DISCRIMINATION. See **Confessions**, 1; **Constitutional Law**, III, 1, 3–4.

DISTILLERS. See **Antitrust Acts**, 2; **Interstate Commerce.**

DISTRIBUTION OF HANDBILLS. See **Abstention**; **Procedure**, 4–5.

DISTRICT ATTORNEYS. See **Jurisdiction**; **Mandamus.**

DISTRICT COURTS. See **Procedure**, 2.

DIVISION BY BRANDS. See **Antitrust Acts**, 2; **Interstate Commerce.**

DUE PROCESS. See **Confessions**, 1–2; **Constitutional Law**, I; **Evidence**; **Procedure**, 9–10.

EASEMENTS. See **Constitutional Law**, II.

EAST GERMANY. See **Constitutional Law**, IV; **Federal-State Relations.**

EAVESDROPPING. See **Constitutional Law**, VIII, 2–3; **Procedure**, 7, 11.

EDITORIALS. See **Constitutional Law**, VII.

ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959**, 1–2.

ELECTRONIC EAVESDROPPING. See **Constitutional Law**, VIII, 2–3.

ELIGIBILITY TO VOTE. See **Labor-Management Reporting and Disclosure Act of 1959**, 1–2.

EMINENT DOMAIN. See **Constitutional Law**, II.

EMPLOYEE PROTECTION. See **Railroad Mergers**, 1–3.

EMPLOYER AND EMPLOYEES. See **Constitutional Law**, IX; **Federal Rules of Civil Procedure**; **National Labor Relations Act.**

EMPLOYMENT AT SHIPYARD. See **Constitutional Law**, V; **Subversive Activities Control Act.**

ENFORCEMENT. See **Administrative Procedure.**

ENHANCED PUNISHMENT. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

EQUAL PROTECTION OF THE LAWS. See **Confessions**, 1; **Constitutional Law**, III; **Procedure**, 7, 11.

ERIE-LACKAWANNA RAILROAD. See **Railroad Mergers**, 1–3.

ERRORS. See **Constitutional Law,** I, 4; **Evidence; Procedure,** 9.

ESCHEAT. See **Constitutional Law,** IV; **Federal-State Relations.**

ESTATES. See **Constitutional Law,** IV; **Federal-State Relations.**

EVIDENCE. See also **Confessions,** 1–2; **Constitutional Law,** I, 1–2, 4; III, 1, 3–4; VIII, 1–3; **Procedure,** 1, 7, 9–11; **Railroad Mergers,** 1–3.

Presumptively void prior convictions—Use as evidence in another trial—Prejudicial error.—Use of a constitutionally invalid prior conviction as evidence is inherently prejudicial error which cannot be rendered "harmless beyond a reasonable doubt" by instructions to the jury to disregard it. Burgett v. Texas, p. 109.

EXCLUSIONARY RULE. See **Constitutional Law,** VIII, 1; **Procedure,** 1.

EXHAUSTION OF REMEDIES. See **Civil Rights Act; Constitutional Law,** III, 2; **Procedure,** 3, 6–7, 11.

EXPENSES. See **Taxes.**

EXTRAORDINARY REMEDIES. See **Jurisdiction; Mandamus.**

FAIR TRIAL. See **Constitutional Law,** I, 4; **Evidence; Procedure,** 9.

FARMERS COOPERATIVES. See **Antitrust Acts,** 1.

FAST LANDS. See **Constitutional Law,** II.

FEDERAL BUREAU OF INVESTIGATION. See **Procedure,** 7, 11.

FEDERAL GRANTS. See **Accretion.**

FEDERAL RULES OF APPELLATE PROCEDURE. See **Supreme Court.**

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 65 (d)—"Order granting an injunction"—Specificity of decree.—Since the District Court's decree, involving an arbitrator's award in a dispute concerning the meaning of a "set-back" provision in a collective bargaining agreement, which was an "order granting an injunction" within the meaning of Rule 65 (d), did not comply with the Rule's requirement that it state in specific terms the acts that it commands or prohibits, neither it nor the decision holding the union in contempt can stand. Longshoremen v. Philadelphia Marine Assn., p. 64.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Jurisdiction; Mandamus.**

FEDERAL-STATE RELATIONS. See also **Abstention; Accretion; Civil Rights Act; Constitutional Law,** I, 4–5; II; III, 2; IV; IX; **Evidence; Procedure,** 3–5, 9; **Submerged Lands Act.**

Oregon inheritance statute — Reciprocity — Foreign affairs. — As applied by Oregon, each of the three provisions of Ore. Rev. Stat. § 111.070, which provides for escheat where a nonresident alien claims personalty unless there is reciprocity with the foreign nation, involves the State in foreign affairs and international relations, matters which the Constitution entrusts solely to the Federal Government. Zschernig v. Miller, p. 429.

FEDERAL TRADE COMMISSION. See **Administrative Procedure.**

FIFTH AMENDMENT. See **Constitutional Law,** II.

FINANCIAL ABILITY. See **Constitutional Law,** III, 2; **Criminal Justice Act; Procedure,** 7, 11.

FINES. See **Procedure,** 2.

FIRST AMENDMENT. See **Abstention; Constitutional Law,** V–VII; **Procedure,** 4–5; **Subversive Activities Control Act.**

FLORIDA. See **Confessions,** 2; **Constitutional Law,** I, 1; IX.

FOREIGN AFFAIRS. See **Constitutional Law,** IV; **Federal-State Relations.**

FOURTEENTH AMENDMENT. See **Abstention; Confessions,** 1–2; **Constitutional Law,** I; III; VI–VII; **Evidence; Procedure,** 1, 4–5, 9–10.

FOURTH AMENDMENT. See **Constitutional Law,** VIII; **Procedure,** 1.

FREEDOM OF SPEECH AND ASSEMBLY. See **Constitutional Law,** VI.

FREEDOM OF THE PRESS. See **Constitutional Law,** VII.

FRUIT GROWERS. See **Antitrust Acts,** 1.

GAMBLING INFORMATION. See **Constitutional Law,** VIII, 2–3.

GEORGIA. See **Confessions,** 1; **Constitutional Law,** III, 1, 3.

GERMANY. See **Constitutional Law,** IV; **Federal-State Relations.**

GOVERNMENT EMPLOYEES. See **Constitutional Law,** I, 3.

GRAND JURIES. See **Confessions,** 1; **Constitutional Law,** III, 3.

GULF OF MEXICO. See **Submerged Lands Act.**

HABEAS CORPUS. See **Constitutional Law**, I, 5.

HABITUAL CRIMINAL STATUTES. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

HARBORS. See **Constitutional Law**, II.

HEARINGS. See **Constitutional Law**, I, 6; **Procedure**, 10.

HEIRS. See **Constitutional Law**, IV; **Federal-State Relations.**

ILLINOIS. See **Constitutional Law**, VI.

ILLINOIS SAVINGS AND LOAN ACT. See **Securities Exchange Act of 1934.**

IMPEDIMENTS TO NAVIGATION. See **Remedies**; **Rivers and Harbors Act of 1899.**

INCARCERATION. See **Trial.**

INCLUSION PROCEEDINGS. See **Railroad Mergers**, 1–3.

INDICTMENTS. See **Jurisdiction**; **Mandamus.**

INDIGENTS. See **Constitutional Law**, I, 5; III, 2; **Procedure**, 7, 11.

INELIGIBILITY. See **Labor-Management Reporting and Disclosure Act of 1959**, 2.

INFORMANTS. See **Jurisdiction**; **Mandamus.**

INHERITANCE. See **Constitutional Law**, IV; **Federal-State Relations.**

INJUNCTIONS. See **Abstention**; **Federal Rules of Civil Procedure**; **Procedure**, 4–5.

INLAND WATERWAYS. See **Remedies**; **Rivers and Harbors Act of 1899.**

IN PERSONAM LIABILITY. See **Remedies**; **Rivers and Harbors Act of 1899.**

INSTRUCTIONS. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

INTERIM PROTECTION. See **Railroad Mergers**, 1–3.

INTERLOCUTORY ORDERS. See **Jurisdiction**; **Mandamus.**

INTERNAL REVENUE CODE. See **Taxes.**

INTERNATIONAL RELATIONS. See **Constitutional Law**, IV; **Federal-State Relations.**

INTERSTATE COMMERCE. See also **Antitrust Acts**, 2; **Constitutional Law**, II.

Division by territories and brands by Oklahoma liquor wholesalers—Affecting interstate commerce.—Whether or not the lower courts' conclusion was valid that the market division did not occur *in* interstate commerce, it inevitably *affected* such commerce and thus came within the Sherman Act since the territorial division by reducing competition almost surely resulted in fewer sales to wholesalers by out-of-state distillers and the brands division meant fewer wholesale outlets available to any one distiller. Burke v. Ford, p. 320.

INTERSTATE COMMERCE ACT. See **Railroad Mergers**, 1–3.

INTERSTATE COMMERCE COMMISSION. See also **Railroad Mergers**, 1–3.

Certificate of public convenience—Motor carriers—Service deficiencies.—While the ICC should consider the public interest in maintaining the health and stability of existing carriers, it may, upon the basis of appropriate findings, authorize a new certificate even though the existing carriers might arrange for improvements in service. United States v. Dixie Express, p. 409.

INTERVENTION. See **Railroad Mergers**, 1–3.

JAIL. See **Trial.**

JETTIES. See **Submerged Lands Act.**

JUDGES. See **Jurisdiction; Mandamus; Trial.**

JUDICIAL REVIEW. See **Jurisdiction; Mandamus; Procedure**, 2; **Railroad Mergers**, 1–3.

JURIES. See **Confessions**, 1; **Constitutional Law**, I, 6; III, 1, 3–4; **Procedure**, 10.

JURISDICTION. See also **Abstention; Mandamus; Procedure**, 4–5.

Courts of appeals—Criminal cases—Interlocutory orders.—The record in this case discloses no proper justification for the Court of Appeals to have invoked the extraordinary writ of mandamus to review the trial judge's interlocutory order that the Government supply the defendant in a criminal case with certain information before trial. Will v. United States, p. 90.

JURY COMMISSIONERS. See **Constitutional Law**, III, 1.

JUST COMPENSATION. See **Constitutional Law**, II.

LABOR. See **Constitutional Law,** IX; **Federal Rules of Civil Procedure; National Labor Relations Act.**

LABORERS' UNION. See **Labor-Management Reporting and Disclosure Act of 1959,** 1–2.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

1. *Union elections—Intervening nonsupervised election—Secretary of Labor.*—When Secretary of Labor proves existence of violation of § 401 of the Act that may have affected the outcome of a challenged election, he is not deprived of the right to court order voiding that election and directing a new election under his supervision because union has meanwhile conducted another unsupervised election. Wirtz v. Bottle Blowers Assn., p. 463; Wirtz v. Laborers' Union, p. 477.

2. *Union elections—Runoff election—Ineligibility of candidates and voters.*—On the facts of this case, where union had fair notice from the violation of ineligible candidate and voters charged by union member with respect to runoff election that the same unlawful conduct had occurred at the earlier general election, the Secretary of Labor is entitled to maintain his action challenging the general election. Wirtz v. Laborers' Union, p. 477.

LAWYERS. See **Constitutional Law,** I, 4–5; VI; **Criminal Justice Act; Evidence; Procedure,** 9.

LIABILITY. See **Remedies; Rivers and Harbors Act of 1899.**

LIBEL. See **Constitutional Law,** VII.

LIBELS. See **Remedies; Rivers and Harbors Act of 1899.**

LIQUOR DEALERS. See **Antitrust Acts,** 2; **Interstate Commerce.**

LIST OF WITNESSES. See **Jurisdiction; Mandamus.**

LOCKS. See **Constitutional Law,** II.

LONGSHOREMEN. See **Federal Rules of Civil Procedure.**

LOYALTY OATHS. See **Constitutional Law,** I, 3.

MAIL FRAUD. See **Trial.**

MAJORITY. See **Administrative Procedure.**

MANDAMUS. See also **Jurisdiction.**

Courts of appeals—Criminal cases—Interlocutory orders.—The record in this case discloses no proper justification for the Court of Appeals to have invoked the extraordinary writ of mandamus to review the trial judge's interlocutory order that the Government supply the defendant in a criminal case with certain information before trial. Will v. United States, p. 90.

MARKET DIVISION. See **Antitrust Acts**, 2; **Interstate Commerce.**

MARYLAND. See **Constitutional Law**, I, 3.

MASSACHUSETTS. See **Constitutional Law**, VIII, 1; **Procedure**, 1.

MEALS. See **Taxes.**

MERGERS. See **Railroad Mergers**, 1–3.

MISSISSIPPI RIVER. See **Remedies**; **Rivers and Harbors Act of 1899.**

MONITORING. See **Procedure**, 7, 11.

MOOTNESS. See **Labor-Management Reporting and Disclosure Act of 1959**; **Railroad Mergers**, 1–3.

MOTIONS. See **Procedure**, 7, 11.

MOTOR CARRIERS. See **Interstate Commerce Commission.**

MURDER. See **Constitutional Law**, I, 2; III, 1.

NATIONAL LABOR RELATIONS ACT. See also **Constitutional Law**, IX.

Reinstatement of striking employees—Hiring of new applicants—Unfair labor practice.—Employer's refusal to reinstate strikers constituted an unfair labor practice under the Act, since it did not show that such action was due to "legitimate and substantial business justifications," and the right of strikers to reinstatement does not depend upon job availability when they first apply but continues until they have obtained "other regular and substantially equivalent employment," at least, where, as here, their continued desire for reinstatement is apparent. NLRB v. Fleetwood Trailer Co., p. 375.

NAVIGABLE WATERS. See **Constitutional Law**, II; **Remedies**; **Rivers and Harbors Act of 1899.**

NAVIGATIONAL SERVITUDE. See **Constitutional Law**, II.

NEGLIGENCE. See **Remedies**; **Rivers and Harbors Act of 1899.**

NEGROES. See **Confessions**, 1; **Constitutional Law**, III, 1, 3–4.

NEW HAVEN RAILROAD. See **Railroad Mergers**, 1–3.

NEW JERSEY. See **Constitutional Law**, I, 6; **Procedure**, 8, 10.

NEWSPAPERS. See **Constitutional Law**, VII.

NEW TRIAL. See **Procedure**, 7–8, 11.

NEW YORK. See **Abstention**; **Constitutional Law**, III, 2; **Procedure**, 4–5, 7, 11.

NORFOLK AND WESTERN SYSTEM. See **Railroad Mergers**, 1–3.

NOTICE. See **Labor-Management Reporting and Disclosure Act of 1959**, 2.

OATHS. See **Constitutional Law**, I, 3.

OBER ACT. See **Constitutional Law**, I, 3.

OCEAN-FRONT PROPERTY. See **Accretion.**

OKLAHOMA. See **Antitrust Acts**, 2; **Interstate Commerce.**

ORANGES. See **Antitrust Acts**, 1.

ORDERS. See **Administrative Procedure**; **Federal Rules of Civil Procedure.**

OREGON. See **Constitutional Law**, II; IV; **Federal-State Relations.**

OVERBREADTH. See **Abstention**; **Constitutional Law**, I, 3; V; **Procedure**, 4–5; **Subversive Activities Control Act.**

PACKING HOUSES. See **Antitrust Acts**, 1.

PAROLE BOARDS. See **Constitutional Law**, I, 5.

PARTIAL PAYMENT. See **Criminal Justice Act.**

PAUPERS. See **Constitutional Law**, I, 5; III, 2.

PENNSYLVANIA-NEW YORK CENTRAL MERGER. See **Railroad Mergers**, 1–3.

PERSONAL PROPERTY. See **Constitutional Law**, IV; **Federal-State Relations.**

PETIT JURIES. See **Confessions**, 1; **Constitutional Law**, I, 4, 6; III, 1, 3–4; **Evidence**; **Procedure**, 9–10.

PHYSICAL ABUSE. See **Confessions**, 2; **Constitutional Law**, I, 1.

PHYSICAL INTRUSION. See **Constitutional Law**, VIII, 2–3.

PLEADING. See **Jurisdiction**; **Mandamus.**

POLICE OFFICERS. See **Confessions**, 1; **Constitutional Law**, III, 3.

POLITICAL HANDBILLS. See **Abstention**; **Procedure**, 4–5.

POOLING. See **Railroad Mergers**, 1–3.

PORT SITES. See **Constitutional Law**, II.

POST-TRIAL PROCEEDING. See **Constitutional Law**, I, 5.

PREJUDICIAL ERROR. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

PRELIMINARY HEARING TRANSCRIPTS. See **Constitutional Law**, III, 2; **Procedure**, 7, 11.

PRESUMPTIONS. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

PRETRIAL DISCOVERY. See **Jurisdiction**; **Mandamus.**

PRIOR CONVICTIONS. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

PRISON RIOTS. See **Confessions**, 2; **Constitutional Law**, I, 1.

PRIVACY. See **Constitutional Law**, VIII, 2–3.

PROBATE COURTS. See **Constitutional Law**, IV; **Federal-State Relations.**

PROBATION. See **Constitutional Law**, I, 5.

PROCEDURE. See also **Abstention**; **Administrative Procedure**; **Civil Rights Act**; **Confessions**, 1; **Constitutional Law**, I, 2, 4, 6; III, 1–4; **Criminal Justice Act**; **Evidence**; **Interstate Commerce Commission**; **Jurisdiction**; **Mandamus**; **Railroad Mergers**, 1–3; **Trial.**

1. *Certiorari—Record not clear and specific—Illegal search and seizure.*—Record in this case involving State's use of evidence to convict respondent which allegedly had been illegally seized is not sufficiently clear and specific to permit decision of the constitutional issues involved, and certiorari is dismissed. Massachusetts v. Painten, p. 560.

2. *Certiorari—Ripeness—Court of Appeals' remand.*—Petition for certiorari denied as case not ripe for review where Court of Appeals had ordered remand for District Court to determine if petitioner union was in contempt of District Court's order not to strike and, if so, whether that court's coercive fine was warranted. Firemen v. Bangor & A. R. Co., p. 327.

3. *Civil Rights Act—Welfare regulations—Exhaustion of administrative remedies.*—One of the Act's underlying purposes was "to provide a remedy in the federal courts supplementary to any remedy any State might have," and "relief under the Act may not be defeated because relief was not sought under state law which provided [an administrative] remedy." Damico v. California, p. 416.

4. *Declaratory judgment — Abstention — Injunctions.* — District Court had duty of adjudicating request for declaratory judgment that New York statute forbidding distribution of anonymous political handbills contravened the First Amendment by its overbreadth, regardless of its conclusion as to the propriety of the issuance of an injunction, for the questions of abstention and of injunctive relief are not the same. Zwickler v. Koota, p. 241.

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PROCEDURE—Continued.

5. *Declaratory Judgment Act—Abstention—Civil Rights Act.*—District Court erred in refusing to pass on appellant's claim for a declaratory judgment that New York statute forbidding distribution of anonymous political handbills contravened the First Amendment by its overbreadth, as there was no "special circumstance" warranting its application of the abstention doctrine to that claim. Zwickler v. Koota, p. 241.

6. *Exhaustion of administrative remedies—Subversive Activities Control Act — Constitutional claims.* — Ordinarily, where Congress has provided a civil proceeding in which appellants can raise their constitutional claims, this administrative procedure should be followed so that the District Court will not have to decide the constitutional issues devoid of factual context and before it is clear that appellants are covered by the Act. DuBois Clubs v. Clark, p. 309.

7. *Exhaustion of state remedies—Denial of equal protection of the laws.*—The Court of Appeals erred in holding that petitioner should return to the state courts for relief in light of holding by highest state court, after petitioner had exhausted his state remedies, that statutory requirement for payment of transcript, as applied to indigent, constituted denial of equal protection, as no substantial interest would be served by requiring him to resubmit to the state courts an issue the resolution of which is predetermined by established federal principles. Roberts v. LaVallee, p. 40.

8. *New trial granted to co-defendant—Claim of concealment by prosecution.*—The case, in light of action by the New Jersey Supreme Court granting petitioner's co-defendant a new trial on allegations similar to petitioner's claim that the prosecution concealed the existence of a promise to recommend leniency for an accomplice who testified for the State, is remanded for reconsideration, which may include whether petitioner must first exhaust any available state remedies. Garner v. Yeager, p. 86.

9. *Presumptively void prior conviction—Use to support guilt or enhance punishment for other offense.*—Use of a prior conviction presumably obtained after denial of the right to counsel, and thus presumptively void under *Gideon* v. *Wainwright,* 372 U. S. 335, either for purpose of supporting guilt or enhancing punishment for another offense would erode principle of that case and allow an unconstitutional procedure to injure a defendant twice. Burgett v. Texas, p. 109.

10. *Voluntariness of confession—Hearing in jury's presence—Consent of counsel.*—Previous cases in this Court have not determined that voluntariness hearings must necessarily be held out of the

PROCEDURE—Continued.

jury's presence, and where, as here, respondent's counsel consented to the procedure used, and the judge found the statement voluntary, respondent was deprived of no constitutional right. Pinto v. Pierce, p. 31.

11. *Wiretaps—Monitoring conversations of co-defendant—New trial for co-defendant.*—Court of Appeals erred in denying petitioner's motion for an evidentiary hearing in District Court to determine whether he was prejudiced by monitoring where it had granted his co-defendant a new trial based on the Government's disclosure that the F. B. I. after the indictment had monitored conversations between the co-defendant and the latter's attorney. Roberts v. United States, p. 18.

PRODUCERS. See **Antitrust Acts**, 1.

PROOF. See **Constitutional Law**, VII.

PROSECUTION. See **Procedure**, 8.

PROSECUTORS. See **Jurisdiction; Mandamus.**

PROTECTIVE CONDITIONS. See **Railroad Mergers**, 1–3.

PUBLIC EMPLOYEES. See **Constitutional Law**, I, 3; VII.

PUBLIC INTEREST. See **Interstate Commerce Commission; Railroad Mergers**, 1–3.

PUBLIC OFFICIALS. See **Constitutional Law**, VII.

PUNISHMENT. See **Constitutional Law**, I, 4; **Evidence; Procedure**, 9; **Trial.**

QUORUM. See **Administrative Procedure.**

RACIAL DISCRIMINATION. See **Constitutional Law**, III, 1, 3–4.

RAILROAD MERGERS.

1. *Interstate Commerce Commission—Penn-Central merger—Norfolk and Western inclusion proceedings.*—The ICC properly and lawfully discharged its duties with respect to the Penn-Central merger, as its findings and conclusions accord with § 5 of the Interstate Commerce Act and are supported by substantial evidence. Competition is merely one aspect of the public interest in the merger; rail service by the merged company will remain subject to vigorous competition from motor, rail, water and air carriers; the evidence before the ICC generally attested to the probability of significant benefit from the merger; and the ICC retains authority over any reductions of service and facilities not specifically approved in the merger plans. Penn-Central Merger Cases, p. 486.

RAILROAD MERGERS—Continued.

2. *Penn-Central merger—Inclusion of New Haven Railroad—Bondholders.*—The appeals of New Haven Railroad bondholders challenging the ICC's order providing terms, subject to the approval of the bankruptcy court, for New Haven's inclusion in the Penn-Central system and for a loan arrangement to keep the road operating, are rejected. Penn-Central Merger Cases, p. 486.

3. *Penn-Central merger—Norfolk and Western inclusion order.*—The District Court's disallowance of the claims of those who challenge the ICC's order for the inclusion of the "protected roads" in the N & W system is affirmed. If the smaller roads' bondholders feel that N & W has invaded their rights, they may apply to the ICC for relief under its reserved jurisdiction. The financial terms involved in the inclusion were established by the ICC within the area of fairness and equity, were reviewed by the District Court in detail and sustained, and there is no basis for reversing that judgment. Penn-Central Merger Cases, p. 486.

RAPE. See **Confessions**, 1; **Constitutional Law**, I, 2; III, 3.

REAL PROPERTY. See **Accretion**; **Constitutional Law**, IV; **Federal-State Relations.**

RECIDIVIST STATUTES. See **Constitutional Law**, I, 4; **Evidence**; **Procedure**, 9.

RECIPROCITY. See **Constitutional Law**, IV; **Federal-State Relations.**

RECORD. See **Constitutional Law**, VIII, 1; **Procedure**, 1.

RECORDINGS. See **Constitutional Law**, VIII, 2–3.

REGISTRATION ORDERS. See **Constitutional Law**, V; **Procedure**, 6; **Subversive Activities Control Act.**

REINSTATEMENT. See **National Labor Relations Act.**

REMAND. See **Procedure**, 2.

REMEDIES. See also **Civil Rights Act**; **Constitutional Law**, III, 2; **Jurisdiction**; **Mandamus**; **Procedure**, 3, 6–8, 11; **Rivers and Harbors Act of 1899.**

Negligent sinking of vessel—Removal by Government—Rivers and Harbors Act of 1899.—The remedies and procedures for the enforcement of § 15 of the Act, which makes it unlawful to "carelessly sink, or permit or cause to be sunk a vessel in navigable waters," are not exclusive and do not foreclose the Government from *in personam* relief against a party who negligently sinks a vessel in a navigable waterway. Wyandotte Co. v. United States, p. 191.

RESTRAINT OF TRADE. See **Antitrust Acts**, 1–2.

RETAILERS AND WHOLESALERS. See **Antitrust Acts**, 2; **Interstate Commerce.**

REVIEW. See **Procedure**, 2.

RIGHT TO COUNSEL. See **Constitutional Law**, I, 4–5; **Evidence**; **Procedure**, 9; **Trial.**

RIPARIAN RIGHTS. See **Constitutional Law**, II.

RIPENESS. See **Procedure**, 2.

RIVERS. See **Constitutional Law**, II; **Remedies**; **Rivers and Harbors Act of 1899.**

RIVERS AND HARBORS ACT OF 1899. See also **Remedies.**

Negligent sinking of vessel—Removal by Government—In personam liability.—The remedies and procedures for the enforcement of § 15 of the Act, which makes it unlawful to "carelessly sink, or permit or cause to be sunk a vessel in navigable waters," are not exclusive and do not foreclose the Government from *in personam* relief against a party who negligently sinks a vessel in a navigable waterway. Wyandotte Co. v. United States, p. 191.

ROBINSON-PATMAN ACT. See **Administrative Procedure.**

RULE OF PROPERTY. See **Interstate Commerce Commission.**

RULES. See **Federal Rules of Civil Procedure**; **Jurisdiction**; **Mandamus**; **Supreme Court.**

RUNOFF ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959**, 2.

SALESMEN. See **Taxes.**

SAVINGS AND LOAN ASSOCIATIONS. See **Securities Exchange Act of 1934.**

SEARCH AND SEIZURE. See **Constitutional Law**, VIII; **Procedure**, 1.

SECRETARY OF DEFENSE. See **Constitutional Law**, V; **Subversive Activities Control Act.**

SECRETARY OF LABOR. See **Labor-Management Reporting and Disclosure Act of 1959**, 1–2.

SECURITIES EXCHANGE ACT OF 1934.

Illinois Savings and Loan Act—Withdrawable capital share—Security.—Withdrawable capital share in an Illinois-chartered savings and loan association is a "security" within the meaning of the Securities Exchange Act of 1934. Tcherepnin v. Knight, p. 332.

SECURITY. See **Securities Exchange Act of 1934.**

SENTENCES. See **Constitutional Law,** I, 5.

SERVICE DEFICIENCIES. See **Interstate Commerce Commission.**

"SET-BACK" PROVISIONS. See **Federal Rules of Civil Procedure.**

SEVERABILITY CLAUSE. See **Constitutional Law,** I, 3.

SHARES. See **Securities Exchange Act of 1934.**

SHERMAN ACT. See **Antitrust Acts,** 1–2; **Interstate Commerce.**

SHIPS. See **Remedies; Rivers and Harbors Act of 1899.**

SHIPYARDS. See **Constitutional Law,** V; **Subversive Activities Control Act.**

SHORELINE. See **Accretion; Submerged Lands Act.**

SINKINGS. See **Remedies; Rivers and Harbors Act of 1899.**

SIXTH AMENDMENT. See **Constitutional Law,** I, 4; **Evidence; Procedure,** 9.

STATE EMPLOYEES. See **Constitutional Law,** I, 3.

STATE SAVINGS AND LOAN ASSOCIATIONS. See **Securities Exchange Act of 1934.**

STATE'S WITNESS. See **Procedure,** 8.

STEVEDORES. See **Federal Rules of Civil Procedure.**

STREAMS. See **Constitutional Law,** II.

STRIKES. See **Federal Rules of Civil Procedure; National Labor Relations Act; Procedure,** 2.

SUBMERGED LANDS ACT. See also **Constitutional Law,** II.

Texas' coastline—Three-league limit—Not measured from jetties.—Texas' claim under the three-league grant of the Submerged Lands Act must be measured by the boundary which existed in 1845, when Texas entered the Union, and cannot be measured from artificial jetties built long thereafter. United States v. Louisiana, p. 155.

SUBVERSIVE ACTIVITIES CONTROL ACT. See also **Constitutional Law,** V; **Procedure,** 6.

Member of Communist Party employed at shipyard—Designation of shipyard as "defense facility."—Section 5 (a)(1)(D) of the Act, which provides that, when a Communist-action organization is under final order to register, it shall be unlawful for any member "to engage in any employment in any defense facility," is invalid since by its overbreadth it unconstitutionally abridges the right of association protected by the First Amendment. United States v. Robel, p. 258.

SUBVERSIVE ORGANIZATIONS. See **Constitutional Law,** V; **Subversive Activities Control Act.**

SUNKIST ORANGES. See **Antitrust Acts,** 1.

SUPERVISED ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959,** 1–2.

SUPREMACY CLAUSE. See **Constitutional Law,** IX; **Federal-State Relations.**

SUPREME COURT. See **Procedure,** 2.

1. Amendments to Rules of Civil Procedure, p. 1121.
2. Amendments to Rules of Criminal Procedure, p. 1125.
3. Appointment of Mr. Justice Marshall, p. vii.
4. Assignment of Mr. Justice Reed (retired) to United States Court of Claims, p. 924.
5. Presentation of the Solicitor General, p. xi.
6. Rules of Appellate Procedure, p. 1063.

SURVEILLANCE. See **Constitutional Law,** VIII, 2–3.

"SWEATBOX" PUNISHMENT. See **Confessions,** 2; **Constitutional Law,** I, 1.

TARDINESS. See **Trial.**

TAXES.

Deductions—Traveling expenses—Costs of meals.—Commissioner of Internal Revenue's long-standing ruling that "traveling expenses" incurred in the pursuit of business "while away from home," which are deductible under § 162 (a) (2) of the Internal Revenue Code of 1954, include the cost of meals only if the trip requires rest or sleep achieves not only ease and certainty of application but also substantial fairness and is within the Commissioner's authority to implement the statute in any reasonable manner. United States v. Correll, p. 299.

TEACHERS. See **Constitutional Law,** I, 3.

TELEPHONE BOOTHS. See **Constitutional Law,** VIII, 2–3.

TENNESSEE. See **Constitutional Law,** I, 2.

TERRITORIAL DIVISION. See **Antitrust Acts,** 2; **Interstate Commerce.**

TESTIMONY. See **Confessions,** 1; **Constitutional Law,** III, 3.

TEXAS. See **Constitutional Law,** I, 4; **Evidence; Procedure,** 9; **Submerged Lands Act.**

THREATS. See **Constitutional Law,** I, 2.

THREE-LEAGUE LIMIT. See **Submerged Lands Act.**

THREE-MILE LIMIT. See **Submerged Lands Act.**

TRANSCRIPTS. See **Constitutional Law,** III, 2; **Procedure,** 7, 11.

TRANSPORTATION ACTS. See. **Railroad Mergers,** 1–3.

TRAVELING EXPENSES. See **Taxes.**

TREATIES. See **Constitutional Law,** IV; **Federal-State Relations.**

TRESPASS. See **Constitutional Law,** VIII, 2–3.

TRIAL. See also **Constitutional Law,** I, 4; **Evidence; Procedure,** 9.

Tardiness of defendant—Incarceration for remainder of trial.—Trial judge's ordering defendant to be incarcerated for balance of trial period as a result of one instance of tardiness was punitive, and because the procedures for inflicting punishment had not been followed and because the order could not be justified as having been made to facilitate the trial, the order placed an unjustified burden on the defense. Bitter v. United States, p. 15.

TRIAL COUNSEL. See **Criminal Justice Act.**

TRIAL JUDGE. See **Constitutional Law,** I, 6; **Procedure,** 10.

TRIALS. See **Confessions,** 1; **Constitutional Law,** I, 4; III, 3.

UNAUTHORIZED PRACTICE OF LAW. See **Constitutional Law,** VI.

UNEMPLOYMENT COMPENSATION. See **Constitutional Law,** IX.

UNFAIR LABOR PRACTICE. See **Constitutional Law,** IX; **National Labor Relations Act.**

UNION ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959,** 1–2.

UNIONS. See **Constitutional Law,** IX; **Federal Rules of Civil Procedure; National Labor Relations Act; Procedure,** 2.

UNITED STATES ATTORNEYS. See **Jurisdiction; Mandamus.**

UNIVERSITY OF MARYLAND. See **Constitutional Law,** I, 3.

UNSUPERVISED ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959,** 1–2.

VAGUENESS. See **Constitutional Law,** I, 3; **Federal Rules of Civil Procedure.**

VESSELS. See **Remedies; Rivers and Harbors Act of 1899.**

VOLUNTARINESS. See **Confessions,** 1–2; **Constitutional Law,** I, 1, 6; III, 3; **Procedure,** 10.

WAGERING INFORMATION. See **Constitutional Law,** VIII, 2–3.

WAREHOUSES. See **Antitrust Acts**, 2; **Interstate Commerce.**

WARRANTS. See **Constitutional Law**, VIII, 2–3.

WASHINGTON. See **Accretion; Constitutional Law**, II.

WATERFRONT PROPERTY. See **Constitutional Law**, II.

WATERS. See **Constitutional Law**, II.

WELFARE REGULATIONS. See **Civil Rights Act; Procedure**, 3.

WEST VIRGINIA. See **Constitutional Law**, VII.

WIRETAPS. See **Procedure**, 11.

WITHDRAWABLE CAPITAL SHARES. See **Securities Exchange Act of 1934.**

WITNESSES. See **Confessions**, 1; **Constitutional Law**, III, 3; **Jurisdiction; Mandamus.**

WORDS.

1. *"Security."* Securities Exchange Act of 1934, § 3 (a)(10), 15 U. S. C. § 78c (a)(10). Tcherepnin v. Knight, p. 332.

2. *"Traveling expenses . . . while away from home."* Internal Revenue Code of 1954, § 162 (a)(2), 26 U. S. C. § 162 (a)(2) (1958 ed.). United States v. Correll, p. 299.

WORKMEN'S COMPENSATION CLAIMS. See **Constitutional Law**, IX.

WRECKS. See **Remedies; Rivers and Harbors Act of 1899.**