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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1967

JANUARY 16 THROUGH MAY 1, 1968

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA.

277 U. S. 465, line 17: "Clark" should be "Clarke."

385 U. S. 450, No. 767: "72" in "68 Wash. 2d 72" should be "721."

386 U. S. xxxvii: "929" in "Pennsylvania; Stell *v.* . . . . 925, 929" should be "969."

386 U. S. 483: "265 F. Supp. 492" should be "279 F. Supp. 619."

388 U. S. 905, No. 958: "S. W." should be "S. W. 2d."

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.

RETIRED.

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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

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.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1964 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

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TABLE OF STATUTES CITED

(A) STATUTES OF THE UNITED STATES.

(B) CONSTITUTIONS AND STATUTES OF THE STATES AND THE DISTRICT OF COLUMBIA.

(C) REORGANIZATION PLANS.

(D) TREATY.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1967.

HARDIN, MAYOR OF TAZEWELL, ET AL. *v.* KENTUCKY UTILITIES CO.

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

No. 40. Argued December 13, 1967.—Decided January 16, 1968.*

Respondent, a private utility company, sued to enjoin the Tennessee Valley Authority (TVA) from supplying TVA power in alleged violation of § 15d of the TVA Act for use in two small Tennessee towns where, as of July 1, 1957, respondent had supplied 94% of the electric power and TVA 6%. At that time TVA supplied 62% of the power used in all Claiborne County. It supplied most of the county's rural areas, and on a relatively unprofitable basis. Respondent's retail rates in the two towns were about 2½ times those of TVA. Section 15d of the Act bars TVA from expanding sales outside "the area for which [it] or its distributors were the primary source of power on July 1, 1957." The District Court upheld the determination of the TVA Board of Directors that Claiborne County as a whole constituted TVA's primary service "area" and dismissed the action. The Court of Appeals reversed, holding that the towns and a narrow corridor between them and respondent's main service area in nearby Kentucky constituted

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*Together with No. 50, *Powell Valley Electric Cooperative* v. *Kentucky Utilities Co.*, and No. 51, *Tennessee Valley Authority* v. *Kentucky Utilities Co.*, also on certiorari to the same court.

the "area." Both courts ruled against petitioners' contention that the respondent lacked standing to sue. *Held:*

1. Respondent, being within the class of private utilities which § 15d. is designed to protect from TVA competition, has standing to maintain this suit. Pp. 5–7.

2. TVA's determination that Claiborne County constituted the primary service "area" within the meaning of § 15d should be upheld since it was within the range of permissible choices contemplated by the Act and had reasonable economic and technical support in relation to the statutory purpose of controlling but not altogether prohibiting TVA's territorial expansion. Pp. 8–13.

375 F. 2d 403, reversed.

William R. Stanifer argued the cause for petitioners in Nos. 40 and 50. With him on the brief for petitioners in No. 40 was *Philip P. Ardery*. *Clyde Y. Cridlin* was on the brief for petitioner in No. 50. *Robert H. Marquis* argued the cause for petitioner in No. 51. With him on the brief were *Acting Solicitor General Spritzer, Richard A. Posner, Charles J. McCarthy* and *Thomas A. Pedersen.*

Malcolm Y. Marshall argued the cause for respondent in all three cases. With him on the brief were *Squire R. Ogden* and *James S. Welch.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question for decision in these cases is whether Congress has prohibited the Tennessee Valley Authority from competing in the sale of electricity with respondent, the Kentucky Utilities Company, in two small villages in Claiborne County, Tennessee, and in a narrow corridor between the two villages and the Tennessee-Kentucky state boundary 16 miles away. By § 15d of the Tennessee Valley Authority Act of 1933, as added by the 1959 amendments to that Act, Congress barred the TVA from expanding its sales outside "the area for which the Corporation [TVA] or its distributors were the pri-

mary source of power supply on July 1, 1957," [1] and our problem is therefore the narrow one of deciding whether these villages and the narrow corridor are part of an "area" for which TVA was the primary source of power on the crucial date. The difficulty lies in determining the location and extent of the "area" to which the statute refers. In June 1957, TVA supplied 62% of the power used in all of Claiborne County, and therefore if the entire county is an "area" within the meaning of the statute, TVA would have been the "primary" source of power, and its expansion into the two villages would be

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[1] Tennessee Valley Authority Act of 1933, § 15d (a), 73 Stat. 280, as amended, 73 Stat. 338, 16 U. S. C. § 831n–4 (a). The full text of the relevant portion of § 15d (a) is as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

permissible. On the other hand, in the villages themselves, TVA supplied only 6% of the power in June 1957, while respondent supplied 94%; thus if the two villages either alone or with the corridor constitute an "area," TVA would not have been the primary source of power, and it would be barred by § 15d from expanding into that area.

The question of statutory interpretation now before us arose in this way. TVA is the major supplier of electric power in Tennessee and in many adjoining areas of Alabama, Mississippi, Georgia, Virginia, and Kentucky. Respondent, whose service area is centered in Kentucky, has long served customers in Tazewell and New Tazewell, the two villages within 16 miles of the Kentucky border in Claiborne County, Tennessee. The power lines of TVA distributors also crisscross Claiborne County, and TVA has therefore been able to serve a small number of customers in the two villages, even though respondent was the predominant source of power. Because Kentucky Utilities' retail rates for electricity in the two villages were approximately 2½ times higher for typical consumers than the rates for TVA power,[2] the value of residential and commercial properties served by TVA was substantially and uniformly higher than the value of similar properties served by respondent. This rate disparity created a seething discontent among residential and industrial consumers in the villages. Pointing out that they lived in the very heart of the TVA watershed and in immediate proximity to TVA's large Norris Lake, these citizens contended that it was wholly unjust and inequitable to deny them the benefits and advantages of cheap TVA power. After complaints, planning, and consultations over a period of more than three years, the local

[2] For the owner of an electrically heated home, TVA power might cost $30.50 for a winter month as against $75.53 for the identical amount of power supplied by respondent.

governments engaged a contractor to build the facilities necessary to establish a municipal system linked to TVA's cheap power. Kentucky Utilities' customers immediately began to discontinue their service and become customers of the municipal system.

Kentucky Utilities then filed this suit against TVA, the mayors of the two Tazewells, and the Powell Valley Electric Cooperative, a TVA distributor, charging them with conspiracy to destroy its Tazewell business and asking the court to enjoin TVA from supplying power to the new municipal system in alleged violation of § 15d. The District Court upheld the determination of the TVA Board of Directors that the two Tazewells were within TVA's primary service "area" and dismissed the case, 237 F. Supp. 502 (1964), but the Court of Appeals reversed, holding that the two villages plus the corridor constituted an "area" and that TVA accordingly was barred from extending its service in the Tazewells. 375 F. 2d 403 (1966). We granted certiorari, 386 U. S. 980 (1967), to resolve this important question in the administration of the TVA Act. We reverse and agree with the District Court that the TVA Board properly determined the relevant service "area" to extend beyond the two Tazewells and to include the entire county. TVA, as the primary power source within this area, could therefore properly make its low-cost power available to consumers in this entire county area including the two villages.

I.

Before discussing the merits, we shall briefly consider petitioners' contention that the Kentucky Utilities Company lacks standing to challenge the legality of TVA's activities. We agree with both the courts below that this contention is without merit. This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself,

confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co.* v. *Ellerman,* 105 U. S. 166 (1882); *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Tennessee Power Co.* v. *TVA,* 306 U. S. 118 (1939); *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case,* 264 U. S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co.* v. *United States,* 315 U. S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, 83 (1958).

Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. This is evident from the provision itself and is amply supported by its legislative history. The provision grew out of TVA's efforts to find some way to meet the cost of new facilities without dependence upon annual appropriations from Congress. In 1955 TVA began to seek authority to issue bonds to finance these expenditures. Although TVA spokesmen assured Congress that the objective was not territorial expansion but only improvement of facilities in TVA's existing service area, many members of Congress were apprehensive and thought that if congressional budgetary control was to be weakened, some substitute to prevent territorial expansion should be found. A series of bills to give TVA borrowing power failed to pass.[3] Several

[3] S. 2373, 84th Cong., 1st Sess. (1955); H. R. 4266, 85th Cong., 1st Sess. (1957).

bills were then introduced combining the grant of borrowing power with various provisions to prohibit territorial expansion,[4] and one of these bills was eventually enacted as the TVA amendments of 1959. Although discussions of the territorial limitation mentioned a number of policy reasons for the restriction,[5] it is clear and undisputed that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the limitation.[6] Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see *Stark* v. *Wickard,* 321 U. S. 288, 309 (1944); cf. *United States* v. *ICC,* 337 U. S. 426, 433–434 (1949), and no explicit statutory provision is necessary to confer standing.[7]

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[4] S. 1855, S. 1869, S. 1986, S. 2145, 85th Cong., 1st Sess. (1957); S. 931, H. R. 3460, 86th Cong., 1st Sess. (1959).

[5] One of the Senators active in framing the territorial limitation expressed concern over TVA's powerful bargaining position with respect to its purchase of coal. See S. Rep. No. 470, 86th Cong., 1st Sess., 54 (1959) (supplemental views of Senator Randolph).

[6] See, *e. g., id.,* at 9 (majority report); *id.,* at 54–55 (supplemental views of Senator Randolph); 105 Cong. Rec. 13053 (July 9, 1959) (remarks of Senator Cooper); *id.,* at 13054 (remarks of Senator Holland); *id.,* at 13055 (remarks of Senator Kerr); *id.,* at 13060–13061 (remarks of Senator Randolph); *id.,* at 13061 (remarks of Senator Byrd); hearings on H. R. 3460 before House Committee on Public Works, March 10–11, 1959, 86th Cong., 1st Sess., 110, 115 (testimony of Representative Vinson); *id.,* at 122 (testimony of Representative Boykin).

[7] Petitioners' reliance on *Kansas City Power & Light Co.* v. *McKay,* 96 U. S. App. D. C. 273, 225 F. 2d 924, cert. denied, 350 U. S. 884 (1955), is thus misplaced. The Court in *McKay* ruled that an explicit statutory provision was necessary to confer standing because of the "long established rule" that an injured competitor cannot sue to enforce statutory requirements not designed to protect competitors. In the case of statutes concerned with protecting competitive interests, the "long established rule" is of course precisely the opposite.

II.

Basic to our consideration of the merits of these cases is an appraisal of the significance of the TVA Board's determination that all of Claiborne County, including the two Tazewells, constituted a single "area" in which TVA is the primary source of power. Petitioners argue that the Court of Appeals gave no weight whatever to this determination and urge that the finding should instead have been treated like an administrative interpretation by an agency or executive officer, to be set aside only if it is not properly related to the purposes of the statute. The opinion of the Court of Appeals is not altogether clear in dealing with this question, however,[8] and respondent has not attempted to argue here that the Court of Appeals could have decided the matter entirely on its own, without any consideration of the TVA Board's finding. Rather, respondent appears to agree with petitioners that the determination of the TVA Board is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute, and we think this is the proper rule. The initial determination as to the extent of the "area" under § 15d must be made by the TVA Board in every case, since TVA is required under the Act to make power available to public bodies and cooperatives within the per-

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[8] The Court of Appeals stated at one point:

"But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine 'the area' in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority." 375 F. 2d, at 412.

Later in its opinion, however, the court suggests that this statement was not intended to deny any role to the Board's determination:

"We hold that the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this appeal." 375 F. 2d, at 415.

missible area.[9] In making this determination as to the most appropriate boundaries for its service area, the TVA Board will normally evaluate the economic and engineering aspects of providing its service to the customers in question, especially in relation to the particular topography of the affected region. Given the innate and inevitable vagueness of the "area" concept and the complexity of the factors relevant to decision in this matter, we think it is more efficient, and thus more in line with the overall purposes of the Act, for the courts to take the TVA's "area" determinations as their starting points and to set these determinations aside only when they lack reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion. Cf. *SEC* v. *New England Electric,* 384 U. S. 176, 185 (1966); *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 109–110 (1904).

III.

Tested by this standard, we think the determination of the TVA Board with respect to Claiborne County should have been upheld by the court below. Neither the language of § 15d, its legislative history, nor any of the economic and technical circumstances of this particular locality suggest that the TVA Board's determination here exceeded the outer boundaries of choice contemplated in the Act.

Certainly nothing in the language of § 15d (a) itself forecloses the TVA's present decision. The second paragraph of that section reads:

> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally estab-

[9] See § 12 of the Tennessee Valley Authority Act, 48 Stat. 65, 16 U. S. C. § 831k.

> lished electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

In light of this provision, respondent argues that even *within* its "area," TVA may not extend its services to new customers previously served by a private company. Literally, of course, this language does not establish such a rule. It simply states that when a customer is served by a private utility in this area of generally established service, an area perhaps broader than the "area" of primary service which is controlling under the first paragraph of § 15d (a), the Act *may* prevent TVA from supplying the customer; other parts of the subsection must be looked to for the actual prohibition. This literal reading, moreover, is the only appropriate one in light of other provisions of the statute. The first paragraph of § 15d (a) authorizes TVA to provide power not only within its "area" but also within an additional region "extending not more than five miles around the periphery of such area." This is followed by a proviso denying TVA the right to serve within this additional region any "municipality receiving electric service from another source on or after July 1, 1957." Since the Act makes the existence of a private supplier an explicit bar to TVA expansion only within the additional region, we cannot read the statute as also making the existence of a private supplier, in and of itself, an automatic bar to expansion in the primary service "area."

The parties have also called our attention to numerous incidents in the legislative history suggesting that Congress may have regarded the very villages involved in this case as either inside or outside of TVA's service area. Petitioners note that maps placed before the congressional committees showed the Tazewells as within TVA's primary service area. Respondent counters that one map submitted to the House Public Works Com-

mittee showed the Tazewells as within respondent's service area. In addition, respondent notes that a "gentlemen's agreement" between TVA and neighboring private utilities had placed the Tazewells within respondent's area, and respondent refers to a number of statements indicating that various sponsors of the territorial limitations intended to enact the "gentlemen's agreement" into law.

We do not find any of this information particularly helpful in resolving the question before us. The maps on which petitioners rely were large-scale representations of TVA's entire multistate system, and they were submitted to various committees for general reference. Even if all these maps had placed the Tazewells in the same area, it would be artificial in the extreme to assume that Congress actually entertained any specific intention with respect to these small villages in one tiny portion of the county, the State and the map. With respect to the "gentlemen's agreement," it is undeniable that many members of Congress did hope to freeze completely the existing situation by enactment of the territorial limitation. Others, the majority of the Senate Public Works Committee in particular, undoubtedly sought to include language that would authorize adjustments and permit a certain amount of elasticity in the availability of TVA service. We think it is sufficient to note, without tracing all the changes in the wording of the territorial limitation, that the language of the Act in its final form is a compromise and that the views of those who sought the most restrictive wording cannot control interpretation of the compromise version.

Finally, we think that apart from the structure of the Act and its legislative history, the facts of the situation in Claiborne County, in Tennessee, and in Kentucky support rather than undercut the TVA Board's determination. The parties place great stress on the question

whether respondent's service area should be characterized as a "peninsula" attached to its main region of service or as a mere "island" surrounded by TVA territory and therefore more properly subject to TVA intrusion. But we can attribute no controlling significance to such characterizations. The most isolated area of private service will necessarily be connected to the private company's main area by at least one power line such as the one present here, and the company may even, as here, serve scattered customers along the line—if indeed the region contains any customers to serve. At the same time a broad area served almost entirely by a private company and contiguous with its main service area may be crisscrossed by the lines of TVA distributors and TVA may even have scattered customers along these lines; the fact that the private company was thus surrounded by TVA might not under this statute justify TVA expansion into the "peninsula" or "island," whatever it may be, served by private power. In the present cases respondent did serve a substantial number of customers in the corridor between the Tazewells and its main service area in Kentucky, but if a "peninsula," it was at best a very narrow and tiny one in relation to the possible patterns of power distribution. TVA, on the other hand, served most of the rural areas in Claiborne County and had a substantial minority of the customers in the Tazewells themselves. Under these circumstances, the TVA Board could properly have concluded that the pattern of electric power distribution would be more sensible and efficient if TVA competed in the entire Tazewell municipal area as well as serving the relatively unprofitable rural customers, many of whom were rather close to respondent's transmission line into the Tazewells. In addition, the Board could have considered the existence of its significant, though not primary, service in the Tazewells themselves as a compelling reason for including these villages in its

"area," since the factors supporting inclusion were in any event significant and since the great disparity of rates in the villages had resulted in significant economic dislocations.

Under all these circumstances we cannot say that the conclusion of the TVA Board in the present cases is incompatible with the "area" concept formulated in the Act. We therefore reverse the judgment of the Court of Appeals and affirm that of the District Court.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, dissenting.

These cases present a narrow question of statutory construction, upon which differing views might reasonably be entertained. I cannot, however, agree that the position now adopted by the Court will satisfactorily achieve the purposes evidently sought by Congress in 1959. I therefore respectfully dissent.

The scope of judicial review of administrative action is, of course, governed principally by the terms and purposes of the underlying statutory system. Compare generally 4 Davis, Administrative Law Treatise § 30.03 (1958); Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239; Jaffe, Judicial Control of Administrative Action 546 *et seq.* (1965). The purposes of these statutory provisions are uncommonly plain. The Court acknowledges, as it must, that "it is clear and undisputed that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the [service area] limitation." *Ante,* at 7.

The provisions in question were expected to protect private utilities by "defin[ing]" and "limit[ing]" the

"working arrangement that now exists with respect to" the Authority's service area. S. Rep. No. 470, 86th Cong., 1st Sess., 8. They were thus intended to constrict the Authority's discretion as to the expansion of its area of service. It is no disparagement of the Authority to recognize that an orderly system of law does not place the enforcement of a restraint upon discretion into the unfettered hands of the party sought to be restrained; surely, therefore, the scope of judicial review of proceedings involving such limitations should be measured generously.

The role of the courts should, in particular, be viewed hospitably where, as here, the question sought to be reviewed does not significantly engage the agency's expertise. This is an instance "where the only or principal dispute relates to the meaning of the statutory term," *NLRB* v. *Marcus Trucking Co.*, 286 F. 2d 583, 591; it may, as Judge Friendly has noted, therefore appropriately be denominated a "question of law." *Ibid.* It presents issues on which courts, and not the Authority, are relatively more expert. See 4 Davis, *supra,* at § 30.04. No doubt "economic and engineering aspects," *ante,* at 9, including topography, may influence the Authority's wish to expand its area of service, but such factors can hardly prescribe the terms or stringency of Congress' prohibitions against expansion.

In light of these considerations, I am unable to accept this decision, the effect of which is to restrict severely the scope of judicial review of the Authority's determinations under § 15d (a). The Court forbids reviewing courts to set aside such determinations unless they lack "reasonable support," and then discovers such support here in the most minimal evidence.[1] At bottom, the support

[1] It should be noted that the agency determination upon which the Court places so much weight was reached at a "special meeting" of the Board of Directors on August 26, 1964, more than eight

adduced for this determination by the Court consists of two facts: first, the Authority's distributor served on July 1, 1957, eight customers in New Tazewell and 20 customers in Tazewell; [2] and second, at least some of the other residents of the two municipalities quite understandably would prefer to pay the lower rates for electrical power charged by the Authority.[3] If these facts illustrate the "reasonable support" demanded by the Court, Congress' stringent limitation upon the Authority has proved extraordinarily fragile.[4]

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months after respondent filed its complaint, and only three weeks before trial. One of the staff memoranda upon which the determination was based refers specifically to this litigation. One might have supposed that a determination which was made *post litem motam* warranted at least cautious treatment.

[2] The Court's choice of descriptive phrase is noteworthy. The Court suggests that the Authority's distributor served "a substantial minority" of the customers in the two Tazewells. The District Court found, in fact, that on July 1, 1957, respondent served 95.3% of those customers. 237 F. Supp. 502, 513.

[3] The Court intimates darkly that "economic dislocations" have occurred. The pertinent evidence appears to consist at bottom of allegations that housing and other forms of economic development tend to locate in areas in which the Authority's less expensive electrical power is available. Surely the Court does not suppose that Congress in 1959 was unaware that the Authority's electrical power is relatively inexpensive, or that it did not recognize that those who reside outside the Authority's service area would find it economically desirable to have that area extended so as to include themselves.

[4] It is pertinent to note that neither of the two staff memoranda upon which the Authority's belated determination was explicitly based included among the "facts which appear to be relevant" (Memorandum from the Manager of Power to the General Manager, Tennessee Valley Authority, August 25, 1964, 2 Transcript of Record 801) any references to "economic and engineering aspects" (*ante*, at 9), or even to any "economic dislocations" (*ante*, at 13). Whatever the relevance of these factors in the eyes of the Court, the Authority's staff appears to have thought them immaterial. The determination itself does not, of course, refer to these factors.

Neither the statute nor the pertinent legislative history provides any formula for the precise measurement of the Authority's service area. However, given Congress' clear purpose to restrict stringently the expansion of the area served by the Authority on July 1, 1957, I think that the emphasis placed by the Court of Appeals on the number of customers served on that date by respondent and the Authority offers the basis of a sensible and practical standard. Certainly Congress did not wish or expect that, as this Court now holds, the question should be left largely, if not entirely, in the hands of the Authority. I would therefore affirm the judgment below for the reasons given in Judge O'Sullivan's opinion for the Court of Appeals, 375 F. 2d 403, supplemented by the considerations discussed in this opinion.

SCHNEIDER *v.* SMITH, COMMANDANT, UNITED STATES COAST GUARD.

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

No. 196. Argued December 12–13, 1967.—
Decided January 16, 1968.

Appellant applied to the Commandant of the Coast Guard for validation of his merchant mariner's document evidencing his ability to act as a second assistant engineer. Such validation is required by regulations promulgated pursuant to the Magnuson Act, which authorizes the President, if he finds that "the security of the United States is endangered by . . . subversive activity," to issue regulations "to safeguard . . . from sabotage or other subversive acts" all "vessels" in the territories or waters under United States jurisdiction. In response to a questionnaire, appellant stated that he had been a member of some organizations on the Attorney General's list of subversive organizations, but he refused to answer certain questions on a supplemental form relating generally to the nature and extent of his membership in any of the groups and to his political philosophy. When the Commandant refused to process the application further, appellant brought this action seeking a declaration that the Act and the Commandant's actions thereunder were unconstitutional and praying that the Commandant be directed to approve the application. A three-judge court dismissed the complaint. *Held:*

1. Since appellant challenged the Act's constitutionality on grounds of vagueness and abridgment of First Amendment rights and also questioned whether the power to install a screening program was properly delegated, the case was one to be heard by a three-judge court and this Court has jurisdiction of the appeal. P. 22.

2. The Act gives the President no express authority to set up a screening program for personnel on American merchant vessels. P. 22.

3. The procedure involved here, which is not concerned with appellant's conduct, but which arguably does impinge on his First Amendment freedoms, cannot be justified by the language of the Act, as the Act is to be read narrowly to avoid questions

concerning "associational freedom" and other rights within the protection of the First Amendment. Pp. 22–27.

263 F. Supp. 496, reversed.

Leonard W. Schroeter and *John Caughlan* argued the cause and filed a brief for appellant.

John S. Martin, Jr., argued the cause for appellee. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant, who has served on board American-flag commercial vessels in various capacities, is now qualified to act as a second assistant engineer on steam vessels. But between 1949 and 1964 he was employed in trades other than that of a merchant seaman. In October 1964 he applied to the Commandant of the Coast Guard for a validation of the permit or license which evidences his ability to act as a second assistant engineer.

Under the Magnuson Act, 64 Stat. 427, 50 U. S. C. § 191 (b), the President is authorized, if he finds that "the security of the United States is endangered by . . . subversive activity," to issue rules and regulations "to safeguard against destruction, loss, or injury from sabotage or other subversive acts" all "vessels" in the territories or waters subject to the jurisdiction of the United States.[1]

[1] Section 191 provides in part:

"Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

"(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his

President Truman promulgated Regulations, 33 CFR, pt. 6, which give the Commandant of the Coast Guard authority to grant or withhold validation of any permit or license evidencing the right of a seaman to serve on a merchant vessel of the United States. § 6.10–3. He is directed not to issue such validation unless he is satisfied that "the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States." § 6.10–1.

The questionnaire, which appellant in his application was required to submit, contained the following inquiry which he answered:

> "ITEM 4. Do you now advocate, or have you ever advocated, the overthrow or alteration of the Government of the United States by force or violence or by unconstitutional means?
>
> "Answer: No."

The questionnaire contained the following inquiries which related to his membership and participation in organizations which were on the special list of the Attorney General as authorized by Executive Order 10450, 18 Fed. Reg. 2489:

> "ITEM 5. Have you ever submitted material for publication to any of the organizations listed in Item 6 below?

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opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

"(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

"Answer. No.

"ITEM 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below? [There followed a list of more than 250 organizations.]

"Answer. Yes.

"If your answer is 'yes,' give full details in Item 7.

"ITEM 7. (Use this space to explain Items 1 through 6. . . . Attach a separate sheet if there is not enough space here.)

"Answer. I have been a member of many political & social organizations, including several named on this list.

"I cannot remember the names of most of them & could not be specific about any.

"To the best of my knowledge, I have not been a member or participated in the activities of any of these organizations for ten years."

Upon receiving the questionnaire returned by the appellant, the Commandant advised him that the information was not sufficient and that answers to further interrogatories were necessary.[2]

[2] "1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

"(a) List the names of the political and social organizations to which you belonged, and location.

"(b) Furnish approximate dates of membership.

"(c) Furnish full particulars concerning the extent of your activities and participation in the organizations (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.).

"(d) Your reason for discontinuing the membership.

"(e) Your present attitude toward the principles and objectives of the organizations.

"If your answer is 'YES' to the following Questions, *explain fully* in the space provided at the end of the Interrogatories:

"2. Are you now, or have you ever been, a member of or affiliated

In reply, appellant, speaking through his counsel, admitted to the Commandant that he had been a member of the Communist Party as well as other organizations on the Attorney General's list and that he had subscribed to People's World. He said that he had joined the Party because of his personal philosophy and idealistic goals, but later quit it and the other organizations due to fundamental disagreement with Communist methods and techniques. But beyond that he said he would not answer because "it would be obnoxious to a truly free citizen to answer the kinds of questions under compulsion that you require." The Commandant declined to process the application further, relying upon 33 CFR § 121.05 (d)(2), which authorizes him to hold the application in abeyance if an applicant fails or refuses to furnish the additional information.

Appellant thereupon brought this action for declaratory relief that the provisions of the Magnuson Act in question and the Commandant's actions thereunder were unconstitutional, praying that the Commandant be directed to approve his application and that he be enjoined

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with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

"..... (Answer 'Yes' or 'No.')

"3. Have you at any time been a subscriber to the 'People's World'?

"..... If your answer is 'Yes,' give dates. (Answer 'Yes' or 'No.')

4. "Have you at any time engaged in any activities in behalf of the 'People's World'? ..... (Answer 'Yes' or 'No.')

"If your answer is 'Yes,' furnish details.

"5. What is your present attitude toward the Communist Party?

"6. What is your present attitude toward the principles and objectives of Communism?

"7. What is your attitude toward the form of Government in the United States?"

from interfering with appellant's employment upon vessels flying the American flag.

A three-judge court was convened and the complaint was dismissed. 263 F. Supp. 496. The case is here on appeal, 28 U. S. C. § 1253. We postponed the question of jurisdiction to the merits. 389 U. S. 810.

We agree, as does appellee, that the case was one to be heard by a three-judge court and that accordingly we have jurisdiction of this appeal. For appellant did raise the question as to whether the statute was unconstitutional because of vagueness and abridgment of First Amendment rights and also questioned whether the power to install a screening program was validly delegated. A three-judge court was accordingly proper. *Baggett* v. *Bullitt*, 377 U. S. 360; *Zemel* v. *Rusk*, 381 U. S. 1.

The Magnuson Act gives the President no express authority to set up a screening program for personnel on merchant vessels of the United States. As respects "any foreign-flag vessels" the power to control those who "go or remain on board" is clear. 50 U. S. C. § 191 (a). As respects personnel of our own merchant ships, the power exists under the Act only if it is found in the power to "safeguard" vessels and waterfront facilities against "sabotage or other subversive acts," that is, under § 191 (b). The Solicitor General argues that the power to exclude persons from vessels "clearly implies authority to establish a screening procedure for determining who shall be allowed on board." But that power to exclude is contained in § 191 (a) which, as noted, applies to "foreign-flag vessels," while, as we have said, the issue tendered here must find footing in § 191 (b).[3]

[3] It is true that Senator Magnuson when discussing this measure stated that it "will give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II." 96 Cong. Rec. 10795. And from that the

We agree with the District Court that keeping our merchant marine free of saboteurs is within the purview of this Act. Our question is a much narrower one.

The Regulations prescribe the standards by which the Commandant is to judge the "character and habits of life" of the employee to determine whether his "presence . . . on board" the vessel would be "inimical to the security of the United States":

> "(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.
>
> "(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

Solicitor General argues that the Act authorizes the broad sweeping personnel screening programs which were in force during World War II.

But this reference by Senator Magnuson apparently was to § 191 (a) which, as noted, covers "any foreign-flag vessels." When it came to § 191 (b) Senator Magnuson did not speak in terms of any screening program, but said:

"It [the bill] also has this purpose, which I think is a good one: As I have said before, the last stronghold of subversive activity in this country, in my opinion, or at least the last concentrated stronghold, has been around our waterfronts. It would be impossible for destruction to come to any great port of the United States, of which there are many, as the result of a ship coming into port with an atomic bomb or with biological or other destructive agency, without some liaison ashore. This would give authority to the President to instruct the FBI, in cooperation with the Coast Guard, the Navy, or any other appropriate governmental agency, to go to our water fronts and pick out people who might be subversives or security risks to this country. I think it goes a long way toward taking care of the domestic situation, as related to this subject, particularly in view of the large amount of talk we have had in the Senate within the past few days about Communists. The bill also protects that last loophole which is left, by which there might be some actual destruction along the shores of the United States." 96 Cong. Rec. 11321.

"(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

"(d) Deliberate unauthorized disclosure of classified defense information.

"(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." 33 CFR § 121.03.

If we assume *arguendo* that the Act authorizes a type of screening program directed at "membership" or "sympathetic association," the problem raised by it and the Regulations would be kin to the one presented in *Shelton* v. *Tucker,* 364 U. S. 479, where a teacher to be hired by a public school of Arkansas had to submit an affidavit "listing all organizations to which he at the time belongs and to which he has belonged during the past five years." *Id.,* at 481.

We held that an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed; that an unlimited and indiscriminate search of the employee's past which interferes with his associational freedom is unconstitutional. *Id.,* at 487–490.

If we gave § 191 (b) the broad construction the Solicitor General urges, we would face here the kind of issue present in *Shelton* v. *Tucker, supra,* whether government can probe the reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seamen on our merchant vessels.

A saboteur on a merchant vessel may, of course, be dangerous. But no charge that appellant was a saboteur

was made. Indeed, no conduct of appellant was at issue before the Commandant. The propositions tendered in the complaint were (1) plaintiff is now and always has been loyal to the United States; (2) he has not been active in any organization on the Attorney General's list for the past 10 years; (3) he has never committed any act of sabotage or espionage or any act inimical to the security of the United States. Those propositions were neither contested by the Commandant nor conceded. He took the position that admission of evidence on those propositions was "irrelevant and immaterial."

We are loath to conclude that Congress, in its grant of authority to the President to "safeguard" vessels and waterfront facilities from "sabotage or other subversive acts," undertook to reach into the First Amendment area. The provision of the Act in question, 50 U. S. C. § 191 (b), speaks only in terms of actions, not ideas or beliefs or reading habits or social, educational, or political associations.

The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people. The First Amendment's ban against Congress "abridging" freedom of speech, the right peaceably to assemble and to petition, and the "associational freedom" (*Shelton* v. *Tucker, supra,* at 490) that goes with those rights create a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "the opinions of men are not the object of civil government, nor under its jurisdiction . . . . [I]t 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 . . . ." [4]

[4] A Bill for Establishing Religious Freedom, Jeffersonian Cyclopedia 976 (1900).

No act of sabotage or espionage or any act inimical to the security of the United States is raised or charged in the present case.

In *United States* v. *Rumely,* 345 U. S. 41, the Court construed the statutory word "lobbying" to include only direct representation to Congress, its members, and its committees, not all activities tending to influence, encourage, promote, or retard legislation. *Id.,* at 47. Such an interpretation of the statute, it was said, was "in the candid service of avoiding a serious constitutional doubt" (*ibid.*)—doubts that were serious "in view of the prohibition of the First Amendment." *Id.,* at 46.

The holding in *Rumely* was not novel. It is part of the stream of authority which admonishes courts to construe statutes narrowly so as to avoid constitutional questions.[5]

The Court said in *Rumely,* "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain." 345 U. S., at 46.

The present case involves investigation, not by Congress but by the Executive Branch, stemming from congressional delegation. When we read that delegation with an eye to First Amendment problems, we hesitate to conclude that Congress told the Executive to ferret out the ideological strays in the maritime industry. The words it used—"to safeguard . . . from sabotage or other subversive acts"—refer to actions, not to ideas or

[5] *United States* v. *Delaware & H. Co.,* 213 U. S. 366, 407–408; *United States* v. *Harriss,* 347 U. S. 612, 618, n. 6; *International Machinists* v. *Street,* 367 U. S. 740, 749; *Lynch* v. *Overholser,* 369 U. S. 705, 710–711; *United States* v. *National Dairy Corp.,* 372 U. S. 29, 32.

beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges. *Rumely,* and its allied cases, teach just the opposite—that statutory words are to be read narrowly so as to avoid questions concerning the "associational freedom" that *Shelton* v. *Tucker* protected and concerning other rights within the purview of the First Amendment.

Reversed.

MR. JUSTICE BLACK, while concurring in the Court's judgment and opinion, also agrees with the statement in MR. JUSTICE FORTAS' concurring opinion that the statute under consideration, if construed to authorize the interrogatories involved, is offensive to the First Amendment.

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

MR. JUSTICE FORTAS, concurring.

I concur in the opinion of the Court. Reversal is dictated because the interrogatories which petitioner refused to answer offend the First Amendment. *Shelton* v. *Tucker,* 364 U. S. 479 (1960). (They also pass the outermost bounds of reason. No agency may be permitted to require of a person, subject to heavy penalty, sworn essays as to his "attitude toward the form of Government in the United States" or "full particulars," under oath, without time limit, as to contributions made and functions attended with respect to 250 organizations.) I agree that since Congress did not specifically authorize a personnel screening program, authority to impose procedures of the comprehensive type here involved, necessarily impinging on First Amendment freedoms, may not be inferred from dubious general language. The fault, however, is not that there was an inadequate or

improper delegation, but that Congress did not authorize the type of investigation which was launched. Needless to say, Congress has constitutional power to authorize an appropriate personnel screening program and to delegate to executive officials the power to implement and administer it. See *United States* v. *Robel,* 389 U. S. 258 (1967).

MR. JUSTICE STEWART, agreeing with the separate views of MR. JUSTICE FORTAS, concurs in the judgment.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, concurring in the result.

I agree with the Court that the Magnuson Act did not authorize the inquiry undertaken by the Coast Guard Commandant and that therefore the judgment of the District Court must be reversed. I express no opinion as to the scope of inquiry which Congress could constitutionally provide with respect to applicants for the position of merchant seaman.

EPTON *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 502, Misc. Decided January 22, 1968.*

19 N. Y. 2d 496, 227 N. E. 2d 829, certiorari denied in No. 502, Misc.; and appeal dismissed in No. 771, Misc.

Eleanor Jackson Piel for petitioner in No. 502, Misc., and for appellant in No. 771, Misc.

Frank S. Hogan, H. Richard Uviller and *Michael Juviler* for respondent in No. 502, Misc., and for appellee in No. 771, Misc.

PER CURIAM.

The petition for a writ of certiorari is denied in No. 502, Misc. The motion to dismiss is granted in No. 771, Misc., and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE STEWART, concurring in the denial of certiorari and the dismissal of the appeal.

I join the denial of certiorari in No. 502, Misc., and the dismissal of the related appeal in No. 771, Misc., but only because Epton has been sentenced to serve three concurrent one-year terms: one for conspiring to riot, New York Penal Law (1944 and 1966 Cum. Supp.), §§ 580, 2090; one for advocating criminal anarchy, §§ 160, 161; and one for conspiring to engage in such advocacy, §§ 580, 160, 161. I think the riot conviction presents no substantial federal question,† and since the three sen-

*Together with No. 771, Misc., *Epton* v. *New York,* on appeal from the same court.

†It is true that some of the acts relied upon by the State to establish the existence of a conspiracy to riot consisted of speeches

tences were ordered to run concurrently, I conclude that these cases do not require the Court to consider either the criminal anarchy conviction or the associated conspiracy conviction. See *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Lanza* v. *New York*, 370 U. S. 139. If the constitutionality of New York's criminal anarchy laws were properly presented, however, I would vote to grant the petition for certiorari and note probable jurisdiction of the appeal, to reconsider the Court's decision in *Gitlow* v. *New York*, 268 U. S. 652, and to decide whether the New York anarchy statutes, either on their face or as applied in these cases, violate the First and Fourteenth Amendments.

MR. JUSTICE DOUGLAS, dissenting.

I would hear argument in these cases, since I am of the opinion that all questions presented, including those under the first count of the indictment for conspiring to riot, present substantial federal questions.

In the first count, the State alleged the commission of 15 overt acts by Epton in furtherance of the alleged conspiracy to riot. The alleged acts consisted in part of speeches made by Epton and his participation in the preparation and distribution of certain leaflets. Such activities, of course, are normally given the protection of the First Amendment with exceptions not now

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made by Epton. Like my Brother DOUGLAS, I think it is at least arguable that a State cannot convict a man of criminal conspiracy without first demonstrating some constitutionally unprotected overt act in furtherance of the alleged unlawful agreement. But the State in these cases presented proof that Epton had actively participated in the formation of a group dedicated to armed revolt against the police under the direction of "block captains" and with the assistance of "terrorist bands," equipped with Molotov cocktails that Epton himself had explained how to use. In the context of this record, activities such as these can make no serious claim to constitutional protection.

necessary to state. See *Yates* v. *United States,* 354 U. S. 298; *Dennis* v. *United States,* 341 U. S. 494; *Terminiello* v. *Chicago,* 337 U. S. 1; *Thomas* v. *Collins,* 323 U. S. 516; *Bridges* v. *California,* 314 U. S. 252; *Gitlow* v. *New York,* 268 U. S. 652, 672 (dissenting opinion); *Abrams* v. *United States,* 250 U. S. 616, 624 (dissenting opinion); *Schenck* v. *United States,* 249 U. S. 47; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Feiner* v. *New York,* 340 U. S. 315, 329 (dissenting opinion).

Under New York law, a conviction for conspiracy requires both an agreement to commit an unlawful act and at least one overt act in furtherance of that agreement.[1] Whether the overt act required to convict a defendant for conspiracy must be shown to be constitutionally unprotected presents an important question. An argument can of course be made that overt acts are used only to demonstrate the existence of a conspiracy, and to draw reasonable inferences as to the intent of the alleged conspirator.

Although the Court has indicated that the overt act requirement of the treason clause ensures that "thoughts and attitudes alone cannot make a treason" (*Cramer* v. *United States,* 325 U. S. 1, 29), it has never decided whether activities protected by the First Amendment can constitute overt acts for purposes of a conviction for treason. The matter was adverted to in *Cramer* v. *United States:*

> "Thus the crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid

[1] N. Y. Pen. Law §§ 105.00–105.20 (1967). At the time of Epton's trial, the New York law was essentially the same. N. Y. Pen. Law §§ 580, 583 (1966 Cum. Supp.).

> and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—*making a speech critical of the government or opposing its measures,* profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." (Italics added.) *Id.*, at 29.

In the same case, the four dissenters noted that:

> "It is plain . . . that the requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech." *Id.*, at 61.

The lower federal courts have considered the question in a few cases, the most exhaustive treatment probably being found in *Chandler* v. *United States,* 171 F. 2d 921 (C. A. 1st Cir. 1948). Treason, of course, is not the charge here. Yet the use of constitutionally protected activities to provide the overt acts for conspiracy convictions might well stifle dissent and cool the fervor of those with whom society does not agree at the moment. Society, like an ill person, often pretends it is well or tries to hide its sickness. From this perspective, First Amendment freedoms safeguard society from its own folly. As long as the exercise of those freedoms is within the protection of the First Amendment, the question is presented whether this Court should permit criminal convictions for conspiracy to stand, when they turn on that exercise.

The issue, then, is whether Epton's speeches and his participation in the preparation and distribution of leaflets can be used as overt acts in a conspiracy charge, without a requirement that they must first be found constitutionally unprotected.

Yates v. *United States,* 354 U. S. 298, can be construed to permit constitutionally protected activities to be used as overt acts in criminal conspiracies. But there was a separate opinion in that case, written by my Brother BLACK, which I joined, saying in part:

> "The only overt act which is now charged against these defendants is that they went to a constitutionally protected public assembly where they took part in lawful discussion of public questions, and where neither they nor anyone else advocated or suggested overthrow of the United States Government." *Id.,* at 343.

The majority in the *Yates* case, however, went to some lengths in protecting First Amendment freedoms. There advocacy was the heart of the case, and the majority held that "advocacy" to be an ingredient of a crime "must be of action and not merely abstract doctrine," *id.,* at 325. The Court reversed the convictions because the instructions to the jury did not properly delineate that line of distinction. While the majority held that attending a meeting could be an overt act, *id.,* at 334, it went on to hold that the line between constitutionally protected First Amendment rights and those that exceeded the limits must be carefully drawn in instructions to the jury. In the present cases, however, the trial court in its charge to the jury made no qualifications whatsoever as to the permissible range of the use of speech and publications as overt acts. There was no instruction whatsoever that the jury would first have to determine that the particular speech or the particular publication was not constitutionally protected. The principle of *Yates* was therefore disregarded.[2]

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[2] My Brother STEWART agrees that "it is at least arguable that a State cannot convict a man of criminal conspiracy without first demonstrating some constitutionally unprotected overt act in fur-

Since in my opinion, none of Epton's convictions is free of doubt there is no basis for applying the rule that there is no occasion to review a conviction on one count of an indictment if the judgment on another count is valid and the sentences are concurrent. See *Lanza* v. *New York,* 370 U. S. 139, 146, 152 (separate opinion of MR. JUSTICE BRENNAN); *Hirabayashi* v. *United States,*

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therance of the alleged unlawful agreement." But he dismisses that contention in this case because, in his view, the record demonstrates that at least some of Epton's activities were not constitutionally protected. Perhaps my Brother STEWART means that although some overt acts charged were constitutionally protected, others were not. The latter is doubtless true. But the charge to the jury drew no such discriminating line; and so far as we know the conviction may have rested in whole or in part on overt acts which had First Amendment protection. Because the jury rendered a general verdict on count one, it is impossible for this Court to determine whether a protected activity was employed to convict Epton of conspiracy to riot. In such circumstances, our precedents indicate that the proper procedure would be to set aside the conviction if any of the acts submitted were constitutionally protected. See *Haupt* v. *United States,* 330 U. S. 631, 641, n. 1. Cf. *Yates* v. *United States,* 354 U. S. 298, 311–312; *Cramer* v. *United States,* 325 U. S. 1, 36, n. 45; *Stromberg* v. *California,* 283 U. S. 359, 367–368. Moreover, the approach taken by my Brother STEWART hearkens back to the view of the Court in *Dennis* v. *United States,* 341 U. S. 494, 512–513, that the question of "clear and present danger" is one of law. The Court ruled that as long as the jury had found the facts essential to establish the substantive crime, the protection of the First Amendment against conviction on those facts was a matter of law for the courts to determine. I dissented in that case, in part on the ground that our precedents had established that the "question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury." *Id.,* at 587. And, as already noted, the Court in *Yates* v. *United States* showed greater solicitude toward the role of the jury in this sensitive First Amendment area than the Court in *Dennis* or this Court today. To be consistent with the the approach taken in *Yates,* the jury should be instructed on all points of law that make the difference between conviction and acquittal.

320 U. S. 81, 85; *Whitfield* v. *Ohio,* 297 U. S. 431, 438. Like my Brother STEWART, I believe that Epton's convictions for advocating criminal anarchy and conspiracy to advocate criminal anarchy should be reviewed by this Court to consider whether New York's anarchy statutes either on their face or as applied here pass beyond the pale of constitutionality. See *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Gitlow* v. *New York,* 268 U. S. 652. Accordingly, I would grant certiorari in No. 502, Misc., note probable jurisdiction in No. 771, Misc., and set the cases for oral argument.

KNIGHT ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL.

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

No. 826. Decided January 22, 1968.

269 F. Supp. 339, affirmed.

Alan H. Levine and *Jeremiah S. Gutman* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Charles A. La Torella, Jr.,* and *Maria L. Marcus,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

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

PAULAITIS *v.* PAULAITIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 815. Decided January 22, 1968.

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.

WETTER ET AL. *v.* CITY OF INDIANAPOLIS ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 895. Decided January 22, 1968.

— Ind. —, 226 N. E. 2d 886, appeal dismissed and certiorari denied.

Edward H. Knight and *Richard M. Givan* for appellants.

Harry T. Ice 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.

BOGART *v.* STATE BAR OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 806, Misc. Decided January 22, 1968.

Appeal dismissed and certiorari denied.

Peter D. Bogart, appellant, *pro se.*

Homer I. Mitchell and *F. La Mar Forshee* 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.

CROSS *v.* UNITED STATES BOARD OF PAROLE ET AL.

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

No. 842, Misc. Decided January 22, 1968.

Appeal dismissed.

Solicitor General Griswold, Assistant Attorney General Vinson and *Beatrice Rosenberg* for appellees.

PER CURIAM.

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

CREPEAULT *v.* VERMONT.

APPEAL FROM THE SUPREME COURT OF VERMONT.

No. 778, Misc. Decided January 22, 1968.

— Vt. —, 229 A. 2d 245, 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.

MARCHETTI *v.* UNITED STATES.

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

No. 2. Argued January 17–18, 1967.—Reargued October 10, 1967.—Decided January 29, 1968.

Petitioner was convicted for conspiring to evade payment of the occupational tax relating to wagers imposed by 26 U. S. C. § 4411, for evading such payment, and for failing to comply with § 4412, which requires those liable for the occupational tax to register annually with the Internal Revenue Service and to supply detailed information for which a special form is prescribed. Under other provisions of the interrelated statutory system for taxing wagers, registrants must "conspicuously" post at their business places or keep on their persons stamps showing payment of the tax; maintain daily wagering records; and keep their books open for inspection. Payment of the occupational taxes is declared not to exempt persons from federal or state laws which broadly proscribe wagering, and federal tax authorities are required by § 6107 to furnish prosecuting officers lists of those who have paid the occupational tax. Petitioner, whose alleged wagering activities subjected him to possible state or federal prosecution, contended that the statutory requirements to register and to pay the occupational tax violated his privilege against self-incrimination. The Court of Appeals affirmed, relying on *United States* v. *Kahriger,* 345 U. S. 22, and *Lewis* v. *United States,* 348 U. S. 419, which held the privilege unavailable in a situation like the one here involved. *Held:*

1. The recognized principle that taxes may be imposed upon unlawful activities is not at issue here. P. 44.

2. Petitioner's assertion of his Fifth Amendment privilege against self-incrimination barred his prosecution for violating the federal wagering tax statutes. Pp. 48–61.

(a) All the requirements for registration and payment of the occupational tax would have had the direct and unmistakable consequence of incriminating petitioner. Pp. 48–49.

(b) Petitioner did not waive his constitutional privilege by failing to assert it when the tax payments were due. Pp. 50–51.

(c) *United States* v. *Kahriger, supra, Lewis* v. *United States, supra,* both *pro tanto* overruled. Pp. 50–54.

(d) The premises supporting *Shapiro* v. *United States*, 335 U. S. 1 (*viz.*, that the records be analogous to public documents and of a kind which the regulated party has customarily kept, and that the statutory requirements be essentially regulatory rather than aimed at a particular group suspected of criminal activities), do not apply to the facts of this case and therefore *Shapiro*'s "required records" doctrine is not controlling. Pp. 55–57.

(e) Permitting continued enforcement of the registration and occupational tax provisions by imposing restrictions against the use by prosecuting authorities of information obtained thereunder might improperly contravene Congress' purpose in adopting the wagering taxes and impede enforcement of state gambling laws. Pp. 58–60.

352 F. 2d 848, reversed.

Jacob D. Zeldes reargued the cause for petitioner. With him on the brief on the reargument were *David Goldstein, Elaine S. Amendola, Francis J. King* and *Ira B. Grudberg,* and on the original argument *Messrs. Goldstein, King* and *Grudberg.*

Francis X. Beytagh, Jr., reargued the cause for the United States, *pro hac vice.* With him on the brief on the reargument were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit,* and on the original argument *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Theodore George Gilinsky.*

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner was convicted in the United States District Court for the District of Connecticut under two indictments which charged violations of the federal wagering tax statutes. The first indictment averred that petitioner and others conspired to evade payment of the annual occupational tax imposed by 26 U. S. C. § 4411. The second indictment included two counts: the first

alleged a willful failure to pay the occupational tax, and the second a willful failure to register, as required by 26 U. S. C. § 4412, before engaging in the business of accepting wagers.

After verdict, petitioner unsuccessfully sought to arrest judgment, in part on the basis that the statutory obligations to register and to pay the occupational tax violated his Fifth Amendment privilege against self-incrimination. The Court of Appeals for the Second Circuit affirmed, 352 F. 2d 848, on the authority of *United States* v. *Kahriger,* 345 U. S. 22, and *Lewis* v. *United States,* 348 U. S. 419.

We granted certiorari to re-examine the constitutionality under the Fifth Amendment of the pertinent provisions of the wagering tax statutes, and more particularly to consider whether *Kahriger* and *Lewis* still have vitality.[1] 383 U. S. 942. For reasons which follow, we have

[1] Certiorari was originally granted in *Costello* v. *United States,* 383 U. S. 942, to consider these issues. Upon Costello's death, certiorari was granted in the present case. 385 U. S. 1000. Marchetti and Costello, with others, were convicted at the same trial of identical offenses, arising from the same series of transactions. Certiorari both here and in *Costello* was limited to the following questions: "Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), overrule *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955)?" After argument, the case was restored to the calendar, and set for reargument at the 1967 Term. 388 U. S. 903. Counsel were asked to argue, in addition to the original questions, the following: "(1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States,* 335 U. S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U. S. C. §§ 4411, 4412? (2) Can an obligation to pay the special occupational tax required by 26 U. S. C. § 4411 be satisfied without filing the registration statement provided for by 26 U. S. C. § 4412?"

concluded that these provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination. The judgment below is accordingly reversed.

I.

The provisions in issue here are part of an interrelated statutory system for taxing wagers. The system is broadly as follows. Section 4401 of Title 26 imposes upon those engaged in the business of accepting wagers an excise tax of 10% on the gross amount of all wagers they accept, including the value of chances purchased in lotteries conducted for profit. Parimutuel wagering enterprises, coin-operated devices, and state-conducted sweepstakes are expressly excluded from taxation. 26 U. S. C. § 4402 (1964 ed., Supp. II). Section 4411 imposes in addition an occupational tax of $50 annually, both upon those subject to taxation under § 4401 and upon those who receive wagers on their behalf.

The taxes are supplemented by ancillary provisions calculated to assure their collection. In particular, § 4412 requires those liable for the occupational tax to register each year with the director of their local internal revenue district. The registrants must submit Internal Revenue Service Form 11–C,[2] and upon it must provide their residence and business addresses, must indicate whether they are engaged in the business of accepting wagers, and must list the names and addresses of their agents and employees. The statutory obligations to register

[2] A July 1963 revision of Form 11–C modified the form of certain of its questions. The record does not indicate which version of the return was available to petitioner at the time of the omissions for which he was convicted. The minor verbal variations between the two do not affect the result which we reach today.

and to pay the occupational tax are essentially inseparable elements of a single registration procedure; [3] Form 11–C thus constitutes both the application for registration and the return for the occupational tax.[4]

In addition, registrants are obliged to post the revenue stamps which denote payment of the occupational tax "conspicuously" in their principal places of business, or, if they lack such places, to keep the stamps on their persons, and to exhibit them upon demand to any Treasury officer. 26 U. S. C. § 6806 (c). They are required to preserve daily records indicating the gross amount of the wagers as to which they are liable for taxation, and to permit inspection of their books of account. 26 U. S. C. §§ 4403, 4423. Moreover, each principal internal revenue office is instructed to maintain for public inspection a listing of all who have paid the occupational tax, and to provide certified copies of the listing upon request to any state or local prosecuting officer. 26 U. S. C.

[3] The Treasury Regulations provide that a stamp, evidencing payment of the occupational tax, may not be issued unless the taxpayer both submits Form 11–C and tenders the full amount of the tax. 26 CFR § 44.4901–1 (c). Accordingly, the Revenue Service has refused to accept the $50 tax unless it is accompanied by the completed registration form; and it has consistently been upheld in that practice. See *United States* v. *Whiting,* 311 F. 2d 191; *United States* v. *Mungiole,* 233 F. 2d 204; *Combs* v. *Snyder,* 101 F. Supp. 531, aff'd, 342 U. S. 939. The United States has in this case acknowledged that the registration and occupational tax provisions are not realistically severable. Brief on Reargument 37–41.

[4] In his trial testimony in *Grosso* v. *United States,* decided herewith, *post,* p. 62, W. Dean Struble, technical advisor to the District Director of Internal Revenue, Pittsburgh, Pennsylvania, described Form 11–C as follows: "A Form 11–C serves two purposes. The first is an application for registry for a wagering tax stamp. After the application is properly filed and the tax paid, at that time the Form 11–C becomes a special tax return." Transcript of Record 90.

§ 6107. Finally, payment of the wagering taxes is declared not to "exempt any person from any penalty provided by a law of the United States or of any State for engaging" in any taxable activity. 26 U. S. C. § 4422.

II.

The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases. See, *e. g., License Tax Cases,* 5 Wall. 462. The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment. We must for this purpose first examine the implications of these statutory provisions.

Wagering and its ancillary activities are very widely prohibited under both federal and state law. Federal statutes impose criminal penalties upon the interstate transmission of wagering information, 18 U. S. C. § 1084; upon interstate and foreign travel or transportation in aid of racketeering enterprises, defined to include gambling, 18 U. S. C. § 1952; upon lotteries conducted through use of the mails or broadcasting, 18 U. S. C. §§ 1301–1304; and upon the interstate transportation of wagering paraphernalia, 18 U. S. C. § 1953.

State and local enactments are more comprehensive. The laws of every State, except Nevada, include broad prohibitions against gambling, wagering, and associated activities.[5] Every State forbids, with essentially minor

[5] The following illustrate the state gambling and wagering statutes under which one engaged in activities taxable under the federal provisions at issue here might incur criminal penalties. Ala. Code,

and carefully circumscribed exceptions, lotteries.[6] Even Nevada, which permits many forms of gambling, retains criminal penalties upon lotteries and certain other wager-

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Tit. 14, c. 46 (1958); Alaska Laws, Tit. 65, c. 13 (1949); Ariz. Rev. Stat. Ann. § 13–438 (1956); Ark. Stat. Ann., Tit. 41, c. 20 (1947); Cal. Pen. Code §§ 330–337a (1956); Colo. Rev. Stat. Ann., c. 40, Art. 10 (1963); Del. Code Ann., Tit. 11, §§ 665–669 (1953); D. C. Code Ann. §§ 22–1504 to 22–1511 (1967); Fla. Stat., c. 849 (1965); Ga. Code Ann., c. 26–64 (1953); Hawaii Rev. Laws, c. 288 (1955); Idaho Code Ann., Tit. 18, c. 38 (1948); Ill. Rev. Stat., c. 38, Art. 28 (1965); Ind. Ann. Stat., Tit. 10, c. 23 (1956); Iowa Code, c. 726 (1966); Kan. Stat. Ann., c. 21, Art. 15 (1964); Ky. Rev. Stat. § 436.200 (1962); La. Rev. Stat. § 14:90 (1950); Me. Rev. Stat. Ann., Tit. 17, c. 61 (1964); Md. Ann. Code, Art. 27, §§ 237–242 (1957); Mass. Gen. Laws Ann., c. 271 (1959); Mich. Stat. Ann. § 28.533 (1954); Minn. Stat. § 609.755 (1965); Miss. Code Ann. §§ 2190–2202 (1942); Mo. Rev. Stat. § 563.350 (1959); Mont. Rev. Codes Ann., Tit. 94, c. 24 (1947); Neb. Rev. Stat. § 28–941 (1943); Nev. Rev. Stat. §§ 293.603, 465.010 (1957); N. H. Rev. Stat. Ann., c. 577 (1955); N. J. Rev. Stat., Tit. 2A, c. 112 (1953); N. M. Stat. Ann., c. 40A, Art. 19 (1953); N. Y. Pen. Law, Art. 225 (1967); N. C. Gen. Stat. §§ 14–292 to 14–295 (1953); N. D. Cent. Code Ann., c. 12–23 (1959); Ohio Rev. Code Ann., c. 2915 (1953); Okla. Stat. Ann., Tit. 21, c. 38 (1958); Ore. Rev. Stat. § 167.505 (1965); Pa. Stat. Ann., Tit. 18, §§ 4603–4607 (1963); R. I. Gen. Laws Ann., Tit. 11, c. 19 (1956); S. C. Code Ann., Tit. 16, c. 8, Art. 1 (1962); S. D. Code, Tit. 24, c. 24.01 (1939); Tenn. Code Ann., Tit. 39, c. 20 (1955); Tex. Pen. Code Ann., c. 6 (1952); Utah Code Ann., Tit. 76, c. 27 (1953); Vt. Stat. Ann., Tit. 13, c. 43, subch. 2 (1959); Va. Code Ann., Tit. 18.1, c. 7, Art. 2 (1950); Wash. Rev. Code, Tit. 9, c. 9.47 (1956); W. Va. Code Ann., c. 61, Art. 10 (1961); Wis. Stat., c. 945 (1965); Wyo. Stat. Ann., Tit. 6, c. 9, Art. 2 (1957). These statutes of course vary in their terms and scope, but these variations scarcely detract from the breadth or prevalence of the penalties which in combination they create.

[6] New Hampshire conducts a state sweepstakes, but imposes broad criminal penalties upon privately operated lotteries. N. H. Rev. Stat. Ann., c. 577 (1955). The following illustrate the other state statutes which impose criminal penalties upon lottery activities which would be taxable under these federal statutes. Ala. Code,

ing activities taxable under these statutes. Nev. Rev. Stat. §§ 293.603, 462.010–462.080, 465.010 (1957).

Connecticut, in which petitioner allegedly conducted his activities, has adopted a variety of measures for the punishment of gambling and wagering. It punishes "[a]ny person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies" premises employed for purposes of wagering or pool selling. Conn. Gen. Stat. Rev. § 53–295 (1958). It imposes criminal penalties upon any person who possesses, keeps, or maintains premises in which policy playing occurs, or lotteries are conducted, and upon any

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Tit. 14, c. 46 (1958); Alaska Laws § 65–13–1 (1949); Ariz. Rev. Stat. Ann. § 13–436 (1956); Ark. Stat. Ann. § 41–2024 (1947); Cal. Pen. Code §§ 319–326 (1956); Colo. Rev. Stat. Ann., c. 40, Art. 16 (1963); Del. Code Ann., Tit. 11, §§ 661–664 (1953); D. C. Code Ann. § 22–1501 (1967); Fla. Stat. § 849.09 (1965); Ga. Code Ann., c. 26–65 (1953); Hawaii Rev. Laws, c. 288 (1955); Idaho Code Ann., Tit. 18, c. 49 (1948); Ill. Rev. Stat., c. 38, Art. 28 (1965); Ind. Ann. Stat., Tit. 10, c. 23 (1956); Iowa Code § 726.8 (1966); Kan. Stat. Ann., c. 21, Art. 15 (1964); Ky. Rev. Stat. § 436.360 (1962); La. Rev. Stat. § 14:90 (1950); Me. Rev. Stat. Ann., Tit. 17, c. 81 (1964); Md. Ann. Code, Art. 27, § 356 (1957); Mass. Gen. Laws Ann., c. 271 (1959); Mich. Stat. Ann., §§ 28.604–28.608 (1954); Miss. Code Ann. §§ 2270–2279 (1942); Mo. Rev. Stat. § 563.430 (1959); Mont. Rev. Codes Ann., Tit. 94, c. 30 (1947); Neb. Rev. Stat. § 28–961 (1943); N. J. Rev. Stat., Tit. 2A, c. 121 (1953); N. M. Stat. Ann., c. 40A, Art. 19 (1953); N. Y. Pen. Law, Art. 225 (1967); N. C. Gen. Stat. §§ 14–289 to 14–291 (1953); N. D. Cent. Code Ann., c. 12–24 (1959); Ohio Rev. Code Ann., c. 2915 (1953); Okla. Stat. Ann., Tit. 21, c. 41 (1958); Ore. Rev. Stat. § 167.405 (1965); Pa. Stat. Ann., Tit. 18, §§ 4601–4602 (1963); R. I. Gen. Laws Ann., Tit. 11, c. 19 (1956); S. C. Code Ann., Tit. 16, c. 8, Art. 1 (1962); S. D. Code, Tit. 24, c. 24.01 (1939); Tenn. Code Ann. § 39–2017 (1955); Tex. Pen. Code Ann., Art. 654 (1952); Utah Code Ann., Tit. 76, c. 27 (1953); Vt. Stat. Ann., Tit. 13, c. 43, subch. 1 (1959); Va. Code Ann., Tit. 18.1, c. 7, Art. 2 (1950); Wash. Rev. Code, Tit. 9, c. 9.59 (1956); W. Va. Code Ann., c. 61, Art. 10 (1961); Wis. Stat., c 945 (1965); Wyo. Stat. Ann., Tit. 6, c. 9, Art. 2 (1957).

person who becomes the custodian of books, property, appliances, or apparatus employed for wagering. Conn. Gen. Stat. Rev. § 53–298 (1958). See also §§ 53–273, 53–290, 53–293. It provides additional penalties for those who conspire to organize or conduct unlawful wagering activities. Conn. Gen. Stat. Rev. § 54–197 (1958). Every aspect of petitioner's wagering activities thus subjected him to possible state or federal prosecution. By any standard, in Connecticut and throughout the United States, wagering is "an area permeated with criminal statutes," and those engaged in wagering are a group "inherently suspect of criminal activities." *Albertson* v. *SACB,* 382 U. S. 70, 79.

Information obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties. Section 6107 of Title 26 requires the principal internal revenue offices to provide to prosecuting officers a listing of those who have paid the occupational tax. Section 6806 (c) obliges taxpayers either to post the revenue stamp "conspicuously" in their principal places of business, or to keep it on their persons, and to produce it on the demand of Treasury officers. Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; [7] such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently

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[7] See, *e. g., Irvine* v. *California,* 347 U. S. 128; *United States* v. *Zizzo,* 338 F. 2d 577; *Commonwealth* v. *Fiorini,* 202 Pa. Super. 88, 195 A. 2d 119; *State* v. *Curry,* 92 Ohio App. 1, 109 N. E. 2d 298; *State* v. *Reinhardt,* 229 La. 673, 86 So. 2d 530; *Griggs* v. *State,* 37 Ala. App. 605, 73 So. 2d 382; *McClary* v. *State,* 211 Tenn. 46, 362 S. W. 2d 450. See also *State* v. *Baum,* 230 La. 247, 88 So. 2d 209.

been obtained.[8] Finally, we are obliged to notice that a former Commissioner of Internal Revenue has acknowledged that the Service "makes available" to law enforcement agencies the names and addresses of those who have paid the wagering taxes, and that it is in "full cooperation" with the efforts of the Attorney General of the United States to suppress organized gambling. Caplin, The Gambling Business and Federal Taxes, 8 Crime & Delin. 371, 372, 377.

In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner "real and appreciable," and not merely "imaginary and unsubstantial," hazards of self-incrimination. *Reg.* v. *Boyes*, 1 B. & S. 311, 330; *Brown* v. *Walker*, 161 U. S. 591, 599–600; *Rogers* v. *United States*, 340 U. S. 367, 374. Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant "link in a chain" [9] of evidence tending to establish his guilt.[10] Unlike the income tax return

[8] One State has gone a step further to facilitate the enforcement of its gambling prohibitions through the federal wagering tax. Illinois requires each holder of a wagering tax stamp to register with the clerk of the county in which he resides or conducts any business, and imposes fines and imprisonment upon those who do not. Ill. Rev. Stat., c. 38, § 28–4 (1965).

[9] The metaphor is to be found in the opinions both of Lord Eldon in *Paxton* v. *Douglas*, 19 Ves. Jr. 225, 227, and of Chief Justice Marshall in *United States* v. *Burr, In re Willie*, 25 Fed. Cas. 38, 40 (No. 14,692 e).

[10] We must note that some States and municipalities have undertaken to punish compliance with the federal wagering tax statutes in an even more direct fashion. Alabama has created a statutory presumption that possessors of federal wagering tax stamps are in violation of state law. Ala. Code, Tit. 14, §§ 302 (8)–(10) (1958). Florida adopted a similar statute, Fla. Laws 1953, c. 28057, but

in question in *United States* v. *Sullivan,* 274 U. S. 259, every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the application of the constitutional privilege to the entire registration procedure was in this instance neither "extreme" nor "extravagant." See *id.,* at 263. It would appear to follow that petitioner's assertion of the privilege as a defense to this prosecution was entirely proper, and accordingly should have sufficed to prevent his conviction.

Nonetheless, this Court has twice concluded that the privilege against self-incrimination may not appropriately be asserted by those in petitioner's circumstances. *United States* v. *Kahriger, supra; Lewis* v. *United States, supra.* We must therefore consider whether those cases have continuing force in light of our more recent decisions. Moreover, we must also consider the relevance of certain collateral lines of authority; in particular, we must determine whether either the "required records" doctrine, *Shapiro* v. *United States,* 335 U. S. 1, or restrictions placed upon the use by prosecuting authorities of information obtained as a consequence of the wagering taxes, cf. *Murphy* v. *Waterfront Commission,* 378 U. S. 52, should be utilized to preclude assertion of the constitutional privilege in this situation. To these questions we turn.

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it was subsequently declared unconstitutional by the Florida Supreme Court. *Jefferson* v. *Sweat,* 76 So. 2d 494. The Supreme Court of Tennessee has upheld an ordinance adopted by the City of Chattanooga which makes possession of a federal tax stamp a misdemeanor. *Deitch* v. *City of Chattanooga,* 195 Tenn. 245, 258 S. W. 2d 776. See for a similar provision Rev. Ord., Kansas City, Missouri, § 23.110 (1956); and *Kansas City* v. *Lee,* 414 S. W. 2d 251. Georgia has recently provided by statute that the possession or purchase of a federal wagering tax stamp is "prima facie evidence of guilt" of professional gambling. Ga. Code Ann. § 26–6413 (Supp. 1967). See for a similar rule *McClary* v. *State, supra,* n. 7.

III.

The Court's opinion in *Kahriger* suggested that a defendant under indictment for willful failure to register under § 4412 cannot properly challenge the constitutionality under the Fifth Amendment of the registration requirement. For this point, the Court relied entirely upon Mr. Justice Holmes' opinion for the Court in *United States* v. *Sullivan, supra.* The taxpayer in *Sullivan* was convicted of willful failure to file an income tax return, despite his contention that the return would have obliged him to admit violations of the National Prohibition Act. The Court affirmed the conviction, and rejected the taxpayer's claim of the privilege. It concluded that most of the return's questions would not have compelled the taxpayer to make incriminating disclosures, and that it would have been "an extreme if not an extravagant application" of the privilege to permit him to draw within it the entire return. 274 U. S., at 263.

The Court in *Sullivan* was evidently concerned, first, that the claim before it was an unwarranted extension of the scope of the privilege, and, second, that to accept a claim of privilege not asserted at the time the return was due would "make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson* v. *SACB,* 382 U. S. 70, 79. Neither reason suffices to prevent this petitioner's assertion of the privilege. The first is, as we have indicated, inapplicable, and we find the second unpersuasive in this situation. Every element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him "to prove guilt to avoid admitting it." *United States* v. *Kahriger, supra,* at 34 (concurring opinion). In these circumstances, we cannot conclude that his failure

to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional protection. Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can here be required.

The Court held in *Lewis* that the registration and occupational tax requirements do not infringe the constitutional privilege because they do not compel self-incrimination, but merely impose on the gambler the initial choice of whether he wishes, at the cost of his constitutional privilege, to commence wagering activities. The Court reasoned that even if the required disclosures might prove incriminating, the gambler need not register or pay the occupational tax if only he elects to cease, or never to begin, gambling. There is, the Court said, "no constitutional right to gamble." 348 U. S., at 423.

We find this reasoning no longer persuasive. The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See, *e. g., Carnley* v. *Cochran,* 369 U. S. 506. Compare *Johnson* v. *Zerbst,* 304 U. S. 458; and *Glasser* v. *United States,* 315 U. S. 60. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them

would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation." Morgan, The Privilege against Self-Incrimination, 34 Minn. L. Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither.

The Court held in both *Kahriger* and *Lewis* that the registration and occupational tax requirements are entirely prospective in their application, and that the constitutional privilege, since it offers protection only as to past and present acts, is accordingly unavailable. This reasoning appears to us twice deficient: first, it overlooks the hazards here of incrimination as to past or present acts; and second, it is hinged upon an excessively narrow view of the scope of the constitutional privilege.

Substantial hazards of incrimination as to past or present acts plainly may stem from the requirements to register and to pay the occupational tax. See generally McKee, The Fifth Amendment and the Federal Gambling Tax, 5 Duke B. J. 86. In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted. It both centers attention upon the registrant as a gambler, and compels "injurious disclosure[s]" [11] which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses. These offenses need not include actual gambling; they might involve only the custody or transportation of gambling paraphernalia, or other preparations for future gambling. Further, the acquisition of a federal gambling tax stamp,

[11] *Hoffman* v. *United States,* 341 U. S. 479, 487.

requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes. See, *e. g., Acklen* v. *State,* 196 Tenn. 314, 267 S. W. 2d 101.

There is a second, and more fundamental, deficiency in the reasoning of *Kahriger* and *Lewis.* Its linchpin is plainly the premise that the privilege is entirely inapplicable to prospective acts; for this the Court in *Kahriger* could vouch as authority only a generalization at 8 Wigmore, Evidence § 2259*c* (3d ed. 1940).[12] We see no warrant for so rigorous a constraint upon the constitutional privilege. History, to be sure, offers no ready illustrations of the privilege's application to prospective acts, but the occasions on which such claims might appropriately have been made must necessarily have been very infrequent. We are, in any event, bid to view the constitutional commands as "organic living institutions," whose significance is "vital not formal." *Gompers* v. *United States,* 233 U. S. 604, 610.

The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination. *Rogers* v. *United States,* 340 U. S. 367, 374; *Brown* v. *Walker,* 161 U. S. 591, 600. This principle does not permit the rigid chronological distinction adopted in *Kahriger* and *Lewis.* We see

[12] We presume that the Court referred to the following: "[T]here is no compulsory self-crimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting." 8 Wigmore, *supra,* at 349. But see Morgan, *supra,* at 37; and McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 221.

no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence. Yet, if the factual situations in which the privilege may be claimed were inflexibly defined by a chronological formula, the policies which the constitutional privilege is intended to serve could easily be evaded. Moreover, although prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true. As we shall show, it is not true here. We conclude that it is not mere time to which the law must look, but the substantiality of the risks of incrimination.

The hazards of incrimination created by §§ 4411 and 4412 as to future acts are not trifling or imaginary. Prospective registrants can reasonably expect that registration and payment of the occupational tax will significantly enhance the likelihood of their prosecution for future acts, and that it will readily provide evidence which will facilitate their convictions. Indeed, they can reasonably fear that registration, and acquisition of a wagering tax stamp, may serve as decisive evidence that they have in fact subsequently violated state gambling prohibitions. Compare Ala. Code, Tit. 14, §§ 302 (8)–(10) (1958); Ga. Code Ann. § 26–6413 (Supp. 1967). Insubstantial claims of the privilege as to entirely prospective acts may certainly be asserted, but such claims are not here, and they need only be considered when a litigant has the temerity to pursue them.

We conclude that nothing in the Court's opinions in *Kahriger* and *Lewis* now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted. To this extent *Kahriger* and *Lewis* are overruled.

IV.

We must next consider the relevance in this situation of the "required records" doctrine, *Shapiro* v. *United States,* 335 U. S. 1. It is necessary first to summarize briefly the circumstances in *Shapiro.* Petitioner, a wholesaler of fruit and produce, was obliged by a regulation issued under the authority of the Emergency Price Control Act to keep and "preserve for examination" various records "of the same kind as he has customarily kept . . . ." Maximum Price Regulation 426, § 14, 8 Fed. Reg. 9546, 9548–9549 (1943). He was subsequently directed by an administrative subpoena to produce certain of these records before attorneys of the Office of Price Administration. Petitioner complied, but asserted his constitutional privilege. In a prosecution for violations of the Price Control Act, petitioner urged that the records had facilitated the collection of evidence against him, and claimed immunity from prosecution under § 202 (g) of the Act, 56 Stat. 30. Petitioner was nonetheless convicted, and his conviction was affirmed. 159 F. 2d 890.

On certiorari, this Court held both that § 202 (g) did not confer immunity upon petitioner, and that he could not properly claim the protection of the privilege as to records which he was required by administrative regulation to preserve. On the second question, the Court relied upon the cases which have held that a custodian of public records may not assert the privilege as to those records, and reiterated a dictum in *Wilson* v. *United States,* 221 U. S. 361, 380, suggesting that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly estab-

lished.' " [13] 335 U. S., at 33. The Court considered that "it cannot be doubted" that the records in question had "public aspects," and thus held that petitioner, as their custodian, could not properly assert the privilege as to them. *Id.*, at 34.

We think that neither *Shapiro* nor the cases upon which it relied are applicable here.[14] Compare generally Note, Required Information and the Privilege against Self-Incrimination, 65 Col. L. Rev. 681; and McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 214–217. Moreover, we find it unnecessary for present purposes to pursue in detail the question, left unanswered in *Shapiro*, of what "limits . . . the Government cannot constitutionally exceed in requiring the keeping of records . . . ." 335 U. S., at 32. It is enough that there are significant points of difference between the situations here and in *Shapiro* which in this instance preclude, under any formulation, an appropriate application of the "required records" doctrine.

Each of the three principal elements of the doctrine, as it is described in *Shapiro,* is absent from this situation.

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[13] The Court in fact quoted from the reiteration of the *Wilson* dictum included in *Davis* v. *United States,* 328 U. S. 582, 590.

[14] The United States has urged that this case is not reached by *Shapiro* simply because petitioner was required to submit reports, and not to maintain records. Insofar as this is intended to suggest the the crucial issue respecting the applicability of *Shapiro* is the method by which information reaches the Government, we are unable to accept the distinction. We perceive no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States. We believe, as the United States itself argued in *Shapiro,* that "[r]egulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated." Brief for the United States in No. 49, October Term 1947, at 21, n. 7.

First, petitioner Marchetti was not, by the provisions now at issue, obliged to keep and preserve records "of the same kind as he has customarily kept"; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony. Compare McKay, *supra,* at 221. Second, whatever "public aspects" there were to the records at issue in *Shapiro,* there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a "selective group inherently suspect of criminal activities." Cf. *Albertson* v. *SACB,* 382 U. S. 70, 79. The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, see *United States* v. *Calamaro,* 354 U. S. 351, 358; but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro.* There is no need to explore further the elements and limitations of *Shapiro* and the cases involving public papers; these points of difference in combination preclude any appropriate application of those cases to the present one.

V.

Finally, we have been urged by the United States to permit continued enforcement of the registration and occupational tax provisions, despite the demands of the constitutional privilege, by shielding the privilege's claimants through the imposition of restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with the wagering tax requirements. It is suggested that these restrictions might be similar to those imposed by the Court in *Murphy* v. *Waterfront Commission,* 378 U. S. 52.

The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers. We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful. Nor can it be doubted that the privilege against self-incrimination may not properly be asserted if other protection is granted which "is so broad as to have the same extent in scope and effect" as the privilege itself. *Counselman* v. *Hitchcock,* 142 U. S. 547, 585. The Government's suggestion is thus in principle an attractive and apparently practical resolution of the difficult problem before us. Compare Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 159; and McKay, *supra,* at 232. Nonetheless, we think that it would be entirely inappropriate in the circumstances here for the Court to impose such restrictions.

The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupa-

tional tax to be provided to interested prosecuting authorities. See 26 U. S. C. § 6107.[15] This has evidently been the consistent practice of the Revenue Service. We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes.[16] Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; [17] the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. We cannot know how Congress would assess the competing demands of the

[15] Section 6107 reads as follows:

"In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged." The special taxes to which the section refers include the occupational tax imposed by 26 U. S. C. § 4411.

[16] The requirement now embodied in § 6107 was adopted prior to the special occupational tax on wagering, but Congress plainly indicated when it adopted the latter that it understood, and wished, that state prosecuting authorities would be provided lists of those who had paid the wagering tax. See H. R. Rep. No. 586, 82d Cong., 1st Sess., 60; S. Rep. No. 781, 82d Cong., 1st Sess., 118.

[17] The Court required such a showing as part of the restrictions imposed in *Murphy*, 378 U. S., at 79, n. 18. The United States has acknowledged that this would be no less imperative here. Brief for the United States 24–25.

federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values.[18] We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States.

VI.

We are fully cognizant of the importance for the United States' various fiscal and regulatory functions of timely and accurate information, compare Mansfield, *supra,* and Meltzer, Required Records, the McCarran Act, and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687; but other methods, entirely consistent with constitutional limitations, exist by which Congress may obtain such information. See generally *Counselman* v. *Hitchcock, supra,* at 585; compare *Murphy* v. *Waterfront Commission, supra.* Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.

Nonetheless, we can only conclude, under the wagering tax system as presently written, that petitioner properly asserted the privilege against self-incrimination, and that his assertion should have provided a complete defense to this prosecution. This defense should have reached both

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[18] It should be emphasized that it would not suffice here simply to sever § 6107. See 26 U. S. C. § 7852 (a). Cf. *Warren* v. *Mayor of Charlestown,* 2 Gray 84, 99; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 316. We would be required not merely to strike out words, but to insert words that are not now in the statute. Here, as in the analogous circumstances of *United States* v. *Reese,* 92 U. S. 214, "This would, to some extent, substitute the judicial for the legislative department of the government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.,* at 221.

the substantive counts for failure to register and to pay the occupational tax, and the count for conspiracy to evade payment of the tax. We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes.

The judgment of the Court of Appeals is

Reversed.

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

[For concurring opinion of MR. JUSTICE BRENNAN, see *post,* p. 72.]

[For concurring opinion of MR. JUSTICE STEWART, see *post,* p. 76.]

[For dissenting opinion of MR. CHIEF JUSTICE WARREN, see *post,* p. 77.]

GROSSO *v.* UNITED STATES.

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

No. 12. Argued January 18, 1967.—Reargued October 10–11, 1967.—Decided January 29, 1968.

Petitioner was convicted for failure to pay the excise tax on wagering and the occupational tax imposed, respectively, by 26 U. S. C. §§ 4401 and 4411 and for conspiracy to defraud the Government by evading payment of both taxes. In addition to the general statutory and regulatory requirements described in *Marchetti* v. *United States, ante,* p. 39, those liable for payment of the excise tax must submit monthly to the tax authorities on a special form, to accompany payment, detailed information concerning their wagering activities which the tax authorities make available to prosecuting officers. The Court of Appeals affirmed, rejecting petitioner's contention that the charges relating to the excise tax violated his Fifth Amendment rights against self-incrimination. Petitioner has not made a similar contention concerning his conviction on charges involving the special occupational tax. *Held:*

1. The wagering excise tax provisions, which, like the provisions involved in *Marchetti* v. *United States, supra,* were directed almost exclusively to individuals inherently suspect of criminal activities, violated petitioner's privilege against self-incrimination secured by the Fifth Amendment. *Ibid.* Pp. 64–69.

2. The "required records" doctrine of *Shapiro* v. *United States,* 335 U. S. 1, cannot appropriately be applied here. *Marchetti* v. *United States, supra.* Pp. 67–69.

3. Restrictions upon the use by prosecuting authorities of information obtained as a consequence of payment of the wagering excise tax would be inappropriate where this Court has held it improper to impose similar restrictions with respect to "an integral part" of the same system. *Ibid.* P. 69.

4. Since petitioner did not waive the privilege against self-incrimination with regard to the charges involving the occupational tax and reversal by the lower courts of his conviction thereon would be inevitable in the light of this case and *Marchetti,* the judgment of conviction in its entirety is reversed by this Court. Pp. 71–72.

358 F. 2d 154, reversed.

Charles Alan Wright reargued the cause for petitioner. With him on the briefs on the reargument and on the original argument was *James E. McLaughlin.*

Francis X. Beytagh, Jr., reargued the cause for the United States, *pro hac vice.* With him on the brief on the reargument were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit. Jack S. Levin* argued the cause for the United States on the original argument. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Theodore George Gilinsky.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania of 15 counts of willful failure to pay the excise tax imposed on wagering by 26 U. S. C. § 4401, four counts of willful failure to pay the special occupational tax imposed by 26 U. S. C. § 4411, and one count of conspiracy to defraud the United States by evading payment of both taxes. 18 U. S. C. § 371. Petitioner moved before trial to dismiss the counts which charged conspiracy to defraud and failure to pay the excise tax, asserting that payment would have obliged him to incriminate himself, in violation of the privilege against self-incrimination guaranteed by the Fifth Amendment. He reiterated this contention in support of unsuccessful motions for acquittal after verdict and for a new trial. The Court of Appeals for the Third Circuit affirmed the conviction. 358 F. 2d 154.

Petitioner did not assert below, and therefore has not urged here, that his privilege was violated by reason of his convictions for conspiracy and for failure to pay the special occupational tax. He has contended only

that payment of the excise tax would have required him to incriminate himself, that he therefore may not properly be prosecuted for willful failure to pay the tax or for conspiracy to evade its payment, and that conduct of the trial court after submission of the case to the jury denied him a fair trial. We granted certiorari, 385 U. S. 810, and the case was argued with *Marchetti* v. *United States,* decided today, *ante,* p. 39.[1] For reasons which follow, we reverse.

I.

We turn first to petitioner's contention that payment of the wagering excise tax would have compelled him to incriminate himself. We have summarized in *Marchetti, supra,* the various state and federal penalties which have been imposed upon wagering. It is enough now to reiterate that Pennsylvania, in which petitioner allegedly accepted wagers, has adopted a comprehensive statutory system for the punishment of gambling and ancillary activities. Pa. Stat. Ann., Tit. 18, §§ 4601–4607 (1963). These penalties, in combination with the federal statutes described in *Marchetti,* place petitioner entirely within "an area permeated with criminal statutes," where he is "inherently suspect of criminal activities." *Albertson* v. *SACB,* 382 U. S. 70, 79. The issues here are therefore

[1] After argument, the case was returned to the calendar, and set for reargument at the 1967 Term, again with *Marchetti, supra.* 388 U. S. 904. Counsel were asked to argue, in addition to the original questions, the following: "(1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States,* 335 U. S. 1, to the validity under the Fifth Amendment of the obligation to pay the wagering excise tax imposed by 26 U. S. C. § 4401? (2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U. S. C. § 4401 conditioned upon the filing of a return required under 26 U. S. C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?"

whether payment of the excise tax would have provided information incriminating to petitioner, and, if it would have done so, whether petitioner is otherwise prevented from asserting the constitutional privilege.

The statutory scheme by which wagering is taxed is described in *Marchetti, supra.* Two additional observations are, however, required in order to assess fully the hazards of self-incrimination created by the wagering excise tax. First, those liable for payment of that tax are required to submit each month Internal Revenue Service Form 730. Treas. Reg. § 44.6011 (a)–1 (a). The return is expressly designed for the use only of those engaged in the wagering business; its submission, and the replies demanded by each of its questions, evidence in the most direct fashion the fact of the taxpayer's wagering activities. Although failures to pay the excise tax and to file a return are separately punishable under 26 U. S. C. § 7203, the two obligations must be considered inseparable for purposes of measuring the hazards of self-incrimination which might stem from payment of the excise tax. Nothing in the pertinent statutes or regulations contemplates payment of the tax without submission of the return,[2] and we are informed by the United States that if the return does not accompany the tax payment, "the money is not accepted." Brief for the United States on Reargument 39, n. 35. We must conclude that here, as in *Albertson,* the validity under the Constitution of criminal prosecutions for willful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from "literal and full compliance" with all the statutory requirements. 382 U. S., at 78.

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[2] Indeed, so far as the pertinent materials can be said to reflect any position, it is that a return must accompany a tax payment. See 26 U. S. C. § 6011; Treas. Reg. § 44.6011 (a)–1 (a).

Second, although there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax. Moreover, it appears that the Revenue Service, evidently acting under the authority of certain general statutory provisions,[3] has undertaken to tender this information to interested prosecuting authorities.[4] We can only conclude that those liable for payment of the excise tax reasonably may expect that information obtainable from its payment, or from submission of Form 730, will ultimately be proffered to state and federal prosecuting officers.

In these circumstances, it would be impossible to say that the hazards of incrimination which stem from the obligation to pay the excise tax and to file Form 730 are "imaginary and unsubstantial." *Reg.* v. *Boyes*, 1 B. & S. 311, 330; *Brown* v. *Walker*, 161 U. S. 591, 599–600. The criminal penalties for wagering with which petitioner is threatened are scarcely "remote possibilities out of the ordinary course of law," *Heike* v. *United States*, 227 U. S. 131, 144; yet he is obliged, on pain of criminal prosecution, to provide information which

[3] The United States has suggested that the Commissioner has authority to make information obtained as a result of the excise tax available to prosecuting officers under 26 U. S. C. § 6103, 5 U. S. C. §§ 22, 1002 (c), and Treas. Reg. §§ 601.702 (a) (3) and (d). Brief for the United States on the original argument, p. 14, n. 10. But see Transcript of Record 101–102.

[4] See *State* v. *Mills*, 229 La. 758, 86 So. 2d 895; *State* v. *Baum*, 230 La. 247, 88 So. 2d 209; *Boynton* v. *State*, 75 So. 2d 211, 213; *United States* v. *Whiting*, 311 F. 2d 191, 193. And see Caplin, The Gambling Business and Federal Taxes, 8 Crime & Delin. 371, 372. Further, we note that the United States has acknowledged the "limited availability" of the excise tax returns, "in certain circumstances," to state and local officials. Brief on Reargument 33, n. 30.

would readily incriminate him, and which he may reasonably expect would be provided to prosecuting authorities. These hazards of incrimination can only be characterized as "real and appreciable." *Reg.* v. *Boyes, supra,* at 330; *Brown* v. *Walker, supra,* at 599–600. Moreover, unlike the income tax return at issue in *United States* v. *Sullivan,* 274 U. S. 259, petitioner's submission of an excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him; his claim of privilege as to the entire tax payment procedure was therefore neither "extreme" nor "extravagant." Compare, *id.,* at 263.

We are thus obliged to inquire whether petitioner is otherwise foreclosed from asserting the constitutional privilege. For reasons indicated in *Marchetti, supra,* we have found nothing in *United States* v. *Kahriger,* 345 U. S. 22, or *Lewis* v. *United States,* 348 U. S. 419, which now warrants the exclusion of this situation from the privilege's protection.[5] It need only be added that the requirements associated with the excise tax are directed wholly to past and present wagering activities; they lack even the illusory prospectivity which characterizes the special occupational tax and registration requirements.

Similarly, we have concluded that the "required records" doctrine, *Shapiro* v. *United States,* 335 U. S. 1, cannot be appropriately applied to these circumstances. See generally *Marchetti* v. *United States, supra.* The premises of the doctrine, as it is described in *Shapiro,* are evidently three: first, the purposes of the United

[5] It is useful to note that the validity under the Fifth Amendment of the wagering excise tax was not at issue in either *Kahriger* or *Lewis*; *Lewis* involved an information which charged a willful failure to pay the occupational tax, and *Kahriger* an information which charged willful failures both to register and to pay the occupational tax.

States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents. There is no need for present purposes to examine the relative significance of these three factors, or to undertake to define more specifically their incidents, for both the first and third factors are plainly absent from this case.

Here, as in *Marchetti,* the statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities. The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers, *United States* v. *Calamaro,* 354 U. S. 351, 358; but we cannot ignore either the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made. These collateral circumstances, in combination with Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities, readily suffice to distinguish these requirements from those at issue in *Shapiro.* Moreover, the information demanded here lacks every characteristic of a public document. No doubt it is desired by the United States, but we have concluded, for reasons indicated in *Marchetti,* that this alone does not render information "public," and thus does not deprive it of constitutional protection.

We must note that the pertinent Treasury regulations provide that the replies to the questions included on Form 730 are to be compiled each month "from the daily records required by §§ 44.4403–1 and 44.6001–1." Treas. Reg. § 44.6011 (a)–1 (a). It might therefore be argued that Form 730 is merely a monthly abstract of

records essentially similar to those required to be preserved by the regulations in *Shapiro*. The difficulties with this argument are two. First, it is scarcely plain that the records required here are "of the same kind [the taxpayer] has customarily kept." 335 U. S., at 5, n. 3. Second, and more important, there are, as we have indicated, other points of significant dissimilarity between this situation and that in *Shapiro*. We have concluded that in combination these points of difference preclude any appropriate application to these circumstances of the "required records" doctrine.

Finally, as in *Marchetti,* we have been urged by the United States to permit continued enforcement of the wagering excise tax requirements by imposing restrictions upon the use by state and federal authorities of information obtained as a consequence of payment of the tax. We recognize that § 6107 (see *Marchetti, supra,* at 59, n. 15) is not by its terms applicable to the excise tax, and that there is no similar statutory obligation that the Commissioner provide prosecutors with listings of those who have paid the excise tax. Nonetheless, it would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti,* to do so upon "an integral part" [6] of the same system. We therefore decline to impose the restrictions urged by the United States.

II.

There remain for disposition the substantive counts for willful failure to pay the occupational tax, and the count for conspiracy to defraud.[7] The latter was bot-

[6] H. R. Rep. No. 586, 82d Cong., 1st Sess., 60.

[7] Section 4411 provides that the occupational tax must be paid "by each person who is liable for tax under section 4401" and by each person who receives wagers for one liable under § 4401. It

tomed on allegations that petitioner had conspired to evade payment both of the excise tax and of the occupational tax. Petitioner has consistently contended that the constitutional privilege should have prevented his conviction on the conspiracy count, evidently on the basis that, insofar as it is founded on his failure to pay the excise tax, this count raises questions identical with those presented by the substantive counts for failure to pay that tax. We agree, and conclude that a taxpayer may not be convicted of conspiracy to evade payment of the tax, if the constitutional privilege would properly prevent his conviction for willful failure to pay it. Cf. *Marchetti* v. *United States, supra,* at 60–61.

Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax.[8]

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might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense of a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. We cannot accept such an argument. We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax.

[8] It should be noted that petitioner's trial counsel did once assert, in colloquy with the trial judge, that "We contended and have always contended—and if required to go on appeal will continue to contend—that the requirements of this Act in requiring you to pay this excise tax and take out the stamp are a violation of the privilege against self incrimination." The court then inquired, "You are raising the Constitutional question of the validity of the law?" Petitioner's counsel replied, "That is right." Transcript of Record 33. Petitioner did not, however, challenge his obligation to pay the occupational tax either in any of his various motions or in any of his other arguments, here or in the courts below.

Given the decisions of this Court in *Kahriger* and *Lewis, supra,* which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB, supra,* we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege. By the same token, we do not think that we can well reach these counts on the theory of "plain error."

It might, therefore, be thought that the proper disposition of the substantive occupational tax counts, and of the portion of the conspiracy count concerned with the occupational tax, would be to vacate, rather than to reverse, the judgments of conviction, and to return the case to the lower courts for further proceedings consistent with our opinions in this case and in *Marchetti.*

We think, however, that a different course is indicated. Under 28 U. S. C. § 2106 [9] we have power to dispose of this case "as may be just under the circumstances." See *Yates* v. *United States,* 354 U. S. 298, 327–331. Since the record is barren of any evidence on which a finding of waiver of the privilege against self-incrimination might properly be predicated, and since, absent such a waiver, reversal of the conviction would be inevitable in light of our holdings today in this case and in *Marchetti,* we consider that the entire case should now be finally disposed of at this level. In the special circumstances presented, this course seems to us to be dictated by considerations of sound judicial administration, in

[9] Section 2106 provides that "The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

order to obviate further and entirely unnecessary proceedings below.[10] Cf. *Yates* v. *United States, supra.*

Accordingly, the judgment of the Court of Appeals is reversed in its entirety.

It is so ordered.

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

MR. JUSTICE BRENNAN, concurring.*

I join the opinions of the Court in these cases. I write only to emphasize why, in my view, nothing we decide or say today in any wise impairs or modifies *United States* v. *Sullivan,* 274 U. S. 259, and *Shapiro* v. *United States,* 335 U. S. 1.

The privilege against self-incrimination does not bar the Government from establishing every program or scheme featured by provisions designed to secure information from citizens to accomplish proper legislative purposes. Congress is assuredly empowered to construct a statutory scheme which either is general enough to avoid conflict with the privilege, or which assures the necessary confidentiality or immunity to overcome the privilege. See *Adams* v. *Maryland,* 347 U. S. 179; *Reina* v. *United States,* 364 U. S. 507. True, some of the values protected by the self-incrimination guaranty may well be affected to an extent by any enforced system of information gathering based upon individual participation, see *Murphy* v. *Waterfront Commission,* 378 U. S. 52, 55, but it is clear that the scope of the privilege does not coincide with the complex of values it helps to protect.

[10] In light of this disposition, we find it unnecessary to reach petitioner's alternative contention, that conduct of the trial judge after submission of the case to the jury prevented a fair trial.

*[This opinion applies also to No. 2, *Marchetti* v. *United States, ante,* p. 39.]

Despite the impact upon the inviolability of the human personality, and upon our belief in an adversary system of criminal justice in which the Government must produce the evidence against an accused through its own independent labors, the prosecution is allowed to obtain and use evidence offered by the accused "in the unfettered exercise of his own will," *Malloy* v. *Hogan,* 378 U. S. 1, 8, and evidence which although compelled is generally speaking not "testimonial," *Schmerber* v. *California,* 384 U. S. 757, 761. Moreover, by the simple expedient of granting appropriate immunity the Government is able to surmount entirely the self-incrimination barrier, despite the value of privacy that provision is intended to protect.

United States v. *Sullivan, supra,* makes clear that an individual is not exempted, by the fact that he may be privileged to refuse to answer some questions, from a requirement, "directed at the public at large," of filing an income tax return exclusively containing questions "neutral on their face." *Albertson* v. *SACB,* 382 U. S. 70, 79. *Shapiro* v. *United States, supra,* involved a similar situation; it involved a record-keeping requirement pursuant to a neutral governmental system of price regulation.

On the other hand, we know that where the governmental scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the privilege. Thus in *Albertson* v. *SACB, supra,* we held invalid both the requirement that Communist Party members file a registration form and that they complete and file a registration statement under the Subversive Activities Control Act of 1950. We distinguished *Sullivan,* stating that the questions on the forms in *Albertson* "are directed at a highly selective group inherently suspect of criminal activities," and that the privilege is asserted, not "in

an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Id.*, at 79.

The cases before us present a statutory system condemned by *Albertson.* The wagering excise tax, the occupational tax, and the registration requirement are only parts of an interrelated statutory system for taxing illegal wagers. Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use in their prosecution. See *United States* v. *Kahriger,* 345 U. S. 22, 37 (Frankfurter, J., dissenting).

The Court's opinions fully establish the statutory system's impermissible invasions of the privilege. Indeed, 26 U. S. C. § 4401 should create substantial suspicion on privilege grounds simply because it is an excise tax upon persons "engaged in the business of accepting wagers" or who conduct "any wagering pool or lottery." The persons affected by this language are a relatively small group, many of whom are engaged in activities made unlawful by state and federal statutes. But § 4401 is actually even more directly confined to that group. Section 4402 (1) exempts from the tax wagers placed with a parimutuel wagering enterprise "licensed under State law," and § 4421 defines "wager" to exclude most forms of unorganized gambling such as dice and poker, and defines "lottery" to exclude commonly played games such as bingo and drawings conducted by certain tax-exempt organizations. The effect of these exceptions is to limit the wagering excise tax under § 4401 almost exclusively to illegal, organized gambling.

Moreover, the code contemplates extensive record-keeping reporting by persons obligated to pay the tax.

But these are records and reports which would incriminate overwhelmingly. Section 6011 (a) requires any person liable to pay a tax to file a return in accordance with the forms and regulations promulgated by the Secretary or his delegate. The regulations promulgating record-keeping requirements and the requirement that taxpayers make a monthly return on Form 730, Treas. Reg. § 44.6011 (a)–1(a), were therefore formulated pursuant to specific congressional authority. That the return is intended to be a part of the wagering tax obligation is clear from the face of the return itself. Immediately under Form 730's title "TAX ON WAGERING" is a reference to "(Section 4401 of the Internal Revenue Code)," and in at least three places the return indicates that "this form must be filed, *with remittance,* with the District Director of Internal Revenue." † (Emphasis added.)

Thus § 4401 requires that taxpayers send the Government every month both the tax due and the completed Form 730. That much can start them on the road to prison. The Service then is free to take various steps to assure that it does. It may investigate such taxpayers. It may subpoena taxpayers' records to ascertain whether the payments are accurate. It can and does pass on for use by prosecuting authorities the facts of payments and filing and any other evidence uncovered. These many, substantial dangers easily satisfy the test for incrimination fashioned by our cases.

Of course the privilege does not guarantee anonymity. The question in these cases, however, is not whether all governmental programs which require citizens to expose

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†The instructions on Form 730 state that the "[r]eturn, with remittance, covering the tax due under section 4401 for any calendar month must be in the hands of the District Director . . . on or before the last day of the succeeding month . . . ."

their identity are invalid, but whether this statutory system, designed primarily for and utilized to pierce the anonymity of citizens engaged in criminal activity, is invalid. The privilege does guarantee anonymity from inquiries so designed, when the risks are not wholly fanciful. And the risks here are obvious and real. A list of persons who comply with § 4401 every month is invaluable to prosecuting authorities. It must frequently provide the clinching link in the chain of conviction.

We must take this statute as it is written and as it has been applied. Both the statute and the practice under it clearly further a congressional purpose to gather evidence from citizens in order to secure their conviction of crime. There undoubtedly will be other statutes and practices as to which this determination will be more difficult to make. These cases, however, present a statutory system manifesting a patent violation of the privilege. That system must be dealt with uncompromisingly to protect against encroachment of the privilege and to encourage legislative care and concern for its continuing vitality.

MR. JUSTICE STEWART, concurring.*

If we were writing upon a clean slate, I would agree with the conclusion reached by THE CHIEF JUSTICE in these cases.[1] For I am convinced that the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding.[2] But the Court long ago lost sight of that original mean-

*[This opinion applies also to No. 2, *Marchetti* v. *United States*, *ante*, p. 39.]

[1] And in *Haynes* v. *United States*, *post*, p. 85.

[2] That, after all, is what the clause says:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

ing. In the absence of a fundamental re-examination of our decisions, the most relevant recent one being *Albertson* v. *SACB*, 382 U. S. 70, I am compelled to join the opinions and judgments of the Court.

MR. CHIEF JUSTICE WARREN, dissenting.*

The Court today strikes down as unconstitutional a statutory scheme enacted by Congress to make effective and enforceable taxes imposed on wagers and the occupation of gambling. In so doing, it of necessity overrules *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955). I cannot agree with the Court's conclusion on the constitutional questions presented, and I would affirm the convictions in these two cases on the authority of *Kahriger* and *Lewis*.

In addition to being in disagreement with the Court on the result it reaches in these cases, I am puzzled by the reasoning process which leads it to that result. The Court professes to recognize and accept the power of Congress legitimately to impose taxes on activities which have been declared unlawful by federal or state statutes. Yet, by its sweeping declaration that the congressional scheme for enforcing and collecting the taxes imposed on wagers and gamblers is unconstitutional, the Court has stripped from Congress the power to make its taxing scheme effective. A reading of the registration requirement of 26 U. S. C. § 4412, as implemented by Internal Revenue Service Form 11–C, reveals that the information demanded of gamblers is no more than is necessary to assure that the tax-collection process will be effective. Registration of those liable for special taxes is a common and integral feature of the tax laws. See 26 U. S. C.

*[This opinion applies also to No. 2, *Marchetti* v. *United States*, *ante*, p. 39.]

§ 7011.[1] So also is the requirement of public disclosure.[2] And the reach of the registration and disclosure requirements extends to both lawful and unlawful activities. Because registration and disclosure are so pervasive in the Internal Revenue Code, it is clear that such requirements have been imposed by Congress to aid in the collection of taxes legitimately levied. Because most forms of gambling have been declared illegal in this country, gamblers necessarily operate furtively in the dark shadows of the underworld. Only by requiring that such individuals come forward under pain of criminal sanctions and reveal the nature and scope of their activities can Congress confidently expect that revenue derived from that outlawed occupation will be subject to the legitimate reach of the tax laws. Indeed, it seems to me that the very secrecy which surrounds the business of gambling demands disclosure. Those legislative committees and executive commissions which have studied the problems of illicit gambling activities have found it impossible to determine with any precision the gross revenues derived from that business. For example, the President's Commission on Law Enforcement and Administration of Justice reported:

> "There is no accurate way of ascertaining organized crime's gross revenue from gambling in the United States. Estimates of the annual intake have varied from $7 to $50 billion. . . . While the Com-

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[1] It is true that the Internal Revenue Code also imposes special registration requirements in connection with some of the special taxes. See the registration sections collected in 26 U. S. C. § 7012. However, the special registration requirements differ only in degree, and not in kind, from the provisions of § 7011.

[2] Among the more general public disclosure provisions of the Revenue Code are § 6103 (f) (list of taxpayers); § 6104 (returns of certain tax-exempt organizations); and § 6105 (lists of those who have been granted excess profit relief).

> mission cannot judge the accuracy of these figures, even the most conservative estimates place substantial capital in the hands of organized crime leaders." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime 3 (1967).[3]

The Commission's observation is doubly revealing. It shows that the business of gambling is a lucrative revenue source. And it demonstrates the need for an enforceable disclosure device, such as the registration requirement of § 4412, if the revenue potential is to be realized. No one denies that the disclosures demanded by § 4412 can also be useful to law enforcement officials and that the very process of disclosure may have a regulatory effect on gamblers and their operations.[4] But this Court has

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[3] Other reports are similarly indefinite concerning the precise amount of revenue realized by organized crime from illicit gambling operations. Thus, a Senate report could be no more exact than to describe unlawful gambling activities as "a multibillion dollar racket." Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, Gambling and Organized Crime, S. Rep. No. 1310, 87th Cong., 2d Sess., 43 (1962). The President's Commission on Crime in the District of Columbia reported that "over 100 million dollars is bet annually on 'numbers' and sports events" in the Washington metropolitan area. The Commission relied for its figures on information supplied by Sheldon S. Cohen, Commissioner of Internal Revenue. Report of the President's Commission on Crime in the District of Columbia 112 (1966).

[4] Investigations by congressional committees have established that gambling revenue provides a principal source of revenue for organized crime in this country. See S. Rep. No. 1310, 87th Cong., 2d Sess., 43 (1962); S. Rep. No. 141, 82d Cong., 1st Sess., 11 (1951). Some congressmen may well have been motivated by a desire to control and curtail organized crime in enacting the tax laws challenged in these cases. However, it is not the task of this Court to examine such motives in ruling on the constitutionality of such laws, and the Court today has wisely declined to engage in any motive-searching inquiries.

repeatedly recognized that "a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky* v. *United States,* 300 U. S. 506, 513 (1937). See also *License Tax Cases,* 5 Wall. 462 (1867).

In declaring the registration requirements of § 4412 invalid, the Court places principal reliance on *Albertson* v. *SACB,* 382 U. S. 70 (1965). But there is a critical distinction between that case and the cases decided today. In *Albertson,* the Court dealt with a registration requirement which clashed head-on with protected First Amendment rights and which could be viewed as serving no substantial governmental purpose in light of the curtailment of those rights.[5] These elements are notably lacking in the cases decided today. The occupation of gambling can in no sense be called a "protected" activity. The only claim that those engaged in gambling make is that they are somehow entitled to have their activities shrouded in secrecy and shielded from disclosure. Nothing in the Constitution compels such a result. And there is clearly a legitimate tax purpose in demanding that gamblers make the disclosures required by § 4412 and Form 11–C. Disclosure by means of registration is routinely required under the tax laws of those engaged in legitimate and lawful business enterprises. See, *e. g.,* 26 U. S. C. §§ 4101, 4222, 5502, 5802. Cf. *Shapiro* v. *United States,* 335 U. S. 1 (1948). To relieve gamblers of the registration requirement is to create for those

[5] I recognize that *Albertson* was decided on Fifth Amendment grounds without reaching the petitioners' First Amendment claims. 382 U. S., at 73–74 and n. 6. However, in applying the *Albertson* holding to the facts of these cases, it cannot be overlooked that the registration requirement in *Albertson* was directed at the petitioners' organizational affiliations which were arguably protected by the First Amendment. See *United States* v. *Robel,* 389 U. S. 258 (1967). There is no such First Amendment issue lurking in the cases decided today. The operative fact upon which the registration requirement of § 4412 depends is an individual's status as a gambler.

engaged in that occupation a special constitutional privilege of nonregistration.

In view of these considerations, I cannot understand why the Court today finds it necessary to strike down the registration requirement of § 4412 directed at those who derive their income from gambling. What seems to trouble the Court is not that registration is required but that the information obtained through the registration requirement is turned over by federal officials, under the statutory compulsion of 26 U. S. C. § 6107,[6] to state prosecutors to aid them in the enforcement of state gambling laws. If that is the source of the Court's Fifth Amendment concern, then constitutional adjudication demands that the provisions of § 6107 be the focus of the Court's decision. It does not seem reasonable to me to rule that, because information derived from the registration provisions of § 4412 must be made available to state prosecutors under § 6107, the registration requirements suffer from a fatal constitutional infirmity, even though § 4412 is a necessary and proper means of assuring that the occupational tax on gamblers will be enforceable. Certainly no Fifth Amendment issue arises from the fact of registration until an effort is made to use the registration procedure in aid of criminal prosecution. To the extent that the disclosure requirements of § 6107 would raise a Fifth Amendment problem because some of the names on the public list have admitted unlawful activities, that statutory provision is severable for purposes of constitutional adjudication. In fact, in the Internal Revenue Code itself, Congress has specifically enacted a severability clause. Section 7852 (a) of Title 26 pro-

[6] The Court points out in *Grosso* v. *United States* that the disclosure requirements of § 6107 do not extend to the excise tax provisions of § 4401. But, by administrative practice, the identity of those who pay the excise tax on wagers is made known to state prosecuting officials. *Ante,* at 66.

vides: "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." That clause represents a clear statutory command to this Court to wield its constitutional knife surgically, concentrating on the suspect provisions of § 6107 rather than bludgeoning the entire taxing scheme. The Court cannot evade this constitutional and statutory duty, as it seems to do, by labeling every provision of the wagering tax statutes as "interrelated" or "integral."

There is no such narrow focus to the Court's approach to these two cases. In fact, the Court impliedly rejects such an approach in dealing with the Government's suggestion that the taxing scheme at issue be saved from constitutional interment by imposing a use restriction on the information derived from registration under § 4412. Cf. *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964). The Court finds such a limitation unacceptable because the legislative history of the wagering tax system reveals a congressional purpose to make available to state and local law enforcement officials the disclosures made through registration. The Court reasons that to impose the use restriction would be to defeat the congressional purpose, and it finds the suggested saving device unacceptable. But realistically the Court's sweeping constitutional ruling has the effect of frustrating two congressional purposes—the disclosure purpose and the revenue purpose. Such a result can hardly be justified on the ground of according a congressional purpose the deference due it by this Court. Conceding that the statutory scheme is intended to assist law enforcement, the fact that taxes in the sum of $115,000,000 have flowed from the wagering tax scheme to the Treasury in the past several years is convincing evidence of a legitimate

tax purpose. The congressional intent to assist law enforcement should not be the excuse for frustrating the revenue purpose of the statutes before the Court. Regardless of legislative intent, this Court has in the past refused "to formulate a rule of constitutional law broader than is required." *Garner* v. *Louisiana,* 368 U. S. 157, 163 (1961); cf. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 186, n. 43 (1963). This principle should prevail in this case where the Act has the wholesome objective of devising workable procedures to assure that gamblers will pay the same taxes on their profits as other citizens are compelled to pay.

I apprehend that the Court, by unnecessarily sweeping within its constitutional holding the registration requirements of § 4412, is opening the door to a new wave of attacks on a number of federal registration statutes whenever the registration requirement touches upon allegedly illegal activities. As I noted above, registration is a common feature attached to a number of special taxes imposed by Title 26. For example, the following provisions impose special registration requirements: § 4101 (those subject to the tax on petroleum products); § 4222 (registration regarding certain tax-free sales by manufacturers); § 4722 (those engaged in dealing in narcotic drugs); § 4753 (those who deal in marihuana); § 4804 (d) (manufacturers of white phosphorous matches); §§ 5171–5172 (registration of distilleries); § 5179 (registration of stills); § 5502 (manufacturers of vinegar); § 5802 (importers, manufacturers, and dealers in firearms). And § 7011 imposes a general registration requirement on all those liable for other special taxes.[7] Heretofore this

[7] For example, the following sections impose occupational taxes and subject the taxpayer to the registration requirements of § 7011: § 4461 (those who maintain for use or permit use of coin-operated amusement or gaming devices); §§ 4721 and 4702 (a)(2)(C) (those who deal in narcotic drugs); § 4751 (dealers in marihuana); § 4821 (manufacturers or dealers in renovated or adulterated butter);

Court has consistently upheld the validity of such registration requirements, without regard to the legality of the activity being taxed. *United States* v. *Sanchez,* 340 U. S. 42 (1950) (26 U. S. C. § 4753); *Sonzinsky* v. *United States,* 300 U. S. 506 (1937) (26 U. S. C. § 5841); *Nigro* v. *United States,* 276 U. S. 332 (1928) (26 U. S. C. § 4722). The implications of the Court's decisions today also extend beyond the tax statutes. For example, the statute requiring narcotics addicts and violators to register whenever they enter or leave the country, 18 U. S. C. § 1407, can now be expected to come under attack. My concern that such registration requirements will now come under attack is not imaginary. This very day the Court, adhering to its decisions in *Marchetti* and *Grosso,* declares unconstitutional in *Haynes* v. *United States, post,* p. 85, 26 U. S. C. § 5851, which makes unlawful the possession of a firearm not registered under § 5841.[8] The impact of that decision on the efforts of Congress to enact much-needed federal gun control laws is not consistent with national safety. In my view, the Court has failed to take account of these relevant implications in the very broad holdings of today's decisions.

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§ 4841 (manufacturers or dealers in filled cheese); § 5081 (those who rectify distilled spirits or wines); § 5091 (brewers of beer); § 5101 (manufacturers of stills); and § 5111 (wholesale dealers in liquors, wines, and beer); § 5121 (retail dealers in liquors, wines, and beer); and § 5801 (dealers in certain firearms). The registration requirement applies uniformly to those engaged in such occupations lawfully and those whose activities would make them liable to criminal penalties.

[8] The petition for a writ of certiorari in *Haynes* was filed on March 11, 1967, almost a year after this Court granted a writ of certiorari in *Costello* v. *United States* (the companion case to *Marchetti*). In granting the writ, the Court stipulated as the sole question in *Costello* whether *Kahriger* and *Lewis* should be overruled. 383 U. S. 942. There can be little doubt that the Court's specification of the question for argument in *Costello* prompted the Fifth Amendment challenge in *Haynes.*

HAYNES *v.* UNITED STATES.

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

No. 236. Argued October 11, 1967.—Decided January 29, 1968.

Petitioner was charged by information with violating 26 U. S. C. § 5851 (part of the National Firearms Act, an interrelated statutory system for the taxation of certain classes of firearms used principally by persons engaged in unlawful activities) by knowingly possessing a defined firearm which had not been registered as required by 26 U. S. C. § 5841. Section 5841 obligates the possessor of a defined firearm to register the weapon, unless he made it or acquired it by transfer or importation, and the Act's requirements as to transfers, makings and importations "were complied with." Section 5851 declares unlawful the possession of such firearm which has "at any time" been transferred or made in violation of the Act, or which "has not been registered as required by section 5841." Additionally, § 5851 provides that "possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury." Petitioner moved before trial to dismiss the charge, sufficiently asserting that § 5851 violated his privilege against self-incrimination guaranteed by the Fifth Amendment. The motion was denied, petitioner pleaded guilty, and his conviction was affirmed by the Court of Appeals. *Held:*

1. Congress, subject to constitutional limitations, has authority to regulate the manufacture, transfer, and possession of firearms, and may tax unlawful activities. Pp. 90, 98.

2. Petitioner's conviction under § 5851 for possession of an unregistered firearm is not properly distinguishable from a conviction under § 5841 for failure to register possession of a firearm, and both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register. Pp. 90–95.

3. A proper claim of the privilege against self-incrimination provides a full defense to prosecutions either for failure to register under § 5841 or for possession of an unregistered firearm under § 5851. Pp. 95–100.

4. Restrictions upon the use by federal and state authorities of information obtained as a consequence of the registration require-

ment, suggested by the Government, is not appropriate. *Marchetti* v. *United States, ante,* p. 39, and *Grosso* v. *United States, ante,* p. 62. Pp. 99–100.

5. Since any proceeding in the District Court upon a remand must inevitably result in the reversal of petitioner's conviction, it would be neither just nor appropriate to require such needless action and accordingly the judgment is reversed. Pp. 100–101.

372 F. 2d 651, reversed.

Charles Alan Wright argued the cause for petitioner. With him on the brief was *Ernest E. Figari, Jr.*

Harris Weinstein argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was charged by a three-count information filed in the United States District Court for the Northern District of Texas with violations of the National Firearms Act. 48 Stat. 1236. Two of the counts were subsequently dismissed upon motion of the United States Attorney. The remaining count averred that petitioner, in violation of 26 U. S. C. § 5851, knowingly possessed a firearm, as defined by 26 U. S. C. § 5848 (1), which had not been registered with the Secretary of the Treasury or his delegate, as required by 26 U. S. C. § 5841. Petitioner moved before trial to dismiss this count, evidently asserting that § 5851 violated his privilege against self-incrimination, as guaranteed by the Fifth Amendment.[1] The motion was denied, and petitioner thereupon

[1] Petitioner's motion asserted merely that § 5851 was "unconstitutional," and the order denying the motion does not indicate more precisely the substance of petitioner's contentions. His subsequent arguments, both in the courts below and here, have, however, consistently asserted a claim of the constitutional privilege. No suggestion is made by the Government that the claim of privilege was not sufficiently made.

entered a plea of guilty.[2] The judgment of conviction was affirmed by the Court of Appeals for the Fifth Circuit. 372 F. 2d 651. We granted certiorari to examine the constitutionality under the Fifth Amendment of petitioner's conviction. 388 U. S. 908. For reasons which follow, we reverse.

I.

Section 5851[3] forms part of the National Firearms Act, an interrelated statutory system for the taxation of certain classes of firearms. The Act's requirements are applicable only to shotguns with barrels less than 18 inches long; rifles with barrels less than 16 inches long; other weapons, made from a rifle or shotgun, with an overall length of less than 26 inches; machine guns and other automatic firearms; mufflers and silencers; and other firearms, except pistols and revolvers, "if such weapon is capable of being concealed on the person . . . ." 26 U. S. C. § 5848 (1); Treas. Reg. § 179.20, 26 CFR § 179.20. These limitations were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation.[4]

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[2] Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege. See, *e. g., United States* v. *Ury,* 106 F. 2d 28.

[3] The section provides that "It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812 (b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

[4] The views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress. See *Rainwater* v. *United States,* 356 U. S. 590, 593; *United States* v. *Price,* 361 U. S. 304, 313. Nonetheless, it is pertinent to note that

Importers, manufacturers, and dealers in such firearms are obliged each year to pay special occupational taxes, and to register with the Secretary of the Treasury or his delegate. 26 U. S. C. §§ 5801, 5802. Separate taxes are imposed on the making and transfer of such firearms by persons other than those obliged to pay the occupational taxes. 26 U. S. C. §§ 5811, 5821. For purposes of these additional taxes, the acts of making and transferring firearms are broadly defined. Section 5821 thus imposes a tax on the making of a firearm "whether by manufacture, putting together, alteration, any combination thereof, or otherwise." Similarly, to transfer encompasses "to sell, assign, pledge, lease, loan, give away, or otherwise dispose of" a firearm. 26 U. S. C. § 5848 (10).

All these taxes are supplemented by comprehensive requirements calculated to assure their collection. Any individual who wishes to make a weapon, within the meaning of § 5821 (a), is obliged, "prior to such making," to declare his intention to the Secretary, and to provide to the Treasury his fingerprints and photograph. 26 U. S. C. § 5821 (e); Treas. Reg. § 179.78. The declaration must be "supported by a certificate of the local chief of police . . . or such other person whose certificate may . . . be acceptable . . . ." Treas. Reg. § 179.78. The certificate must indicate satisfaction that the fingerprints and photograph are those of the declarant, and that the firearm is intended "for lawful purposes." *Ibid.* Any person who wishes to transfer such a weapon may lawfully do so only

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the Committee on Ways and Means of the House of Representatives, while reporting in 1959 on certain proposed amendments to the Act, stated that the "primary purpose of [the Firearms Act] was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the gangster-type element." H. R. Rep. No. 914, 86th Cong., 1st Sess., 2.

if he first obtains a written order from the prospective transferee on an "application form issued . . . for that purpose by the Secretary." 26 U. S. C. § 5814 (a). The application, supported by a certificate of the local chief of police, and accompanied by the transferee's fingerprints and photograph, must be approved by the Secretary prior to the transfer. Treas. Reg. §§ 179.98, 179.99. Finally, every person possessing such a firearm is obliged to register his possession with the Secretary, unless he made the weapon, or acquired it by transfer or importation, and the Act's requirements as to transfers, makings, and importations "were complied with." 26 U. S. C. § 5841.[5]

Failure to comply with any of the Act's requirements is made punishable by fines and imprisonment. 26 U. S. C. § 5861. In addition, § 5851 creates a series of supplementary offenses; it declares unlawful the possession of any firearm which has "at any time" been transferred or made in violation of the Act's provisions, or which "has not been registered as required by section 5841." Finally, § 5851 provides that in prosecutions conducted under that section "possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

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[5] The section provides that "Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with."

II.

At the outset, it must be emphasized that the issue in this case is not whether Congress has authority under the Constitution to regulate the manufacture, transfer, or possession of firearms; nor is it whether Congress may tax activities which are, wholly or in part, unlawful. Rather, we are required to resolve only the narrow issue of whether enforcement of § 5851 against petitioner, despite his assertion of the privilege against self-incrimination, is constitutionally permissible. The questions necessary for decision are two: first, whether petitioner's conviction under § 5851 is meaningfully distinguishable from a conviction under § 5841 for failure to register possession of a firearm; and second, if it is not, whether satisfaction of petitioner's obligation to register under § 5841 would have compelled him to provide information incriminating to himself. If, as petitioner urges, his conviction under § 5851 is essentially indistinguishable from a conviction premised directly upon a failure to register under § 5841, and if a prosecution under § 5841 would have punished petitioner for his failure to incriminate himself, it would follow that a proper claim of privilege should have provided a full defense to this prosecution.[6] To these questions we turn.

III.

The first issue is whether the elements of the offense under § 5851 of possession of a firearm "which has not been registered as required by section 5841" differ in any significant respect from those of the offense under § 5841 of failure to register possession of a firearm. The United States contends that the two offenses, despite the sim-

[6] Indeed, so much is recognized by the Government; it has stated that "[w]e concede that if petitioner's reading of the two provisions were right . . . petitioner's conviction under Section 5851 would not be valid." Brief for the United States 8.

ilarity of their statutory descriptions, serve entirely different purposes, in that the registration clause of § 5851 is intended to punish acceptance of the possession of a firearm which, despite the requirements of § 5841, was never registered by any prior possessor, while § 5841 punishes only a present possessor who has failed to register the fact of his own possession. If this construction is correct, nothing in a prosecution under § 5851 would turn on whether the present possessor had elected to register; his offense would have been complete when he accepted possession of a firearm which no previous possessor had registered. We need not determine whether this construction would be free from constitutional difficulty under the Fifth Amendment, for we have concluded that § 5851 cannot properly be construed as the United States has urged.[7]

The United States finds support for its construction of § 5851 chiefly in the section's use of the past tense: the act stated to be unlawful is "to possess any firearm which *has not been* registered as required by section 5841." (Emphasis added.) It is contended that we may infer from this choice of tense that the failure to register must necessarily precede the accused's acquisition of possession. We cannot derive so much from so little. We perceive no more in the draftsman's choice of tense

[7] The Government's position is generally supported by several cases in the courts of appeals. See, in addition to the opinion below, *Frye* v. *United States,* 315 F. 2d 491; *Starks* v. *United States,* 316 F. 2d 45; *Mares* v. *United States,* 319 F. 2d 71; *Sipes* v. *United States,* 321 F. 2d 174; *Taylor* v. *United States,* 333 F. 2d 721; *Castellano* v. *United States,* 350 F. 2d 852; *Pruitt* v. *United States,* 364 F. 2d 826; *Decker* v. *United States,* 378 F. 2d 245. None of these cases, however, undertook an extended examination of the relationship between §§ 5851 and 5841. Compare *Lovelace* v. *United States,* 357 F. 2d 306, 309; and Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 158–159, n. 95.

than the obvious fact that the failure to register must precede the moment at which the accused is charged; we find nothing which confines the clause's application to failures to register which have occurred before a present possessor received the firearm. It follows that the phrase fastened upon by the United States is, at the least, equally consistent with the construction advanced by petitioner.

If, however, nothing further were available, it might be incumbent upon us to accept the Government's construction in order to avoid the adjudication of a serious constitutional issue. See, *e. g., Ashwander* v. *Valley Authority,* 297 U. S. 288, 348 (concurring opinion); *Crowell* v. *Benson,* 285 U. S. 22, 62. But there are persuasive indications at hand which, in our view, preclude adoption of the position urged by the United States. Initially, we must note that each of the other two offenses defined by § 5851 indicates very specifically that the violations of the making or transfer provisions, on which the § 5851 offenses are ultimately premised, can have occurred "at any time." An analogous phrase in the registration clause would have made plain beyond all question that the construction now urged by the United States should be accepted; if this was indeed Congress' purpose, it is difficult to see why it did not, as it did in the other clauses, insert the few additional words necessary to make clear its wishes. The position suggested by the United States would thus oblige us, at the outset, to assume that Congress has, in this one clause, chosen a remarkably oblique and unrevealing phrasing.

Similarly, it is pertinent to note that the transfer and making clauses of § 5851 punish the receipt, as well as the possession, of firearms; the registration clause, in contrast, punishes only possession. Under the construction given § 5851 by the United States, Congress might have been expected to declare unlawful, in addition, the receipt of

firearms never previously registered; indeed, the receipt of the firearm is, under that construction, the central element of the offense. Congress' preference in the registration clause for "possession," rather than "receipt," is satisfactorily explicable only if petitioner's construction of § 5851 is adopted.

Third, and more important, we find it significant that the offense defined by § 5851 is the possession of a firearm which has not been registered "as required by section 5841." In the absence of persuasive evidence to the contrary, the clause's final words suggest strongly that the perimeter of the offense which it creates is to be marked by the terms of the registration requirement imposed by § 5841. In turn, § 5841 indicates quite precisely that "[e]very person possessing a firearm" must, unless excused by the section's exception, register his possession with the Secretary or his delegate. Moreover, the Treasury regulations are entirely unequivocal; they specifically provide that "[e]very person in the United States possessing a firearm (a) not registered *to him,* . . . must execute an application for the registration of such firearm . . . ." Treas. Reg. § 179.120. (Emphasis added.)

The pertinent legislative history offers additional assistance, and points against the Government's construction. The registration clause was inserted into § 5851 by the Excise Tax Technical Changes Act of 1958. 72 Stat. 1428. The two committee reports indicate, in identical terms,[8] that the existing section was thought inadequate because, although it defined as an unlawful act the possession of any firearm which had been made or transferred in violation of the Firearms Act, it failed "to so

[8] The language in the reports was evidently taken without change or elaboration from the recommendations submitted to the House Committee on Ways and Means by the Treasury. See Hearings before House Committee on Ways and Means on Excise Tax Technical and Administrative Problems, 84th Cong., 1st Sess., 185, 211.

define the possession of an unregistered firearm." H. R. Rep. No. 481, 85th Cong., 1st Sess., 195; S. Rep. No. 2090, 85th Cong., 2d Sess., 212. The section as amended "specifically defines such possession of an unregistered firearm as an unlawful act." *Ibid.* It is useful to note that the committees did not suggest that the failure to register must have preceded the acquisition of possession. Further, the reports indicate that the proposed amendment was intended to make available in prosecutions for possession of an unregistered firearm the presumption already contained in § 5851; they conclude that the "primary purpose of this change is to simplify and clarify the law and to aid in prosecution." H. R. Rep. No. 481, *supra,* at 196; S. Rep. No. 2090, *supra,* at 212.

We infer that the amendment was thought to have two purposes. First, it would complete the series of supplementary offenses created by § 5851, by adding to those premised on a making or transfer one bottomed on a failure to register. Second, it would facilitate the prosecution of failures to register by permitting the use of the presumption included in § 5851. It would thus "aid in prosecution" of conduct also made unlawful by § 5841. Both these purposes are fully consistent with the construction of § 5851 urged by petitioner; but only the first offers any support to the position suggested by the United States.

We are unable to escape the conclusion that Congress intended the registration clause of § 5851 to incorporate the requirements of § 5841, by declaring unlawful the possession of any firearm which has not been registered by its possessor, in circumstances in which § 5841 imposes an obligation to register. The elements of the offenses created by the two sections are therefore identical. This does not, however, fully resolve the question of whether any hazards of incrimination which stem from the regis-

tration requirement imposed by § 5841 must be understood also to inhere in prosecutions under § 5851. Two additional distinctions between the offenses have been suggested, and we must examine them.

First, it has been said that the offenses differ in emphasis, in that § 5851 chiefly punishes possession, while § 5841 punishes a failure to register. Cf. *Frye* v. *United States,* 315 F. 2d 491, 494; *Castellano* v. *United States,* 350 F. 2d 852, 854. We find this supposed distinction entirely unpersuasive, for, as we have found, the possession of a firearm and a failure to register are equally fundamental ingredients of both offenses. Second, it has been suggested that § 5841 creates a "status of unlawful possession" which, if assumed by an individual, denies to him the protection of the constitutional privilege. *Castellano* v. *United States, supra,* at 854. It has evidently been thought to follow that the privilege may be claimed in prosecutions under § 5841, but not in those under § 5851. This is no less unpersuasive; for reasons discussed in *Marchetti* v. *United States,* decided today, *ante,* at 51–52, we decline to hold that the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the constitutional privilege, suffices to deprive an accused of the privilege's protection. We hold that petitioner's conviction under the registration clause of § 5851 is not properly distinguishable from a conviction under § 5841 for failure to register, and that both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register.

IV.

We must now consider whether, as petitioner contends, satisfaction of his obligation to register would have compelled him to provide information incriminating to him-

self.[9] We must first mark the terms of the registration requirement. The obligation to register is conditioned simply upon possession of a firearm, within the meaning of § 5848 (1). Not every possessor of a firearm must, however, register; one who made the firearm, or acquired it by transfer or importation, need not register if the Act's provisions as to transfers, makings, and importations "were complied with." If those requirements were not met, or if the possessor did not make the firearm, and did not acquire it by transfer or importation, he must furnish the Secretary of the Treasury with his name, address, the place where the firearm is usually kept, and the place of his business or employment. Further, he must indicate his date of birth, social security number, and whether he has ever been convicted of a felony. Finally, he must provide a full description of the firearm. See 26 U. S. C. § 5841; Treas. Reg. § 179.120; Internal Revenue Service Form 1 (Firearms).

The registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions under §§ 5851 and 5861. They are unmistakably persons "inherently suspect of criminal activities." *Albertson* v. *SACB*, 382 U. S. 70, 79. It is true, as the United States emphasizes, that registration is not invariably indicative of a violation of the Act's requirements; there are situations, which the United States itself styles "uncommon," [10] in which a possessor

[9] We note that § 5841 has several times been held to require incriminating disclosures, in violation of the Fifth Amendment privilege against self-incrimination. See *Russell* v. *United States*, 306 F. 2d 402; *Dugan* v. *United States*, 341 F. 2d 85; *McCann* v. *United States*, 217 F. Supp. 751; *United States* v. *Fleish*, 227 F. Supp. 967. See also *Lovelace* v. *United States*, *supra*, at 309.

[10] In particular, the United States emphasizes the position of a finder of a lost or abandoned firearm. Brief for the United States 20.

who has not violated the Act's other provisions is obliged to register.[11] Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution under the making and transfer clauses of § 5851. In these circumstances, it can scarcely be said that the risks of criminal prosecution confronted by prospective registrants are "remote possibilities out of the ordinary course of law," *Heike* v. *United States,* 227 U. S. 131, 144; yet they are compelled, on pain of criminal prosecution, to provide to the Secretary both a formal acknowledgment of their possession of firearms, and supplementary information likely to facilitate their arrest and eventual conviction. The hazards of incrimination created by the registration requirement can thus only be termed "real and appreciable." *Reg.* v. *Boyes,* 1 B. & S. 311, 330; *Brown* v. *Walker,* 161 U. S. 591, 599–600.

We are, however, urged by the United States, for various disparate reasons, to affirm petitioner's convic-

[11] We must note, however, that certain of these prospective registrants might be threatened by prosecution under state law for possession of firearms, or similar offenses. It is possible that such persons would be obliged, if they registered in compliance with § 5841, to provide information incriminating to themselves. Such hazards would, of course, support a proper claim of privilege. See *Malloy* v. *Hogan,* 378 U. S. 1. For illustrations of state statutes under which such prosecutions might occur, see Conn. Gen. Stat. Rev. § 53–202 (1958); Del. Code Ann., Tit. 11, § 465 (1953); Hawaii Rev. Laws § 157–8 (1955); Iowa Code § 696.1 (1966); Kan. Stat. Ann. § 21–2601 (1964); La. Rev. Stat. § 40:1752 (1950); Minn. Stat. § 609.67 (1965); N. J. Rev. Stat., Tit. 2A, § 151–50 (1953). We have discovered no state statute under which the present petitioner might have been subject to prosecution for acts registrable under § 5841, and he has not contended that registration would have incriminated him under state law.

tion. It is first suggested that the registration requirement is a valid exercise of the taxing powers, in that it is calculated merely to assure notice to the Treasury of all taxable firearms. We do not doubt, as we have repeatedly indicated,[12] that this Court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution's other commands. We are fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information may be obtained. See generally *Counselman* v. *Hitchcock,* 142 U. S. 547, 585. See also *Adams* v. *Maryland,* 347 U. S. 179; *Murphy* v. *Waterfront Commission,* 378 U. S. 52. Accordingly, nothing we do today will prevent the effective regulation or taxation by Congress of firearms.

Nonetheless, these statutory provisions, as now written, cannot be brought within any of the situations in which the Court has held that the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application. See *United States* v. *Sullivan,* 274 U. S. 259; *Shapiro* v. *United States,* 335 U. S. 1. For reasons given in *Marchetti* v. *United States, supra,* and *Grosso* v. *United States, ante,* p. 62, we have concluded that the points of significant dissimilarity between these circumstances and those in *Shapiro* and *Sullivan* preclude any proper application of those cases here. The questions propounded by § 5841, like those at issue in *Albertson, supra,* are "directed at a highly selective group inherently suspect of criminal activities"; they concern,

[12] See, for example, *Sonzinsky* v. *United States,* 300 U. S. 506; *Marchetti* v. *United States, supra.*

not "an essentially non-criminal and regulatory area of inquiry," but "an area permeated with criminal statutes." 382 U. S., at 79. There are, moreover, no records or other documents here to which any "public aspects" might reasonably be said to have attached. Compare *Shapiro* v. *United States, supra,* at 34; and *Marchetti* v. *United States, supra.*

The United States next emphasizes that petitioner has consistently contended that §§ 5841 and 5851 are unconstitutional on their face; it urges that this contention is foreclosed by the inclusion in the registration requirement of situations in which the obligation to register cannot produce incriminating disclosures. We recognize that there are a number of apparently uncommon circumstances in which registration is required of one who has not violated the Firearms Act; the United States points chiefly to the situation of a finder of a lost or abandoned firearm.[13] Compare *United States* v. *Forgett,* 349 F. 2d 601. We agree that the existence of such situations makes it inappropriate, in the absence of evidence that the exercise of protected rights would otherwise be hampered, to declare these sections impermissible on their face. Instead, it appears, from the evidence now before us, that the rights of those subject to the Act will be fully protected if a proper claim of privilege is understood to provide a full defense to any prosecution either for failure to register under § 5841 or, under § 5851, for possession of a firearm which has not been registered.

Finally, we are asked to avoid the constitutional difficulties which we have found in §§ 5841 and 5851 by imposing restrictions upon the use by state and federal authorities of information obtained as a consequence of the registration requirement. We note that the provi-

[13] Again, we note that these registrants might be confronted by hazards of prosecution under state law, and that those hazards might support a proper claim of privilege. See *supra,* n. 11.

sions of 26 U. S. C. § 6107 [14] are applicable to the special occupational taxes imposed by § 5801, although not, apparently, to the making and transfer taxes imposed by §§ 5811 and 5821. In these circumstances, we decline, for reasons indicated in *Marchetti, supra,* and *Grosso, supra,* to impose the restrictions urged by the United States.

We hold that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 or for possession of an unregistered firearm under § 5851.

V.

It remains only to determine the appropriate disposition of this case. Petitioner has seasonably and consistently asserted a claim of privilege, but the courts below, believing the privilege inapplicable to prosecutions under § 5851, evidently did not assess the claim's merits. It would therefore ordinarily be necessary to remand the cause to the District Court, with instructions to examine the merits of the claim. We note, however, that there can be no suggestion here that petitioner has waived his privilege, and that, moreover, the United States has conceded that petitioner's privilege against

[14] Section 6107 provides that "In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged." The special taxes to which the section refers include those imposed by 26 U. S. C. § 5801.

self-incrimination must be found to have been impermissibly infringed if his contentions as to the proper construction of §§ 5851 and 5841 are accepted. Brief for the United States 8. Accordingly, the District Court would be obliged in any additional proceeding to conclude that "there is reasonable ground to apprehend danger to the witness from his being compelled to answer." *Reg.* v. *Boyes, supra,* at 330. It follows that any proceeding in the District Court must inevitably result in the reversal of petitioner's conviction. We have plenary authority under 28 U. S. C. § 2106 to make such disposition of the case "as may be just under the circumstances." See *Yates* v. *United States,* 354 U. S. 298, 327–331; *Grosso* v. *United States, supra.* It would be neither just nor appropriate to require the parties and the District Court to commence an entirely needless additional proceeding. Accordingly, the judgment of the Court of Appeals is

Reversed.

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

MR. CHIEF JUSTICE WARREN, dissenting.

For reasons stated in my dissent in *Marchetti* v. *United States* and *Grosso* v. *United States, ante,* p. 77, I cannot agree with the result reached by the Court in this case.

PROVIDENT TRADESMENS BANK & TRUST CO., ADMINISTRATOR *v.* PATTERSON, ADMINISTRATOR, ET AL.

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

No. 28. Argued November 6–7, 1967.—Decided January 29, 1968.

An automobile owned by Dutcher, driven by Cionci, to whom Dutcher had given the keys, in which Lynch and Harris were passengers, collided with a truck driven by Smith. Cionci, Lynch and Smith were killed and Harris was injured. The administrator of Lynch's estate, the petitioner here, sued Cionci's estate in a diversity action which was settled for $50,000, which was not paid as Cionci's estate was penniless. Smith's administratrix and Harris each brought a state-court action against Cionci's estate, Dutcher, and Lynch's estate, but these suits have never gone to trial. Dutcher had an automobile policy with Lumbermens Mutual Casualty Co., a respondent here, which had a limit of $100,000 for an accident. The policy covered Dutcher's potential liability as Cionci's "principal" and the direct liability of anyone driving the car with Dutcher's permission. Lumbermens had declined to defend in petitioner's action against Cionci's estate, believing that Cionci lacked permission and thus was not covered by the policy. Petitioner then brought this diversity action for a declaration that Cionci's use of the car had been "with permission" of Dutcher, naming as defendants Lumbermens and Cionci's estate. The state-court tort plaintiffs were joined as plaintiffs, but Dutcher, a Pennsylvania resident, as were all the plaintiffs, was not joined either as plaintiff or defendant, a fact not adverted to at trial. The District Court ruled that under Pennsylvania law the driver is presumed to have the owner's permission, and the State's "Dead Man Rule" did not permit Dutcher to testify in the two estate claims as his interest was adverse. The court directed verdicts in favor of the two estates. Dutcher was allowed to testify as against Harris, but the jury found that Cionci had had permission and awarded a verdict to Harris. Lumbermens appealed on state-law grounds, which the Court of Appeals did not reach. That court reversed on the grounds that Dutcher was an indispensable party, that the right of any person who "may be

affected" by the judgment to be joined is a "substantive" right, unaffected by Rule 19 of the Fed. Rules of Civ. Proc., and that since Dutcher could not be joined without destroying diversity jurisdiction, the action had to be dismissed. The court also concluded that since the state-court actions "presented the mooted question as to the coverage of the policy," the issue here, the District Court should have declined jurisdiction to allow the state courts to settle this question of state law. *Held:*

1. On the basis of the record and applying the "equity and good conscience" test of Rule 19 (b), the Court of Appeals erred in not allowing the judgment to stand. Pp. 107–116.

(a) Here, where Dutcher was assumedly a party who should, under Rule 19 (a), be "joined if feasible," but where his joinder as a defendant would destroy diversity, is a problem within the scope of Rule 19 (b). Pp. 108–109.

(b) Rule 19 (b) has four "interests" to be examined, in this case from an appellate perspective: plaintiff's interest in having a forum, defendant's interest in avoiding multiple litigation, interest of the outsider whom it would have been desirable to join, and interests of courts and the public in complete, consistent, and efficient settlement of controversies. Pp. 109–111.

(c) Application of Rule 19's criteria by the Court of Appeals would have resulted in a different conclusion. Pp. 112–116.

2. The Court of Appeals' dismissal of Rule 19 (b) as an ineffective attempt to change the "substantive rights" stated in *Shields* v. *Barrow*, 17 How. 130, was erroneous, as the Rule is a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person. Pp. 116–125.

3. The Court of Appeals decided the procedural question incorrectly. Pp. 125–128.

(a) In deciding this discretionary matter the court should have considered the existence of a verdict reached after a prolonged trial in which the defendants did not invoke the pending state actions. Pp. 125–126.

(b) The issue in the state-court actions, whether Cionci was acting as Dutcher's agent, differs from the question in this case of whether Cionci had "permission" within the scope of the insurance policy. P. 127.

365 F. 2d 802, vacated and remanded.

Avram G. Adler argued the cause for petitioner. With him on the brief were *Abraham E. Freedman, J. Willison Smith* and *Bayard M. Graf.*

Norman Paul Harvey argued the cause and filed a brief for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This controversy, involving in its present posture the dismissal of a declaratory judgment action for nonjoinder of an "indispensable" party, began nearly 10 years ago with a traffic accident. An automobile owned by Edward Dutcher, who was not present when the accident occurred, was being driven by Donald Cionci, to whom Dutcher had given the keys. John Lynch and John Harris were passengers. The automobile crossed the median strip of the highway and collided with a truck being driven by Thomas Smith. Cionci, Lynch, and Smith were killed and Harris was severely injured.

Three tort actions were brought. Provident Tradesmens Bank, the administrator of the estate of passenger Lynch and petitioner here, sued the estate of the driver, Cionci, in a diversity action. Smith's administratrix, and Harris in person, each brought a state-court action against the estate of Cionci, Dutcher the owner, and the estate of Lynch. These Smith and Harris actions, for unknown reasons, have never gone to trial and are still pending. The Lynch action against Cionci's estate was settled for $50,000, which the estate of Cionci, being penniless, has never paid.

Dutcher, the owner of the automobile and a defendant in the as yet untried tort actions, had an automobile liability insurance policy with Lumbermens Mutual Casualty Company, a respondent here. That policy had an upper limit of $100,000 for all claims arising out of a

single accident. This fund was potentially subject to two different sorts of claims by the tort plaintiffs. First, Dutcher himself might be held vicariously liable as Cionci's "principal"; the likelihood of such a judgment against Dutcher is a matter of considerable doubt and dispute. Second, the policy by its terms covered the direct liability of any person driving Dutcher's car with Dutcher's "permission."

The insurance company had declined, after notice, to defend in the tort action brought by Lynch's estate against the estate of Cionci, believing that Cionci had not had permission and hence was not covered by the policy. The facts allegedly were that Dutcher had entrusted his car to Cionci, but that Cionci had made a detour from the errand for which Dutcher allowed his car to be taken. The estate of Lynch, armed with its $50,000 liquidated claim against the estate of Cionci, brought the present diversity action for a declaration that Cionci's use of the car had been "with permission" of Dutcher. The only named defendants were the company and the estate of Cionci. The other two tort plaintiffs were joined as plaintiffs. Dutcher, a resident of the State of Pennsylvania as were all the plaintiffs, was not joined either as plaintiff or defendant. The failure to join him was not adverted to at the trial level.

The major question of law contested at trial was a state-law question. The District Court had ruled that, as a matter of the applicable (Pennsylvania) law, the driver of an automobile is presumed to have the permission of the owner. Hence, unless contrary evidence could be introduced, the tort plaintiffs, now declaratory judgment plaintiffs, would be entitled to a directed verdict against the insurance company. The only possible contrary evidence was testimony by Dutcher as to restrictions he had imposed on Cionci's use of the automobile. The two estate plaintiffs claimed, however, that

under the Pennsylvania "Dead Man Rule" Dutcher was incompetent to testify on this matter as against them. The District Court upheld this claim. It ruled that under Pennsylvania law Dutcher was incompetent to testify against an estate if he had an "adverse" interest to that of the estate. It found such adversity in Dutcher's potential need to call upon the insurance fund to pay judgments against himself, and his consequent interest in not having part or all of the fund used to pay judgments against Cionci. The District Court, therefore, directed verdicts in favor of the two estates. Dutcher was, however, allowed to testify as against the live plaintiff, Harris. The jury, nonetheless, found that Cionci had had permission, and hence awarded a verdict to Harris also.

Lumbermens appealed the judgment to the Court of Appeals for the Third Circuit, raising various state-law questions.[1] The Court of Appeals did not reach any of these issues. Instead, after reargument *en banc,* it decided, 5–2, to reverse on two alternative grounds neither of which had been raised in the District Court or by the appellant.

The first of these grounds was that Dutcher was an indispensable party. The court held that the "adverse interests" that had rendered Dutcher incompetent to testify under the Pennsylvania Dead Man Rule also required him to be made a party. The court did not consider whether the fact that a verdict had already been rendered, without objection to the nonjoinder of Dutcher, affected the matter. Nor did it follow the provision of Rule 19 of the Federal Rules of Civil Procedure that findings of "indispensability" must be based on

[1] Appellants challenged the District Court's ruling on the Dead Man issue, the fairness of submitting the question as to Harris to a jury that had been directed to find in favor of the two estates whose position was factually indistinguishable, and certain instructions.

stated pragmatic considerations. It held, to the contrary, that the right of a person who "may be affected" by the judgment to be joined is a "substantive" right, unaffected by the federal rules; that a trial court "may not proceed" in the absence of such a person; and that since Dutcher could not be joined as a defendant without destroying diversity jurisdiction the action had to be dismissed.

Since this ruling presented a serious challenge to the scope of the newly amended Rule 19, we granted certiorari. 386 U. S. 940. Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid, we reverse.

I.

The applicable parts of Rule 19 read as follows:

> "Rule 19. Joinder of Persons Needed for Just Adjudication
>
> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant,

or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

We may assume, at the outset, that Dutcher falls within the category of persons who, under § (a), should be "joined if feasible." The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him.

The optimum solution, an adjudication of the permission question that would be binding on all interested persons, was not "feasible," however, for Dutcher could not be made a defendant without destroying diversity. Hence the problem was the one to which Rule 19 (b)

appears to address itself: in the absence of a person who "should be joined if feasible," should the court dismiss the action or proceed without him? Since this problem emerged for the first time in the Court of Appeals, there were also two subsidiary questions. First, what was the effect, if any, of the failure of the defendants to raise the matter in the District Court? Second, what was the importance, if any, of the fact that a judgment, binding on the parties although not binding on Dutcher, had already been reached after extensive litigation? The three questions prove, on examination, to be interwoven.

We conclude, upon consideration of the record and applying the "equity and good conscience" test of Rule 19 (b), that the Court of Appeals erred in not allowing the judgment to stand.

Rule 19 (b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled.[2] Each of these interests must, in this case, be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court. First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists.[3]

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[2] For convenience, we treat these interests in a different order from that appearing in Rule 19 (b). Our list follows that of Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 330 (1957).

[3] The Advisory Committee on the Federal Rules of Civil Procedure, in its Note on the 1966 Revision of Rule 19, quoted at 3 Moore, Federal Practice ¶ 19.01 (hereinafter cited as "Committee Note"), comments as follows on the fourth factor listed in Rule 19 (b), the adequacy of plaintiff's remedy if the action is dismissed: "[T]he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." See *Fitzgerald* v. *Haynes,*

On appeal, if the plaintiff has won, he has a strong additional interest in preserving his judgment. Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. After trial, however, if the defendant has failed to assert this interest, it is quite proper to consider it foreclosed.[4]

Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty.[5] It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not "bound" in the technical sense.[6] Instead, as Rule 19 (a) expresses it, the court must consider the extent to which the judgment may "as a practical matter impair or impede his ability to protect" his interest in the subject matter. When a case has reached the appeal stage the matter is more complex. The judgment ap-

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241 F. 2d 417, 420 (C. A. 3d Cir.); *Fouke* v. *Schenewerk,* 197 F. 2d 234, 236.

[4] The Committee Note comments that "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . and is not seeking vicariously to protect the absent person against a prejudicial judgment . . . his undue delay in making the motion can properly be counted against him as a reason for denying the motion." Of course, where an objection to nonjoinder has been erroneously overruled in the district court, the court of appeals may correct the error to prevent harassment of defendants. *Young* v. *Powell,* 179 F. 2d 147.

[5] See the discussion by Reed, *supra,* n. 2, at 330–335. See also Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Col. L. Rev. 1254 (1961).

[6] See *Keegan* v. *Humble Oil & Refining Co.,* 155 F. 2d 971.

pealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered.[7] When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below.[8]

Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be "adequate," to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent.

Rule 19 (b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. Commentators had argued that greater attention should be paid to this potential solution to a joinder stymie,[9] and the Rule now makes it explicit that

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[7] See *Bourdieu* v. *Pacific Oil Co.*, 299 U. S. 65, where this Court held that an inquiry into indispensability would be unnecessary where the complaint did not state a cause of action. But see *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216, criticized, 2 Barron & Holtzoff, Federal Practice & Procedure § 516 (1967 Supp.) (Wright ed.).

[8] *E. g., Hoe* v. *Wilson*, 9 Wall. 501. See generally 2 Barron & Holtzoff, Federal Practice & Procedure § 516 (1967 Supp.) (Wright ed.).

[9] *E. g.*, Reed, *supra*, n. 2. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967). Compare *Roos* v. *Texas Co.*, 23 F. 2d 171.

a court should consider modification of a judgment as an alternative to dismissal.[10] Needless to say, a court of appeals may also properly require suitable modification as a condition of affirmance.

Had the Court of Appeals applied Rule 19's criteria to the facts of the present case, it could hardly have reached the conclusion it did. We begin with the plaintiffs' viewpoint. It is difficult to decide at this stage whether they would have had an "adequate" remedy had the action been dismissed before trial for nonjoinder: we cannot here determine whether the plaintiffs could have brought the same action, against the same parties plus Dutcher, in a state court. After trial, however, the "adequacy" of this hypothetical alternative, from the plaintiffs' point of view, was obviously greatly diminished. Their interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum.

Opposing considerations in this case are hard to find. The defendants had no stake, either asserted or real, in the joinder of Dutcher. They showed no interest in joinder until the Court of Appeals took the matter into its own hands. This properly forecloses any interest of theirs, but for purposes of clarity we note that the insurance company, whose liability was limited to $100,000, had or will have full opportunity to litigate each claim on that fund against the claimant involved. Its only concern with the absence of Dutcher was and is to obtain a windfall escape from its defeat at trial.

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[10] As the Committee Note points out, this principle meshes with others to be considered. An appropriate statement of the question might be "Can the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery?"

The interest of the outsider, Dutcher, is more difficult to reckon. The Court of Appeals, concluding that it should not follow Rule 19's command to determine whether, as a practical matter, the judgment impaired the nonparty's ability to protect his rights, simply quoted the District Court's reasoning on the Dead Man issue as proof that Dutcher had a "right" to be joined:

> " 'The subject matter of this suit is the coverage of Lumbermens' policy issued to Dutcher. Depending upon the outcome of this trial, Dutcher may have the policy all to himself or he may have to share its coverage with the Cionci Estate, thereby extending the availability of the proceeds of the policy to satisfy verdicts and judgments in favor of the two Estate plaintiffs. Sharing the coverage of a policy of insurance with finite limits with another, and thereby making that policy available to claimants against that other person is immediately worth less than having the coverage of such policy available to Dutcher alone. By the outcome in the instant case, to the extent that the two Estate plaintiffs will have the proceeds of the policy available to them in their claims against Cionci's estate, Dutcher will lose a measure of protection. Conversely, to the extent that the proceeds of this policy are not available to the two Estate plaintiffs Dutcher will gain. . . . It is sufficient for the purpose of determining adversity [of interest] that it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit. That being so, Dutcher's interest in these proceedings is adverse to the interest of the two Estate plaintiffs, the parties who represent, on this record, the interests of the deceased persons in the matter in controversy.' " [11]

[11] 218 F. Supp. 802, 805–806, quoted at 365 F. 2d, at 805.

There is a logical error in the Court of Appeals' appropriation of this reasoning for its own quite different purposes: Dutcher had an "adverse" interest (sufficient to invoke the Dead Man Rule) because he would have been *benefited* by a ruling *in favor of* the insurance company; the question before the Court of Appeals, however, was whether Dutcher was *harmed* by the judgment *against* the insurance company.

The two questions are not the same. If the three plaintiffs had lost to the insurance company on the permission issue, that loss would have ended the matter favorably to Dutcher. If, as has happened, the three plaintiffs obtain a judgment against the insurance company on the permission issue, Dutcher may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue. At that point it might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of Dutcher's have been lost by his own inaction.

If Dutcher is not foreclosed by his failure to intervene below, then he is not "bound" by the judgment against the insurance company and, in theory, he has not been harmed. There remains, however, the practical question whether Dutcher is likely to have any need, and if so will have any opportunity, to relitigate. The only possible threat to him is that if the fund is used to pay judgments against Cionci the money may in fact have disappeared before Dutcher has an opportunity to

assert his interest. Upon examination, we find this supposed threat neither large nor unavoidable.

The state-court actions against Dutcher had lain dormant for years at the pleading stage by the time the Court of Appeals acted. Petitioner asserts here that under the applicable Pennsylvania vicarious liability law there is virtually no chance of recovery against Dutcher. We do not accept this assertion as fact, but the matter could have been explored below. Furthermore, even in the event of tort judgments against Dutcher, it is unlikely that he will be prejudiced by the outcome here. The potential claimants against Dutcher himself are identical with the potential claimants against Cionci's estate. Should the claimants seek to collect from Dutcher personally, he may be able to raise the permission issue defensively, making it irrelevant that the actual monies paid from the fund may have disappeared: Dutcher can assert that Cionci did not have his permission and that therefore the payments made on Cionci's behalf out of Dutcher's insurance policy should properly be credited against Dutcher's own liability. Of course, when Dutcher raises this defense he may lose, either on the merits of the permission issue or on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case, but Dutcher will not have been prejudiced by the failure of the District Court here to order him joined.

If the Court of Appeals was unconvinced that the threat to Dutcher was trivial, it could nevertheless have avoided all difficulties by proper phrasing of the decree. The District Court, for unspecified reasons, had refused to order immediate payment on the Cionci judgment. Payment could have been withheld pending the suits against Dutcher and relitigation (if that became necessary) by him. In this Court, furthermore, counsel for

petitioner represented orally that the tort plaintiffs would accept a limitation of all claims to the amount of the insurance policy. Obviously such a compromise could have been reached below had the Court of Appeals been willing to abandon its rigid approach and seek ways to preserve what was, as to the parties, subject to the appellant's other contentions, a perfectly valid judgment.

The suggestion of potential relitigation of the question of "permission" raises the fourth "interest" at stake in joinder cases—efficiency. It might have been preferable, at the trial level, if there were a forum available in which both the company and Dutcher could have been made defendants, to dismiss the action and force the plaintiffs to go elsewhere. Even this preference would have been highly problematical, however, for the actual threat of relitigation by Dutcher depended on there being judgments against him and on the amount of the fund, which was not revealed to the District Court. By the time the case reached the Court of Appeals, however, the problematical preference on efficiency grounds had entirely disappeared: there was no reason then to throw away a valid judgment just because it did not theoretically settle the whole controversy.

II.

Application of Rule 19 (b)'s "equity and good conscience" test for determining whether to proceed or dismiss would doubtless have led to a contrary result below. The Court of Appeals' reasons for disregarding the Rule remain to be examined.[12] The majority of the

[12] Rule 19 was completely rewritten subsequent to the proceedings in the District Court in this case. There is, however, no occasion for separate consideration of the question whether the action of the Court of Appeals would have been proper under the old version of the Rule. The new version was adopted on July 1, 1966, while the appeal, in which the joinder question first arose, was pending. The majority in the Court of Appeals did not purport to rely on the

court concluded that the Rule was inapplicable because "substantive" rights are involved, and substantive rights are not affected by the Federal Rules. Although the

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older version, but on its conclusion that the Rule, in either form, had no application to this case. The dissent below found the Rule applicable, and concluded that the District Court should not be reversed on the basis of either version.

The new text of the Rule was not intended as a change in principles. Rather, the Committee found that the old text "was defective in its phrasing and did not point clearly to the proper basis of decision." This Court, having the ultimate rule-making authority subject to congressional veto, approved the Committee's suggestions. Where the new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the older version tended to emphasize classification of parties as "necessary" or "indispensable." Although the two approaches should come to the same point, since the only reason for asking whether a person is "necessary" or "indispensable" is in order to decide whether to proceed or dismiss in his absence and since that decision must be made on the basis of practical considerations, *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, and not by "prescribed formula," *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, the Committee concluded, without directly criticizing the outcome of any particular case, that there had at times been "undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions." An excellent example of the cases causing apprehension is *Parker Rust-Proof Co.* v. *Western Union Tel. Co.*, 105 F. 2d 976. Judge Swan, writing for a panel that included Judges L. Hand and A. N. Hand, stated that a nonjoined person was an "indispensable" party to a suit to compel issuance of a patent, but went on to say that "as the object of the rule respecting indispensable parties is to accomplish justice between all the parties in interest, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice." *Id.*, at 980. On this basis, the Court of Appeals reversed the District Court's dismissal of the action for nonjoinder. Under the present version of the Rule, the same result would be reached for, ultimately, the same reasons. The present version simply avoids the purely verbal anomaly, an indispensable person who turns out to be dispensable after all.

court did not articulate exactly what the substantive rights are, or what law determines them, we take it to have been making the following argument: (1) there is a category of persons called "indispensable parties"; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute.[13]

With this we may contrast the position that is reflected in Rule 19. Whether a person is "indispensable," that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.[14] There is a large category, whose limits are not presently in question, of persons who, in the Rule's terminology, should be "joined if feasible," and who, in the older terminology, were called either necessary or indispensable parties. Assuming the existence of a person who should be joined if feasible, the only further question arises when joinder is not possible and the court must decide whether to dismiss or to proceed without him. To use the familiar but confusing terminology, the decision to proceed is a decision that the absent person is merely "necessary" while the decision to dismiss is a decision that he is "indispensable." [15] The

[13] One commentator has stated that "[i]f this [the Court of Appeals' position in the present case] is sound, amended Rule 19 would be invalid. But there is no case support for the proposition that the judge-made doctrines of compulsory joinder have created substantive rights beyond the reach of the rulemaking power." 2 Barron & Holtzoff, Federal Practice & Procedure § 512, n. 21.14 (1967 Supp.) (Wright ed.).

[14] As the Court has before remarked, "[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party . . . ." *Niles-Bement Co.* v. *Iron Moulders Union,* 254 U. S. 77, at 80.

[15] The Committee Note puts the matter as follows: "The subdivision [19 (b)] uses the word 'indispensable' only in a conclusory

decision whether to dismiss (*i. e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

The Court of Appeals concluded, although it was the first court to hold, that the 19th century joinder cases in this Court created a federal, common-law, substantive right in a certain class of persons to be joined in the corresponding lawsuits.[16] At the least, that was not the

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sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it."

[16] Numerous cases in the lower federal courts have dealt with compulsory joinder, and the Court of Appeals concluded that principles enunciated in those cases required dismissal here. However, none of the cases cited here or below presented a factual situation resembling this case: the error made by the Court of Appeals was precisely its reliance on formulas extracted from their contexts rather than on pragmatic analysis. Moreover, although the Court of Appeals concluded that the "distilled essence" of earlier cases is that the question whether to dismiss is "substantive" and that "Rule 19 does not apply to the indispensable party doctrine," it found no cases actually so holding.

One of the reasons listed by the Committee Note for the change in the wording of Rule 19 was "Failure to point to correct basis of decision." The imprecise and confusing language of the original wording of the Rule produced a variety of responses in the

way the matter started. The joinder problem first arose in equity and in the earliest case giving rise to extended discussion the problem was the relatively simple one of the inefficiency of litigation involving only some of the interested persons. A defendant being sued by several cotenants objected that the other cotenants were not made parties. Chief Justice Marshall replied:

> "This objection does not affect the jurisdiction, but addresses itself to the policy of the Court. Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. . . . [B]eing introduced by the Court itself, for the purposes of justice, [the rule] is susceptible of modification

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lower courts. In some cases a formulaic approach was employed, making it difficult now to determine whether the result reached was proper or not. Other cases demonstrate close attention to the significant pragmatic considerations involved in the particular circumstances, leading to a resolution consistent with practical and creative justice. For examples in the latter category, see *Roos* v. *Texas Co.*, 23 F. 2d 171 (C. A. 2d Cir.) (L. Hand, J.) (decided prior to adoption of Fed. Rules Civ. Proc.); *Kroese* v. *General Steel Castings Corp.*, 179 F. 2d 760 (C. A. 3d Cir.) (Goodrich, J.); *Stevens* v. *Loomis*, 334 F. 2d 775 (C. A. 1st Cir.) (Aldrich, J.). It is interesting that the only judicial recognition found by the Court of Appeals of its view that indispensability is a "substantive" matter is a footnote in the last-cited case attributing to the (then) proposed new formulation of Rule 19 "the view that what are indispensable parties is a matter of substance, not of procedure." *Id.*, at 778, n. 7. Taken in context, Judge Aldrich's statement refers simply to the view that a decision whether to dismiss must be made pragmatically, in the context of the "substance" of each case, rather than by procedural formula. The statement is hardly support for the proposition that a court of appeals may ignore Rule 19's command to undertake a practical examination of circumstances.

> for the promotion of those purposes. . . . In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree upon its merits." [17]

Following this case there arose three cases, also in equity, that the Court of Appeals here held to have declared a "substantive" right to be joined. It is true that these cases involved what would now be called "substantive" rights. This substantive involvement of the absent person with the controversy before the Court was, however, in each case simply an inescapable fact of the situation presented to the Court for adjudication. The Court in each case left the outsider with no more "rights" than it had already found belonged to him. The question in each case was simply whether, given the substantive involvement of the outsider, it was proper to proceed to adjudicate as between the parties.

The first of the cases was *Mallow* v. *Hinde,* 12 Wheat. 193, in which, in essence, the plaintiff sought specific performance of a contract to convey land, but sought it not against his vendor (who could not be joined) but against a person who claimed through an entirely different chain of title. The Court saw that any declaration of rights between the parties before it would either purport (incorrectly) to determine the validity of plaintiff's contract with his grantor, or would decide nothing. The Court said, in language quoted here by the Court of Appeals:

> "In this case, the complainants have no rights separable from, and independent of, the rights of

[17] *Elmendorf* v. *Taylor,* 10 Wheat. 152, at 166–168.

> persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . .
>
> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground . . . . We put it on the ground that no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." [18]

Nothing in this language is inconsistent with the Rule 19 formulation, or otherwise suggests that lower courts are expected to proceed without examining the actual interest of the nonjoined person. As the Court explicitly stated, there is no question of "jurisdiction" and there can be no binding adjudication of a person's rights in the absence of that person. Rather, the problem under the circumstances was that the substantive involvement of the grantor was such that in his absence there was nothing for the Court to decide.

The second case relied upon by the Court of Appeals, *Northern Indiana R. Co.* v. *Michigan Central R. Co.*, 15 How. 233, presents a different aspect of joinder. There suit was brought for an injunction against construction

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[18] 12 Wheat., at 198, quoted at 365 F. 2d, at 806. The facts were that T, a trustee of land for the benefit of certain persons, may or may not have conveyed legal title to defendant Hinde. Plaintiff Mallow claimed equitable title by virtue of an executory agreement between the trust beneficiaries and one Langham, who conveyed to plaintiff. Mallow sued Hinde to compel conveyance of the legal title, but T and the beneficiaries could not be joined. Hinde contended that the beneficiaries had no power to sell to Langham, and that the purported contract had, in any event, been obtained by fraud.

by defendant of a railroad that it was under contract to a nonjoined outsider to build. Thus the plaintiff was seeking equitable relief that would, in practice, abrogate the contractual rights of a nonparty. Among the unpleasant possibilities entailed by proceeding was the likelihood that the defendant might find itself subject to directly conflicting injunctive orders. The Court ruled that,

> ". . . in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice." [19]

Again, the Court of Appeals' reliance on this language to show that in *any* case where an outsider "may be affected" it is necessarily unjust to proceed, is altogether misplaced: the Court in *Northern Indiana R. Co.* simply found that there would be injustice in proceeding given the particular factual and legal situation before it. Neither Rule 19, nor we, today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional, rights of an outsider by proceeding with a particular case. In this instance, however, no such examination was made below, and no such injustice appears on the record here.

The most influential of the cases in which this Court considered the question whether to proceed or dismiss in the absence of an interested but not joinable outsider is *Shields* v. *Barrow,* 17 How. 130, referred to in the opinion below. There the Court attempted, perhaps unfortunately, to state general definitions of those per-

[19] 15 How., at 246, quoted at 365 F. 2d, at 806.

sons without whom litigation could or could not proceed. In the former category were placed

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." [20]

The persons in the latter category were

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." [21]

These generalizations are still valid today, and they are consistent with the requirements of Rule 19, but they are not a substitute for the analysis required by that Rule. Indeed, the second *Shields* definition states, in rather different fashion, the criteria for decision announced in Rule 19 (b). One basis for dismissal is

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[20] 17 How., at 139.

[21] *Ibid.* Plaintiff was suing for rescission of a contract but was unable to join some of the parties to it. Reed, *supra,* n. 2, comments that much later difficulty could have been avoided had this Court pointed the way in *Shields* by undertaking a practical examination of the facts. *Id.,* at 340–346. He concludes that "The facts in the opinion are insufficient to demonstrate that the result is a just one." *Id.,* at 344. See also Kaplan, *supra,* n. 9, at 361.

prejudice to the rights of an absent party that *"cannot"* be avoided in issuance of a final decree. Alternatively, if the decree can be so written that it protects the interests of the absent persons, but as so written it leaves the controversy so situated that the outcome may be inconsistent with "equity and good conscience," the suit should be dismissed.

The majority of the Court of Appeals read *Shields* v. *Barrow* to say that a person whose interests "may be affected" by the decree of the court is an indispensable party, and that all indispensable parties have a "substantive right" to have suits dismissed in their absence. We are unable to read *Shields* as saying either. It dealt only with persons whose interests must, unavoidably, be affected by a decree and it said nothing about substantive rights.[22] Rule 19 (b), which the Court of Appeals dismissed as an ineffective attempt to change the substantive rights stated in *Shields,* is, on the contrary, a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person. It takes, for aught that now appears, adequate account of the very real, very substantive claims to fairness on the part of outsiders that may arise in some cases. This, however, simply is not such a case.

III.

The Court of Appeals stated a second and distinct ground for reversing the District Court and ordering dismissal of the action. It will be recalled that at the

[22] Indeed, for example, it has been clear that in a diversity case the question of joinder is one of federal law. *E. g., De Korwin* v. *First Nat. Bank,* 156 F. 2d 858, 860, citing *Shields.* To be sure, state-law questions may arise in determining what interest the outsider actually has, *e. g., Kroese* v. *General Steel Castings Corp.,* 179 F. 2d 760 (C. A. 3d Cir.), but the ultimate question whether, given those state-defined interests, a federal court may proceed without the outsider is a federal matter.

time the present declaratory judgment action came to trial two tort actions were pending in the state courts. In one, the estate of the deceased truck driver, Smith, was suing the estate of Cionci, as tortfeasor, plus Dutcher, on the theory that Cionci was doing an errand for him at the time of the accident, plus Lynch's estate, on the theory that Lynch had been in "control" of Cionci. Harris, the injured passenger, was suing the same three defendants on the same theories in a separate action. The Court of Appeals concluded that since these actions "presented the mooted question as to the coverage of the policy," the issue presented in the present proceeding, the District Court should have declined jurisdiction in order to allow the state courts to settle this question of state law.

We believe the Court of Appeals decided this question incorrectly. While we reaffirm our prior holding that a federal district court should, in the exercise of discretion, decline to exercise diversity jurisdiction over a declaratory judgment action raising issues of state law when those same issues are being presented contemporaneously to state courts, *e. g.*, *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, we do not find that to be the case here.

This issue, like the joinder issue, was not raised at trial. While we do not now declare that a court of appeals may never on its own motion compel dismissal of an action as an unwarranted intrusion upon state adjudication of state law, we do conclude that, this being a discretionary matter, the existence of a verdict reached after a prolonged trial in which the defendants did not invoke the pending state actions should be taken into consideration in deciding whether dismissal is the wiser course.

It can hardly be said that Lynch's administrator, the plaintiff and petitioner in this case, would have had a satisfactory opportunity to litigate the issue of Cionci's

permission in the state actions. The Court of Appeals said that "all the persons involved in the accident were parties" to the state-court actions. If the implication is that the state actions could have resulted in judgments in favor of Lynch's estate and against the insurance company on the issue of Cionci's permission, this implication is not correct. The insurance company was not a party to the tort actions, and was not defending Cionci's estate. Lynch's estate was a party only in the sense that Lynch's personal representative (a different person from Lynch's administrator, the plaintiff in this case) was made a defendant in tort. Furthermore, the Smith and Harris actions against Cionci had nothing to do with the issue of insurance coverage: had Smith or Harris won a judgment against Cionci's estate, they would have had to bring a further action against the insurance company; this further action could well have been brought in a federal court. In short, the net result of dismissal here would presumably have been a diversity action identical with this one, except that Lynch's estate would have been compelled to wait upon the convenience of plaintiffs over whom it had no control, and would have been dependent upon a victory by those plaintiffs in a suit in which it was a defendant.

The issues that were before the state courts in the tort actions were not the same as the issues presented by this case. To be sure, a critical question of fact in both cases was what Dutcher said to Cionci when he gave him the keys. But in the state-court actions the ultimate question was whether Cionci was acting as Dutcher's agent, thus making Dutcher personally liable for Cionci's tort. In this case the question was simply whether Cionci had "permission," thus bringing Cionci's own liability within the coverage of the insurance policy. Resolution of the "agency" issue in the state court would have had no bearing on the "permission" issue even if

that resolution were binding on Lynch's estate. Furthermore, although the state court would have had to rule (and still will have to do so, if the cases are ever tried) whether or not Dutcher may testify against the estates under the Dead Man Rule, this question is also a different one in the state and federal cases. In the state cases, Dutcher was a defendant, and the question would be whether he could testify in defense against his own liability. In the present case the question was rather whether he could testify, as a nonparty, on the coverage of his insurance policy.

We think it clear that the judgment below cannot stand. The judgment is vacated and the case is remanded to the Court of Appeals for consideration of those issues raised on appeal that have not been considered, and, should the Court of Appeals affirm the District Court as to those issues, for appropriate disposition preserving the judgment of the District Court and protecting the interests of nonjoined persons.

It is so ordered.

SMITH *v.* ILLINOIS.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 158. Argued December 7, 1967.—Decided January 29, 1968.

Where on cross-examination of principal prosecution witness at petitioner's state trial for illegal sale of narcotics the court sustained the prosecutor's objections to disclosure of witness' correct name and his address, *held* petitioner was denied his Sixth Amendment right, made applicable to the States by the Fourteenth Amendment, to confront the witnesses against him. *Alford* v. *United States,* 282 U. S. 687, followed. Pp. 131–133.

70 Ill. App. 2d 289, 217 N. E. 2d 546, reversed.

Gerald W. Getty argued the cause for petitioner. With him on the briefs were *James J. Doherty* and *Marshall J. Hartman.*

John J. O'Toole, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William G. Clark,* Attorney General, and *Philip J. Rock,* Assistant Attorney General.

Opinion of the Court by MR. JUSTICE STEWART, announced by MR. JUSTICE FORTAS.

In *Pointer* v. *Texas,* 380 U. S. 400, 403, this Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right . . . made obligatory on the States by the Fourteenth Amendment." The question presented in this case is whether Illinois denied that right to the petitioner, Fleming Smith. He was convicted in a criminal court of Cook County, Illinois, upon a charge of illegal sale of narcotics, and his conviction was affirmed on appeal.[1]

[1] 70 Ill. App. 2d 289, 217 N. E. 2d 546.

We granted certiorari to consider his constitutional claim.[2]

At the trial the principal witness against the petitioner was a man who identified himself on direct examination as "James Jordan." This witness testified that he had purchased a bag of heroin from the petitioner in a restaurant with marked money provided by two Chicago police officers. The officers corroborated part of this testimony,[3] but only this witness and the petitioner testified to the crucial events inside the restaurant, and the petitioner's version of those events was entirely different.[4] The only real question at the trial, therefore, was the relative credibility of the petitioner and this prosecution witness.

On cross-examination this witness was asked whether "James Jordan" was his real name. He admitted, over the prosecutor's objection, that it was not. He was then asked what his correct name was, and the court sustained the prosecutor's objection to the question.[5] Later the

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[2] 387 U. S. 904.

[3] The officers testified that the witness had entered the restaurant with the marked money and without narcotics, and that he had emerged with a bag of heroin. They also testified that they had found some of the marked money in the petitioner's possession when they arrested him.

[4] The petitioner testified that he had refused to sell the witness narcotics but had directed him to another man in the restaurant from whom he believed a purchase had been made. The petitioner also testified that he used a $5 bill to purchase a cup of coffee, and must have received the marked money in his change.

[5] "MR. PRIDE: Is James Jordan your correct name?

"MR. MARTWICK: Object.

"MR. PRIDE: I have a right to know if it is his correct name.

"THE COURT: He may answer if it is his correct name or not.

"MR. PRIDE: Is that your correct name?

"A. No, it is not.

"Q. What is your correct name?

"MR. MARTWICK: Object.

"THE COURT: I won't have him answer that."

witness was asked where he lived, and again the court sustained the prosecutor's objection to the question.[6]

As the Court said in *Pointer,* "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." 380 U. S., at 404. Even more recently we have repeated that "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis,* 384 U. S. 1, 3.

In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" [7] through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

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[6] "Q. Now, where do you live now?

"MR. MARTWICK: Objection.

"MR. PRIDE: This is material.

"MR. MARTWICK: Objection, Judge.

"THE COURT: Yes, objection allowed."

The record shows that in fact the petitioner and his lawyer knew "Jordan" and that the lawyer had once represented him. However, there is no evidence in the record that either the petitioner or his lawyer knew "Jordan's" correct name or where he was living at the time of this trial.

[7] See *Pointer* v. *Texas,* 380 U. S., at 404.

In *Alford* v. *United States*, 282 U. S. 687, this Court almost 40 years ago unanimously reversed a federal conviction because the trial judge had sustained objections to questions by the defense seeking to elicit the "place of residence" of a prosecution witness over the insistence of defense counsel that "the jury was entitled to know 'who the witness is, where he lives and what his business is.'" 282 U. S., at 688–689. What the Court said in reversing that conviction is fully applicable here:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .
>
> ". . . The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. . . .
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> . . . . .
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> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. . . . But no obligation is imposed

> on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. . . . But no such case is presented here. . . ." 282 U. S., at 692–694.

In *Pointer* v. *Texas, supra,* the Court made clear that "the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding . . . ." 380 U. S., at 407–408. In this state case we follow the standard of *Alford* and hold that the petitioner was deprived of a right guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution.[8]

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE MARSHALL joins, concurring.

In *Alford* v. *United States,* 282 U. S. 687, 694 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to en-

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[8] It is to be noted that no claim of the privilege against compulsory self-incrimination was asserted by "James Jordan." Cf. *United States* v. *Cardillo,* 316 F. 2d 606. Nor are this Court's decisions in *McCray* v. *Illinois,* 386 U. S. 300, and *Roviaro* v. *United States,* 353 U. S. 53, relevant here. In neither of those cases was the informer a witness for the prosecution. Another recent Illinois decision seems to have recognized that the state evidentiary informer privilege is not involved when the informer is himself a witness at the trial. *People* v. *Smith,* 69 Ill. App. 2d 83, 89, 216 N. E. 2d 520, 523. See 8 Wigmore, Evidence § 2374, n. 6 (McNaughton rev. 1961).

danger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason I join the Court's judgment and its opinion which, as I understand it, is not inconsistent with these views. I should note in addition that although petitioner and his attorney may have known the witness in the past, it is not at all clear that either of them had ever known the witness' real name or knew where he lived at the time of the trial.

MR. JUSTICE HARLAN, dissenting.

We granted certiorari in this case believing that it presented with requisite clarity the issue whether a defendant in a state criminal trial may constitutionally be denied on cross-examination of a principal state witness the right to question such witness as to his actual name and address. Were I still of the view, after examination of the record, that this case clearly presents that question, I would concur in the Court's judgment on due process, but not on Sixth Amendment "incorporation," grounds.* The record, however, raises serious doubt that this petitioner was denied any information that he did not already have, thus either rendering the error harmless or at least making the issue inappropriate for constitutional adjudication.

The State's witness identified himself as "James Jordan." Apparently knowing that this was not his real

*See my opinion concurring in the result in *Pointer* v. *Texas,* 380 U. S. 400, 408.

or his only name, defense counsel asked Jordan whether that was his correct name, and received a negative reply. Further inquiry was disallowed by the trial judge as to both the witness' name and address. Later, however, defense counsel said of the witness "I represented him before, I know him." Still later, when asked by defense counsel on direct examination how long he had known James Jordan, the defendant replied, "I'd say a few years or so, casually." The defendant also indicated that he knew Jordan to be a narcotics addict, and that he knew that Jordan was acquainted with a person whose legal name he knew to be Herbert Simpson.

In the face of these developments, the Court's suggestion that perhaps the defense nevertheless did not know Jordan's name or address is, to say the least, exceedingly dubious. At no point did defense counsel, or defendant, state that he lacked the requested information, nor did counsel pursue the point with any vigor after the State's objections to the questions; he simply turned to another series of questions without suggesting any way in which his attempt to present a defense had been prejudiced. The inference seems to me patent that counsel was asking routine questions, to which he already knew the answers, and that his failure to get answers in court was of no consequence.

I would not reverse a state conviction on a record so opaque, indeed one savoring of a disingenuous constitutional contention. Cf. *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Poe* v. *Ullman,* 367 U. S. 497. I would therefore dismiss the writ as improvidently granted.

KOLOD ET AL. *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 133. Certiorari denied October 9, 1967.—Rehearing and certiorari granted and case decided January 29, 1968.

After the petition for writ of certiorari in this case was filed, petitioners' counsel, as alleged in their petition for rehearing, learned of a government agency's electronic monitoring of a petitioner's conversations at his place of business. The Solicitor General sought to justify nondisclosure by the Government on the basis of the Justice Department's determination that the eavesdropped information was not arguably relevant to this prosecution. *Held:* This Court cannot accept the Department's *ex parte* determination of relevancy in lieu of such a determination in an adversary District Court proceeding, to be confined to the content of any electronically eavesdropped conversations at petitioner's place of business and the pertinence thereof to petitioners' subsequent convictions.

Rehearing and certiorari granted; 371 F. 2d 983, vacated and remanded.

Edward Bennett Williams, Harold Ungar and *W. H. Erickson* for petitioners.

Solicitor General Griswold, former *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

PER CURIAM.

The petition for rehearing is granted and the order denying petitioners' petition for the writ of certiorari, 389 U. S. 834, is set aside. The petition for rehearing alleges that petitioners' counsel was informed after the petition for the writ of certiorari was filed that petitioner Alderisio's conversations were monitored through electronic surveillance conducted by a government agency at Alderisio's place of business in Chicago. The Court invited the Solicitor General to respond to the petition

for rehearing. 389 U. S. 966. The Solicitor General responded that the petition should be denied because the case did not come within ". . . the policy of the Department of Justice to make disclosure to the courts if it finds (1) that a defendant was present or participated in a conversation overheard by unlawful electronic surveillance, and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved." The Solicitor General stated that "As a result of his inquiries and examination, he is satisfied that there is nothing that is arguably relevant to the present case," that is, "no overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution."

We read the response as admitting that Alderisio's conversations were overheard by unlawful electronic eavesdropping but as justifying nondisclosure on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution. We cannot accept the Department's *ex parte* determination of relevancy in lieu of such determination in an adversary proceeding in the District Court. Accordingly we grant the petition for certiorari as to each of the petitioners Alderisio and Alderman,* vacate the judgment of the Court of Appeals, and remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of any conversations that may be shown to have been overheard through unlawful electronic surveillance of petitioner Alderisio's place of business in Chicago. In such proceedings, the District Court will confine the evidence presented by both sides to that which is material to questions of the content of any electronically eavesdropped conversations at petitioner Alderisio's place

*Petitioner Kolod died in August 1967 and the petition for certiorari as to him is dismissed.

of business in Chicago, and of the relevance of any such conversations to petitioners' subsequent convictions. The District Court will make such findings of fact on these questions as may be appropriate in light of the further evidence and of the entire existing record. If the District Court decides, on the basis of such findings, that the convictions of the petitioners were not tainted by the use of evidence improperly obtained, it will enter new final judgments of convictions based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. If, on the other hand, the District Court concludes after such further proceedings that the conviction of a petitioner was tainted, it would then become its duty to accord such petitioner a new trial. *Hoffa* v. *United States,* 387 U. S. 231, 233–234.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Black dissents.

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

TEITEL FILM CORP. ET AL. *v.* CUSACK ET AL., MEMBERS OF THE MOTION PICTURE APPEAL BOARD OF THE CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 787. Decided January 29, 1968.

Appellants, who were permanently enjoined by the Illinois courts from showing certain motion pictures, challenged the Chicago Motion Picture Censorship Ordinance as unconstitutional on its face and as applied. The ordinance allows 50 to 57 days to complete the administrative process, and there is no provision for a prompt judicial decision by the trial court of the alleged obscenity of the film. *Held:* Appellants' constitutional rights were violated since the requirements of *Freedman* v. *Maryland*, 380 U. S. 51, that the censor within a "specified brief period" either issue a license or go to court to restrain showing the film, and that there be "prompt final judicial decision," were not met.

38 Ill. 2d 53, 230 N. E. 2d 241, judgments reversed and remanded.

Elmer Gertz and *Leon N. Miller* for appellants.

Raymond F. Simon and *Marvin E. Aspen* for appellees.

PER CURIAM.

This appeal seeks review of judgments of the Supreme Court of Illinois which affirmed orders of the Circuit Court of Cook County permanently enjoining the appellants from showing certain motion pictures in public places in the City of Chicago, 38 Ill. 2d 53, 230 N. E. 2d 241. The questions presented are whether the Chicago Motion Picture Censorship Ordinance is unconstitutional on its face and as applied, and whether the films involved are obscene.[1]

[1] In light of our decision, we do not reach, and intimate no view upon, the question whether the films are obscene.

The Chicago Motion Picture Censorship Ordinance prohibits the exhibition in any public place of "any picture . . . without first having secured a permit therefor from the superintendent of police." The Superintendent is required "within three days of receipt" of films to "inspect such . . . films . . . or cause them to be inspected by the Film Review Section . . . and within three days after such inspection" either to grant or deny the permit.[2] If the permit is denied the exhibitor may within seven days seek review by the Motion Picture Appeal Board. The Appeal Board must review the film within 15 days of the request for review, and thereafter within 15 days afford the exhibitor, his agent or distributor a hearing. The Board must serve the applicant with written notice of its ruling within five days after close of the hearing. If the Board denies the permit, "the Board, within ten days from the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film." A Circuit Court Rule, General Order 3–3, promulgated May 26, 1965, provides that a "complaint for injunction . . . shall be given priority over all other causes. The Court shall set the cause for hearing within five (5) days after the defendant has answered . . . ."[3] However, neither the rule nor any

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[2] The ordinance was amended during the pendency of the case before the Illinois Supreme Court to require inspection within three days after submission of the films. The members of the Superintendent's Film Review Section, upon his request, "review each motion picture submitted and . . . recommend in writing to the superintendent of police whether to grant or deny a permit."

[3] Comments of the trial judge in this case suggest doubt whether the trial court regarded compliance with this rule to be mandatory:

"Mr. Aspen [counsel for the City]: As far as the Court is concerned, it is my understand [*sic*] that Judge Boyle in General Rule

statutory or other provision assures a prompt judicial decision of the question of the alleged obscenity of the film.

The Illinois Supreme Court held "that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants." 38 Ill. 2d, at 63, 230 N. E. 2d, at 247. We disagree. In *Freedman* v. *Maryland,* 380 U. S. 51, 58–59, we held ". . . that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period,* either issue a license or go to court to restrain showing the film. . . . [T]he procedure must also assure a *prompt final judicial decision,* to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure "that the censor will, within a specified brief period, either

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3–3, which has nothing to do with the ordinance has said there will be a hearing within five days of either the filing of an answer—

"The Court: I am going to have it changed because we just cannot set everything aside to give priority to this kind of litigation.

. . . . . .

"The Court: First amendment matters cannot be anymore important than any other constitutional right or any other citizen's right to have his case heard.

"As I said before, it is far more important in my judgment to take care of the broken heads and fractured legs than it is to take care of the bleeding hearts."

issue a license or go to court to restrain showing the film." (2) The absence of any provision for a prompt judicial decision by the trial court violates the standard that ". . . the procedure must also assure a prompt final judicial decision . . . ."

Accordingly, we reverse the judgments of the Supreme Court of Illinois and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, agreeing that *Freedman* v. *Maryland,* 380 U. S. 51, 58–59, requires reversal of this case, base their reversal also on *Redrup* v. *New York,* 386 U. S. 767.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE STEWART bases his concurrence in this judgment upon *Redrup* v. *New York,* 386 U. S. 767.

SMITH *v.* NOBLE DRILLING CORP.

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

No. 648. Decided January 29, 1968.

Certiorari granted; vacated and remanded.

Samuel C. Gainsburgh for petitioner.

W. Ford Reese for respondent.

PER CURIAM.

The petition for a writ of certiorari to the Supreme Court of Louisiana is granted. The judgment below is vacated and the case is remanded to the Supreme Court of Louisiana for further consideration in light of *Billiot* v. *Sewart Seacraft, Inc.*, 382 F. 2d 662 (C. A. 5th Cir. 1967), and *Loffland Brothers Co.* v. *Huckabee*, 373 F. 2d 528 (C. A. 5th Cir. 1967).

GARAFOLO *v.* UNITED STATES.

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

No. 866. Decided January 29, 1968.

Certiorari granted; 385 F. 2d 200, vacated and remanded.

Francis Heisler for petitioner.

Solicitor General Griswold, 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 of the United States Court of Appeals for the Seventh Circuit is vacated. The case is remanded to that court for further consideration in light of *Smith* v. *Illinois, ante,* p. 129.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN are of the opinion that certiorari should be denied.

ALBRECHT *v.* HERALD CO., DBA GLOBE-DEMOCRAT PUBLISHING CO.

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

No. 43. Argued November 9, 1967.—Decided March 4, 1968.

Petitioner, an independent newspaper carrier, bought from respondent at wholesale and sold at retail copies of respondent's morning newspaper under an exclusive territory arrangement which was terminable if a carrier exceeded the maximum retail price advertised by respondent. When petitioner exceeded that price, respondent protested to petitioner, and then informed petitioner's subscribers that it would itself deliver the paper at the lower price. Respondent engaged an agency (Milne) to solicit petitioner's customers. About 300 of petitioner's 1200 subscribers switched to direct delivery by respondent. Respondent later turned these customers over, without cost, to another carrier (Kroner), who was aware of respondent's purpose and who knew that he might have to return the route if petitioner discontinued his pricing practice. Respondent told petitioner that he could have his customers back if he adhered to the suggested price. Petitioner filed a treble-damage complaint which, as later amended, charged a combination in restraint of trade in violation of § 1 of the Sherman Act, between respondent, petitioner's customers, Milne, and Kroner. Petitioner's appointment as carrier was terminated and petitioner sold his route. The jury found for respondent and the trial court denied petitioner's motion for judgment *n. o. v.*, which asserted that the undisputed facts showed as a matter of law a combination to fix a resale price which was *per se* illegal under *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), and like cases. The Court of Appeals affirmed, holding that respondent's conduct was wholly unilateral and not in restraint of trade. *Held:*

1. The uncontroverted facts showed a combination within § 1 of the Sherman Act between respondent, Milne, and Kroner, to force petitioner to conform to respondent's advertised retail price. *United States* v. *Parke, Davis & Co., supra,* followed. Pp. 149–150.

2. Since fixing maximum as well as minimum resale prices by agreement or combination is a *per se* violation of § 1 of the

Act, the Court of Appeals erred in holding that there was no restraint of trade. *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U. S. 211 (1951), followed. Pp. 151–153.

3. The Court of Appeals also erred in assuming on the record here that it was necessary to permit respondent to impose a price ceiling to prevent the price gouging made possible by exclusive territories, for neither the existence of exclusive territories nor the dealers' resultant economic power was in issue; and the court was not entitled to assume that the exclusive rights granted by respondent were valid under § 1 of the Act, either alone or in conjunction with a price-fixing scheme. Pp. 153–154.

367 F. 2d 517, reversed and remanded.

Gray L. Dorsey argued the cause for petitioner. With him on the briefs was *Donald S. Siegel.*

Lon Hocker argued the cause for respondent. With him on the brief was *Thomas Newman.*

Arthur B. Hanson filed a brief for the American Newspaper Publishers Association, as *amicus curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

A jury returned a verdict for respondent in petitioner's suit for treble damages for violation of § 1 of the Sherman Act.[1] Judgment was entered on the verdict and the Court of Appeals for the Eighth Circuit affirmed. 367 F. 2d 517 (1966). The question is whether the denial of petitioner's motion for judgment notwithstanding the verdict was correctly affirmed by the Court of Appeals. Because this case presents important issues under the antitrust laws, we granted certiorari. 386 U. S. 941 (1967).

[1] Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, in part provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

We take the facts from those stated by the Court of Appeals. Respondent publishes the Globe-Democrat, a morning newspaper distributed in the St. Louis metropolitan area by independent carriers who buy papers at wholesale and sell them at retail. There are 172 home delivery routes. Respondent advertises a suggested retail price in its newspaper. Carriers have exclusive territories which are subject to termination if prices exceed the suggested maximum. Petitioner, who had Route 99, adhered to the advertised price for some time but in 1961 raised the price to customers.[2] After more than once objecting to this practice, respondent wrote petitioner on May 20, 1964, that because he was overcharging and because respondent had reserved the right to compete should that happen, subscribers on Route 99 were being informed by letter that respondent would itself deliver the paper to those who wanted it at the lower price. In addition to sending these letters to petitioner's customers, respondent hired Milne Circulation Sales, Inc., which solicited readers for newspapers, to engage in telephone and house-to-house solicitation of all residents on Route 99. As a result, about 300 of petitioner's 1,200 customers switched to direct delivery by respondent. Meanwhile, respondent continued to sell papers to petitioner but warned him that should he continue to overcharge, respondent would not have to do business with him. Since respondent did not itself want to engage in home delivery, it advertised a new route of 314 customers as available without cost. Another carrier, George Kroner, took over the route knowing that respondent would not tolerate overcharging and understanding that he might have to return the

[2] The record indicates that petitioner raised his price by 10 cents a month.

route if petitioner discontinued his pricing practice.[3] On July 27 respondent told petitioner that it was not interested in being in the carrier business and that petitioner could have his customers back as long as he charged the suggested price. Petitioner brought this lawsuit on August 12. In response, petitioner's appointment as a carrier was terminated and petitioner was given 60 days to arrange the sale of his route to a satisfactory replacement. Petitioner sold his route for $12,000, $1,000 more than he had paid for it but less than he could have gotten had he been able to turn over 1,200 customers instead of 900.[4]

Petitioner's complaint charged a combination or conspiracy in restraint of trade under § 1 of the Sherman Act.[5] At the close of the evidence the complaint was amended to charge only a combination between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner." The case went to the jury on this theory, the jury found for respondent, and judgment in its favor was entered on the verdict. The court denied petitioner's motion for judgment notwithstanding the verdict, which asserted that under *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), and like cases, the undisputed facts showed as a matter of law a combination to fix resale prices of newspapers which was *per se* illegal under the Sherman Act. The Court of Appeals affirmed. In its view "the

[3] The record shows that at about this time petitioner lowered his price to respondent's advertised price. Although petitioner notified all his customers of this change, respondent apparently remained unaware of it.

[4] Kroner testified at trial that he sold the customers he had within Route 99 to petitioner's vendee for $3,600.

[5] Petitioner also charged respondent with tortious interference with business relations under state law, but this count was dismissed before trial.

undisputed evidence fail[ed] to show a Sherman Act violation," because respondent's conduct was wholly unilateral and there was no restraint of trade. The previous decisions of this Court were deemed inapposite to a situation in which a seller establishes maximum prices to be charged by a retailer enjoying an exclusive territory and in which the seller, who would be entitled to refuse to deal, simply engages in competition with the offending retailer. We disagree with the Court of Appeals and reverse its judgment.

On the undisputed facts recited by the Court of Appeals respondent's conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act. That section covers combinations in addition to contracts and conspiracies, express or implied. The Court made this quite clear in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), where it held that an illegal combination to fix prices results if a seller suggests resale prices and secures compliance by means in addition to the "mere announcement of his policy and the simple refusal to deal . . . ." *Id.*, at 44. Parke Davis had specified resale prices for both wholesalers and retailers and had required wholesalers to refuse to deal with noncomplying retailers. It was found to have created a combination "with the retailers and the wholesalers to maintain retail prices . . . ." *Id.*, at 45. The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers.

If a combination arose when Parke Davis threatened its wholesalers with termination unless they put pressure on their retail customers, then there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail price. When respondent learned that

petitioner was overcharging, it hired Milne to solicit customers away from petitioner in order to get petitioner to reduce his price. It was through the efforts of Milne, as well as because of respondent's letter to petitioner's customers, that about 300 customers were obtained for Kroner. Milne's purpose was undoubtedly to earn its fee, but it was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to the advertised price, and he knew that he might have to return the customers if petitioner ultimately complied with respondent's demands. He undertook to deliver papers at the suggested price and materially aided in the accomplishment of respondent's plan. Given the uncontradicted facts recited by the Court of Appeals, there was a combination within the meaning of § 1 between respondent, Milne, and Kroner, and the Court of Appeals erred in holding to the contrary.[6]

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[6] Petitioner's original complaint broadly asserted an illegal combination under § 1 of the Sherman Act. Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. See *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 372 (1967). These additional claims, however, appear to have been abandoned by petitioner when he amended his complaint in the trial court.

Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention. See *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *Girardi* v. *Gates Rubber Co. Sales Div., Inc.*, 325 F. 2d 196 (C. A. 9th Cir. 1963); *Graham* v. *Triangle Publications, Inc.*, 233 F. Supp. 825 (D. C. E. D. Pa. 1964), aff'd *per curiam*, 344 F. 2d 775 (C. A. 3d Cir. 1965).

The Court of Appeals also held there was no restraint of trade, despite the long-accepted rule in § 1 cases that resale price fixing is a *per se* violation of the law whether done by agreement or combination.[7] *United States* v.

[7] Our Brother HARLAN seems to state that suppliers have no interest in programs of minimum resale price maintenance, and hence that such programs are "essentially" horizontal agreements between dealers even when they appear to be imposed unilaterally and individually by a supplier on each of his dealers. Although the empirical basis for determining whether or not manufacturers benefit from minimum resale price programs appears to be inconclusive, it seems beyond dispute that a substantial number of manufacturers formulate and enforce complicated plans to maintain resale prices because they deem them advantageous. See E. Grether, Price Control Under Fair Trade Legislation, c. X (1939); Federal Trade Commission, Report on Resale Price Maintenance 5–11, 59 (1945); Select Committee on Small Business, Fair Trade: The Problem and the Issues, H. R. Rep. No. 1292, 82d Cong., 2d Sess. (1952); Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825, 832–843 (1955); Corey, Fair Trade Pricing: A Reappraisal, 30 Harv. Bus. Rev. No. 5, p. 47 (1952); Fulda, Resale Price Maintenance, 21 U. Chi. L. Rev. 175, 184–186 (1954). As a theoretical matter, it is not difficult to conceive of situations in which manufacturers would rightly regard minimum resale price maintenance to be in their interest. Maintaining minimum resale prices would benefit manufacturers when the total demand for their product would not be increased as much by the lower prices brought about by dealer competition as by some other nonprice, demand-creating activity. In particular, when total consumer demand (at least within that price range marked at the bottom by the minimum cost of manufacture and distribution and at the top by the highest price at which a price maintenance scheme can operate effectively) is affected less by price than by the number of retail outlets for the product, the availability of dealer services, or the impact of advertising and promotion, it will be in the interest of manufacturers to squelch price competition through a scheme of resale price maintenance in order to concentrate on nonprice competition. Finally, if the retail price of each of a group of competing products is stabilized through manufacturer-imposed price maintenance schemes, the danger to all the manufacturers of severe interbrand price competition is apt to be alleviated.

Trenton Potteries Co., 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

In *Kiefer-Stewart, supra,* liquor distributors combined to set maximum resale prices. The Court of Appeals held the combination legal under the Sherman Act because in its view setting maximum prices ". . . constituted no restraint on trade and no interference with plaintiff's right to engage in all the competition it desired." 182 F. 2d 228, 235 (C. A. 7th Cir. 1950). This Court rejected that view and reversed the Court of Appeals, holding that agreements to fix maximum prices "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." [8] 340 U. S. 211, 213.

We think *Kiefer-Stewart* was correctly decided and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for

[8] Our Brother HARLAN appears to read *Kiefer-Stewart* as prohibiting only combinations of suppliers to squeeze retailers from the top. Under this view, scarcely derivable from the opinion in that case, signed contracts between a single supplier and his many dealers to fix maximum resale prices would not violate the Sherman Act. With all deference, we reject this view, which seems to stem from the notion that there can be no agreement violative of § 1 unless that agreement accrues to the benefit of both parties, as determined in accordance with some *a priori* economic model. Cf. Comment, The Per Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect, 19 U. Chi. L. Rev. 837 (1952).

the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.[9] It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

We also reject the suggestion of the Court of Appeals that *Kiefer-Stewart* is inapposite and that maximum price fixing is permissible in this case. The Court of Appeals reasoned that since respondent granted exclusive territories, a price ceiling was necessary to protect the public from price gouging by dealers who had monopoly power in their own territories. But neither the existence of exclusive territories nor the economic power they might place in the hands of the dealers was at issue before the jury. Likewise, the evidence taken was not directed to the question of whether exclusive territories had been granted or imposed as the result of an illegal combination in violation of the antitrust laws. Certainly on the record before us the Court of Appeals was not entitled to assume, as its reasoning necessarily did, that the

[9] In *Kiefer-Stewart* after the manufacturer established the maximum price at which its product could be sold, it fair-traded the product so as to fix that price as the legally permissible minimum. 182 F. 2d, at 230–231.

exclusive rights granted by respondent were valid under § 1 of the Sherman Act, either alone or in conjunction with a price-fixing scheme. See *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 373, 379 (1967). The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If, as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price fixing itself injurious to the public, the entire scheme must fall under § 1 of the Sherman Act.

In sum, the evidence cited by the Court of Appeals makes it clear that a combination in restraint of trade existed. Accordingly, it was error to affirm the judgment of the District Court which denied petitioner's motion for judgment notwithstanding the verdict. The judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is a word I would add. This is a "rule of reason" case stemming from *Standard Oil Co.* v. *United States,* 221 U. S. 1, 62. Whether an exclusive territorial franchise in a vertical arrangement is *per se* unreasonable under the antitrust laws is a much mooted question. A fixing of prices for resale is conspicuously unreasonable, because of the great leverage that price has over the market. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. The Court quite properly refuses to say whether in the newspaper distribution business an exclusive territorial franchise is illegal.

The traditional distributing agency is the neighborhood newspaper boy. Whether he would have the time, acu-

men, experience, or financial resources to wage competitive warfare without the protection of a territorial franchise is at least doubtful. Here, however, we have a distribution system which has the characteristics of a large retail enterprise. Petitioner's business requires practically full time. He purchased his route for $11,000, receiving a list of subscribers, a used truck, and a newspaper-tying machine. At the time his dispute with respondent arose, there were 1,200 subscribers on the route, and that route covered "the whole northeast section" of a "big city." Deliveries had to be made by motor vehicle and although they were usually completed by 6 o'clock in the morning, the rest of the workday was spent in billing, receiving phone calls, arranging for new service, or in placing "stop" or "start" orders on existing service. Petitioner at times hired a staff to tie and to wrap newspapers.

Under our decisions* the legality of exclusive territorial franchises in the newspaper distribution business

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* "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238. Cf. *United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (economics of the drug distribution business); *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365 (economics of the bicycle business). In the latter case we noted that the evidence of record "elaborately sets

would have to be tried as a factual issue; and that was not done here.

The case is therefore close to *White Motor Co.* v. *United States,* 372 U. S. 253, where before ruling on the legality of a territorial restriction in a vertical arrangement, we remanded for findings on "the actual impact of these arrangements on competition." *Id.,* at 263.

MR. JUSTICE HARLAN, dissenting.

While I entirely agree with the views expressed by my Brother STEWART and have joined his dissenting opinion, the Court's disregard of certain economic considerations underlying the Sherman Act warrants additional comment.

I.

The practice of setting genuine price "ceilings," that is maximum prices, differs from the practice of fixing minimum prices, and no accumulation of pronouncements from the opinions of this Court can render the two economically equivalent.

The allegation of a combination of persons to fix maximum prices undoubtedly states a Sherman Act cause of action. In order for a plaintiff to win such a § 1 case, however, he must be able to prove the existence of the alleged combination, and the defendant must be unable, either by virtue of a *per se* rule or by failure of proof at trial, to show an adequate justification. It is on these two points that price ceilings differ from price floors: to hold that a combination may be inferred from the vertical dictation of a maximum price simply because it may be permissible to infer a combination from the vertical dictation of a minimum price ignores economic

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forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices." 388 U. S., at 367.

reality; to conclude that no acceptable justification for fixing maximum prices can be found simply because there is no acceptable justification for fixing minimum prices is to substitute blindness for analysis.

Resale price maintenance, a practice not involved here, lessens horizontal intrabrand competition. The effects, higher prices, less efficient use of resources, and an easier life for the resellers, are the same whether the price maintenance policy takes the form of a horizontal conspiracy among resellers or of vertical dictation by a manufacturer plus reseller acquiescence. This means two things. First, it is frequently possible to infer a combination of resellers behind what is presented to the world as a vertical and unilateral price policy, because it is the resellers and not the manufacturer who reap the direct benefits of the policy. Second, price floors are properly considered *per se* restraints, in the sense that once a combination to create them has been demonstrated, no proffered justification is an acceptable defense. Following the rule of reason, combinations to fix price floors are invariably unreasonable: to the extent that they achieve their objective, they act to the direct detriment of the public interest as viewed in the Sherman Act. In the absence of countervailing fair trade laws, all asserted justifications are, upon examination, found wanting, either because they are too trivial or elusive to warrant the expense of a trial (as is the case, for example, with a defense that price floors maintain the prestige of a product) or because they run counter to Sherman Act premises (as is the case with the defense that price maintenance enables inefficient sellers to stay in business).

Vertically imposed price ceilings are, as a matter of economic fact that this Court's words cannot change, an altogether different matter. Other things being equal, a manufacturer would like to restrict those distributing

his product to the lowest feasible profit margin, for in this way he achieves the lowest overall price to the public and the largest volume. When a manufacturer dictates a minimum resale price he is responding to the interest of his customers, who may treat his product better if they have a secure high margin of profits. When the same manufacturer dictates a price ceiling, however, he is acting directly in his own interest, and there is no room for the inference that he is merely a mechanism for accomplishing anticompetitive purposes of his customers.[1]

Furthermore, the restraint imposed by price ceilings is of a different order from that imposed by price floors. In the present case the Court uses again the fallacious argument that price ceilings and price floors must be equally unreasonable because both "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." [2] The fact of the matter is that this statement does not in itself justify a *per se* rule in either the maximum or minimum price case, and that the real justification for a *per se* rule in the case of minimums has not been shown to exist in the case of maximums.

It has long been recognized that one of the objectives of the Sherman Act was to preserve, for social rather than economic reasons, a high degree of independence, multiplicity, and variety in the economic system. Recognition of this objective does not, however, require this Court to hold that every commercial act that fetters the freedom of some trader is a proper subject for a *per se* rule in the sense that it has no adequate provable justification. See, *e. g.*, *White Motor Co.* v. *United States*,

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[1] See the opinion of Judge Coffin in *Quinn* v. *Mobil Oil Co.*, 375 F. 2d 273, 276.

[2] *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 213.

372 U. S. 253. The *per se* treatment of price maintenance is justified because analysis alone, without the burden of a trial in each individual case, demonstrates that price floors are invariably harmful on balance.[3] Price ceilings are a different matter: they do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the manufacturer who dictates them and the customer who accepts them have both miscalculated. Since price ceilings reflect the manufacturer's view that there is insufficient competition to drive prices down to a competitive level, they have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits.

When price floors and price ceilings are placed side by side, then, and the question is asked of each, "Does analysis justify a no-trial rule?" the answers must be quite different. Both practices share the negative attribute that they restrict individual discretion in the pricing area, but only the former imposes upon the public the much more significant evil of lessened competition, and, as just seen, the latter has an important arguable justification that the former does not possess. As the Court's opinion partially but inexplicitly recognizes, in a maximum price case the asserted justification must be met on its merits, and not by incantation of a *per se* rule developed for an altogether different situation.[4]

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[3] See the analysis in the leading case, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, at 395–402. Price floors, or other agreements to prevent price cutting, are there held to be *per se* unreasonable because they inevitably lessen competition. There is no reference to the purely collateral effect of limiting individual trader discretion, still less to a program such as the one involved in this case that does not inhibit competitive price cutting.

[4] The same points may be made from the perspective of the retailers or wholesalers subject to the price dictation. When the

II.

The Court's discovery in this case of (a) a combination and (b) a restraint that is *per se* unreasonable is beset with pitfalls. The Court relies directly on combinations with Milne and Kroner, two third parties who were simply hired and paid to do telephoning and distributing jobs that respondent could as effectively have done itself. Neither had any special interest in respondent's objective of setting a price ceiling. If the critical question is whether a company pays one of its own employees to perform a routine task, or hires an outsider to do the same thing, the requirement of a "combination" in restraint of trade has lost all significant meaning. The point is more than that the words in a statute ought to be taken to mean something of substance. The premise of § 1 adjudication has always been that it is quite proper for a firm to set its own prices and determine its own territories, but that it may not do so

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issue is minimum resale prices, those sellers who are more efficient and ambitious are likely to object to price restrictions, while the lazier and less efficient sellers will welcome their protection. When the issue is price ceilings, the matter is different. Assuming the ceilings are high enough to permit a return that will enable the seller to stay in business, a seller will object to price ceilings only because they deny him the supercompetitive return that the imperfections of competition would otherwise permit. At the same time, in stark contrast to the situation involved in resale price maintenance, no seller has any interest in insisting that price ceilings be imposed on his competitors; he is not worried that they may sell at a higher price than his own. Thus while resale price maintenance establishes what is the equivalent of a single horizontal restraint on otherwise competitive sellers, price ceilings establish merely a series of distinct vertical relationships between manufacturer and seller, with no one seller economically interested in the maintenance of the vertical relationship with any other seller.

in conjunction with another firm with which, in combination, it can generate market power that neither would otherwise have. A firm is not "combining" to fix its own prices or territory simply because it hires outside accountants, market analysts, advertisers by telephone or otherwise, or delivery boys. Once it is recognized that Kroner had no interest whatever in forcing his competitor to *lower* his price, and was merely being paid to perform a delivery job that respondent could have done itself, it is clear respondent's activity was in its essence unilateral.

The Court, quite evidently dissatisfied with the Milne and Kroner theories of combination, goes on to suggest two others not claimed. First, it is said, petitioner might have alleged a combination with other carriers who accepted respondent's maximum price. The difficulty with this thesis is that such a "combination" would have been wholly irrelevant to what was done to petitioner. In a price maintenance situation, each distributor does have an interest in preventing others from breaking the price line and driving everyone's prices down, and there is thus a real symphony of interests behind the pressure exerted on any individual retailer. However, in contrast, the effectiveness of a price ceiling imposed on one distributor does not depend upon the imposition of ceilings on other distributors, be they competitive or not. Each distributor's maximum price agreement is, for reasons already discussed, a vertical matter only, independent of agreements by other dealers. Hence the result of the Court's theory here would be to make what was done to this petitioner illegal because of the coincidental existence of unrelated similar agreements, and to base petitioner's right to recover upon activities that are altogether irrelevant to whatever harm he has suffered.

The Court also suggests that, under *Parke, Davis,* "petitioner could have claimed a combination between

respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price." This theory is intriguing, because although it is unsound on its face, it has within it the ring of something familiar. Obviously it makes no sense to deny recovery to a pressured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages. It is not the momentary acquiescence but the punishment for refusing to acquiesce that does the damage on which recovery is based.

The Court's difficulties on all of its theories stem from its unwillingness to face the ultimate conclusion at which it has actually arrived: it is unlawful for one person to dictate price floors or price ceilings to another; any pressure brought to bear in support of such dictation renders the dictator liable to any dictatee who is damaged. The reason for the Court's reluctance to state this conclusion bluntly is transparent: this statement of the matter takes no account of the absence of a combination or conspiracy.

This does not mean, however, that no combination or conspiracy could ever be inferred in such an ostensibly unilateral situation. It would often be proper to infer, in situations in which a manufacturer dictates a minimum price to a retailer, that the manufacturer is the mechanism for enforcing a very real combinatorial restraint among retailers who should be competing horizontally.[5] Instead of undertaking to analyze when this

[5] See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655. Professor Turner (as he then was) suggested the overruling of *United States* v. *Colgate & Co.*, 250 U. S. 300, arguing, *inter alia*, that *Colgate* behavior by a manufacturer tends to produce tacit or

inference would be proper, the Court has in the past followed the rough approximation adopted in *Parke, Davis:* [6] there is no "combination" when a manufacturer simply states a resale price and announces that he will not deal with those who depart from it; there is a combination when the manufacturer goes one inch further. The magical quality in this transformation is more apparent than real, for the underlying horizontal combination may frequently be there and the Court has simply failed to state what it is.[7]

When a manufacturer dictates a maximum price, however, the *Parke, Davis* approach does not yield even a satisfactory rough answer to the question "[I]s there a combination?" For the manufacturer who purports to act unilaterally in dictating a maximum price really is acting unilaterally. No one is economically interested in the price squeeze but himself. Had the Court been in the habit of analyzing the economics on which the inference of a combination may be based, it would have seen that

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implied minimum price agreements among otherwise competitive retailers. He suggested that "it should be perfectly clear to any manufacturer that a policy of refusing to deal with *price cutters* is no more nor less than an invitation [to retailers] to agree [with each other as well as with the manufacturer] on . . . a *minimum* price . . . ." *Id.*, at 689. (Emphasis added.)

[6] *United States* v. *Parke, Davis & Co.*, 362 U. S. 29.

[7] I thought at the time *Parke, Davis* was decided (see my dissenting opinion in that case, 362 U. S., at 49) and continue to believe, that the result reached could not be supported on the majority's reasoning. I am frank to say, however, that I now consider that the *Parke, Davis* result can be supported on Professor Turner's rationale. See Turner, *supra,* n. 5, at 684–691. Further reflection on the matter also leads me to say that my statement in dissent to the effect that *Parke, Davis* had overruled the *Colgate* case was overdrawn, and further that I am not yet prepared to say that Professor Turner's rationale necessarily carries the total discard of *Colgate.*

even if combinations to fix maximum prices are as illegal as combinations to fix minimum prices the circumstances under which a combination to fix maximum prices may be inferred are different from those which imply a combination to keep prices up.

It was for this reason that in *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, the only case in this Court in which maximum resale prices have actually been held unlawful, the key question was whether there was an actual horizontal combination of manufacturers to impose on retailers a maximum resale price. The Court refused to hold that dictation of price ceilings to a single retailer by a single manufacturer was unlawful, but instead insisted upon, and found, a situation in which two manufacturers, in their common interest, combined to impose upon retailers a condition of doing business which they might not have been able to demand individually.

Kiefer-Stewart's treatment of the combination requirement is instructive. Any manufacturer is at perfect liberty to set the prices at which he will sell to retailers, and in that way maximize his profits while lessening theirs. Competition, that is the threat that the purchasing seller will simply turn to another manufacturer, prevents the manufacturer from raising his prices beyond a certain point. It is *per se* unlawful, however, for two manufacturers to combine to raise their prices together, rendering each of them secure because the retailer or wholesaler has nowhere else to turn. From the manufacturer's viewpoint, putting a ceiling on the resale price may be simply an alternative means to the end of maximizing his own profits by lessening distribution costs: instead of squeezing the reseller from the bottom he squeezes from the top. The holding of *Kiefer-Stewart* was that the squeeze from the top, like the squeeze from

the bottom, was lawful unless by a combination of persons between whom competition would otherwise have limited the power to squeeze from either direction. No combination of the kind required in *Kiefer-Stewart* exists here, and the Court has found no sensible substitute theory of combination.

The Court's second difficulty in this case is to state why imposition of price ceilings is a *per se* unlawful restraint. The respondent offered as a defense the contention that since there was no competition between distributors to keep resale prices down, a fixed maximum price was in the interest of both the respondent itself and the public. The Court, recognizing that despite scattered dicta about maximum and minimum prices both being *per se* illegal there was here an alleged justification that would have to be faced on its merits, attempts to show that the defense may be disposed of without hearing evidence on it.

The Court has not been persuasive. The question in this case is not whether dictation of maximum prices is *ever* illegal, but whether it is *always* illegal. Petitioner is seeking, and now receives, a judgment notwithstanding the verdict of a jury that he had failed to show that the practice was unreasonable in this case. The best the Court can do is to list certain unfortunate consequences that maximum price dictation might have in other cases but was not shown to have here. Then, in rejecting the significant affirmative justification offered for respondent's practice, the Court merely says, "The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive." *Ante,* at 154. I shall ignore the insertion of the word "illegal," which merely assumes the conclusion. I cannot understand why, in deciding whether a practice is an unreasonable restraint of trade, the Court

finds it "unpersuasive" that the practice blunts pernicious attributes of an existing distribution system.

The Court's only answer is that the courts below did not consider whether the existing distribution system might itself be illegal. But even assuming that respondent can conceivably be penalized for failure to raise the question whether the distribution system, unchallenged by petitioner, was lawful, the Court's argument falls short. The Court has decided that exclusive territories and consequent market power can never be a justification for dictation of maximum prices because exclusive territories are sometimes unlawful. But they are neither always unlawful nor have they been demonstrated to be unlawful in this case.

It may well be that the mechanics of newspaper distribution are such that a city quite naturally divides itself into one or more relatively exclusive territories (sometimes called "paper routes"), giving each distributor a large degree of monopoly power. It is hardly farfetched to assume that a newspaper might be able to prove (if given the opportunity it is today denied) that rough territorial exclusivity is simply a fact of economic life in the newspaper distributing business, both because the nature of the enterprise dictates compactness of routes and because the number of distributors that a particular area can sustain is necessarily so small that they naturally fall into oligopolistic respect for each other's territories, and into a pattern of price leadership.

There is no question that the ideal situation, from the point of view of both the publisher and the public, is to have a very large number of distributors intensely vying with each other in both price and service. This situation, however, may be one that it is impossible to achieve in some, perhaps in all, cities. It seems quite possible that a publisher who does not want to do his

own distributing must live with the fact that there will always be a relatively small number of competing distributors, who consequently will be likely to fall into lawful but undesirable oligopolistic behavior—price leadership and territorial exclusivity.

Confronted by this situation, the publisher, who is competing with other publishers in, among other things, price and service to the public, will seek to provide efficient distribution service at the lowest possible price. These objectives would be realized by intense competition without the publisher's interference, but in the absence of such competition the publisher must take steps of his own.

The present respondent took two steps. First, it insisted on the right to approve each distributor. Naturally, since newspapermen are notoriously realistic, it referred to the acquisition of a distributorship as the purchase of a "route." Second, it set a maximum home delivery price and enforced it; the price could not be below the level that perfect competition would dictate without driving the distributors out of business and defeating the publisher's whole objective. Hence the price set cannot be supposed to have been unreasonable.[8] Respondent had no need to go to the extreme of cutting off distributors preferring to do a high-profit, low-volume business, and did not do so. It simply advertised the maximum home delivery price and created competition

[8] Reasonableness is also evidenced by the abundance of persons willing to distribute newspapers at or below the fixed ceilings. The point is not affected by the fact that the distributors willing to accept respondent's conditions were buying monopolies. The principal virtue of a monopoly is the power of the monopolist to charge supercompetitive prices. Hence it cannot be argued that the ceilings might have proved too low to attract buyers but for the fact that they were accompanied by monopoly power.

with any distributor not observing it. Today's decision leaves respondent with no alternative but to use its own trucks.

For the reasons stated in my Brother STEWART's opinion and those stated here, I would affirm the judgment below.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

The respondent is the publisher of the only daily morning newspaper in St. Louis. The petitioner was one of some 170 independent distributors who bought copies of the paper from the respondent and sold them to householders. Each distributor had an exclusive territory subject only to the condition that his resale price not exceed a stated maximum. When the petitioner's price did exceed that maximum, the respondent allowed and indeed actively assisted another distributor to enter the petitioner's territory and compete with him. The Court today holds that this latter practice by the respondent subjected it to antitrust liability to the petitioner. I cannot understand why.

The case was litigated throughout by both parties upon the premise that the respondent's granting of an exclusive territory to each distributor was a perfectly permissible practice. Upon that premise the judgment of the Court of Appeals was obviously correct. For the respondent's conduct here was in furtherance of, not contrary to, the purposes of the antitrust laws. The petitioner was a monopolist within his own territory; he was the only person who could sell for home delivery the city's only daily morning newspaper. But for the fact that respondent provided competition above a certain price level, the householders would have been totally without protection from the petitioner's monopoly posi-

tion. The cases cited by the petitioner, such as *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, and *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, did not involve monopoly products distributed through exclusive territories and are thus totally inapplicable here. The thrust of those decisions is that the reseller should be free to make his own independent pricing determination. But that cannot be a proper objective where the reseller is a monopolist.[1] To the extent that the respondent prevented the petitioner from raising his price above that which would have prevailed in a competitive market, the respondent's actions were fully compatible with the antitrust laws.[2]

But, says the Court, the original grant of an exclusive territory to the petitioner may have itself violated the antitrust laws. Putting aside the fact that this question was not briefed or argued either here or in the court below, I fail to understand how the illegality of the petitioner's exclusive territory could conceivably help his case. The petitioner enjoyed the benefits of his exclusive territory subject to the condition that he keep his price at or below a stated maximum. When he did charge more, the respondent took steps to force the petitioner's price down by introducing competition into his territory. If it was illegal in the first place for the petitioner to enjoy a *conditional* monopoly, I am at a loss to under-

[1] See Elman, "Petrified Opinions" and Competitive Realities, 66 Col. L. Rev. 625, 633 (1966).

[2] Because the major portion of the respondent's income derives from advertising rather than from sales to distributors, the respondent's self-interest is in keeping the retail price of the paper low in order to increase circulation and thereby increase advertising revenues. However, neither the petitioner nor the Court suggests that the maximum set by the respondent was less than the price that would have prevailed if there had been competition among the distributors.

stand how the respondent can be liable to the petitioner for not permitting him a *complete* monopoly.

The Court in this case does more, I think, than simply depart from the rule of reason.[3] *Standard Oil Co.* v. *United States,* 221 U. S. 1. The Court today stands the Sherman Act on its head.[4]

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[3] See generally Elman, "Petrified Opinions" and Competitive Realities, 66 Col. L. Rev. 625 (1966). "It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden." *Id.,* at 627.

[4] "The Supreme Court shows a growing determination in its antitrust decisions to convert laws designed to promote competition into laws which regulate or hamper the competitive process." Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale L. J. 70 (1967).

Syllabus.

UNITED STATES *v.* THIRD NATIONAL BANK IN NASHVILLE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 86. Argued December 11, 1967.—Decided March 4, 1968.

Third National Bank in Nashville and Nashville Bank and Trust Co., the second and fourth largest banks in Davidson County, Tennessee, merged on August 18, 1964. After the merger the three largest banks had 97.9% of the total bank assets in the county, and the two largest banks had 76.7%. The Government's suit challenging the merger had not come to trial when the Bank Merger Act of 1966 took effect, on February 21, 1966. The Act did not provide antitrust immunity for the merger but did state that courts "shall apply the substantive rule of law set forth" in the Act to pending cases. Section 5 of the Act prohibits approval of a merger whose effect "may be substantially to lessen competition" unless the anticompetitive effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The District Court asserted that the Act altered the standards used in determining whether a merger violated § 7 of the Clayton Act and § 1 of the Sherman Act and mandated a return to *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948). The court found that Nashville Bank and Trust was a "stagnant and floundering bank," suffering from lack of young and aggressive officers. It held that the merger would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by benefits to the "convenience and needs of the community." *Held:*

1. The Bank Merger Act of 1966 requires *de novo* inquiry by the district courts into the validity of bank mergers to determine whether the merger offends the antitrust laws, and, if it does, whether the banks have established that the merger is justified by benefits to the "convenience and needs of the community." *United States* v. *First City National Bank of Houston*, 386 U. S. 361 (1967). P. 178.

2. The Act, which adopted the language of § 7 of the Clayton Act, "substantially to lessen competition," did not provide a dif-

ferent antitrust standard for bank cases, and therefore the District Court applied an erroneous Clayton Act standard to the merger. Pp. 181–182.

3. On the facts of this case, the merger did tend substantially to lessen competition in the Nashville commercial banking market. P. 183.

4. The lower court misapprehended the meaning of the phrase "convenience and needs of the community," and misunderstood the weight to be given the relevant factors in determining whether the anticompetitive effects are "clearly outweighed in the public interest" by the effects on the convenience and needs of the community. Pp. 184–192.

(a) While the District Court noted the increased loan capacity of the merged bank, it was not specific in describing the beneficial consequences thereof to the Nashville community, or in defining the value of such increase, especially as compared with less desirable results of the merger. P. 186.

(b) The District Court's analysis did not explore possible ways of satisfying the community's convenience and needs without merger. It was incumbent on the banks to demonstrate that they made reasonable efforts to solve Nashville Bank and Trust's management dilemma short of merger with a major competitor. P. 189.

(c) The findings of the District Court do not sufficiently establish the unavailability of alternative solutions to Nashville Bank and Trust's problems. Pp. 190–192.

5. The case is remanded so that the lower court can consider again the Act's application to the facts of this merger; and since the District Court heard this case before *Houston Bank, supra,* was decided, it may wish to consider reopening the record to permit the presentation of new evidence in light of the intervening interpretations of the Act. P. 192.

260 F. Supp. 869, reversed and remanded.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Turner, Richard A. Posner* and *Barry Grossman.*

E. William Henry argued the cause for appellees Third National Bank in Nashville et al. With him on the

brief were *Paul A. Porter, Dennis G. Lyons, Frank M. Farris, Jr., Edwin F. Hunt* and *John J. Hooker, Jr. Joseph J. O'Malley* argued the cause for appellee Camp, Comptroller of the Currency. With him on the brief were *Robert Bloom* and *Charles H. McEnerney, Jr.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case the United States appeals from a District Court decision [1] upholding the merger of Third National Bank in Nashville and Nashville Bank and Trust Company against challenge under § 7 of the Clayton Act. The court below concluded that the merger, which joined the second largest and the fourth largest banks in Davidson County, Tennessee, into a bank which immediately after the merger was the county's largest bank but since has become the second largest, would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by the "convenience and needs of the community to be served." We disagree with the District Court on both issues. We hold that the United States established that this merger would tend to lessen competition, and also that the District Court did not point to community benefits in terms of "convenience and needs" sufficient to outweigh the anticompetitive impact.

I.

Like other urban centers in the Southeast, Nashville has grown steadily since World War II in both population and economic activity. Commercial banks, as "the intermediaries in most financial transactions," [2] grew

[1] The opinion of the District Court is reported at 260 F. Supp. 869 (D. C. M. D. Tenn. 1966). Its findings of fact and conclusions of law are unreported. Probable jurisdiction was noted at 388 U. S. 905 (1967).

[2] *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 326 (1963).

along with their city. From 1955 to 1964, for example, total assets of all banks located in Davidson County increased from $548,300,000 to $1,053,700,000, an increase of 92.2%. The number of banks hardly changed. Indeed, since 1927 there has been only one new bank in the county, Capital City Bank, and at the time of this merger it had achieved only .9% of the county's bank assets. The other banks at the time of the merger, and their percentage of total bank assets in Davidson County, were First American National, 38.3%; Third National, 33.6%; Commerce Union, 21.2%; Nashville Bank, 4.8%; and three small banks, two of them located in Davidson County towns outside Nashville, .6%, .3%, and .3%.[3] The merger before us thus joined one of the three very large banks in Nashville and the one middle-sized bank. Its result was to increase from 93.1% to 97.9% the percentage of total assets held by the three largest banks and from 71.9% to 76.7% the percentage held by the two largest institutions.

The two merging banks played significantly different roles in Nashville banking. Third National was characterized by the Comptroller of the Currency as one of the strongest and best managed banks in the Nation and by the District Court as "strong, dynamic and aggressive." [4] It had "a history of innovating services or promptly providing new services," [5] a recruitment program at local universities, a continuous audit program, and a legal lending limit of $2,000,000. It had 14 branches at the

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[3] We cite percentages of total assets for convenience, not because they are alone a valid indication of a bank's market share. The percentages of total deposits and of total loans held by the eight Davidson County banks varied insignificantly from the percentages of total assets. See the District Court's Finding of Fact No. 66.

[4] 260 F. Supp., at 881.

[5] Finding of Fact No. 91.

time of the merger and served as correspondent for smaller banks located throughout the central south.

Nashville Bank and Trust approached the merger with a more checkered history and a less dynamic present. Until 1956 it was largely a trust institution. In that year, under the direction of W. S. Hackworth, it changed its name from Nashville Trust Company and embarked on a drive to become a full-service commercial bank. This program enjoyed considerable success. Between 1955 and 1964, Nashville Bank's deposits grew from $20,800,000 to $45,500,000, and its loans and discounts from $8,100,000 to $22,800,000. In both categories it grew faster than the county average and faster than Third National. This growth, however, occurred at a substantially faster rate before 1960 than after that year. Before 1960 it was growing more rapidly than the other banks in the county, and after that year more slowly. Its share of total Nashville banking business thus declined from a high of 5.72% on June 30, 1960, to 4.83% on June 30, 1964.

The District Court made elaborate findings as to why Nashville Bank and Trust "reached a plateau on which it remained until the date of the merger" and why in this period "it was a stagnant and floundering bank." [6] From those findings, and from the broad picture of Nashville Bank's history and operations which emerges from the testimony and exhibits in this case, it appears that the principal reason was that key members of its management, the men who had been responsible for the bank's progress in the late 1950's, had advanced in age and either retired or slowed their activities. The bank's officials nonetheless made but scant efforts to recruit and advance young talent. Nashville Bank paid substan-

[6] Finding of Fact No. 134.

tially lower salaries than the other Nashville banks, had no funded pension plan, and conducted no systematic recruiting program. On January 1, 1964, the bank's board of directors had 13 members, of whom four were 75 or over, nine were 65 or older, and 11 were 63 or older. Of the six department heads four were 65 or older and the other two were 59. The average age of the 15 officers working outside the trust department was over 60. The District Court painted in somber hues the banking policies and the economic results which seemed to flow from the failure to hire young talent. Essentially, Nashville Bank was not aggressive or efficient, and it had stopped growing, so that it could not open branches (it had only one) or embark on a correspondent banking program. It was nevertheless an institution of substantial size, with assets of $50,900,000 and deposits of $45,500,000. It was profitable, and it offered somewhat different services, occasionally at somewhat lower rates, than its competitors.

In January 1964, the individuals who had owned controlling shares of Nashville Bank and Trust decided to sell 10,845 shares, a controlling interest, to a group of prominent Nashville citizens headed by William Weaver. The price was $350 per share. In February 1964, the Weaver group opened negotiations looking to a merger with Commerce Union Bank, Nashville's third largest. The negotiations were unsuccessful, however, because Weaver demanded $460 per share while Commerce Union offered only $360. Weaver then negotiated the sale to Third National, at a price of about $420 per share. The merger was approved by the boards of directors of both banks on March 12, 1964, and, after approval by the Comptroller of the Currency, was consummated on August 18, 1964.

II.

The legislative history of the Bank Merger Act of 1966 [7] leaves no doubt that the Act was passed to make substantial changes in the law applicable to bank mergers. Congress was evidently dissatisfied with the 1960 Bank Merger Act as that Act was interpreted in *United States* v. *Philadelphia National Bank,* 374 U. S. 321 (1963), and in *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U. S. 665 (1964), and wished to alter both the procedures by which the Justice Department challenges bank mergers and the legal standard which courts apply in judging those mergers. The resulting

[7] 80 Stat. 7, 12 U. S. C. § 1828 (c) (1964 ed., Supp. II). The Act provides, in relevant part:

"(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

. . . . . .

"(7) . . . .

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than [§ 2 of the Sherman Act], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

statute, however, as some members of Congress recognized,[8] was more clear and more specific in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged.

Last Term, in *United States* v. *First City National Bank of Houston,* 386 U. S. 361 (1967), this Court interpreted the procedural provisions of the 1966 Act, holding that the Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but had created a new defense, with the merging banks having the burden of proving that defense. The task of the district courts was to inquire *de novo* into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by "the convenience and needs of the community to be served." *Houston Bank* reserved "all questions" concerning the substantive meaning of the "convenience and needs" defense. See 386 U. S., at 369, n. 1.

III.

The proceedings that have occurred until now regarding validity of the merger here before us have been scrambled and confused, largely because the relevant statute, the 1966 Bank Merger Act, became law just prior to the trial and did not receive its first interpretation by this Court, in *Houston Bank,* until the decision below had been rendered.

The two banks agreed to merge on March 12, 1964. On April 27, 1964, they applied to the Comptroller of the Currency for approval, as the 1960 Bank Merger Act required. Pursuant to that Act, the Federal Reserve

[8] See, *e. g.,* 112 Cong. Rec. 2447 (remarks of Congressman Fino).

Board, the Federal Deposit Insurance Corporation, and the Department of Justice reported to the Comptroller of the Currency on "the competitive factors involved." The Federal Reserve Board reported that the merger "would have clearly adverse effects on competition" by "eliminat[ing] direct competition which exists between participants and . . . increas[ing] significantly . . . already heavy concentration . . . ." The Federal Deposit Insurance Corporation reported that "the effect of the proposed merger on competition would be unfavorable." The Department of Justice reported that the merger "would have severe anticompetitive effects upon banking competition in Metropolitan Nashville." The Comptroller of the Currency, however, concluded that the merger would not lessen competition and would "improve the charter bank's ability to serve the convenience and needs of the Nashville public." On August 4, 1964, he approved the merger.

On August 10, 1964, the United States, as this Court's decision in *Philadelphia Bank* authorized, sued in federal district court charging that the proposed merger was in violation of § 7 of the Clayton Act [9] and § 1 of the Sherman Act.[10] On August 18, 1964, the District Court refused the Government's request for a preliminary injunction staying consummation, and on that day the two banks merged.

The antitrust suit against the merger had not come to trial when, on February 21, 1966, the Bank Merger Act of 1966 took effect. Congress had devoted much attention to the impact of that Act on bank mergers still in the process of litigation. In § 2 of the Act, 80

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[9] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18.

[10] 26 Stat. 209, 15 U. S. C. § 1. The United States appealed to this Court only from the dismissal of the § 7 Clayton Act charge. The § 1 Sherman Act count is therefore not before us.

Stat. 10, Congress excluded from all antitrust liability [11] mergers which had been consummated before June 17, 1963, the date of this Court's *Philadelphia Bank* decision, and those consummated between June 17, 1963, and February 21, 1966, as to which the Attorney General had not begun litigation on February 21, 1966. However, although Congress considered amendments which would have provided antitrust immunity also for those bank mergers [12] consummated after June 17, 1963, and already the subject of litigation, a decision was made to leave those mergers subject to liability, apparently [13] because the merging parties had known, from *Philadelphia Bank,* that their consummation was with the risk of an eventual order to dissolve. Congress did provide, in § 2 (c) of the Act, that courts hearing such cases "shall apply the substantive rule of law set forth" in the Act.

Since the trial had been held after the 1966 Act took effect, and since the Comptroller of the Currency and other witnesses, directed by counsel, had addressed themselves to the statutory language contained in that Act, the District Court saw no need to remand to the Comptroller for a new opinion in light of the Act, as was ordered in *United States* v. *Crocker-Anglo National Bank,* 263 F. Supp. 125 (D. C. N. D. Cal. 1966). Proceeding to decide the case, the District Judge held that under the new Act, violation of antitrust standards was "primarily

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[11] Liability for monopolization under § 2 of the Sherman Act was not excluded.

[12] Three mergers are in this category: the Nashville merger at issue here; a California merger, see *United States* v. *Crocker-Anglo National Bank,* 263 F. Supp. 125 (D. C. N. D. Cal. 1966); and a St. Louis merger. See H. R. Rep. No. 1221, 89th Cong., 2d Sess., 4.

[13] See, *e. g.,* 112 Cong. Rec. 2465 (remarks of Congressman Ashley).

a legal issue . . . [on which courts should make] an independent determination," while "convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, 'plainly and unquestionably a legislative or administrative determination' . . . [on which] the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence." [14] The court concluded that the merger did not offend antitrust standards and that the Comptroller's conclusion that it would benefit the community was supported by substantial evidence. The relief sought by the Justice Department was denied.

IV.

The District Court asserted that one effect of the Bank Merger Act of 1966 was to alter the standards used in determining whether a merger is in violation of § 7 of the Clayton Act and § 1 of the Sherman Act. Essentially, the District Court mandated a return to *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), which this Court has held to be "confined to its special facts." *Lexington Bank*, 376 U. S., at 672. In later cases, especially *Philadelphia Bank, supra; Lexington Bank, supra; United States* v. *Aluminum Co. of America*, 377 U. S. 271 (1964); and *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964), this Court has rejected the *Columbia Steel* approach to determining whether a merger will tend "substantially to lessen competition." We find in the 1966 Act, which adopted precisely that § 7 Clayton Act phrase, as well as the "restraint of trade"

[14] 260 F. Supp., at 874. If the District Court failed to review the issues in the case *de novo*, as this quotation suggests, it committed error. *Houston Bank, supra.* Other statements in the opinion and findings below suggest that a *de novo* judgment may also have been reached by the District Court. Our disposition of the case makes it unnecessary to decide whether undue deference was paid to the Comptroller's judgment.

language of Sherman Act § 1, no intention to adopt an "antitrust standard" for bank cases different from that used generally in the law.[15] Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the Act: Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages. See *Houston Bank, supra.* Congressman Minish spoke in tune with the language of the Act and the statements of his colleagues when he said:

> "It should also be clear from the language of paragraph (5)(b) of this bill, which establishes this single standard, that the competitive factor to be used is drawn directly from Clayton Act section 7 and Sherman Act section 1. Thus, all of the principles developed over the last 75 years in regard to these statutes, such as the definition of relevant market and the failing company doctrine are carried forward unchanged by this proposed legislation." [16]

We therefore hold that the District Court employed an erroneous standard in applying § 7 of the Clayton Act to the merger. In addition we hold that, appraised by the test enunciated in recent Clayton Act cases, the

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[15] We also find in the Act no intention to alter the traditional methods of defining relevant markets in which to appraise the anticompetitive effect of a merger, and so agree with the District Court that commercial banking in Davidson County was the relevant market for appraising this merger.

[16] 112 Cong. Rec. 2451. See also 112 Cong. Rec. 2441–2442 (remarks of Congressman Patman); 112 Cong. Rec. 2455 (remarks of Congressman Annunzio); 112 Cong. Rec. 2452 (remarks of Congressman Reuss); 112 Cong. Rec. 2655 (statement of Senator Robertson).

tendency of the merger substantially to lessen competition is apparent. Nashville had three large banks and one of middle size. In this merger the bank of middle size was absorbed by the second largest of the big banks. By the merger the market share of the three largest banks rose from 93% to 98%; the merged bank alone had almost 40% of the Nashville banking business. In addition, the record is replete with evidence that Nashville Bank and Trust was in fact an important competitive element in certain, though not in all, facets of Nashville banking. It offered somewhat different services, at somewhat different rates, from those offered by other banks, and some customers found those services desirable. Although Nashville Bank failed to increase its percentage share of the Nashville banking market after 1960, the absolute size of its business increased steadily from 1956, when it entered seriously into the commercial banking market, to the date of the merger. Throughout this period it was profitable. The record permits no conclusion that Nashville Bank was in any way a "failing" company. See *International Shoe Co.* v. *FTC,* 280 U. S. 291 (1930). On these facts, the conclusion is inescapable that the merger of Third National Bank in Nashville with Nashville Bank and Trust Co. tended to lessen competition in the Nashville commercial banking market. *Philadelphia Bank, supra.*

V.

Because the District Court erroneously concluded that the merger would not tend to lessen competition, its conclusion upon weighing the competitive effect against the asserted benefits to the community is suspect. To weigh adequately one of these factors against the other requires a proper conclusion as to each. Having decided that the court below erred in assessing competitive impact, we should remand, so that the District Court

can perform again the balancing process mandated by the Act.[17]

There is, however, an additional reason to remand. In our view, the District Court misapprehended the meaning of the phrase "convenience and needs of the community"; it misunderstood the weight to be given the relevant factors when seeking to determine whether the anticompetitive effects of a merger are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

The purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market. Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger even though the merger lessened competition. The public interest was the ultimate test imposed. This is clear not only from the language of the Act but from the statements of those who supported it while the Act was under consideration:

> "Mr. ASHLEY. . . . In other words, the merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, on balance, it may properly be regarded as in the public interest.
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[17] Although the District Court erroneously determined the antitrust impact of the merger, its judgment that the merger was not unlawful under the Act may nevertheless have resulted from a sufficient weighing of the evidence before it. Some of the findings below suggest the view that the merger would tend to lessen competition but that this anticompetitive effect would be outweighed by benefits to the community. The argument need not be pursued, however, since we hold that the District Court also misapplied the Act's convenience-and-needs provision.

"Mr. MULTER. . . . I believe it was the intention of the Congress originally in 1960 when we enacted the Bank Merger Act that the public interest should be paramount in making any determination with reference to a merger. The words 'in the public interest' are again written into this bill now and will remain in the law so that there will be no question but that the courts and the agencies must take the public interest into account.

. . . . . .

"Mr. ASHLEY. Is the gentleman saying, as I believe he is, that it is the consensus of the committee, in drafting this bill, that the public interest is to be considered as combining the consideration both of the anticompetitive factors of a particular merger on the one hand, and, on the other, the needs and convenience of the community that may derive from that merger, which, as I say, may result in a diminution of competition; in other words, that the public interest has got to involve a consideration of both of these rather considerable factors?

"Mr. STEPHENS. That is correct . . . ." 112 Cong. Rec. 2446, 2449, 2450.

It is plain that Congress considered both competition in commercial banking and satisfaction of "the convenience and needs of the community" to be in the public interest. It concluded that a merger should be judged in terms of its overall effect upon the public interest. If a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.

The necessity of choosing is most clearly posed where the proposed merger would create an institution with

capabilities for serving the public interest not possessed by either of the two merging institutions alone and where the potential could be realized only through merger. Thus, it might be claimed, as it is in this case, that a combined bank would have a greater lending capacity and hence be better equipped to serve the financial needs of the community. In *Philadelphia Bank*, 374 U. S., at 370–371, this Court, acting under the 1960 Bank Merger Act, rejected the relevance of the combined bank's ability to serve Philadelphia by making large loans that could otherwise only be obtained in New York. The Court found no statutory authorization for considering such a benefit in appraising the legality of a merger. Expressions in Congress during consideration of the 1966 Act suggest that one purpose of that Act was to give this factor, not previously relevant in appraising bank mergers, suitable weight in judging their validity.[18] In the case before us the District Court's findings of fact suggest that the new bank, with a 20% greater lending limit than Third National Bank previously had, was able to make larger loans, for which Nashville area companies had previously to go to Chicago or New York. The District Court also stated that because Third National Bank operated with a higher loans-to-deposits ratio than Nashville Bank and Trust, combining their deposits and applying the Third National Bank ratio to the total increased available lending capacity in Nashville by about $2,800,000. But the District Court was not specific in describing the beneficial consequences of such results for the Nashville community, or in defining the value of these additions, especially as compared with the other, and less desirable, results of the merger. Absent such findings, the increased lending capacity of the new bank weighs very little in the balance.

[18] See, *e. g.*, 112 Cong. Rec. 2663 (remarks of Senator Robertson).

Congress was also concerned about banks in danger of collapse—banks not so deeply in trouble as to call forth the traditional "failing company" defense, but nonetheless in danger of becoming before long financially unsound institutions.[19] Congress seems to have felt that a bank failure is a much greater community catastrophe than the failure of an industrial or retail enterprise, and that a much smaller risk of failure than that required by the failing company doctrine should be sufficient to justify the rather radical preventive step of an anticompetitive merger. The Findings of Fact of the District Court included the information that Nashville Bank and Trust Company had a higher than usual percentage of unsound loans, the result of unsatisfactory procedures for investigating and judging credit risks, and that its "rating" had been changed in 1962 from "satisfactory" to "fair." The District Court drew no conclusion about the extent of the danger these conditions posed for Nashville Bank and Trust's future, about the feasibility of curative measures short of merger, or about whether other healthy aspects of the bank's condition—for instance its steady profitability, including after-tax earnings of $368,000 in 1963 [20]—removed any danger of failure in the foreseeable future. Absent findings and conclusions of this nature,[21]

[19] See, *e. g.*, 112 Cong. Rec. 2459–2460 (remarks of Congressman Multer).

[20] In Finding of Fact No. 181 the District Court concluded that the bank's "apparently good earnings record" would have been diminished, absent a merger, by "the expenditures which needed to be made for the proper maintenance of the bank." Among these expenditures were increased salaries, automation, and establishment of additional branch offices. There is no reason to think that such investment of accrued profits would not have been rewarded with a fair return in the form of increased future profits.

[21] The District Court did conclude, in Finding of Fact No. 184, that the merger was "a business necessity" for Nashville Bank and Trust Co. This general conclusion, without supporting findings, hardly establishes the possibility of eventual failure.

the District Court seemed to be holding that the merger should be approved simply because Nashville Bank and Trust Company could be a better bank and could render better banking services.

The District Court, it appears, considered the merger beneficial to the community because Nashville Bank and Trust had only one branch, because it had no program of correspondent banking, because its operations were not computerized, because it emphasized real estate loans rather than commercial loans, because its management was old and unable to render sound business advice to borrowers, because it was not recruiting new talent, and because its salary scale was low. Hence a merger was justified because it would solve these problems and produce an institution which, in the words of the House Report, would be capable of

> "furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result *under general antitrust law criteria* in a substantial lessening of competition." H. R. Rep. No. 1221, 89th Cong., 2d Sess., 3. (Emphasis in original.)

Undeniably, Nashville Bank and Trust had significant problems of the kind outlined in the findings of the District Court, problems which were primarily rooted in unsatisfactory and backward management. Just as surely, securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss of competition. Nor is there any doubt on this record that merger with Third National would very probably end the managerial problems of Nashville Bank and Trust and secure the better

use of its assets in the public interest. Thus if the gains in better service outweighed the anticompetitive detriment and the merger was essential to secure this net gain to the public interest, the merger should be approved.

But this analysis puts aside possible ways of satisfying the requirement of convenience and need without resort to merger. If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the situation is radically different. In such circumstances, we seriously doubt that Congress intended a merger to be authorized by either the banking agencies or the courts. If, for example, just prior to this merger, an experienced banker with competent associates had offered to take over the active management of the bank or another competent businessman with a willingness to tackle the management problems of the bank had offered to buy out the Weaver interests at an acceptable price, it seems obvious that the Weaver group, which seeks to justify the merger in terms of producing an institution rendering better banking service, should not be permitted to merge and to ignore an available alternative. Otherwise, the benefits of competition, acknowledged by Congress, would be sacrificed needlessly. For the same reasons, we think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor but failed in these attempts, or that any such efforts would have been unlikely to succeed.

This seems to us the most rational reading of the Act, which was a compromise and satisfied none of the pro-

tagonists in this extended controversy. The Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. However, the Act requires as well that the "future prospects of the existing and proposed institutions" be appraised. Part of such appraisal, where managerial deficiencies exist as they do in this case, is determining whether the merging bank is capable of obtaining its own improved management. This test does not demand the impossible or the unreasonable. It merely insists that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means.

The question we therefore face is whether the findings of the District Court sufficiently or reliably establish the unavailability of alternative solutions to the woes of Nashville Bank and Trust Company. In our view, they do not. The District Court described the nature and extent of the bank's managerial shortcomings. It noted that the Weaver group had discussed these matters extensively with a number of persons, including bankers, and had learned that recruiting new management would be "extremely difficult" at the salaries paid by Nashville Bank. And it concluded that management procurement was difficult for banks in general and an "almost insoluble" problem for Nashville Bank and Trust.

Just how insoluble was not made clear. The District Court did not ask whether the Weaver group had made concrete efforts to recruit new management, especially a chief executive officer, who was needed most. The record seems clear that they made no proposals to any individual prospects in or outside of Nashville, save one rather casual letter to a banking acquaintance in New York, and that they neither sought nor cared to seek the help of firms specializing in finding or

furnishing new management.[22] The court made no reference to the possibility that the new owners themselves might have taken active charge of the bank. None of them was a banker, but their successful predecessor Hackworth had not been one before becoming president of Nashville Bank.[23] Nor did the court assess the possibility of a sale to others who might have been willing to face up to the management difficulties over a more extended period. We find nothing in the findings indicating that a bank with assets of $50,000,000 was simply too small to attract competent management [24]

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[22] An official of a company specializing in recruitment of executives did testify for the banks at the trial. In his opinion, recruiting executives for Nashville Bank and Trust would have been extremely difficult.

[23] The record contains the revealing statement by William C. Weaver, Jr., the leading member of the group which owned the bank at the time of the merger:

"We finally concluded before we agreed to the merger agreement with the Third National Bank that, if one of us, one of our group, was unable to go down there to the Trust Company and devote full time to its affairs—I would like to say right here that none of us in the group had any commercial banking experience, and that was a serious problem.

"But we concluded that if we were unable to devote our full time to the affairs of the bank, it would be in the best interests of the customers of the bank, the employees of the bank, the stockholders of the bank, and the Nashville community, for us to merge with the Third National Bank."

Mr. Weaver seems to have felt that one or more members of the new ownership group would have been able to furnish satisfactory executive leadership for the bank.

[24] Capital City Bank, founded in 1960 and but one-fourth the size of Nashville Bank and Trust Co., was apparently flourishing.

In this regard, a recent study concluded that "the small bank can compete successfully with the large bank—if it has the will to do so." Kohn, Competitive Capabilities of Small Banks, 60 Banking, January 1968, at 64, reporting on the New York State Banking Department's research study, The Future of Small Banks.

or that the Weaver group, the new owners, were intransigently insisting on unreasonably conservative managerial policies. Indeed, the Weaver group included competent and experienced men who realized the desirability of improving an unsatisfactory situation. Rather than making serious efforts to do so themselves or to sell to others who would, they preferred to merge with a competing bank—a step which produced a profit of $750,000 on a two-month investment of $3,800,000.

The burden of showing that an anticompetitive bank merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served rests on the merging banks. *Houston Bank, supra.* A showing that one bank needed more lively and efficient management, absent a showing that the alternative means for securing such management without a merger would present unusually severe difficulties, cannot be considered to satisfy that burden.

We therefore conclude that the District Court was in error in holding that the factors it cited as ways in which this merger benefited the Nashville community were sufficient to outweigh the anticompetitive effects of the merger. The case must be remanded so that the District Court can consider again the application of the Bank Merger Act to the facts of this merger. Because the District Court heard this case before *Houston Bank* was decided, it may wish to consider reopening the record, so that the parties will have an opportunity to present new evidence in light of the intervening interpretations of the Act. The judgment below is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

My understanding of the procedural structure of the Bank Merger Act of 1966,[1] based on our decision last Term in *United States* v. *First City National Bank of Houston,* 386 U. S. 361, 364, is that the Act requires the District Court to engage in a two-step process. First, the District Court must decide whether the merger, considered solely from an antitrust viewpoint, would violate the Clayton Act standard embodied in the Bank Merger Act. If it would not, the inquiry is over. If there would be a violation, then the District Court must go on to decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." [2] In making the latter decision, the District Court must again evaluate the antitrust factor, this time in a less polar way. For a comparatively minor violation of the Clayton Act, like that in this case, obviously may be more readily outweighed by factors relating to "convenience and needs" than may a relatively serious infraction.

Turning to the application of the Act to this case, the first question is whether the merger, as an antitrust matter, would violate the Clayton Act. I continue to disagree, particularly in the banking field, with the "numbers game" test for determining Clayton Act violations which was adopted by this Court in *United States* v. *Philadelphia National Bank,* 374 U. S. 321. However, I consider myself bound by that decision, and under its dictates I concur in the Court's finding that this merger would violate the Act.

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[1] 80 Stat. 7, 12 U. S. C. § 1828 (c) (1964 ed., Supp. II).

[2] Bank Merger Act of 1966, amending § 18 (c)(5)(B) of the Federal Deposit Insurance Act, 12 U. S. C. § 1828 (c)(5)(B) (1964 ed., Supp. II).

I also concur in the Court's decision that this case must be remanded so that there may be a new application of the second-step balancing process. In this case, which was decided before our decision in *Houston Bank, supra,* the District Court either omitted the first of the two indicated procedural steps or concluded, incorrectly, that the merger would not violate the Clayton Act.[3] In either event, the error may have caused the District Court to misconceive the antitrust "threshold" at which the second-step balancing process was intended to come into play. This, in turn, may have led the court to give the "anticompetitive effect" of the merger a different weight in the balance than was intended by the framers of the Bank Merger Act. Hence, the case must be remanded to the District Court so that it may reweigh the competing factors in light of the correct antitrust threshold.

With regard to the "convenience and needs" side of the balance, I am in accord with the Court's ruling that a merger should not be approved under the 1966 Act unless the District Court finds that the benefits conferred upon the community by the merger could not reasonably have been achieved in other ways. Unlike the Court, however, I conclude from the record that the District Court *did* make adequate findings on this issue. The record reveals that many witnesses testified that Nashville Bank had problems of real magnitude, the greatest being to find replacements for key executives. Mr. Weaver, the leader of the group which purchased control of the bank not long before the merger, testified that initially his group had intended to operate the bank themselves, but that talks with many bankers had convinced him that his group could not solve the bank's problems. The head of an executive-placement firm

[3] The District Court's opinion is unclear as to whether the court considered it necessary to make a discrete finding under the Clayton Act.

testified that he did not believe that he could have found new executives for Nashville Bank, in light of its overall situation.[4] Although there was testimony in rebuttal, including that of another recruiter of executives, to the effect that the problems were not unsolvable, I cannot conclude that the District Court committed error when it held that

> "While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside, a product of the bank's failure . . . to provide itself with the facilities, procedures and equipment required to maintain a competitive posture." 260 F. Supp. 869, 881.

In sum, what I would consider to be the scope of the proceedings on remand is this. In light of our holding that a Clayton Act violation has been made out, further consideration of the first-step antitrust issue by the District Court is foreclosed. Believing, as I do but contrary to the Court, that the findings already made by the District Court as to the alternatives to merger are adequate, in my view the only question for the District Court to consider respecting the second step is whether, because of its character in light of the antitrust standard now set forth, the antitrust violation should yield to other factors bearing on public "convenience and needs."

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[4] An account of Nashville Bank's overall situation appears in the Court's opinion, *ante*, at 175–176.

RAINWATER ET AL. *v.* FLORIDA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 18. Decided March 4, 1968.

Certiorari granted; 186 So. 2d 278, vacated and remanded.

Alfred L. Scanlan and *J. Edward Worton* for petitioners.

Solicitor General Marshall filed a memorandum for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment of the court below is vacated, and the case is remanded for further consideration in the light of *Marchetti* v. *United States, ante,* p. 39. Cf. *Hoffa* v. *United States,* 387 U. S. 231; *Kolod* v. *United States, ante,* p. 136.

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

ROBERTS *v.* WARDEN, MARYLAND PENITENTIARY.

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

No. 950, Misc. Decided March 4, 1968.

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.

LEE *v.* KANSAS CITY, MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 383. Decided March 4, 1968.

414 S. W. 2d 251, vacated and remanded.

Michael J. Drape for appellant.

Jack L. Simms for appellee.

PER CURIAM.

The judgment of the Supreme Court of Missouri is vacated and the case is remanded to that court for further consideration in the light of *Marchetti* v. *United States, ante,* p. 39.

WYNN ET AL. *v.* BYRNE, COUNTY PROSECUTOR.

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

No. 977. Decided March 4, 1968.

Vacated and remanded.

Robert L. Carter, Martin Garbus and *Morton Stavis* for appellants.

Thomas P. Ford, Jr., for appellee.

PER CURIAM.

The judgment of the United States District Court for the District of New Jersey is vacated and the cause is remanded to that court for further proceedings. *Moody* v. *Flowers,* 387 U. S. 97, at 104.

MR. JUSTICE BLACK would affirm the judgment.

ARGO *v.* ALABAMA.

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

No. 121, Misc. Decided March 4, 1968.

Certiorari granted; 280 Ala. 707, 195 So. 2d 819, vacated and remanded.

MacDonald Gallion, Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Alabama for further consideration in light of *Long* v. *District Court of Iowa,* 385 U. S. 192.

ROBISON *v.* UNITED STATES.

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

No. 451, Misc. Decided March 4, 1968.

Certiorari granted; 379 F. 2d 338, vacated and remanded.

Solicitor General Griswold for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. In light of the representations of the Solicitor General and our own independent consideration of the entire record, the judgment is vacated and the case is remanded to the District Court for the Northern District of California for further consideration.

JUSTICE ET UX. *v.* UNITED STATES ET AL.

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

No. 570. Decided March 4, 1968.

274 F. Supp. 283, affirmed.

Francis D. Burke for appellants.

Acting Solicitor General Spritzer, Assistant Attorney General Rogovin and *Joseph M. Howard* for the United States et al.

PER CURIAM.

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

JONES *v.* RUSSELL, WARDEN.

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

No. 407, Misc. Decided March 4, 1968.

Certiorari granted; vacated and remanded.

George F. McCanless, Attorney General of Tennessee, and *Paul E. Jennings,* 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. Upon the representations of the Attorney General and our own independent consideration of the entire case, the judgment is vacated and the case remanded to the Supreme Court of Tennessee for further proceedings.

DeCESARE et al. *v.* UNITED STATES.

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

No. 11. Decided March 4, 1968.*

Certiorari granted; No. 11, 356 F. 2d 107; No. 17, 361 F. 2d 220; No. 19, 363 F. 2d 374; No. 24, 366 F. 2d 770; No. 30, 368 F. 2d 692; No. 45, 369 F. 2d 106; and No. 567, 375 F. 2d 1012, vacated and remanded.

Allen David Stolar for petitioners in No. 11. *Newton B. Schwartz* for petitioner in No. 17. *Ollie Lancaster, Jr.*, for petitioners in No. 19. *Francis L. Giordano* for petitioner in No. 24. *Patrick T. McGahn, Jr.*, for petitioner in No. 30. *Robert J. O'Hanlon* and *Richard L. Daly* for petitioner in No. 45. *B. Clarence Mayfield* for petitioner in No. 567.

Solicitor General Marshall for the United States in No. 11. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States in No. 17. *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Robert G. Maysack* for the United States in Nos. 19 and 30. *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Sidney M. Glazer* for the United States in No. 24. *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Kirby W. Patterson* for the United States in No. 45. *Acting Solicitor General Spritzer, Assistant*

*Together with No. 17, *Butler* v. *United States;* No. 19, *Brazzell et al.* v. *United States;* No. 24, *Rosenzweig* v. *United States;* No. 30, *Augello* v. *United States;* No. 45, *Gennaro* v. *United States;* and No. 567, *Mutcherson* v. *United States,* all on petitions for writs of certiorari. Nos. 17, 19, and 567 are to the Court of Appeals for the Fifth Circuit, No. 24 to the Second Circuit, No. 30 to the Third Circuit, and No. 45 to the Eighth Circuit.

Attorney General Vinson and *Miss Rosenberg* for the United States in No. 567.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated, and the cases are remanded for further consideration in the light of *Marchetti* v. *United States, ante,* p. 39. See also 28 U. S. C. § 2106 and *Grosso* v. *United States, ante,* p. 62.

MR. JUSTICE MARSHALL took no part in the consideration or decision of Nos. 11, 17, 19, 24, 30, and 45.

COSTELLO *v.* UNITED STATES.

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

No. 3. Decided March 4, 1968.

352 F. 2d 848, vacated and remanded.

Ira B. Grudberg and *Jacob D. Zeldes* for petitioner.

Solicitor General Marshall, Assistant Attorney General Vinson, Francis X. Beytagh, Jr., Beatrice Rosenberg and *Theodore George Gilinsky* for the United States.

PER CURIAM.

Upon the suggestion of mootness by reason of the death of the petitioner, 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 District of Connecticut for such disposition as law and justice require.

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

PICCIOLI *v.* UNITED STATES.

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

No. 4. Decided March 4, 1968.*

Certiorari granted; No. 4, 352 F. 2d 856; No. 5, 354 F. 2d 224; No. 6, 354 F. 2d 27; No. 10, 355 F. 2d 924, 356 F. 2d 324; No. 32, 367 F. 2d 347; No. 374, 379 F. 2d 394; and No. 2, Misc., 352 F. 2d 848, vacated and remanded.

Alfred Belinkie for petitioner in No. 4. *Edward G. Burstein* for petitioner in No. 5. *David Goldstein* and *Jacob D. Zeldes* for petitioner in No. 6. *Francis J. DiMento, Paul J. Burns* and *Ronald R. Popeo* for petitioners in No. 10. *Albert J. Krieger* and *Robert Kasanof* for petitioners in No. 32. *Max M. Barr* for petitioner in No. 374.

Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg and *Marshall Tamor Golding* for the United States in No. 4 and No. 2, Misc. *Solicitor General Marshall* for the United States in Nos. 5, 6 and 10. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Miss Rosenberg* for the United States in No. 32. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Miss Rosenberg* and *Jerome M. Feit* for the United States in No. 374.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated, and the cases

*Together with No. 5, *Millo* v. *United States;* No. 6, *Grassia* v. *United States;* No. 10, *Driscoll et al.* v. *United States;* No. 32, *Serao et al.* v. *United States;* No. 374, *Wrieole* v. *United States;* and No. 2, Misc., *Gjanci* v. *United States,* all on petitions for writs of certiorari. Nos. 5, 6, 32, and 2, Misc., are to the United States Court of Appeals for the Second Circuit, No. 374 to the Third Circuit, and No. 10 to the First Circuit. The motion for leave to proceed *in forma pauperis* in No. 2, Misc., is also granted.

are remanded for further consideration in the light of *Marchetti* v. *United States, ante,* p. 39.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

FORGETT *v.* UNITED STATES.

ON PETITION FOR REHEARING.

No. 861, October Term, 1965. Decided March 4, 1968.

Rehearing granted and denial of certiorari, 383 U. S. 926, vacated. Certiorari granted; 349 F. 2d 601, vacated and remanded.

Charles J. Irwin, Eugene Gressman and *Arthur L. Abrams* on the petition for rehearing.

PER CURIAM.

The petition for rehearing is granted, the order of February 28, 1966, denying certiorari is vacated, the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, the judgment of that court is vacated, and the case remanded for further consideration in the light of *Haynes* v. *United States, ante,* p. 85.

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

ORTEGA *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 965, Misc. Decided March 4, 1968.

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.

STONE *v.* UNITED STATES.

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

No. 9. Decided March 4, 1968.*

Certiorari granted; No. 9, 357 F. 2d 257; No. 14, 361 F. 2d 153; No. 77, 374 F. 2d 227; No. 121, 370 F. 2d 987; No. 798, 379 F. 2d 946; and No. 1024, 386 F. 2d 177, vacated and remanded.

Charles W. Tessmer and *Emmett Colvin, Jr.*, for petitioner in No. 9. *William T. Griffin* for petitioners in No. 14. *Seymour Samuels, Jr.*, and *William R. Willis, Jr.*, for petitioner in No. 77. *Anna R. Lavin* and *Richard E. Gorman* for petitioner in No. 798. *James G. Starkey* for petitioner in No. 1024.

Former *Solicitor General Marshall* for the United States in No. 9. Former *Solicitor General Marshall,*

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*Together with No. 14, *Conti et al.* v. *United States;* No. 77, *Ross* v. *United States;* No. 121, *Donlon* v. *United States;* No. 798, *Angelini* v. *United States;* and No. 1024, *Pizzarello* v. *United States,* all on petitions for writs of certiorari. No. 77 is to the United States Court of Appeals for the Sixth Circuit, Nos. 14 and 1024 to the Second Circuit, No. 121 to the Third Circuit, and No. 798 to the Seventh Circuit.

Assistant Attorney General Vinson, Beatrice Rosenberg and *Theodore George Gilinsky* for the United States in No. 14. Former *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Mervyn Hamburg* for the United States in No. 77. Former *Solicitor General Marshall, Assistant Attorney General Vinson, Miss Rosenberg* and *Marshall Tamor Golding* for the United States in No. 121. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Miss Rosenberg* for the United States in No. 798. *Solicitor General Griswold* for the United States in No. 1024.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments of the courts below are vacated and the cases are remanded for further consideration in the light of *Marchetti* v. *United States, ante,* p. 39, and *Grosso* v. *United States, ante,* p. 62.

MR. JUSTICE MARSHALL took no part in the consideration or decision of Nos. 9, 14, 77, and 121.

ANDERSON ET AL. *v.* GEORGIA.

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

No. 329, Misc. Decided March 4, 1968.

Certiorari granted; 223 Ga. 174, 154 S. E. 2d 246, reversed.

Jack Greenberg, Charles Stephen Ralston and *Michael Meltsner* for petitioners.

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. The judgments of the Supreme Court of Georgia are reversed. *Whitus* v. *Georgia,* 385 U. S. 545.

MR. JUSTICE HARLAN would set the case for plenary consideration.

Syllabus.

SECURITIES AND EXCHANGE COMMISSION *v.* NEW ENGLAND ELECTRIC SYSTEM ET AL.

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

No. 305. Argued January 18, 1968.—
Decided March 5, 1968.

This Court previously held (384 U. S. 176) that the SEC was warranted in ruling that § 11 (b)(1)(A) of the Public Utility Holding Company Act of 1935 prohibits a public utility holding company from retaining an integrated gas utility system in addition to its integrated electric system unless the gas system could not be operated separately without a loss of economies causing a serious impairment of that system. After remand, the Court of Appeals reviewed the evidence and concluded that the SEC erred in finding that New England Electric System failed to prove a case for retention of its integrated gas system. *Held:* Since the SEC's determination that divestiture of the gas system would not entail a loss of economies likely to cause serious impairment of the system involved the application of expert judgment which had adequate support in the record, the Court of Appeals should have affirmed the SEC order and should not have indulged in an unwarranted incursion into the administrative domain. Pp. 211–221.

376 F. 2d 107, reversed and remanded.

Daniel M. Friedman argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Robert S. Rifkind, Philip A. Loomis, Jr., David Ferber, Roger S. Foster* and *Richard E. Nathan.*

John R. Quarles argued the cause for respondents. With him on the brief were *Richard B. Dunn, Richard W. Southgate* and *John J. Glessner III.*

George Spiegel filed a brief for the Municipal Electric Association of Massachusetts, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent New England Electric System (NEES), a holding company registered under § 5 of the Public Utility Holding Company Act of 1935,[1] controls both an integrated electric utility system and an integrated gas utility system.[2] Section 11 (b) of the Act requires the Securities and Exchange Commission to limit the operations of a holding company system to a single integrated public utility system, except the Commission may permit the holding company to continue control of any additional integrated utility system that the Commission determines, among other things, "cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system . . . ." [3] In 1957 the Securities and Exchange

[1] 49 Stat. 812, 15 U. S. C. § 79e.

[2] At the time of this proceeding, the integrated electric utility system consisted of seven electric utility companies serving parts of New Hampshire, Massachusetts, Rhode Island, and Connecticut. The integrated gas utility system consisted of eight Massachusetts gas companies. NEES also controlled a service company which provided services for the whole NEES operation.

[3] Section 11 (b) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U. S. C. § 79k (b), provides in pertinent part: "It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

"(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system . . . : *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which

Commission instituted proceedings to determine whether NEES should be permitted to retain control of both the electric and gas systems. The Commission initially found that the electric companies constituted a single integrated electric utility system, 38 S. E. C. 193 (1958), and NEES elected to retain those companies as its principal system. NEES urged, however, that it should also be permitted to retain the gas system. After extensive hearings, the Commission refused respondent permission to do so, and ordered the gas system divested. 41 S. E. C. 888 (1964).

In reaching its conclusion the Commission construed the statutory phrase "loss of substantial economies" in Clause A of § 11 (b)(1) to require a showing that the "additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." In its first review of the Commission's order, the Court of Appeals for the First Circuit held that the Commission had erroneously construed the statute; in the court's view, "loss of substantial economies" merely "called for a business judgment of what would be a significant loss . . . ." The court therefore set aside the Commission's order and remanded for reconsideration in light of that test. 346 F. 2d 399, 406. We reversed, approving the Commission's construction, and remanded to the Court of Appeals for review of the challenged order in light of the proper meaning of the statutory term. *SEC* v. *New England Electric System,* 384 U. S. 176 (*NEES I*). On remand, the Court of Appeals again set aside the Commission's order. 376 F. 2d 107.[4] That court, "after a

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can be secured by the retention of control by such holding company of such system . . . ."

[4] On remand, the Court of Appeals interpreted the "serious impairment" standard as requiring proof only of "a condition allowing survival but not on a sound or 'healthful continuing' basis,"

fresh review of all the evidence," concluded "that the Commission's opinion does not reveal that application of both reason and experience to facts which merits endorsement as the responsible exercise of expertise." *Id.*, at 111. We granted certiorari. 389 U. S. 816. We reverse and remand to the Court of Appeals with direction to enter a judgment affirming the Commission's order.

The question for our decision is whether the Court of Appeals properly held that, on the record, the Commission erred in finding that NEES failed to prove a case for retention of the integrated gas utility system. We address that question against the background of a congressional objective to protect consumer interests through the "elimination of 'restraint of free and independent competition.' . . . One of the evils that had resulted from control of utilities by holding companies was the retention in one system of both gas and electric properties and the favoring of one of these competing forms of energy over the other." *NEES I,* 384 U. S., at 183.[5] Congress therefore ordained separate ownership—and divestiture where necessary to reduce holdings to one system—as the " 'very heart' of the Act." *Id.,* at 180. Although Congress was aware that some economic loss might be suffered by the parent holding company or the separated integrated utility, Congress relented only to the extent of authorizing the Commission to permit retention of an additional integrated utility if that permission might be granted under the narrow exception provided by § 11 (b)(1). But "retention of an 'additional' integrated system is decidely the exception," and the

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rather than proof that severance "will result in imminent bankruptcy . . . ." 376 F. 2d, at 109. The Commission has not contested this interpretation in this Court.

[5] "By fostering competition between gas and electric utility companies, the Act promotes what has been described as 'variegated competition.' " *NEES I,* 384 U. S., at 184, n. 15.

burden is on the holding company to satisfy the "stringent test" set by the statute. *Id.*, at 180, 182; cf. *United States* v. *First City Nat. Bank,* 386 U. S. 361, 366.

Congress committed to the Commission the task of determining whether a holding company has met the burden of showing that its situation falls within the narrow exception under § 11 (b)(1). The Clause A determination whether separation entails a loss of economies likely to cause a serious impairment of the system involves an element of prediction which necessarily calls for difficult and expert judgment. That judgment requires the assessment of many subtle and often intangible factors not easily expressed in precise or quantifiable terms. This is the very nature of economic forecasting. The task calls for expertise and is not simply "an exercise in counting commonplaces." *United States* v. *Drum,* 368 U. S. 370, 384; see *NEES I,* 384 U. S., at 184–185. Judicial review of that expert judgment is necessarily a limited one. See *Gray* v. *Powell,* 314 U. S. 402, 412–413; *NLRB* v. *Hearst Publications,* 322 U. S. 111, 131; *Atlantic Ref. Co.* v. *FTC,* 381 U. S. 357, 367–368; *United States* v. *Drum, supra,* at 375–376. Congress expressly provided that "[t]he findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 U. S. C. § 79x (a); see *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474; cf. *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221, 236. In our view, the Court of Appeals in this case indulged in an unwarranted incursion into the administrative domain.[6] The Commission's order has adequate support in the record and should have been affirmed.

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[6] The following passage is from the court's opinion on remand:

"Even without the burden of proving likely demise, [NEES'] burden is, as the Court said, to meet 'a much more stringent test' than that of a probable significant loss. But, if the standard to be applied to [NEES] is stringent, so is the level of analysis and

As of 1958, the test year selected for purposes of these proceedings,[7] NEES' eight gas subsidiaries provided retail service to some 237,000 customers in a relatively compact 660-square-mile franchise area in Massachusetts. NEES' electric companies also served 75% of this area and about 78% of the gas customers were also electric customers. NEES' gross investment in gas plant and equipment was about $56,300,000 and gross gas revenues for 1958 were about $22,700,000. The eight gas companies were organized administratively as a Gas Division with centralized management, marketing and supply, operations, and merchandising departments.[8] The chief executive of the Gas Division was also president of each gas company and ultimately responsible to NEES' vice president in charge of management; in short, top management rested with executives having joint control over both electric and gas operations.

The Commission had before it a "severance study," a cost analysis and projection prepared for NEES by a professional public utilities management consulting firm, Ebasco Services, Inc. This study projected a loss of economies of approximately $1,100,000 annually for the gas system as the result of its separation from NEES. The Commission dealt with this study in alternative ways. It analyzed the study and concluded that "[t]he Ebasco estimate is inadequately supported in a number of important aspects and leaves considerable doubts

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expertise to be exercised by the Commission. We have, only after a fresh review of all the evidence in the light of this most stringent practical standard, concluded that the Commission's opinion does not reveal that application of both reason and experience to facts which merits endorsement as the responsible exercise of expertise." 376 F. 2d, at 111.

[7] This was the latest year for which audited financial statements were available at the time of the hearing before the Commission. 41 S. E. C., at 889, n. 3.

[8] All but one of the eight companies are located within 48 miles of the division headquarters; one is 80 miles away.

which [NEES has] not satisfactorily overcome in the record." Then it went on to find that even if the estimated $1,100,000 in loss of economies were accepted as accurate "it would not lead us to conclude that such a loss is so substantial, when compared with the loss of economies involved in prior divestment cases and viewed in light of the objectives of the Act, as to warrant retention of the gas properties . . . ." 41 S. E. C., at 895, 897. Because we conclude that the record supports the Commission's decision on the latter ground, we have no occasion to consider whether the Commission's strictures on the reliability of the Ebasco study are well founded.

The Commission's ultimate finding that the projected $1,100,000 loss of economies annually did not constitute a loss of "substantial" economies within Clause A of § 11 (b)(1) was reached primarily upon the basis of its subsidiary findings upon three matters: (1) That NEES' estimated losses were not significantly out of line with those found insubstantial in previous cases; (2) that other nonaffiliated Massachusetts gas companies,[9] all but one of them smaller than the NEES gas system, are apparently able to operate successfully without electric utility affiliations; (3) that NEES did not establish that independent management devoted solely to promoting gas sales would not result in benefits to offset some of the projected losses. The Court of Appeals held that none of the three subsidiary findings was supported by substantial evidence. We disagree.

I.

The Commission, consistent with its practice in prior cases,[10] weighed NEES' estimated $1,100,000 losses in

[9] "Nonaffiliated" or "independent" refers to gas companies not having any electric affiliations and gas companies not jointly operated with electric companies serving the same franchise area.

[10] *E. g., Philadelphia Co.*, 28 S. E. C. 35, 50–52 (1948); *General Pub. Util. Corp.*, 32 S. E. C. 807, 837 (1951).

relative rather than absolute terms, calculating the losses as a percentage of NEES' 1958 revenues, expenses, and income.[11] It found these loss ratios to be "lower or not significantly higher than corresponding ratios of gas systems whose divestment we have required on the ground that the estimated loss of economies was not substantial within the meaning of clause A." 41 S. E. C., at 898. The cases with which these particular comparisons were made involved companies outside Massachusetts.[12] The Court of Appeals held that the comparisons with the loss ratios of companies involved in prior cases were "largely irrelevant" because ". . . these ratios are significant only as they affect the investment structure of the companies in the particular case, and different companies may be compared only on the assumption that both operate at the same level." 376 F. 2d, at 113, 115. The court's ultimate conclusion was that only close analysis of NEES' own "particular circumstances" was relevant to the Commission's inquiry.

It is significant, however, that the Court of Appeals' criticism of the Commission's use of ratios relied heavily on the court's reading of the statistical data in evidence as showing that the projected loss of economies "would decrease [NEES'] rate of return from 6.4 per cent in 1959 to 4.1 per cent on the projected basis," or some 30% below, "an average rate of 5.9 per cent for the non-

[11] The losses would amount to: 4.8% of operating revenues; 6.0% of operating revenue deductions (excluding federal income taxes); 23.3% of gross income (before federal income taxes); 29.9% of net income (before taxes).

[12] See *Engineers Pub. Service Co.*, 12 S. E. C. 41, 55–61, 78–81 (1942); *North Amer. Co.*, 18 S. E. C. 611 (1945); *Philadelphia Co.*, 28 S. E. C. 35, 45–53 (1948); *General Pub. Util. Corp.*, 32 S. E. C. 807, 814–815, 823–839 (1951); *Middle So. Util., Inc.*, 35 S. E. C. 1 (1953), 36 S. E. C. 383 (1955). The relevant financial data for each case are summarized in an appendix to the Commission's opinion. 41 S. E. C., at 905.

affiliated Massachusetts gas companies . . . ." 376 F. 2d, at 114. But, as the Commission has noted, the court's computation that the separated companies would realize a return of only 4.1% contained a serious error, for it overlooked the allowance to be made for income tax deductions generated by the projected losses. The actual rate of return taking such deductions into account would be a significantly higher 5.2%.[13]

In any event, we may agree that the ratios of losses of revenues, expenses, and income are necessarily affected

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[13] Rate of return is the percentage of net operating income to the rate base, which is fixed by a formula tied generally to the value of capital assets. The source of the 4.1% figure appears to have been the Court of Appeals. The 4.1% was apparently derived as follows:

(a) $\frac{\$\ 3{,}050{,}988}{\$47{,}723{,}162}$ (1959 net oper. income after taxes / rate base) = 6.4% rate of return

(b) $\$\ 3{,}050{,}988 - 1{,}098{,}600 = \$\ 1{,}952{,}388$ (projected losses; est. net oper. income)

(c) $\frac{\$\ 1{,}952{,}388}{\$47{,}723{,}162} = 4.1\%$ rate of return

However, the $1,100,000 projected loss would generate income tax deductions of roughly 50%, increasing the numerator of fraction (c) from $1,952,388 to $2,501,688, and the rate of return to 5.2%. The NEES brief relies on the 4.1% figure, but NEES has not challenged the Commission's recalculation.

The 1959 rates of return for the comparable nonaffiliated Massachusetts companies were as follows:

	Percent
Berkshire Gas	5.2
Brockton-Taunton Gas	6.1
Fall River Gas	6.2
Haverhill Gas	6.8
Lowell Gas	7.9
Springfield Gas	6.4
Worcester Gas	4.5

(Resp. Ex. 117; R. 1436.)

by differences in capital structure, management, market position, and other factors. But it by no means follows that the Commission's comparisons are for that reason irrelevant to the determination whether a projected loss of economies is so important as to cause a serious impairment of the separated system. It was well within the range of the Commission's administrative discretion to use the loss ratios, as it did, "as a guide in adjudicating the pending case." *Philadelphia Co.*, 28 S. E. C. 35, 50, n. 24. The Commission in its expert judgment may so employ evaluative factors it considers relevant.[14]

Indeed, NEES apparently recognized that its burden to establish that its situation comes within Clause A included the burden of showing that the projected loss of economies would be more serious for its separated system than the comparable level of losses in the other cases already decided by the Commission. Respondent attempted to prove that the gas system's distance from sources of supply gives it only a very narrow competitive advantage over oil as a fuel, and, further, that the system's growth potential is more limited by a lack of new housing expansion in the area serviced by the gas companies. As we shall see below, the Commission found that NEES had not made a case in either respect insofar as those matters bore on whether the projected loss of economies threatened serious impairment of the separated system.

II.

The Commission's resort to data concerning the operations of the nonaffiliated Massachusetts gas companies was a response to NEES' argument, supported by the

[14] Although the parties are in dispute as to the validity of some of the data drawn from the previous cases, we do not consider it necessary to become involved in that controversy. Suffice it to say that we do not think the Commission in looking to the data for guidance exceeded the bounds of reason or administrative discretion.

Massachusetts Department of Public Utilities, that the projected loss of economies from separation of the gas system would require the gas companies to seek rate increases which might seriously impair or destroy any hope of a successful operation. Natural gas in 1959 enjoyed in New England the smallest price advantage over oil of any section of the country. The annual differential was $7 over oil for a typical New England house compared with $27 to $118 in favor of gas in the rest of the country.[15] NEES contended that the predicted rate increase would substantially or entirely eliminate the gas system's already narrow price advantage over oil competitors. The Commission's answer was to inquire about the economic health of the already nonaffiliated Massachusetts gas companies. The Commission found that these companies were apparently able to earn a fair return although not enjoying the supposed advantages of affiliation with electric utilities; and it could find no evidence that they did not face the same competitive conditions as NEES.[16] The Commission found further that, despite NEES' insistence that its market conditions differed from the nonaffiliated companies because of relatively stagnant franchise areas offering less sales growth,[17] there was no evidence that this would pre-

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[15] Gas to New England was piped all the way from Texas, whereas oil was shipped in by tanker. NEES estimated the average home heating cost to be $166 for gas, $173 for oil; and it was in residential space heating that NEES found its chief market.

[16] NEES calculated the composite rate of return for its gas system at 6.6% for 1958 and 6.4% for 1959. (Resp. Ex. 114; R. 1431.) The average for seven comparable independents was 6.3% in 1958 and 5.9% in 1959. (Resp. Ex. 117; R. 1436.)

[17] NEES cites as prime evidence in this regard the testimony of Robert Cahal, an Ebasco marketing consultant who had to some extent analyzed the marketing conditions NEES faced. The substance of his testimony was that (a) gas and oil are highly competitive in the State, with oil being well entrenched in many areas

vent the separated gas system—which would emerge as the second largest independent in the State—from competing as effectively as the smaller independents who had long held their own. Finally, the Commission noted that after severance the gas system's operating ratio would be more favorable or only slightly higher than the ratios of nine independents and therefore concluded that it "would be entering the realm of speculation at this time to assume that rate increases would ensue from severance." 41 S. E. C., at 899.[18]

The Court of Appeals rejected the comparison of these operating ratios, again on the ground that such ratios fail to take account of special characteristics of individual companies. The court observed that since all New England gas companies operated on a "small cushion . . .

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so that the major source of growth has to be in new residence construction; (b) in Massachusetts growth is in the suburbs with towns proper being relatively stagnant; (c) gas companies are limited by their franchise area, prisoners of the characteristics of their particular communities; (d) the independents are not necessarily comparable with NEES because they may be in areas of higher growth; (e) independents having such areas are Haverhill, Lowell, Springfield, Worcester, Brockton-Taunton; all of them having growth greater (but unspecified as to degree) than any NEES gas company except Norwood.

The Commission noted, without comment, that the population increase in NEES' franchise areas between 1950 and 1960 was only 11% as compared with 18% in the areas of seven independents. 41 S. E. C., at 899, n. 23.

[18] The operating ratio is "the percentage of total operating revenue deductions (other than depreciation, amortization of conversion costs, and Federal income taxes) to total operating revenues." 41 S. E. C., at 899, n. 25. The ratio "affords a measure for determining the efficiency with which the enterprise is conducted and while its value is greater in comparing the year to year trend it has a limited use in comparing very similar enterprises." Moody's Public Utility Manual ix (1967). NEES' ratio was fixed at 76.41% and compared with the composite ratio of nine independents of 79.14%, as well as their median and mean ratios of 74.87% and 76.35% respectively. Individual ratios are cited at 41 S. E. C., at 899, n. 26.

[t]he significance of this is not negated by observing that non-NEES companies in Massachusetts seem to be surviving, for the focus must be on the specific characteristics of the NEES companies, the only ones affected by the Commission's order." 376 F. 2d, at 113. The court further held "irrelevant the comparison of operating ratios, since a business may operate relatively efficiently, yet at a level too low to attract investors." 376 F. 2d, at 114, n. 6. For the reasons already stated for our disagreement with the Court of Appeals' view of the Commission's use of other ratios, we disagree that this comparison was either irrelevant or outside the limits of the Commission's administrative discretion. The dissection and evaluation of an economic projection is a function Congress committed to the Commission, not the courts. A court may believe it would have done the job differently and better; but judicial inquiry must be addressed to whether what the Commission did is fatal to its ultimate conclusion that the holding company failed to carry its burden of showing a loss of "substantial" economies within the meaning of Clause A. In assessing NEES' forecast of the need for rate increases because of the projected loss of economies, it was proper for the Commission to consider the performance of other Massachusetts gas companies which were already operating independently. NEES was afforded every opportunity to sustain its burden of showing that the separated gas system would wither into critical health despite the contrary inferences suggested by the comparison made by the Commission. It cannot be a basis for finding error that the Commission found the attempt unpersuasive, given the gas system's size,[19] and the

[19] The Commission may properly regard size of operation to be a relevant factor. One of Congress' concerns in providing the exception involved here was to protect small companies likely to fail if separated from the parent holding company. Cf. *NEES I*, 384 U. S., at 181; *North Amer. Co.* v. *SEC*, 327 U. S. 686, 697. See also H. R. Rep. No. 1903, 74th Cong., 1st Sess., 68–71; S. Doc.

prognosis of efficiencies comparable to those achieved by the independents.[20]

III.

The Commission conceived that the projected loss of economies would in some measure be offset by advantages realized by the separated system under the direction of "a management solely interested in and devoted to the gas operations . . . ." 41 S. E. C., at 901. NEES, again supported by the Massachusetts Department of Public Utilities, took the position that its operation of the companies had already achieved all possible benefits of interservice competition. The Commission found the argument unpersuasive, relying again on a comparison with the nonaffiliated Massachusetts gas companies. This was a comparison of the sales performance of the gas companies under NEES management with the sales performances of the independents. All seven of the comparable independents showed substantially higher gas sales and revenues per customer and lower costs to customers.[21] The Commission found unpersua-

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No. 92, 70th Cong., 1st Sess., Pt. 72–A, at 831, 835. And NEES' size, especially given its relatively compact franchise area, is some indication of its competitive position.

[20] See n. 18, *supra,* and accompanying text.

[21] The breakdown was as follows:

	NEES	Indep.
1958—		
Sales, mcf/cust	44.2	78.8
Revenues, cust	$95.44	$135.19
Cost to customers, mcf	$2.16	$1.72
1959—		
Sales, mcf/cust	51.5	83.7
Revenues, cust	$104.49	$142.10
Cost to customers, mcf	$2.03	$1.70

Equivalent data for the Norwood Gas Company, the NEES subsidiary asserted to have growth potential comparable to the independents, see n. 17, *supra,* were as follows (1958 and 1959 figures): Sales—51.8 and 60.4 mcf/customer; Revenues—$112.59 and $125.66/customer; Cost to customers—$2.17 and $2.08/mcf. 41 S. E. C., at 901, nn. 29–30. See R. 1446–1447, 1449–1450.

sive NEES' explanation that this was accounted for by the greater residential growth potential of the areas serviced by the independents.[22]

The Court of Appeals held that the test of "serious impairment" under Clause A already took account of offsetting benefits to be realized from separation and therefore "that done, the general judgment has no independent significance in an individual case." 376 F. 2d, at 115–116. Whatever the merit of the general premise, see *NEES I,* 384 U. S., at 184–185, we understand the Commission's finding to have been simply that the projected $1,100,000 loss of economies did not in fact take into account any offsetting benefits on the assumption that joint operation had already achieved the advantages of independence. See 41 S. E. C., at 900–901. The Commission's conclusion that NEES' assumption was not proved has support in the record and the Court of Appeals was not justified in rejecting it.

The judgment of the Court of Appeals is reversed and the case is remanded to that court with direction to enter a judgment affirming the Commission's order.

It is so ordered.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

Given the earlier decision of the Court in this case, *SEC* v. *New England Electric System,* 384 U. S. 176, which I continue to believe wrongly construed the statute but by which I consider myself bound, I join today's opinion of the Court.

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[22] "[N]o specific demonstration of the existence or extent of such a causal relation was presented." 41 S. E. C., at 901. See also n. 21, *supra.*

UNITED STATES *v.* HABIG ET AL.

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

No. 107. Argued January 17, 1968.—Decided March 5, 1968.

Where allegedly false tax returns were filed after the statutory due date (extensions having been granted), the applicable statute of limitations (26 U. S. C. § 6531) *held* to run from the dates the alleged offenses were committed, *i. e.*, the dates on which the returns were filed, not from the statutory due date. Pp. 224–227.

270 F. Supp. 929, reversed and remanded.

Harris Weinstein argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard* and *Vincent P. Russo.*

Lester M. Ponder argued the cause for appellees. With him on the brief were *Anton Dimitroff* and *Fred P. Bamberger.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

Appellees were indicted for crimes relating to allegedly false income tax returns. The District Court dismissed Counts 4 and 6 of the indictment, charging an attempt to evade taxes by filing of a false return (26 U. S. C. § 7201) and aiding in the preparation and presentation of a false return (26 U. S. C. § 7206 (2)), on the ground that the six-year statute of limitations, 26 U. S. C. § 6531, barred prosecution under those counts. 270 F. Supp. 929. The United States filed notice of appeal to this Court under 18 U. S. C. § 3731. We noted probable jurisdiction. 389 U. S. 810.

The question presented is the construction of §§ 6531 and 6513 (a) of the Internal Revenue Code of 1954 (26 U. S. C. §§ 6531 and 6513 (a)). It is squarely raised

by the facts of this case. The indictment was filed on August 12, 1966. The income tax returns involved in Counts 4 and 6 were filed on August 12 and 15, 1960. Section 6531 limits the time when indictments may be filed for the charged offenses to six years "next after the commission of the offense."

The offenses involved in Counts 4 and 6 are committed at the time the return is filed. See, *e. g., Swallow* v. *United States,* 307 F. 2d 81, 83 (C. A. 10th Cir. 1962); *Benham* v. *United States,* 215 F. 2d 472, 473 (C. A. 5th Cir. 1954); *Butzman* v. *United States,* 205 F. 2d 343, 350–351 (C. A. 6th Cir. 1953); *United States* v. *Yeoman-Henderson, Inc.,* 193 F. 2d 867, 869 (C. A. 7th Cir. 1952); *United States* v. *Croessant,* 178 F. 2d 96, 98 (C. A. 3d Cir. 1949); *Cave* v. *United States,* 159 F. 2d 464, 467 (C. A. 8th Cir. 1947). Six years had not quite elapsed from the commission of the crimes in the present case to the filing of the indictment. Appellees do not contest the chronological calculation. But because of § 6513 (a) of the Code, they say that the critical date here is not the date when the returns were actually filed but the date when they were initially due to be filed, *viz.,* May 15, and not August 15, 1960.

The basis for this contention is as follows: Section 6531, which prescribes the six-year period of limitations, also says that "[f]or the purpose of determining [such] periods of limitation . . . the rules of section 6513 shall be applicable." Instead of filing on the due date of May 15, 1960, the corporations obtained extensions of time to August 15, 1960. Accordingly, if the six-year period of limitations runs not from the date of actual filing (August 12 and 15, 1960) but from the original due date of the returns (May 15, 1960), the indictment, having been filed on August 12, 1966, was several months too late.

Section 6513 (a) reads as follows:

> "SECTION 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.
>
> "(a) *Early Return or Advance Payment of Tax.*— For purposes of section 6511 [relating to claims for credit or refund], any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511 (b)(2) and (c) and section 6512 [relating to suits in the Tax Court], payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments."

Appellees' argument is that by reason of the third sentence of § 6513 (a), the starting date for computing the six-year limitations period is to be determined by the original due date of the return, May 15, 1960, "without regard to any extension of time granted the taxpayer." The District Court agreed. In other cases, the Court of Appeals for the Fifth Circuit, *Hull* v. *United States,* 356 F. 2d 919 (1966), and the District Courts for the Northern District of Ohio, *United States* v. *Doelker,* 211 F. Supp. 663 (1962), and the District of New Jersey, *United States* v. *Alper,* 200 F. Supp. 155 (1961), have so held. The District Court for the District of New Mexico has arrived at the contrary result. *United States* v. *Hensley,* 257 F. Supp. 987 (1966).

On the other hand, the Government argues that appellees' contention, despite its support in the decisions of several courts, is necessarily based upon the surprising

assertion that Congress intended the limitations period to begin to run before appellees committed the acts upon which the crimes were based. It argues that this result cannot be squared with the language of the Code or the intent of Congress. We perforce agree with the Government's analysis.

Section 6513 (a), as its title clearly indicates, was designed to apply when a return is filed or a tax is paid before the statutory deadline. The first two sentences provide that the limitations periods on claims for refunds and tax suits (26 U. S. C. §§ 6511, 6512), when the return has been filed or payment made in advance of the date "prescribed" therefor, shall not begin to run on the early date, but on the "prescribed" date. The third sentence states that, for "purposes of [the] subsection," the date "prescribed" for filing or payment shall be determined on the basis fixed by statute or regulations, without regard to any extension of time. The net effect of the language is to prolong the limitations period when, and only when, a return is filed or tax paid in advance of the statutory deadline.

There is no reason to believe that § 6531, by reference to the "rules of section 6513" expands the effect and operation of the latter beyond its own terms so as to make it applicable to situations other than those involving early filing or advance payment. The reference to § 6513 in § 6531 extends the period within which criminal prosecution may be begun only when the limitations period would also be extended for the refunds and tax suits expressly dealt with in § 6513—only when there has been early filing or advance payment. In other words, if a taxpayer anticipates the April 15 filing date by filing his return on January 15, the six-year limitations period for prosecutions under § 6531 commences to run on April 15. Practically, the effect of the reference to § 6513 in § 6531 is to give the Government the adminis-

trative assistance, for purposes of its criminal tax investigations, of a uniform expiration date for most taxpayers, despite variations in the dates of actual filing.

The legislative history supports this reading. The first predecessor of § 6513 (a) was enacted in 1942. See § 332 (b)(4) of the 1939 Code, added by Act of October 21, 1942, c. 619, § 169 (a), 56 Stat. 877. This section applied only to civil income tax refund proceedings. The Report of the House Ways and Means Committee (H. R. Rep. No. 2333, 77th Cong., 2d Sess., 119) states:

> "If the taxpayer files his return before the last day on which it is due, the period in which he can file a claim for refund under the provisions of section 322 (b)(1), measured from the date the return was filed, will expire sooner than would be the case if he waited until such last day. Section 150 of the bill adds paragraph (4) to section 322 (b) to provide that the period of limitations with respect to credit or refund is measured from the last day prescribed for the filing of the return in cases where the return is filed before such last day. *This provision does not apply to taxpayers who are given the benefit of an extension of time in which to file their returns, and file the return before the last day of the extended period. . . .*" (Emphasis added.)

Accord, S. Rep. No. 1631, 77th Cong., 2d Sess., 156. Then, in adopting the 1954 Code, the contested reference to § 6513 was added to § 6531. The House and Senate Reports expressly confirmed that § 6513 still encompassed "the existing . . . rule *as to early returns and advance payment.*" H. R. Rep. No. 1337, 83d Cong., 2d Sess., A 416; S. Rep. No. 1622, 83d Cong., 2d Sess., 587. (Emphasis added.)

The language of § 6513 (a) does not purport to apply when a return is filed during an extension of time. The

legislative history is to the same effect. Accordingly, although we reiterate the principle that criminal limitations statutes are "to be liberally interpreted in favor of repose," *United States* v. *Scharton,* 285 U. S. 518, 522 (1932), we cannot read the statute as appellees urge.

The judgment of the District Court is reversed, and the case is remanded for further proceedings.

Reversed and remanded.

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

UNITED STATES *v.* NEIFERT-WHITE CO.

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

No. 267. Argued January 18, 1968.—Decided March 5, 1968.

The False Claims Act, which was enacted "broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the governmental instrumentality upon which such claims were made," *Rainwater* v. *United States*, 356 U. S. 590, 592 (1958), *held* to apply to the supplying of false information in support of an application to the Commodity Credit Corporation for a loan. Pp. 229–233.

372 F. 2d 372, reversed and remanded.

John S. Martin, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge* and *Robert V. Zener.*

Patrick F. Hooks argued the cause for respondent. With him on the brief was *Michael J. Hughes.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

This is an action by the United States to recover statutory forfeitures under the False Claims Act.[1] The

[1] In relevant part, the statute provides as follows:

R. S. § 3490 (1874):

"Any person . . . who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act . . . ."

R. S. § 5438 (1874):

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States,

question is whether the Act applies to the supplying of false information in support of an application to a federal agency, the Commodity Credit Corporation (CCC), for a loan. The District Court dismissed the action on the ground that an application for a CCC loan, as distinguished from a claim for payment of an obligation owed by the Government, is not a "claim" within the meaning of the Act. The Court of Appeals for the Ninth Circuit affirmed. We granted certiorari. 389 U. S. 814 (1967).

The CCC is authorized to make loans to grain growers to finance the construction or purchase of storage facilities. § 4 (h) of the Commodity Credit Corporation Charter Act, as amended, 62 Stat. 1071, 15 U. S. C. § 714b (h). Pursuant to its authority under statute, 15 U. S. C. § 714b (d), the CCC has adopted regulations providing for the granting of loans in amounts not to exceed 80% of the actual purchase price of storage bins. A grain grower who desires to apply for a loan is required to support his application by an invoice showing the pur-

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or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

The criminal aspect of this statutory scheme has been altered and codified in 18 U. S. C. § 287 and 18 U. S. C. § 1001; see n. 2, *infra*. The civil (forfeiture) provisions have been codified, unaltered, in 31 U. S. C. § 231, but the above-cited version of these provisions continues to be the official one. The above-quoted provisions survive only insofar as civil liability is concerned.

chase price and the amount of the down payment made by him. 23 Fed. Reg. 9687.

Since the Government's complaint was dismissed for failure to state a cause of action, the allegations of the complaint must be taken as true for present purposes. According to the complaint, respondent is a dealer in grain storage bins. In 1959, in selling bins to 12 grain farmers, one of respondent's officers prepared invoices in which the purchase price was deliberately overstated. The purpose was fraudulently to induce the CCC to extend loans to respondent's customers in amounts exceeding 80% of the actual purchase price. The invoices were submitted to the CCC along with the loan applications, and the agency relied on the overstated purchase price in determining the amount of loans that were subsequently made. The United States claims the statutory forfeiture of $2,000 for each of the 12 alleged violations of the Act.

The issue in this case is narrow and precise: Does the False Claims Act reach "claims" for favorable action by the Government upon applications for loans or is it confined to "claims" for payments due and owing from the Government? [2] It is respondent's position that the term "claims" in the Act must be read in its narrow sense to include only a demand based upon the Government's liability to the claimant. Respondent relies upon *United States* v. *Cohn*, 270 U. S. 339 (1926), and *United States* v. *McNinch*, 356 U. S. 595 (1958), to support this narrow reading.

Cohn involved a criminal proceeding under an earlier version of the present False Claims Act.[3] It concerned a

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[2] No other issue is presented. The statute expressly reaches persons who falsify a "receipt" "for the purpose of . . . aiding to obtain the payment or approval of [a] claim." See n. 1, *supra*.

[3] See n. 1, *supra*. The criminal aspect of the original False Claims Act has been carried forward in two separate criminal statutes

fraudulent application to obtain the release of merchandise which did not belong to the United States and which was being held by the customs authorities as bailee only. The case did not involve an attempt, by fraud, to cause the Government to part with its money or property, either in discharge of an obligation or in response to an application for discretionary action. The language in the Court's opinion upon which respondent relies cannot be taken as a decision upon a point which the facts of the case did not present.[4]

In *McNinch,* the Government brought suit for damages and forfeitures under the False Claims Act, in its present form, against persons who had filed fraudulent applications for home-modernization loans with a private bank which was regularly insured by the Federal Housing Administration against losses on such loans. The bank granted the loans sought by defendants, which were "routinely" insured by the FHA. 356 U. S., at 597, n. 4.

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currently in force. Section 287 of Title 18 makes it a crime for a person to present "any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."

Section 1001 of the same title subjects to criminal penalties "[w]hoever . . . knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry."

Respondent has been indicted under still another criminal statute, 15 U. S. C. § 714m (a), which prohibits the making of false statements for the purpose of influencing the CCC.

[4] "[I]t is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, *based upon the Government's own liability to the claimant.*" 270 U. S., at 345–346. (Emphasis added.)

This Court held that since FHA "disburses no funds nor does it otherwise suffer immediate financial detriment," *id.*, at 599, the transaction was not within the ambit of the False Claims Act. The Court emphasized the distinction between contracts of insurance against loss such as those involved in *McNinch,* and transactions in which the United States pays or lends money. For purposes of the present case, we need not reconsider the validity of this distinction. It is sufficient to note that the instant case involves a false statement made with the purpose and effect of inducing the Government immediately to part with money.

The precise question presented by this case has never been considered by the Court. However, both the history and the language of the False Claims Act, as well as the thrust of our prior decisions, indicate the answer to our present inquiry. The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.[5] In its present form the Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, or who makes a false "bill, receipt, . . . claim, . . . affidavit, or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval of" such a false claim. In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.[6] See, *e. g., United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943).

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[5] See Cong. Globe, 37th Cong., 3d Sess., 952–958.

[6] See n. 1, *supra.*

On the very day that this Court decided *McNinch,* it also decided three cases holding that a fraudulent application for a loan submitted to the CCC was a claim against the Government of the United States, within the meaning of the False Claims Act.[7] The question debated in those cases was not the meaning of the word "claim," but whether the CCC, a wholly owned government corporation, was "the Government of the United States, or any department or officer thereof" within the meaning of the statute. In the course of its opinion on this matter, the Court noted that the objective of Congress in enacting the False Claims Act "was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made" and that "[b]y any ordinary standard the language of the Act is certainly comprehensive enough to achieve this purpose." *Rainwater* v. *United States,* 356 U. S. 590, 592 (1958).

Analogous reasoning leads us to hold today that the False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond "claims" which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. We believe the term "claim," as used in the statute, is broad enough to reach the conduct alleged by the Government in its complaint. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings in accordance with this opinion.

Reversed and remanded.

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

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[7] The principal case was *Rainwater* v. *United States,* 356 U. S. 590 (1958). Reference was made to the other two cases, *Cato Bros.* v. *United States* and *Toepleman* v. *United States,* in the course of the opinion in *McNinch.*

HARRIS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 92. Argued January 18, 1968.—Decided March 5, 1968.

Pursuant to a departmental regulation, a police officer searched an impounded car held as evidence of a robbery. The search completed, the officer opened the car door for the purpose of rolling up a window and thus protecting the car and its contents. On opening the door, the officer saw, exposed to plain view, the automobile registration card belonging to the victim of the robbery. This card was used as evidence in petitioner's trial. Petitioner's conviction was affirmed by the Court of Appeals over his contention that the card had been illegally seized following a warrantless search. *Held:* The card was subject to seizure and introducible in evidence since it was not discovered by means of a search in the technical sense, but was plainly visible to the officer who had a right to be in a position of viewing it.

125 U. S. App. D. C. 231, 370 F. 2d 477, affirmed.

Paul H. Weinstein argued the cause for petitioner. With him on the brief was *Laurence Levitan.*

Francis X. Beytagh, Jr., argued the cause for the United States. On the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper.*

PER CURIAM.

Petitioner was charged with robbery under the District of Columbia Code. D. C. Code Ann. § 22–2901. At his trial in the United States District Court for the District of Columbia, petitioner moved to suppress an automobile registration card belonging to the robbery victim, which the Government sought to introduce in evidence. The trial court, after a hearing, ruled that the card was admissible. Petitioner was convicted of the crime charged and sentenced to imprisonment for a period of

two to seven years. On appeal, a panel of the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the card had been obtained by means of an unlawful search. The Government's petition for rehearing *en banc* was, however, granted, and the full Court of Appeals affirmed petitioner's conviction, with two judges dissenting. We granted certiorari to consider the problem presented under the Fourth Amendment. 386 U. S. 1003 (1967). We affirm.

Petitioner's automobile had been seen leaving the site of the robbery. The car was traced and petitioner was arrested as he was entering it, near his home. After a cursory search of the car, the arresting officer took petitioner to a police station. The police decided to impound the car as evidence, and a crane was called to tow it to the precinct. It reached the precinct about an hour and a quarter after petitioner. At this moment, the windows of the car were open and the door unlocked. It had begun to rain.

A regulation of the Metropolitan Police Department requires the officer who takes an impounded vehicle in charge to search the vehicle thoroughly, to remove all valuables from it, and to attach to the vehicle a property tag listing certain information about the circumstances of the impounding. Pursuant to this regulation, and without a warrant, the arresting officer proceeded to the lot to which petitioner's car had been towed, in order to search the vehicle, to place a property tag on it, to roll up the windows, and to lock the doors. The officer entered on the driver's side, searched the car, and tied a property tag on the steering wheel. Stepping out of the car, he rolled up an open window on one of the back doors. Proceeding to the front door on the passenger side, the officer opened the door in order to secure the window and door. He then saw the registration card, which lay face up on the metal stripping over which

the door closes. The officer returned to the precinct, brought petitioner to the car, and confronted petitioner with the registration card. Petitioner disclaimed all knowledge of the card. The officer then seized the card and brought it into the precinct. Returning to the car, he searched the trunk, rolled up the windows, and locked the doors.

The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not. The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker* v. *California,* 374 U. S. 23, 42–43 (1963); *United States* v. *Lee,* 274 U. S. 559 (1927); *Hester* v. *United States,* 265 U. S. 57 (1924).

Affirmed.

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

MR. JUSTICE DOUGLAS, concurring.

Though *Preston* v. *United States,* 376 U. S. 364, is not mentioned in the Court's opinion, I assume it has sur-

vived because in the present case (1) the car was lawfully in police custody, and the police were responsible for protecting the car; (2) while engaged in the performance of their duty to protect the car, and not engaged in an inventory or other search of the car, they came across incriminating evidence.

FEDERAL MARITIME COMMISSION ET AL. *v.* AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE) ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 257. Argued January 25, 1968.—Decided March 6, 1968.*

The American Society of Travel Agents filed a complaint challenging certain practices of respondents, members of two transatlantic passenger steamship conferences, including (1) the "tying rule" of one conference prohibiting agents booking passage on conference ships from selling passage on competing, nonconference lines, and (2) the "unanimity rule" of the other conference requiring unanimous action by conference members before maximum commission rates payable to travel agents may be changed. The Federal Maritime Commission (FMC) after hearings disapproved both rules under § 15 of the Shipping Act, 1916, which authorizes FMC disapproval of any agreement that it finds "unjustly discriminatory or unfair as between carriers . . . , or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter." The Court of Appeals set aside the order and remanded the case to the FMC for more detailed findings and explanations. On remand the FMC again disapproved both rules and the Court of Appeals again set aside the FMC order. The FMC found that the unanimity rule blocked the desires of a majority of the conference for a commission rate increase; prevented conference members from competing effectively with the airlines (by keeping them from increasing commissions to travel agents on ship travel and thus encouraging the agents to promote ship travel over air travel); and injured the undecided traveler who had no opportunity to deal with an agent uninfluenced by his own economic interest favoring the airlines. The FMC found that the tying rule denied passengers the advantages of being able to deal with a travel

*Together with No. 258, *American Society of Travel Agents, Inc.* v. *Aktiebolaget Svenska Amerika Linien (Swedish American Line) et al.*, also on certiorari to the same court.

agent who can sell any means of travel; denied agents the ability to serve passengers wishing to travel on nonconference lines; and denied nonconference lines the opportunity to reach the 80% of transatlantic ship passengers who book travel through conference-appointed agents. In reaching the conclusion that both rules were detrimental to the commerce of the United States and contrary to the public interest and that the tying rule was unjustly discriminatory as between carriers, the FMC relied on the failure of respondents to establish legitimate objectives for rules that contravened antitrust principles, a standard which the Court of Appeals held was not authorized by the tests for illegality set forth in the statute. *Held:*

1. The Shipping Act, 1916, confers only a limited immunity from the antitrust laws, and the antitrust test formulated by the FMC, being an appropriate refinement of the statutory "public interest" standard, should have been upheld. Pp. 242–246.

2. The FMC's conclusions supporting its disapproval of the unanimity rule, in part grounded upon inferences permissible from the record, were based upon substantial evidence and should have been upheld by the Court of Appeals. Pp. 246–250.

3. There was no showing made that the tying rule was necessary to serve the stability of the conference, that conference members actually bore substantial portions of the expense of selecting and supervising the travel agents, or that the rule served any other legitimate purpose; and the FMC was therefore warranted in concluding that the absolute prohibition against agents dealing with nonconference lines was unjustified. Pp. 250–252.

4. Since these proceedings were commenced eight years ago, have been twice appealed to reviewing courts, and the FMC's findings are supported by substantial evidence, the Court of Appeals is directed to affirm the FMC's order. Pp. 252–253.

125 U. S. App. D. C. 359, 372 F. 2d 932, reversed and remanded.

Irwin A. Seibel argued the cause for petitioners in No. 257. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Turner, Louis F. Claiborne, Robert N. Katz* and *Gordon M. Shaw.*

Robert J. Sisk argued the cause for petitioner in No. 258. With him on the briefs were *Harold S. Barron* and *Glen A. Wilkinson.*

Edward R. Neaher argued the cause for respondents in both cases. With him on the brief were *Carl S. Rowe* and *Gertrude S. Rosenthal.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented in these cases is whether the Federal Maritime Commission properly disapproved two provisions of several shipping conference agreements. One of the provisions under attack, the so-called tying rule, prohibits travel agents who book passage on ships participating in the conferences from selling passage on competing, nonconference lines. The second provision, known as the unanimity rule, requires unanimous action by conference members before the maximum rate of commissions payable to travel agents may be changed.

The Commission's authority in this area stems from the Shipping Act, 1916.[1] Section 15 of this Act, as amended, requires common carriers by water to submit most of their cooperative agreements to the Commission and directs it to:

> "disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter . . . ."

In 1959 proceedings were initiated before the Federal Maritime Board, predecessor agency to the present Federal Maritime Commission, on the complaint of the American Society of Travel Agents, petitioner in No.

[1] 39 Stat. 728, as amended, 46 U. S. C. § 801 *et seq.*

258. The Society challenged a number of the practices of two conferences composed of steamship lines that furnish passenger service across the Atlantic. After extensive investigation and hearings before a Commission Examiner, the Commission disapproved both the tying and unanimity rules and ordered them eliminated. 7 F. M. C. 737 (1964). The Court of Appeals, however, set aside the order and remanded the case to the Commission for more detailed findings and explanations. 122 U. S. App. D. C. 59, 351 F. 2d 756 (1965). On remand the Commission again disapproved both rules. The tying rule was found detrimental to the commerce of the United States, unjustly discriminatory as between carriers, and contrary to the public interest. The unanimity rule was found detrimental to the commerce of the United States and contrary to the public interest. —— F. M. C. —— (1966). On appeal, the Court of Appeals again set aside the order, holding that the Commission's new opinion had not remedied the defects noted in the prior decision on appeal, 125 U. S. App. D. C. 359, 372 F. 2d 932 (1967), and we granted certiorari, 389 U. S. 816 (1967). We hold that the Commission's order was supported in all respects by adequate findings and analysis. We therefore reverse the judgment of the Court of Appeals and approve the order of the Commission.

I.

An understanding of the issues in these cases will be facilitated by a very brief discussion of the purposes of these shipping conferences and the federal statutes enacted to regulate them. Major American and foreign steamship lines which compete for traffic along the same routes have long joined together in conferences to fix rates and other charges, allocate traffic, and in other ways moderate the rigors of competition. Despite traditional hostility to anticompetitive arrangements of this kind,

however, Congress found after extensive investigation that the cooperative activity of these conferences was to some extent in the public interest. The House Committee that conducted the primary inquiry reported that the conferences promoted:

> "regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." H. R. Doc. No. 805, 63d Cong., 2d Sess., 416.

These advantages, the Committee concluded, could probably not be preserved in the face of unrestricted competition, and accordingly it recommended that the industry be granted some exemption from the antitrust laws. On the other hand, the Committee stressed that an unqualified exemption would be undesirable. The conferences had abused their power in the past and might do so in the future unless they were subjected to some form of effective governmental supervision. In response to these findings Congress enacted the Shipping Act, 1916. The statute not only outlawed a number of specific abuses but set up the United States Shipping Board, a predecessor of the present Federal Maritime Commission, with permanent authority under § 15 of the Act to modify or disapprove conference agreements. The antitrust immunity conferred was, as the House Committee had recommended, a limited one—only agreements receiving the approval of the Board were exempted. Originally the Board could disapprove an agreement on only three grounds: unjust discrimination, detriment to commerce, or illegality under one of the specific provisions of the Act. In 1959, however, Congress began an extensive

review of regulation under the Shipping Act,[2] and amendments passed in 1961 in response to these studies [3] included a provision granting considerably broader authority by permitting disapproval under § 15 of any agreement found to be "contrary to the public interest." The scheme of regulation adopted thus permits the conferences to continue operation but insures that their immunity from the antitrust laws will be subject to careful control.

II.

A crucial issue in these cases is respondents' challenge to the Commission's reliance on antitrust policy as a basis for disapproving these rules. Since the contention is equally relevant to analysis of the tying and unanimity rules, we consider it at the outset.

The Commission has formulated a principle that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." See —— F. M. C., at ——. In the present cases, but for the partial immunity granted by the Act, both the tying and unanimity rules undoubtedly would be held illegal under the antitrust laws, and

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[2] See Hearings before Antitrust Subcommittee of House Committee on the Judiciary, on Monopoly Problems in Regulated Industries: Ocean Freight Industry, 86th Cong., 1st and 2d Sess., ser. 14, Pt. 1, Vols. I–V, and Pt. 2, Vols. I–II (1959–1960), 87th Cong., 1st Sess., ser. 10, Pt. 3, Vols. I–II (1961); Hearings before Special Subcommittee on Steamship Conferences of House Committee on Merchant Marine and Fisheries, Steamship Conference Study, 86th Cong., 1st Sess., Pts. 1–3 (1959); H. R. Rep. No. 1419, 87th Cong., 2d Sess. (1962).

[3] 75 Stat. 762.

respondents failed to satisfy the Commission that the rules were necessary to further some legitimate interest. The Commission found this sufficient reason to disapprove the rules, but the Court of Appeals disagreed. Emphasizing that "[t]he statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress," the court held, "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles . . . ." 122 U. S. App. D. C., at 64; 351 F. 2d, at 761 (opinion on first appeal).

Insofar as this holding rests on the absence of an explicit antitrust test among the "four ways set out in the section," we think the Court of Appeals was excessively formalistic in its approach to the Commission's findings. By its very nature an illegal restraint of trade is in some ways "contrary to the public interest," and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of "the public interest." Certainly any reservations the Court of Appeals may have had on this point should have been dispelled by the Commission's careful explanation on remand of the connection between its antitrust standard and the public interest requirement. See —— F. M. C., at ——. As long as the Commission indicates which of the statutory standards is the ultimate authority for its disapproval, we can see no objection to the Commission's casting its primary analysis in terms of the requirements of its antitrust test.

Respondents argue more broadly, however, that the antitrust test is not a permissible elaboration of the statutory standards. They contend that the whole purpose of the statutory scheme would be defeated if incom-

patibility with the antitrust laws can be a sufficient reason for denying immunity from these laws. Congress, it is argued, has already decided that there is a justification for intrusions on our antitrust policy by the conference system, and accordingly the Commission cannot require further justifications from the shipping lines but must itself demonstrate the way in which the statutory requirements are violated.

Respondents' arguments, however, are not even superficially persuasive. Congress has, it is true, decided to confer antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists.[4] Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation

[4] For this reason the Commission's antitrust standard is entirely consistent with respondents' evidence of a congressional recognition at the time the "contrary to the public interest" test was added in 1961, that "our traditional antitrust concepts cannot be *fully* applied to this aspect of international commerce." S. Rep. No. 860, 87th Cong., 1st Sess., 2 (1961) (emphasis added). And for the same reason respondents' reliance on *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965), and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959), is misplaced. The antitrust standard formulated here is in full accord with the kind of accommodation between antitrust and regulatory objectives approved by this Court in those cases. Indeed we have stressed that such an accommodation does not authorize the agency in question to ignore the antitrust laws. *E. g., McLean Trucking Co.* v. *United States,* 321 U. S. 67, 79–80 (1944).

is established, this alone will normally constitute substantial evidence that the agreement is "contrary to the public interest," unless other evidence in the record fairly detracts from the weight of this factor. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory "public interest" standard.

III.

We turn then to the Commission's analysis of the specific impact of the unanimity rule. The rule is embodied in the basic agreement of the carriers in the Atlantic Passenger Steamship Conference, an association of the major lines serving passenger traffic between Europe and the United States and Canada. Article 6 (a) of this agreement provides that the rate of commission which member lines may pay to their agents must be established by unanimous agreement of the member lines. In addition, Article 3 (d) of the agreement permits the subcommittee with primary responsibility for suggesting commission rates to make recommendations to the full conference only when subcommittee members are in unanimous accord.

The Commission noted that at the time of its hearings, the commission paid by conference members to travel agents was substantially lower than that paid by the airlines. By the time the Commission wrote its opinion on remand, the conference had raised its commission to the level offered by the airlines, but the effective commission earned by travel agents remained lower on ocean travel because booking passage by sea requires three to four times as much of a travel agent's time as is required

to book air travel. The Commission found that the unanimity rule was responsible for the existing disparity between effective commissions on air and sea travel and for the delays in conference action to rectify the situation. On three specific occasions, lack of unanimity prevented the conference subcommittee from recommending an increase, even though a majority was recorded as being in favor of the proposals. The Commission also referred to several other occasions on which the conference and its subcommittee failed to take action. Because minutes apparently were not taken for these meetings, the Commission was unable to determine with certainty whether the unanimity rule had frustrated the will of a majority on these occasions.

The Commission then found that as a result of the relatively advantageous commission on sales of air travel, there was a definite tendency for travel agents to encourage their customers to travel by air rather than by sea. This situation in turn not only injured the majority of the shipping lines by diverting business to the airlines, but also injured the undecided traveler, who lost the opportunity to deal with an agent whose recommendations would not be influenced by his own economic interest. The Commission also found that respondents had failed to establish any important public interest served by the unanimity rule. Under these circumstances the Commission concluded that the rule was detrimental to commerce by fostering a decline in travel by sea, and contrary to the public interest in the maintenance of a sound and independent merchant marine. The Commission also found the rule contrary to the public interest in that it invaded the principles of the antitrust laws more than was necessary to further any valid regulatory purpose.

We find the Commission's analysis sound and the evidence in support of its conclusions more than ample.

Respondents attack the initial finding that the unanimity rule has blocked the desires of the majority to raise the commission rate, but the argument reduces to an insistence that the Commission establish this point by conclusive proof. It is true that there is no specific evidence in the record revealing that at any of the conference meetings where no action was taken, a majority favored an immediate increase.[5] But the Maritime Commission faces no such rigorous standard of proof. The issue to be decided was a purely factual one, and the Commission was entitled to draw inferences as to the wishes of the majority from the record as a whole. The record showed beyond doubt that in several instances a majority of the subcommittee favored an increase, and faced with the lack of proof one way or the other as to the wishes of the majority of the full conference, the Commission acted reasonably in assuming that the views of the subcommittee were not diametrically opposed to that of the entire membership. In addition, it is undisputed that the rule on several occasions operated to prevent a majority of the subcommittee from presenting its recommendations to the full conference, and the Commission could reasonably conclude that this impact on the subcommittee served in itself to delay or prevent action by the full conference. Although any conclusion as to the commission rate that would have prevailed under a different voting procedure must to some extent rest on "conjecture," the court below misconceived its reviewing

[5] Respondents correctly point out that there is no support for the Commission's finding that the majority of the members were unable to act at the meeting of February-March 1956 because of a veto exercised by one line. It does appear that at the meeting of May 3, 1960, a majority favored an increase, but the memorandum disclosing this does not indicate clearly whether the majority preferred to put the increase into effect immediately, or favored the actual decision to defer consideration.

function when it found this a sufficient basis for setting the Commission's finding aside. Having correctly noted that positive proof on various aspects of the case was simply not available one way or the other, the Commission was fully entitled to draw inferences on these points from the incomplete evidence that was available. "Conjecture" of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts.

Respondents' attack on the finding that the commission disparity affected the recommendations of travel agents suffers from this same misconception of the Commission's task. It is true that no agent testified that he had ever persuaded a customer to travel by air over the customer's preference to travel by sea. Agents heavily dependent on conference business could hardly be expected to make such an admission, but one agent did go so far as to concede that under some circumstances, there was a "definite tendency" to encourage a customer to choose air travel because "it is easier to sell" and "you make more money." This amply supports the Commission's conclusion.

The final problem is respondents' claim that the rule is justified because none of the member lines, the American-flag minority in particular, wishes to surrender control over basic financial decisions to a majority of its competitors. This is a bewildering contention, to say the least. The rule may enable a single line to protect itself from a majority decision, but the rule in no way guarantees that line control over its own financial decisions. Lack of unanimity under this particular rule does not leave the lines free to make independent deci-

sions,[6] but simply freezes the existing situation. In this way control over the basic financial decisions of all lines is "surrendered" not to the majority but to any single line that happens to oppose change. We therefore find that the Commission's conclusions with respect to the unanimity rule were supported by substantial evidence and should have been upheld by the Court of Appeals.

IV.

The tying rule is imposed by the second conference involved in these cases, the Trans-Atlantic Passenger Steamship Conference. This conference is composed of the major lines providing passenger service between America and Europe, and it has substantially the same membership as the conference which is formally responsible for the unanimity rule already considered. The tying rule prohibits all travel agents authorized to book passage for the member lines "from selling passage tickets for any steamer not connected with the fleets of the member Lines." The rule does not prohibit these agents from arranging air travel.

As the Commission correctly noted, this rule seriously interferes with the purposes of the antitrust laws. Under the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*. *United States* v. *General Motors*, 384 U. S. 127, 146–147 (1966); *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959). And the conference's tying rule specifically injures three distinct sets of interests. It denies passengers the advantages of being able to deal with a travel agent who can sell any means of travel. It denies agents the ability to serve passengers who wish

[6] Compare IATA Traffic Conference Resolution, 6 C. A. B. 639, 645 (1946). These airline conferences leave the individual members free to initiate their own rates when unanimous agreement cannot be reached.

to travel on nonconference lines. Most important, it denies nonconference lines the opportunity to reach effectively the 80% of all transatlantic steamship passengers who book their travel through conference-appointed agents.

Given these effects of the rule, which are not seriously disputed, it was incumbent upon the conference to establish a justification for the rule in terms of some legitimate objective. One of the possible purposes of the rule is to eliminate the competition of the nonconference lines, but this is not a permissible objective under the Shipping Act, see *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 491–493 (1958), and respondents quite properly do not press it. Respondents do contend, however, that the rule is justified as a means of preserving the stability of the conference. By choosing and supervising responsible agents who will book steamship passage only for its members, the conference creates an incentive for members to remain in the conference and for other lines to join. The Commission found no indication, however, that elimination of the rule would in fact jeopardize the stability of the conference. Although no evidence in the record actually tends to refute respondents' theory,[7] it is also clear that respondents failed to come forward with any evidence to support their claim. The theory was therefore insufficient to justify the undeniable injury to interests ordinarily protected by the antitrust laws.

Equally insubstantial is the second justification presented by respondents, that the conference members bear

[7] The Commission's reference to the fact that the Caribbean cruise trade operates without a tying rule does not seem to meet respondents' contention. Since the Caribbean cruise trade operates without a conference at all, the lack of a tying rule would in no way indicate the extent to which such a rule tends to strengthen membership in conferences.

the expense of selecting and supervising qualified agents and that other lines who wish to take advantage of these efforts should pay their fair share by joining the conference. The Commission found that most of the expenses incurred by the conference were in fact reimbursed by the agents themselves through annual fees. Many of the promotional activities were paid for by individual lines, and in addition these arrangements often required matching contributions by the agents. In light of these factors the Commission properly concluded that although the conference's efforts might entitle it to exercise some control over the agents' activities, there was no justification for completely prohibiting the agents from dealing with nonconference lines.

These circumstances taken together provide substantial support for all three of the Commission's findings—that the rule is detrimental to the commerce of the United States by injuring passengers, agents, and nonconference lines, that the rule is unjustly discriminatory as between conference and nonconference carriers, and that the rule is contrary to the public interest by unnecessarily invading the policies of the antitrust laws.

V.

For the reasons indicated the Commission properly disapproved the tying and unanimity rules involved in these cases. These proceedings were commenced more than eight years ago, and this is the second time the controversy has been appealed to the reviewing courts. On the second appeal to the Court of Appeals, that court took the extraordinary course of simply reversing, without remanding to the Commission for further action. Since we have found that the Commission's findings and order are supported by substantial evidence, and since there are no other meritorious contentions raised by the respondents, we think it is time for a final dis-

position of the proceedings. The judgment of the Court of Appeals is reversed, and the cases are remanded with directions to affirm the order of the Commission.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, concurring in the result.

I concur in the result reached by the Court, substantially for the reasons stated in the Court's opinion. However, I cannot join in the Court's general statements, *ante,* at 244–246, concerning the relationship between the antitrust laws and the "contrary to the public interest" standard of § 15 of the Shipping Act. It seems plain that the "contrary to the public interest" test was intended to comprehend factors unique to the shipping industry as well as those embodied in the antitrust laws. Hence, I believe that under the Act the Commission may not place upon a shipping conference the burden of justifying an agreement until the Commission has determined that in light of *both* shipping and antitrust factors the agreement would be "contrary to the public interest" in the absence of further explanation.

NATIONAL LABOR RELATIONS BOARD *v.* UNITED INSURANCE CO. OF AMERICA ET AL.

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

No. 178. Argued January 23–24, 1968.—Decided March 6, 1968.*

Petitioner insurance workers union seeks to represent respondent insurance company's "debit agents." The company refused to recognize the union, claiming that the agents were independent contractors rather than employees. The National Labor Relations Board (NLRB) in the ensuing unfair labor practice proceeding determined under the common law of agency that the agents were employees. It found that the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; are trained by company supervisory personnel; do business in the company's name and ordinarily sell only the company's policies; operate under terms and conditions established and changed unilaterally by the company; account for funds under strict company procedures; receive the benefit of the company's vacation plan and group insurance and pension fund; and have a permanent working arrangement under which they may continue with the company as long as their performance is satisfactory. The Court of Appeals refused to enforce the NLRB's order. *Held:* The NLRB's determination that the agents were company employees and not independent contractors represented a choice between two fairly conflicting views, and its order should have been enforced by the Court of Appeals. Pp. 256–260.

371 F. 2d 316, reversed.

Dominick L. Manoli argued the cause for the National Labor Relations Board, petitioner in No. 178 and respondent in No. 179. With him on the brief were *Solicitor General Griswold, Arnold Ordman* and *Norton J. Come.*

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*Together with No. 179, *Insurance Workers International Union, AFL–CIO* v. *National Labor Relations Board et al.*, also on certiorari to the same court.

Isaac N. Groner argued the cause and filed a brief for the Insurance Workers International Union, AFL–CIO, petitioner in No. 179 and respondent in No. 178.

Bernard G. Segal argued the cause for the United Insurance Co. of America, respondent in both cases. With him on the brief were *Samuel D. Slade* and *Herbert G. Keene, Jr.*

Shayle P. Fox filed a brief for the American Retail Federation, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

In its insurance operations respondent United Insurance Company uses "debit agents" whose primary functions are collecting premiums from policyholders, preventing the lapsing of policies, and selling such new insurance as time allows. The Insurance Workers International Union, having won a certification election, seeks to represent the debit agents, and the question before us is whether these agents are "employees" who are protected by the National Labor Relations Act or "independent contractors" who are expressly exempted from the Act.[1] Respondent company refused to recognize the Union, claiming that its debit agents were independent contractors rather than employees. In the ensuing unfair labor practice proceeding the National Labor Relations Board held that these agents were employees and ordered the company to bargain collectively with the Union. 154 N. L. R. B. 38. On appeal the Court of Appeals found that the debit agents were independent contractors and refused to enforce the Board's order. 371 F. 2d 316 (C. A. 7th Cir.). The importance of the question in the context involved to the administration of the

[1] The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*), protects an "employee" only and specifically excludes "any individual having the status of an independent contractor." (§ 2 (3).)

National Labor Relations Act prompted us to grant the petitions of the Board and the Union for certiorari. 389 U. S. 815.

At the outset the critical issue is what standard or standards should be applied in differentiating "employee" from "independent contractor" as those terms are used in the Act. Initially this Court held in *NLRB* v. *Hearst Publications,* 322 U. S. 111, that "Whether . . . the term 'employee' includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation." 322 U. S., at 124. Thus the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in § 2 (3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.[2] And both petitioners and respondents agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.

Since agency principles are to be applied, some factual background showing the relationship between the debit agents and respondent company is necessary. These basic facts are stated in the Board's opinion and will be very briefly summarized here. Respondent has district offices in most States which are run by a manager who usually has several assistant managers under him.

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[2] See 93 Cong. Rec. 6441–6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947, p. 1537. See also H. R. Rep. No. 245, 80th Cong., 1st Sess., 18, 1 Leg. Hist., 1947, p. 309; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32–33, 1 Leg. Hist., 1947, pp. 536–537.

Each assistant manager has a staff of four or five debit agents, and the total number of such agents connected with respondent company is approximately 3,300. New agents are hired by district managers, after interviews; they need have no prior experience and are assigned to a district office under the supervision of an assistant district manager. Once he is hired, a debit agent is issued a debit book which contains the names and addresses of the company's existing policyholders in a relatively concentrated geographic area. This book is company property and must be returned to the company upon termination of the agent's service. The main job of the debit agents is to collect premiums from the policyholders listed in this book. They also try to prevent the lapsing of policies and sell new insurance when time allows. The company compensates the agents as agreed to in the "Agent's Commission Plan" under which the agent retains 20% of his weekly premium collections on industrial insurance and 10% from holders of ordinary life, and 50% of the first year's premiums on new ordinary life insurance sold by him. The company plan also provides for bonuses and other fringe benefits for the debit agents, including a vacation-with-pay plan and participation in a group insurance and profit-sharing plan. At the beginning of an agent's service an assistant district manager accompanies the new agent on his rounds to acquaint him with his customers and show him the approved collection and selling techniques. The agent is also supplied with a company "Rate Book," which the agent is expected to follow, containing detailed instructions on how to perform many of his duties. An agent must turn in his collected premiums to the district office once a week and also file a weekly report. At this time the agent usually attends staff meetings for the discussion of the latest company sales techniques, company directives, etc. Complaints against an agent are investigated

by the manager or assistant manager, and, if well founded, the manager talks with the agent to "set him straight." Agents who have poor production records, or who fail to maintain their accounts properly or to follow company rules, are "cautioned." The district manager submits a weekly report to the home office, specifying, among other things, the agents whose records are below average; the amounts of their debits; their collection percentages, arrears, and production; and what action the district manager has taken to remedy the production "letdown." If improvement does not follow, the company asks such agents to "resign," or exercises its rights under the "Agent's Commission Plan" to fire them "at any time."

There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor,[3] and these cases present such a situation. On the one hand these debit agents perform their work primarily away from the company's offices and fix their own hours of work and work days; and clearly they are not as obviously employees as are production workers in a factory. On the other hand, however, they do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor. In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. When this is done, the decisive factors in these cases become the following:

[3] See annotated cases in 55 A. L. R. 289 *et seq.* and 61 A. L. R. 218 *et seq.*

the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission Plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory. Probably the best summation of what these factors mean in the reality of the actual working relationship was given by the chairman of the board of respondent company in a letter to debit agents about the time this unfair labor practice proceeding arose:

> "if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agents final [*sic*].
>
> "The company is going to have its business managed in your district the same as all other company districts in the many states where said offices are located. The other company officials and I have managed the United Insurance Company of Amer-

> ica's operations for over 45 years very successfully, and we are going to continue the same successful plan of operation, and we will not allow anyone to interfere with us and our successful plan."

The Board examined all of these facts and found that they showed the debit agents to be employees. This was not a purely factual finding by the Board, but involved the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor? It should also be pointed out that such a determination of pure agency law involved no special administrative expertise that a court does not possess. On the other hand, the Board's determination was a judgment made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. As we said in *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, "Nor does it [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S., at 488. Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so.

Reversed.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

Syllabus.

VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* FEDERAL MARITIME COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 69. Argued November 13, 1967.—Decided March 6, 1968.

The Pacific Maritime Association (PMA), representing the Pacific Coast shipping industry employers, and the International Longshoremen's and Warehousemen's Union reached an agreement whereby the union consented to the use of labor-saving devices and the elimination of certain restrictive work practices in return for PMA's promise to create a $29,000,000 fund to mitigate the effect of technological unemployment. The agreement reserved to PMA the right to determine how to raise the fund from its members. PMA approved an assessment per "revenue ton," based either on weight (2,000 pounds) or measurement (40 cubic feet), determined by the manner in which cargo had customarily been manifested, with the exception of automobiles, which were to be declared by measurement. For petitioner's automobiles the assessment came to $2.35 per vehicle, an increase in unloading costs of 22.5%, rather than 25 cents under an assessment by weight, or about 2.4% increase in costs, comparable to the average fund assessment of 2.2% for all other general cargo. Petitioner obtained a stay of the action brought by PMA to collect the assessment from the terminal company unloading petitioner's automobiles, to permit it to invoke the primary jurisdiction of the Federal Maritime Commission (FMC) to determine whether the assessments were claimed under an agreement required to be filed with and approved by the FMC under § 15 of the Shipping Act, 1916, and whether the assessments violated §§ 16 and 17 of that Act. The FMC dismissed petitioner's complaint, holding that the agreement did not "affect competition" and did not come within § 15 in the absence of an additional agreement by PMA to pass on all or a portion of the assessments to the carriers and shippers served by the terminal operators; that § 16 was not violated since petitioner had not shown any unequal treatment between its cars and other automobiles or cargo competitive therewith; and that there was no violation of § 17 since the petitioner

had received "substantial benefits" in return for the assessment. The Court of Appeals affirmed. *Held:*

1. The agreement was required to be filed with the FMC under § 15 of the Act. Pp. 268–278.

(a) The FMC recognized that the assessment formula was a "cooperative working agreement" clearly within the plain language of § 15. P. 271.

(b) In holding that the agreement did not "affect competition" the FMC ignored economic realities which required most of the assessments to be passed on. P. 273.

(c) The FMC has not previously limited § 15 to horizontal agreements among competitors, but has applied it to other agreements within its literal terms. P. 274.

(d) The legislative history of this broad statute indicates that Congress intended to subject to the scrutiny of a specialized agency the myriad of restrictive maritime agreements. Pp. 275–276.

(e) While the FMC may determine that some *de minimis* or routine agreements need not be filed under § 15, this agreement, levying $29,000,000, binding the whole Pacific Coast shipping industry, and resulting in substantially increased stevedoring and terminal charges, was neither *de minimis* nor routine. Pp. 276–277.

(f) The only agreement involved here is the one among PMA members allocating the impact of the fund levy; and only the assessment on automobiles is challenged. P. 278.

2. When the agreement is filed, the FMC may consider anew whether the mere absence of a competitive relationship should foreclose inquiry under § 16. Pp. 279–280.

3. The proper inquiry under § 17 is whether the charge levied is reasonably related to the service rendered. Pp. 280–282.

125 U. S. App. D. C. 282, 371 F. 2d 747, reversed and remanded.

Walter Herzfeld argued the cause for petitioner. With him on the briefs were *Cecelia H. Goetz, Richard A. Whiting, Robert J. Corber* and *Stanley J. Madden.*

Richard A. Posner argued the cause for the United States. With him on the brief were *Acting Solicitor*

General Spritzer, Assistant Attorney General Turner, Howard E. Shapiro and *Milton J. Grossman.*

Robert N. Katz argued the cause and filed a brief for respondent Federal Maritime Commission. *Gary J. Torre* argued the cause for respondents Pacific Maritime Association et al. With him on the brief for Pacific Maritime Association were *Edward D. Ransom* and *R. Frederic Fisher.* On the brief for Marine Terminals Corp. were *Owen Jameson* and *William W. Schwarzer.*

Norman Leonard filed a brief for the International Longshoremen's & Warehousemen's Union, as *amicus curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, a German manufacturer of automobiles, is one of the largest users of the ports on the West Coast of the United States, delivering through them more than 40,000 vehicles each year, the majority transported there by vessels chartered by the petitioner rather than by common carrier. This case grows out of the petitioner's claim that charges imposed upon the unloading of its automobiles at Pacific Coast ports are in violation of the Shipping Act, 1916, as amended. 39 Stat. 728, 46 U. S. C. § 801 *et seq.* The dispute has a long and somewhat complicated history.

The Pacific Maritime Association (the Association) is an employer organization of some 120 principal common carriers by water, stevedoring contractors, and marine terminal operators, representing the Pacific Coast shipping industry. The primary function of the Association is to negotiate and administer collective bargaining contracts with unions representing its members' employees, of which the International Longshoremen's and Warehousemen's Union (ILWU) is one. In late 1960 the

Association and ILWU reached a milestone agreement which, it was hoped, would end a long and troubled history of labor discord on the West Coast waterfront.[1] The ILWU agreed to the introduction of labor-saving devices and the elimination of certain restrictive work practices. In return, the Association agreed to create over the period from 1961 to 1966 a "Mechanization and Modernization Fund" of $29,000,000 (the Mech Fund) to be used to mitigate the impact upon employees of technological unemployment.[2] The agreement specifically reserved to the Association alone the right to determine how to raise the Mech Fund from its members, at the rate of some $5,000,000 a year.

A committee of the Association investigated various possible formulas for collecting the Fund from the stevedoring contractors and terminal operators—*i. e.*, those Association members who were employers of workers represented by the ILWU. A majority of the committee recommended that the Mech Fund assessment be based solely on tonnage handled, and this recommendation was adopted by the Association membership.[3] Under this

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[1] All parties agree that this agreement was an enlightened, forward-looking step in West Coast longshore labor relations. See Kossoris, Working Rules in West Coast Longshoring, 84 Monthly Labor Rev. 1 (1961); Killingsworth, The Modernization of West Coast Longshore Work Rules, 15 Ind. & Lab. Rel. Rev. 295 (1962); *ILWU* (*American Mail Line*), 144 N. L. R. B. 1432, 1442 (1963).

The agreement was not signed in final form until November 15, 1961, although it was implemented in many respects prior to that date.

[2] The agreement has been continued, and the Mech Fund is still being collected and paid out.

[3] A minority of the committee recommended that the Mech Fund be raised by the same formula by which the Association's dues were levied—a formula combining both tonnage handled and man-hours employed, in a ratio of 40/60.

Although the Mech Fund was initially assessed entirely on the basis of tonnage, the formula was later amended to assess employers

formula, general cargo was assessed at 27½¢ per "revenue ton." [4] A revenue ton is based either on weight (2,000 lbs.=one ton) or measurement (40 cu. ft.=one ton). Whether tonnage declarations on a particular item of cargo were to be by weight or by measurement was to depend, with one exception, upon how that cargo had customarily been manifested (and reported to the Association for dues purposes) in 1959. The one exception was automobiles, for which there had been no uniform manifesting custom.[5] The Association decided that automobiles were to be declared by measurement for Mech Fund purposes, regardless of how they were or had been manifested.

Unlike shippers by common carrier, the petitioner must arrange and pay for the unloading of its own chartered vessels upon their arrival in port. For this purpose it has since 1954 contracted with Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles (Terminals), which are members of the Association, for the performance of stevedoring and related services in unloading vehicles from the petitioner's chartered ships in West Coast ports, at a negotiated price. Prior to the Mech Fund assessment agreement, Terminals' charge to the petitioner for these unloading services was $10.45 per vehicle, of which about a dollar represented Terminals' profit. When the vehicles were assessed for the Mech Fund by measurement, the assessment came to $2.35 per vehicle—representing, if passed on to the peti-

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of marine clerks on a man-hour basis. About 12% of the fund was collected in this way.

[4] Bulk cargo was assessed at 5½¢ per revenue ton. In December 1961, the rates were increased to 28½¢ for general cargo and 9¢ for bulk cargo.

[5] On chartered vessels automobiles are manifested on a unit basis (showing weight and sometimes measurement). On common carriers both weight and measurement are shown. In coastwise trade automobiles are manifested by weight.

tioner, an increase in unloading costs of 22.5%.[6] If the vehicles had been assessed by weight (0.9 tons) rather than by measurement (8.7 tons),[7] the assessment would have been 25¢ per vehicle—an increase of about 2.4%, comparable to the average Mech Fund assessment of 2.2% for all other general cargo. Assessment by measurement rather than by weight thus resulted in an assessment rate for the petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund agreement.[8] The petitioner and Terminals both protested these seeming inequities to a committee of the Association set up to handle such claims, but without success.[9]

The petitioner refused to pay any additional charge resulting from the Association's levy, and Terminals, while continuing to unload Volkswagen automobiles for the petitioner, did not pay its resulting assessment to the Association. The Association sued Terminals in a federal court in California for its failure to pay the Mech Fund assessments; Terminals admitted all the allegations of

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[6] Some time after the assessment agreement was implemented, Terminals' charge to the petitioner exclusive of the assessment decreased. The amount of the decrease does not appear in the record.

[7] These figures represent a weighted average of the petitioner's two model lines at the time of the assessment agreement. Passenger models were 0.8 ton by weight and 7.8 tons by measurement; unloading costs initially increased an estimated 22%. Transporter models were 1.1 tons by weight and 11.4 tons by measurement; unloading costs initally increased an estimated 31%.

[8] When the Mech Fund agreement was reached, the unloading of automobiles was already so highly mechanized that there was little likelihood of improvement. Hence shippers of automobiles stood to receive from the agreement only the general benefits of a stable labor situation, such as freedom from strikes and slowdowns.

[9] The committee did make downward adjustments for scrap metal and lumber.

the complaint and impleaded the petitioner as a defendant. The petitioner then obtained a stay of that action to permit it to invoke the primary jurisdiction of the Federal Maritime Commission, in order to determine the following issues:

> "1. Whether the assessments claimed from [the petitioner] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U. S. C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.
>
> "2. Whether the assessments claimed from [the petitioner] result in subjecting the automobile cargoes of [the petitioner] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U. S. C. 815 (1961).
>
> "3. Whether the assessments claimed from [the petitioner] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U. S. C. 816 (1961)."

The petitioner then began the present proceedings by filing a complaint with the Commission raising the above issues. The petitioner alleged that the Association was dominated by common carriers [10] which had agreed upon the assessment formula in order to shift a disproportionate share of the Mech Fund assessment onto the peti-

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[10] By virtue of the Association's bylaws, carriers control the Board of Directors and all membership votes. Both the committee which devised the assessment formula and the one which later ruled on claims of inequities were made up entirely of carriers; neither committee had a single member who was a stevedoring contractor or terminal operator.

tioner, which did not patronize those common carriers.[11] The Commission, after a hearing, upheld the initial decision of its examiner and dismissed the complaint, with two dissents.[12] The Court of Appeals for the District of Columbia Circuit affirmed,[13] and we granted certiorari to consider important questions under the Shipping Act.[14]

I.

The petitioner's primary contention—supported by the United States, a party-respondent—is that implementation of the Association's formula for levying the Mech Fund assessments was unenforceable, because the agreement among Association members imposing that formula was not filed with the Commission in accord with § 15 of the Act. That section provides that there be filed with the Commission "every agreement" among persons subject to the Act

> "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition;

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[11] The petitioner is the largest shipper of dry cargo by charter to West Coast ports. It ships more than 75% of its vehicles by charter and most of the rest by common carriers which are not members of the Association. About two-thirds of all automobiles imported through West Coast ports are Volkswagens. It appears that no other importer of automobiles through West Coast ports uses chartered vessels.

Most, but not all, of the stevedoring contractors and terminal operators passed the Mech Fund assessment on to their customers. In most instances these customers were common carriers who were members of the Association. The member carriers did not pass the assessment on to shippers. Hence, except in situations like the petitioner's, the cost of the Mech Fund was borne by Association members.

[12] *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp.*, 9 F. M. C. 77.

[13] *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 125 U. S. App. D. C. 282, 371 F. 2d 747.

[14] 388 U. S. 909.

> pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . ." [15]

Until submitted to and approved by the Commission, "it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . . ." [16] The Commission is directed to disapprove any agreement

> "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers,

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[15] "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements." 46 U. S. C. § 814.

The original statute in 1916 required filing with the United States Shipping Board. 39 Stat. 728, 729, 733. The Shipping Board was succeeded in 1933 by the United States Shipping Board Bureau of the Department of Commerce, Exec. Order No. 6166, § 12 (1933); in 1936 by the United States Maritime Commission, 49 Stat. 1985; in 1950 by the Federal Maritime Board, 64 Stat. 1273; and in 1961 by the Federal Maritime Commission, 75 Stat. 840. In this opinion the Federal Maritime Commission and its predecessors are collectively referred to as the Commission.

[16] "Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall

> or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of [the Act]. . . ." [17]

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be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817 (b) of this title and with the provisions of any regulations the Commission may adopt." 46 U. S. C. § 814.

[17] "The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any

An agreement filed with and approved by the Commission is immunized from challenge under the antitrust laws.[18]

The Commission held that, although the Mech Fund assessment formula was a "cooperative working agreement" clearly within the plain language of § 15, it nonetheless was not the kind of agreement required to be filed with the Commission under that section:

> "Although the literal language of section 15 is broad enough to encompass any 'cooperative working arrangement' entered into by persons subject to the Act, the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives.
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> . . . . .
>
> "It is not contested that the membership of [the Association] entered into an agreement as to the manner of assessing its own membership for the collection of the 'Mech' fund. Such an agreement, however, does not fall within the confines of section 15 as, standing by itself, it has no impact upon

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member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints." 46 U. S. C. § 814.

[18] "Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto." 46 U. S. C. § 814.

> outsiders. What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the [Association] membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators." 9 F. M. C., at 82–83.

The Court of Appeals affirmed. That court felt itself confined by our decision in *Consolo* v. *FMC*, 383 U. S. 607, to determining simply whether the Commission's ruling was supported by "substantial evidence." With "due deference to the expertise of the Commission," it concluded "(albeit with some hesitation) that there is substantial evidence in the record considered as a whole to support the Commission's decision." 125 U. S. App. D. C., at 290, 371 F. 2d, at 755.

The issue in this case, however, relates not to the sufficiency of evidence but to the construction of a statute. The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." *NLRB* v. *Hearst Publications*, 322 U. S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U. S. 143, 153–154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 385, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U. S. 278, 291. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318. Cf. *FMB* v. *Isbrandtsen Co.*, 356 U. S. 481, 499–500 (where this Court overturned the Commission's construction of § 14 of the Shipping Act).

In limiting § 15 to agreements which "affect competition" and in finding that the assessment agreement did not so "affect competition," the Commission in this case used that phrase in a highly artificial sense—by requiring "an additional agreement by the [Association] membership to pass on all or a portion of its assessments . . . ." There is no question that the assessment agreement necessarily affected the cost structures of, and the charges levied by, individual Association members. Most, though not all, of the stevedoring contractors and terminal operators did pass the assessment on. The economic realities were such that many of them had no choice—a fact of which they apprised the Association at the time the assessment arrangement was being devised.[19] In the case of Terminals, the assessment it had to pay on Volkswagen automobiles was more than twice its profit margin.

The Commission thus took an extremely narrow view of a statute that uses expansive language. In support of that view, the Commission argued in this Court that a narrow construction of § 15 should be adopted in order to minimize the number of agreements that may receive antitrust exemption. However, antitrust exemption results, not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under § 15 to consider antitrust

[19] The dissenting opinion of Commissioner Patterson vigorously attacked the Commission's finding that there was no implied understanding among the Association members that the assessment would be passed on. 9 F. M. C., at 101–104. The Court of Appeals found considerable evidence in support of Commissioner Patterson's view. 125 U. S. App. D. C., at 290, n. 7, 371 F. 2d, at 755, n. 7. However, applying the substantial evidence rule, the court upheld the Commission's finding, although indicating that it might have found the facts differently itself. 125 U. S. App. D. C., at 290–291, 371 F. 2d, at 755–756.

implications.[20] *FMC* v. *Aktiebolaget Svenska Amerika Linien, ante,* p. 238; see also *Isbrandtsen Co.* v. *United States,* 93 U. S. App. D. C. 293, 211 F. 2d 51.[21]

The Commission itself has not heretofore limited § 15 to horizontal agreements among competitors, but has applied it to other types of agreements coming within its literal terms. See, *e. g., Agreements Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc.,* 5 F. M. B. 648 (1959), affirmed, 287 F. 2d 86, and *Agreement No. T–4: Terminal Lease Agreement at Long Beach, California,* 8 F. M. C. 521 (1965), applying § 15 to lease agreements.[22] In the latter case, decided only four months before its decision in the case before us, the Commission said:

> "Section 15 describes in unambiguous language those agreements that must be filed; it does not speak of agreements per se violative of the Sherman Act.

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[20] One of the standards for approval under § 15, added in 1961, 75 Stat. 763, is whether or not the agreement is "contrary to the public interest." See n. 17, *supra.* "We think it now beyond dispute that 'the public interest' within the meaning of section 15 includes the national policy embodied in the antitrust laws." *Mediterranean Pools Investigation,* 9 F. M. C. 264, 289.

Any agreement subject to § 15 filing that is not both filed and approved is not only illegal under § 15 but also subject to attack under the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213.

[21] "[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute." 93 U. S. App. D. C., at 299, 211 F. 2d, at 57.

[22] See also statement of Commission Chairman Harllee requesting from Congress the authority for the Commission to exempt from § 15 such otherwise included agreements as those between two freight forwarders in different ports to perform services for each other. H. R. Rep. No. 2248, 89th Cong., 2d Sess., 4–5 (1966).

> Since the wording of section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve." 8 F. M. C., at 531.

To limit § 15 to agreements that "affect competition," as the Commission used that phrase in the present case, simply does not square with the structure of the statute.[23]

The legislative history offers no support for a different view. The genesis of the Shipping Act was the "Alexander Report" in 1914.[24] *FMB* v. *Isbrandtsen Co.*, 356 U. S. 481, 490. While it is true that the attention of that congressional committee was focused primarily upon the practices that had cartelized much of the maritime industry, it is clear that the concerns of its inquiry were far more broadly ranging. The report summed up the testimony before the committee:

> "Nearly all the steamship line representatives . . . expressed themselves as not opposed to government supervision . . . and approval of *all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies.* On the other hand, the shippers who appeared as witnesses . . . were in the great majority of instances favorable to a comprehensive system of government supervision . . . [and] *the approval of contracts, agreements, and arrangements, and the general supervision of all conditions* of water transportation which vitally affect the interests of shippers." Alexander Report, at 418. (Emphasis added.)

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[23] Section 15 requires filing of "every agreement" in any of seven categories, and one of the seven comprises all agreements which "regulat[e] . . . competition." See n. 15, *supra*. The other six categories would be rendered virtually meaningless by the Commission's construction.

[24] House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations, H. R. Doc. No. 805, 63d Cong., 2d Sess., 415–424 (1914).

The committee recommended, among other things:

> "That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval . . . a copy of all written agreements (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies." Alexander Report, at 419–420.

Nothing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than follow this recommendation of the Alexander Report and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.[25]

This is not to say that the Commission is without power to determine, after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a *de minimis* or routine character as not to require formal filing. Since the Commission's decision in the present case, Congress has explicitly given it such authority:

> "The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of such persons from any requirement of this chapter, or Intercoastal Shipping Act, 1933,

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[25] The recommendations of the Alexander Report were incorporated into both the House and Senate Reports on the Shipping Act. H. R. Rep. No. 659, 64th Cong., 1st Sess., 27–32 (1916); S. Rep. No. 689, 64th Cong., 1st Sess., 7–12 (1916).

where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

"The Commission may attach conditions to any such exemptions and may, by order, revoke any such exemption." [26] 46 U. S. C. § 833a (1964 ed., Supp. II).

But the agreement with which we deal here—levying $29,000,000 over five years, binding all principal carriers, stevedoring contractors, and terminal operators on the Pacific Coast, and necessarily resulting in substantially increased stevedoring and terminal charges—was neither *de minimis* nor routine. We hold that this agreement was required to be filed under § 15 of the Act.

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[26] The need for this provision is set forth in S. Rep. No. 1459, 89th Cong., 2d Sess., 2 (1966):

"The Federal Maritime Commission under the Shipping Act, 1916, regulates certain operations of water carriers and other persons subject to the act which have only slight effect on the foreign commerce of this country and are not significant in the overall design of regulation contemplated by the 1916 act. Exacting compliance with the act under these circumstances has proven unnecessarily costly to the carrier and the Government.

"The authority conferred under this legislation will relieve the Commission and affected carriers of an undue regulatory burden. In addition, a general exemption will preclude the necessity for a piecemeal approach in the future."

Prior to this 1966 amendment, the Commission had taken some steps to protect itself from *de minimis* filings. In *Section 15 Inquiry,* 1 U. S. S. B. 121 (1927), the Commission held "routine" intraconference changes and transactions not subject to § 15. In *Oranje Line* v. *Anchor Line,* 6 F. M. B. 199, 209 (1961), the Commission construed its decision in *Los Angeles By-Products Co.* v. *Barber S. S. Lines,* 2 U. S. M. C. 106 (1939), as holding joint advertising not subject to § 15. Proceeding under general power to issue regulations conferred on it in 1961, 46 U. S. C. § 841a, the Commission exempted at least one class of *de minimis* agreements in 46 CFR §§ 530.5 (d)(4) and (5), dealing with certain terminal agreements.

It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case. Moreover, so far as the record shows, only the assessment on automobiles is now challenged, and there is no reason to suppose that the Commission will not consider expeditious approval of so much of the agreement as is not in dispute.

II.

The petitioner also attacked the Association's assessment of its automobiles under § 16 and § 17 of the Shipping Act. Section 16 makes it unlawful "to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage," [27] and

[27] "It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic

§ 17 forbids any "unjust or unreasonable" regulation or practice "relating to or connected with the receiving, handling, storing, or delivering of property." [28] The Commission ruled that neither of these sections had been violated, and the Court of Appeals affirmed.

If the agreement is now filed under § 15, the Commission will be called upon again to consider the effect of §§ 16 and 17, since an agreement that violates a specific provision of the Act must be disapproved.[29] Accordingly, it is not inappropriate, without now passing upon the ultimate merits of the §§ 16 and 17 issues, to give brief consideration to the Commission's handling of those issues upon the present record.

The Commission ruled that the petitioner had failed to demonstrate any "undue or unreasonable prejudice or disadvantage" under § 16 solely because it had not shown any unequal treatment as between its automobiles and other automobiles or cargo competitive with automobiles. In so ruling, the Commission applied the "competitive relationship" doctrine which it has developed in cases concerning rates for carriage of goods by sea.[30]

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in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 46 U. S. C. § 815.

[28] "Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 46 U. S. C. § 816.

[29] See n. 17, *supra*.

[30] See, *e. g.*, *Boston Wool Trade Assn.* v. *M. & M. T. Co.*, 1 U. S. S. B. 24 (1921); *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.*, 1 U. S. S. B. 101 (1926); *Philadelphia Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. 538 (1936); *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland,"* 4 F. M. B. 343 (1953); *West Indies Fruit Co.* v. *Flota Mercante*, 7 F. M. C. 66 (1962).

But the Commission, in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity,[31] has often found § 16 violations even in the absence of a "competitive relationship." See, *e. g., Practices, etc., of San Francisco Bay Area Terminals,* 2 U. S. M. C. 588 (1941) and 709 (1944), and *Storage Practices at Longview, Washington,* 6 F. M. B. 178 (1960), involving storage charges; and *New York Foreign Freight Forwarders and Brokers Assn.* v. *FMC,* 337 F. 2d 289, involving freight forwarders' fees. In a proceeding subsequent to its decision in the present case, the Commission explicitly dispensed with the competitive relationship requirement with respect to port "free time." *Investigation of Free Time Practices—Port of San Diego,* 9 F. M. C. 525 (1966); cf. *California* v. *United States,* 320 U. S. 577. See also *Investigation on Household Goods, North Atlantic Mediterranean Freight Conference,* F. M. C. Docket No. 66–49 (June 30, 1967). When the agreement in the present case is filed, the Commission may consider anew whether the mere absence of a competitive relationship should foreclose further § 16 inquiry.[32]

With respect to § 17, the Commission found that the assessment upon the petitioner's automobiles was not

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[31] See S. Bross, Ocean Shipping 189–190 (1956); C. Cufley, Ocean Freights and Chartering 400–407 (1962).

[32] The Interstate Commerce Commission has a competitive relationship rule with respect to § 3 (1) of the Interstate Commerce Act, 54 Stat. 902, 49 U. S. C. § 3 (1), *Rheem Mfg. Co.* v. *Chicago, R. I. & P. R. Co.,* 273 I. C. C. 185; *United States* v. *Great Northern R. Co.,* 301 I. C. C. 21. However, that Commission has said:

"This Commission has never held that competition is an indispensable element in a situation of undue prejudice and preference, although it has frequently said that 'ordinarily,' or 'generally,' a competitive relation must appear." *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.,* 229 I. C. C. 497, 501.

"unreasonable," because the petitioner had received "substantial benefits" in return for the assessment, and there was no showing of a deliberate intent to impose an unfair burden upon the petitioner. This, we think, reflects far too narrow a view of § 17. It may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under § 17, even though not all members of the group receive equal benefits. See *Evans Cooperage Co.* v. *Board of Commissioners of the Port of New Orleans,* 6 F. M. B. 415.[33] But here a relatively large charge was unequally imposed. The benefits received by the petitioner may have been substantial, but other cargo received greater benefits at one-tenth the cost.[34] Moreover, the question of reasonableness under § 17 does not depend upon unlawful or discriminatory intent. As the Commission itself has said:

> "[Sections 16 and 17] proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing of the act, and the question of intent is not involved." *Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17,* 7 F. M. C. 673, 675–676 (1964).

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[33] In the *Evans Cooperage* case the Commission upheld a uniform wharfage charge which was imposed on all those who used the wharf, even though the various users of the wharf did not all receive precisely equal benefits from it. But the Commission looked beyond "substantial benefits" to the relationship between the service and the charge:

"The [Commission of the Port of New Orleans] has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is *whether* its facilities are being used and *the commission is performing a service reasonably related to its charges.* The Examiner considered the evidence and found that it was." (Emphasis added.) 6 F. M. B., at 418–419.

[34] See n. 8, *supra.*

Cf. *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 523–526; *ICC* v. *Chicago G. W. R. Co.*, 209 U. S. 108.

The question under § 17 is not whether the petitioner has received some substantial benefit as the result of the Mech Fund assessment, but whether the correlation of that benefit to the charges imposed is reasonable. The "substantial benefits" measure of unreasonableness used by the Commission in this case is far too blunt an instrument. Nothing in the language or history of the statute supports so tortured a construction of the phrase "just and reasonable." The Commission has cited no similar construction of the phrase by any other regulatory agency or court. Indeed, in past decisions the Commission itself has not applied any such test. See *California Stevedore & Ballast Co.* v. *Stockton Elevators, Inc.*, 8 F. M. B. 97 (1964), and *Practices, etc., of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588 (1941), affirmed, 320 U. S. 577, where the Commission found violations of § 17 even though the benefits received were clearly substantial. The proper inquiry under § 17 is, in a word, whether the charge levied is reasonably related to the service rendered.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE HARLAN, concurring.

Although I agree with the conclusions reached by the Court in this case, I deem it desirable to amplify the reasons, as I see them, for what is decided today. More especially, I think that further justification is needed for the Court's decision (1) that the "assessment agreement" falls within the Commission's jurisdiction under

§ 15 notwithstanding its intimate connection with the underlying collective bargaining agreement; and (2) that the Commission should give further consideration to the §§ 16 and 17 issues notwithstanding that it has already determined them.

I.

The Pacific Maritime Association is a multi-employer collective bargaining group. Its "assessment agreement" directly in question here is closely related to a collective bargaining agreement covering a subject about which employers are required to bargain, "terms and conditions of employment."[1] This underlying labor agreement was, according to apparently unanimous industry and expert opinion, a highly desirable step forward in the shipping industry.

Multi-employer collective bargaining units have long been recognized as among the unit classifications that the National Labor Relations Board may deem "appropriate." In *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87, we held that Congress intended

> "that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." *Id.,* at 96.

We specifically referred to longshoring as an industry with a long history of multi-employer bargaining, and we noted

> "cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Id.,* at 95.

[1] 61 Stat. 142, 29 U. S. C. § 158 (d).

The Board has authorized a multi-employer bargaining unit for West Coast shipping, and the labor agreement that forms the background to this case is additional "cogent evidence."

At the same time, the very existence of multi-employer units, and the obvious need for the employers involved to agree on collective policy, must invariably have competitive effects. The signatories to a collective bargaining agreement are frequently, by the very act of signing, agreeing with their own competitors on matters such as labor costs, certain nonlabor costs, services to be provided to the public, and (indirectly) price increases.

Multi-employer collective bargaining must therefore be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, *viz.*, the antitrust laws and, in the case of maritime labor relations, the Shipping Act. This is a problem on which Congress has provided relatively little direct guidance,[2] but it is one of a kind that the Court has repeatedly grappled with since *Allen Bradley Co.* v. *Union*, 325 U. S. 797. It is a problem of line-drawing.

The Court, noting that the assessment agreement levied $29,000,000, thus "necessarily resulting in substantially increased stevedoring and terminal charges," *ante*, at 277, holds that the assessment agreement must be filed under § 15 of the Act. It says that the underlying labor agreement is not before us and the "continuing validity" of that agreement is not brought into question by today's decision. *Ante*, at 278.

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[2] Section 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17, provides that "[t]he labor of a human being is not a commodity or article of commerce." Section 15 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 814, provides that agreements filed and approved by the Commission "shall be excepted from the provisions of sections 1–11 and 15 of Title 15 [antitrust provisions] . . . ."

On the other hand, my Brother DOUGLAS argues that on the Court's premise the assessment agreement could not be distinguished from any collective bargaining agreement that "raised labor costs beyond the point at which PMA members could be expected to absorb those costs without raising prices or charges." *Post,* at 313. He further contends that if part of a collective bargaining agreement is subject to Commission approval, this will stifle labor negotiation.[3] Consequently, he suggests that a proper accommodation between "labor" and "competition" interests can be reached by exempting both labor agreements and labor-related agreements from the filing requirement of § 15 but leaving them subject to the specific prohibitions of the antitrust laws and §§ 16 and 17 of the Shipping Act.

This suggested accommodation seems to me demonstrably wrong. In the first place, as the Court notes, the filing requirement of § 15 was drafted broadly, and the filing-and-approval process includes review of questions arising under §§ 16 and 17, and specifically creates an exemption from antitrust attack. Hence, if the question were simply whether substantive challenge to a maritime agreement (dealing with labor or with any other matter) is to take place in advance of implementation of the agreement or, instead, during its operation, I should have thought it clear that Congress chose the former alternative. Furthermore, I would find it very difficult to see why provision for advance approval and exemption of labor-related agreements would not be

[3] Of course, Congress did not, in § 15, require "good" agreements to be filed and exempt bad ones. Nor did Congress provide a special exemption for cases in which it would create a special hardship to require filing of an agreement that was not filed when it should have been. My Brother DOUGLAS is making a much more relevant and serious point than that the Court's decision will do incidental damage to a "good" agreement.

preferable, from the standpoint of facilitating collective bargaining, to the "wait-and-see" approach.

The real difficulty in this case is not to distinguish between agreements that must be filed and agreements whose impact on competition will be evaluated after implementation, but to define the Commission's jurisdiction in such a way that (whether challenges arise before or after implementation) the Commission will not improperly be brought into labor matters where it does not belong. The Court's only suggestion is that the labor agreements involved in this case "fall in an area of concern to the National Labor Relations Board." *Ante,* at 278.

More circumspect analysis than this is needed, I believe. In the first place, since the later validity and antitrust immunity of all agreements subject to § 15 depend upon filing, it is desirable that signatories to agreements be given more precise instructions than that they need not file if they are in an area of Labor Board "concern." Furthermore, I see no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both.

The Commission took the position that § 15 of the Act, requiring filing, was meant to apply "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives." [4] I agree with the Court's conclusion that proper application of that principle to this case would require the opposite result from the one the Commission reached. The difficulty, however, is that the principle is exces-

[4] 9 F. M. C., at 82.

sively broad: any significant multi-employer agreement on economic matters "affects competition" with respect to prices and services to the public, even if it is a collective bargaining agreement or an employer agreement collateral thereto.

Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements must have some exemption from the filing requirements of § 15 and from successful challenge under the antitrust laws or under the substantive principles in §§ 16 and 17 of the Shipping Act. The exact extent of the "labor exemption" or "labor immunity" from statutes regulating competition has troubled this Court before; [5] however, since no collective bargaining agreement in the maritime industry is now before us, it would be inappropriate to suggest the affirmative extent of the immunity. The important point in this case is an opposite and two-edged one: the assessment agreement before us is *not* immune or exempt, for it raises "shipping" problems logically distinct from the industry's labor problems; at the same time, Commission review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve.

The assessment agreement was, of course, consequent upon the labor agreement committing PMA to raise the fund. The union side was concerned with a guarantee that the fund would be raised somehow, and the

[5] *E. g., Mine Workers* v. *Pennington,* 381 U. S. 657; *Meat Cutters* v. *Jewel Tea,* 381 U. S. 676; cf. *Kennedy* v. *Long Island R. Co.,* 319 F. 2d 366, 372–374. In *Mine Workers* the Court said, "We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws . . . ." 381 U. S., at 664. It seems equally obvious that the employers are not violating the antitrust laws either when they confer about wage policy preparatory to bargaining or when they sign an agreement.

labor agreement guaranteed only that much. But whenever any multi-employer bargaining unit agrees to provide benefits for employees there arises a problem of how to allocate the costs among the various employers and (in consequence) among their customers.

Often, the "allocation" decision follows directly from the terms of the labor agreement. In the case of a multi-employer agreement to raise wages, for example, each employer simply bears the cost of benefiting his own employees. In the present case, had it been possible to make the levy on each employer directly proportional to, and roughly simultaneous with, the savings to that employer from modernization, two things would have followed: the "allocation" decision could be said to stem directly from the terms of the labor agreement, and the modernization program would "pay for itself" as it went along, leaving shipping customers unaffected.

The PMA, however, did not (and presumably could not) apportion costs in this manner. To the extent that, under the plan chosen, individual employers were unable to absorb the levy and debit it against future savings from modernization, the decision how much each employer was to pay necessarily affected that employer's customers as a class. To the extent that the plan went on to determine which of an employer's customers would ultimately pay which share of an employer's dues, the agreement also made choices among customers of an individual employer.

The Commission nevertheless held that the agreement did not "affect competition" because there was "no agreement" to pass the levy on to individual customers. Whether the error be deemed one of "fact" or one of "law" these conclusions are irreconcilable with reality. Terminal companies such as MTC compete with each other for the business of unloading Volks-

wagens. The allocation agreement involved in this case increases the *cost* to a terminal company of unloading one Volkswagen by $2.35. This is a substantial (25%) increase in the company's cost for handling this one product. Since the mechanization and modernization program is not expected to produce a significant (much less a compensatory) saving in the other costs of handling Volkswagens, no terminal company could, in the long run, "absorb" this cost: companies do not absorb costs that are not expected to pay dividends in the future.[6] MTC's only choice was whether to pass the $2.35 on directly to Volkswagen or to pass it on to its other customers in the form of higher charges or lower future savings from mechanization. Since the latter alternative would presumably have driven these other customers to deal with other terminal companies not bearing the Volkswagen curse, MTC was in practice compelled to pass at least a large part of the additional cost on to Volkswagen.

The statements of numerous officials of the participating companies to the effect that there were no "agreements" affecting Volkswagen (statements constituting in large part the "substantial evidence" on which the Commission is supposed to have relied, 125 U. S. App. D. C., at 291, 371 F. 2d, at 756), are at best quibbles about the meaning of words. The members of the Association must be taken to have agreed to the obvious consequences of the paper they all signed. That paper did not destroy price competition for Volkswagen's trade; nor would a specific agreement to "pass on" the addi-

[6] The fact that the figure $2.35 was in fact arithmetically larger than MTC's computed profit per Volkswagen on the accounting basis MTC used is of course not in itself critical. If MTC's computed profit per vehicle had been $2.36, it would have had nevertheless to make up the $2.35 additional cost somewhere.

tional $2.35 charge have done so. But the allocation agreement made Volkswagen a less desirable customer to each and every terminal company unless it did pass on the $2.35 charge. How the Commission could conclude that this collective imposition, by the terminal companies on themselves, of a heavy tax for handling one kind of product did not "affect" competition among them for the trade of shippers of that product I simply cannot understand.

Commission review of the fairness of the agreement allocating the cost burden of mechanization does not mean Commission review of a labor agreement and does not imply consequences in conflict with national labor policy. Whether to mechanize, or otherwise modernize, and what provision should be made for displaced workers, are obviously matters of union concern, and negotiations about these things should be governed by the law of collective bargaining. Resolution of such questions by a decision to create a "Mech Fund" gave rise to a subsidiary "allocation" question. The union was concerned that the question receive *some* answer, but had no proper interest in *which* of the possible cost allocation plans was adopted, so long as any such plan raised the amount promised. On the other hand, in the present case no one has suggested that Maritime Commission review of a particular method of cost allocation may properly reach the question whether the obligation necessitating the allocation should have been entered into, or that the Commission may reject an allocation plan when there are no preferable alternative routes to collection of the necessary amount. Review of the fairness and propriety of a taxing scheme is not the same thing as reviewing the fairness and propriety of the uses to which the tax money, once collected, is put. When the Court notes that only the assessment agreement must be filed and examined, it seems clear that it contemplates a Com-

mission examination starting from the premise that the obligation to collect the Mech Fund will be fulfilled; at issue will be only the propriety of the choice of the route to that objective.[7]

II.

With respect to the §§ 16 and 17 issues, I consider that the Commission's approach to those questions rested, as indeed the Court's opinion now intimates, upon an erroneous understanding of the "assessment agreement" necessitating reconsideration of those matters on remand of the case.

The agreement that was before the Commission was, so far as appears, quite unlike any agreement that body had considered before. It dealt neither with a charge for particularized services in the carrying, handling, or storage of goods, nor with how such services would be provided. Rather, the agreement levied a "tax" on Association members, a tax which (insofar as the modernization program did not directly "pay its own way") would be passed on to members' customers and ultimately to the public. The tax would be used to pay for a general benefit to the shipping industry, but the allocation of that tax bore no direct relationship to benefits received by customers.

The Court holds that it was error for the Commission to reject challenges to this agreement under § 16 simply because there was no showing that the tax was discriminatory as between competitive customers. It declares that such a rule may be sound in cases involving rates

[7] The fact that the "labor" agreement and the "assessment" agreement were on different pieces of paper is of course not critical. What is important is that the whole process raised both labor problems and distinct shipping problems. It would not be impossible for there to be a single agreement raising some problems of Labor Board "concern" and other, separate problems appropriate to Commission review.

for sea carriage of goods because of the "particularized economics" resulting from the finite capacity of ships, but that it is not sound elsewhere, including this case, for unspecified reasons.

On the surface, it might appear that the argument should be the other way around: it makes some sense to speak of an "undue or unreasonable preference or advantage" to, say, watermelons over automobiles when they are "competing" for a finite amount of shipping space; it becomes much more difficult to find anything that can be called a "preference" between such products with respect to any services that are available to both in unlimited quantities.

My Brother DOUGLAS states that the Commission has consistently adhered to its insistence upon a competitive relationship between the product preferred and the product disadvantaged, except where "there are services that are not dependent upon the nature of the cargo and the various charges therefor." *Post,* at 314, n. 30. Yet, if ever it was clear that "the nature of the [products]" was not the basis for a difference in rates, it is in this case.

The true solution of the matter, it seems to me, is that in each situation the problem has been to devise some *workable* basis for determining whether rates are fair *vis-à-vis* other rates. It simply would not be feasible, as the Second Circuit has noted,[8] to assess the fairness of charges for shipping heavy industrial equipment by comparison with the cost of shipping bananas. The notion of a "preference" for bananas over heavy equipment is simply too elusive to be implemented. At the same time, when the service rendered is, for example, procuring insurance or arranging for cartage,

[8] *New York Foreign Freight Forwarders and Brokers Assn.* v. *FMC,* 337 F. 2d 289, 299.

the nature of the product has very little to do with either the value to the customer of the services rendered or the cost of supplying them; in such cases the Commission has quite reasonably held that charging different classes of shippers different amounts for equivalent services may be preferential.[9]

In the present case, the problem before PMA was the allocation of a pre-specified total cost among its various members and their customers. Since this was very much a case of first impression, the Commission would have done well to go back to the language of § 16, which proscribes any "undue or unreasonable preference or advantage to any . . . description of traffic in any respect whatsoever." [10] Certainly, since a "modernization tax" on any one group of customers lowered, by an equivalent amount, the cost of modernization to others obligated to pay for it, an unfair allocation of the burden could properly be described as a "preference" between that "description of traffic" bearing a heavy burden and that "description of traffic" whose burden was correspondingly lightened.

The real difficulty in this case is to formulate a workable definition of whether the burdens have been "unfairly" allocated. Obviously, as the debates in the PMA indicate, there was no "perfect" way to apportion the costs. Any analysis of the present problem must leave room for the implementation of some uniform, practical, general rule of assessment even though it have some features that are less desirable than some alternative imperfect rule. The difficulty with the method of assessment adopted by PMA is that it was not uniform and general but made special provision for automobiles. The fact that all automobiles are treated alike should

[9] *Ibid.*; see, *e. g.*, *Investigation of Free Time Practices—Port of San Diego*, 9 F. M. C. 525.

[10] 46 U. S. C. § 815.

not have prevented the Commission from inquiring whether special treatment for this class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised.

The Commission's interpretation of § 17 was also erroneous. The Commission held that since petitioner received substantial benefits from the modernization program it would not make minute inquiry into whether petitioner's benefits precisely corresponded to the costs imposed. The first difficulty is with the conclusion that petitioner received "substantial benefits." Petitioner apparently is not in a position to profit appreciably from maritime modernization. Petitioner will, of course, benefit from any lessening of labor disputes in shipping and related services; but the only disruptions that are avoided by the labor agreement reached here are those that would otherwise have resulted from the efforts of other shippers and of maritime employers to institute the very modernization practices that will not benefit petitioner. It may be that those who will directly benefit from modernization and those who will benefit only from increased stability during the course of a modernization program in which they have no interest (and which others have imposed on them) should both pay part of the cost of the Mech Fund. However, the existence of such a categorical difference between the benefits received by different groups should at least invite inquiry whether charges are as appropriately proportioned as would be feasible.

In fact, the tax assessed is not "equal" as between Volkswagen and other shippers who will benefit more. The charge to MTC per Volkswagen was figured on a different basis from the assessments for handling other products; the figure reached was a substantially higher percentage of existing costs and charges; and the figure was so high that the additional cost apparently could

not be absorbed and debited against future savings from modernization but had to be passed on to the customer. Of course charges need only be "reasonably" related to benefits, and not perfectly or exactly related, *Evans Cooperage Co.* v. *Board of Commissioners of the Port of New Orleans,* 6 F. M. B. 415, 418, but in this case inquiry ceased before it had reached even that nearer point.

Finding no disagreement in principle between myself and the Court, I join the Court's opinion upon the premises stated in this opinion.

MR. JUSTICE FORTAS, concurring in the judgment.

I agree with the judgment and with Part I of the opinion herein. I do not understand that the Court's opinion purports to determine the effect of §§ 16 and 17, and I believe that the Court certainly should not do so. I do not join Part II of the opinion dealing with these sections.

MR. JUSTICE DOUGLAS, dissenting in part.

I believe the Court has misconstrued § 15 of the Shipping Act, 1916;[1] and I fear that its erroneous construction will cause serious disruption in the process of

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[1] Section 15 provides, in relevant part, that every person subject to the Shipping Act "shall file immediately with the Commission" every agreement with another person subject to the Act:

"fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement." 46 U. S. C. § 814 (§ 15).

The Commission is instructed in § 15 to "disapprove, cancel or modify any agreement" which it finds, after notice and hearing, to

collective bargaining in the maritime industry. If the tariff exacted from petitioner is discriminatory or unreasonable, §§ 16 and 17 of the Shipping Act [2] provide a remedy. If it violates the antitrust laws, there is also a remedy, as I shall indicate. But to require the funding part of maritime collective bargaining agreements to receive prior approval from the Maritime Commission is to use a sledge hammer to fix a watch. I cannot read § 15 so as to attribute to Congress such a heavy-handed management of sensitive labor problems.

The collective bargaining agreement involved in this case, with its Mechanization and Modernization Fund (Mech Fund), cannot be evaluated properly without an understanding of maritime labor relations and technological developments in the shipping industry.

The history of maritime labor relations in this country has been punctuated with lengthy major strikes and

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be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter . . . ."

Any agreement which is not approved, or which is disapproved, by the Commission is declared by § 15 to be "unlawful." And it is also provided that "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . . ."

[2] Those sections read, in relevant part:

"It shall be unlawful for any . . . person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly . . . to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 46 U. S. C. § 815 (§ 16).

"Every . . . person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and

continuous minor disruptions.[3] The maritime industry has long been faced with problems of instability—economic and managerial. Employment for maritime workers is generally both irregular and insecure.[4] That condition lies behind the large number of major strikes and work stoppages on our coasts.

Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability. The Shipping Act, 1916, is one example of this concern.[5] With respect to maritime labor relations, however, the activities of the Federal Government were, until our entry into World War I, primarily devoted to laws protecting or disciplining seamen as individual workers. The war years saw the Government actively encouraging collective bargain-

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order enforced a just and reasonable regulation or practice." 46 U. S. C. § 816 (§ 17).

[3] For a comprehensive study of the history of labor relations in the maritime industry up to 1940, see Maritime Labor Board, Report to the President and to the Congress, H. R. Doc. No. 646, 76th Cong., 3d Sess. (1940). For a valuable history of maritime labor relations on the West Coast, see B. Schneider, Industrial Relations in the West Coast Maritime Industry, Institute of Industrial Relations, University of California (Berkeley, 1958).

[4] Longshoremen and seamen depend, of course, on the amount of work to be done. If business is bad, the workers are without work and without pay. With respect to longshoremen on the Pacific Coast, hiring is done through hiring halls operated jointly by the union and management. Employers can obtain longshoremen only through these halls, and only for specific jobs. No longshoreman may be employed steadily by any one employer; rather, each is dispatched to an employer as part of a gang to perform a specific loading or unloading job. See Kossoris, Working Rules in West Coast Longshoring, 84 Monthly Labor Rev. 1 (1961), for an account of the hiring practice on the West Coast.

[5] This Act was the direct result of the Alexander Report of 1914. House Committee on Merchant Marine and Fisheries, H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

ing in the maritime industry, its efforts resulting by 1920 in a significant expansion of collective bargaining. There followed a general retrogression, with wages and working conditions reaching low levels. That condition prevailed until the highly disruptive and violent Pacific Coast strike of 1934.

That strike was the product of deep-seated grievances of maritime employees regarding low wages and poor working conditions.[6] The situation on the Atlantic Coast was not much better. Although an agreement was reached in late 1934 for Atlantic Coast workers, labor relations remained unstable and work stoppages were rampant. On both coasts, intra-union and inter-union disagreements, coupled with employer-union hostility, made agreement highly difficult. Quickie strikes dotted the ports, and another general strike followed in 1936. On the Pacific Coast, the employers and the ILWU (which had achieved recognition after the 1934 strike) were in constant conflict through 1948, when still another general strike erupted. This period, from 1934 to 1948, has been

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[6] In that strike the International Longshoremen's Association demanded wage increases, a six-hour day, a closed shop, and union control of hiring halls. The employers refused to accede to these demands, and the ensuing strike tied up shipping for almost three months at all Pacific ports. President Roosevelt appointed a National Longshoremen's Board to intervene, after a mediation board had failed to settle the dispute. The union and management agreed to submit to arbitration by the Board, and to end the strike while arbitration was proceeding. Both sides agreed to abide by the Board's decision. The arbitration proceedings took several months, and the award which was eventually rendered represented substantial gains for the union. Hiring halls were to be operated jointly, wage increases were granted, and a six-hour day established. In addition, port labor relations committees were established on which both employers and the union were represented equally; and all issues not decided by those committees were to be submitted to arbitration.

aptly described as something like "class warfare." [7] As one commentator put it:

> "The ILWU (then a part of the AFL International Longshoremen's Association) gained formal employer recognition as a result of the general strike of 1934, which followed years of exploitation and abuse of longshoremen by their employers. The bitterness which had characterized the industry carried over into the subsequent employer-union relationship. The employers did their best to break the union, and the union retaliated just as militantly. The years which followed were among the stormiest in U. S. labor history. Between 1934 and 1948, the West Coast had over 20 major port strikes, more than 300 days of coastwide strikes, about 1,300 local 'job action' strikes, and about 250 arbitration awards." [8]

During the stormy 1930's, the Federal Government was greatly expanding its role in labor relations. The NIRA and NLRA greatly revived unionism among both seamen and longshoremen in addition to workers in other industries. Those Acts guaranteed the right of collective bargaining and offered a means for recognition of unions; the unions gained members and strength. And with stronger unions, collective bargaining became more widespread. But the explosive situation in the maritime industry was not solved by these general enactments, and Congress passed a series of laws to deal with the labor problems in that industry. First was the Merchant Marine Act, 1936, 49 Stat. 1985, creating a United States Maritime Commission to investigate conditions of seamen on ships and to determine minimum wage scales and working conditions on vessels that were receiving govern-

[7] Killingsworth, The Modernization of West Coast Longshore Work Rules, 15 Ind. & Lab. Rel. Rev. 295, 296 (1962).

[8] Kossoris, *supra,* n. 4, at 1.

ment subsidies. Despite the 1936 Act, labor relations did not improve significantly; and Congress in 1938 amended the Act, creating a Maritime Labor Board (MLB) with the duty of encouraging collective bargaining and assisting in the peaceful settlement of labor disputes through mediation. A provision of the 1938 amendment, § 1005, 52 Stat. 967, required all maritime employers to file with the MLB within 30 days a copy of every contract with any group of its employees covering wages, hours, rules, and working conditions. Any new contract or change in an existing contract also had to be filed with the Board. The contracts did not require approval by the Board, but were to be used to assist the Board in its mediation activities and in its promotion of peaceful settlement of labor disputes.[9]

The Board was instructed in the 1938 Act to submit to Congress by 1940 its recommendations for establishing a permanent federal maritime labor policy ensuring stable labor relations. The Board in its 1940 report concluded that conditions in the industry were still uneasy, and recommended a permanent federal body with wide jurisdiction over questions of maritime labor—including representation[10] and settlement of disputes.

[9] It was noted in a 1941 House Committee Report on a bill providing for a two-year extension of the MLB that the MLB was the "only Government agency with which copies of all labor agreements are required to be filed and these have been studied by the Board with a view to promoting stable labor relations in the maritime industry." House Committee on Merchant Marine and Fisheries, Two-Year Extension of the Maritime Labor Board, H. R. Rep. No. 354, 77th Cong., 1st Sess., 2 (1941).

[10] Under the 1938 Act, questions of representation were reserved to the NLRB. Section 1002 of the Merchant Marine Act, as amended, provided that:

"The provisions of this title shall not in any manner affect or be construed to limit the provisions of the National Labor Relations Act, nor shall any of the unfair labor practices listed therein be considered a dispute for the purposes of this title. Questions concerning the representation of employees of a maritime employer

The 1938 Act provided that the Board was to be discontinued in 1941; but in 1940 Congress extended its life until mid-1942 to permit further studies by the Board and Congress. Nothing more was done until 1955 when Congress again turned its attention specifically to the problems of maritime labor relations.[11] In the meantime, the MLB had expired. Although several bills were introduced providing for specialized federal control over maritime labor relations, no special machinery was established; and the maritime industry remains subject to the various provisions of federal labor laws.[12]

In 1948 another general maritime strike rocked the Pacific Coast. Following that strike, which lasted about 100 days, there was a "period of relative calm." [13] The 1948 strike had led to a change in employer leadership, a less hostile attitude on the part of the union leadership,

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shall be considered and determined by the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act: *Provided, however,* That nothing in this title shall constitute a repeal or otherwise affect the enforcement of any of the navigation laws of the United States or any other laws relating to seamen." 52 Stat. 965.

[11] Hearings on H. R. 5734, before the House Committee on Merchant Marine and Fisheries, 84th Cong., 1st and 2d Sess. (1955–1956).

[12] See, *e. g., Hanna Mining Co.* v. *Marine Engineers,* 382 U. S. 181 (pre-emption of state law by federal labor enactments); *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (jurisdiction of NLRB over employees of foreign-flag ships); *Marine Engineers* v. *Interlake S. S. Co.,* 370 U. S. 173 (pre-emption); *Marine Cooks* v. *Panama S. S. Co.,* 362 U. S. 365 (application of Norris-LaGuardia Act); *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (application of Labor Management Relations Act to disputes between maritime employees and foreign ships); *Longshoremen* v. *Juneau Spruce Corp.,* 342 U. S. 237 (right of action by employer against union under § 303 (a)(4) of L. M. R. A.); *NLRB* v. *Pittsburgh S. S. Co.,* 337 U. S. 656 (unfair labor practice); *Southern S. S. Co.* v. *NLRB,* 316 U. S. 31 (representation; refusal to bargain); *NLRB* v. *Waterman S. S. Corp.,* 309 U. S. 206 (unfair labor practice).

[13] Kossoris, *supra,* n. 4, at 2.

and a consequent lessening of tension along the Pacific Coast. Both sides recognized that the reduction of strife was desirable since a substantial amount of traffic had been diverted from the Pacific Coast to other ports or to other means of transportation on account of chronic maritime labor difficulties and work stoppages. But despite the reduction in hostility between labor and management, solutions to problems were not readily forthcoming. Business was bad for the shipping companies—foreign competitors had cut heavily into the market, and a decline in business meant less work for both seamen and longshoremen. Modernization was sorely needed, but it was also greatly feared, for mechanization would cut out jobs. But without improved techniques and facilities, the employers could not regain a strong competitive position.[14] In addition to lack of modern

[14] As one commentator noted in 1961:

"The longshore industry is technologically among the most backward. An industrial engineer from any one of the mass production industries would be horrified to find sacks of coffee on the San Francisco docks being handled just as they have been handled since sailing ship days. No one of the many separate corporate links in the transportation chain has sufficient interest in greater efficiency to force the changes in coffee handling methods, for example, which, to be effective, must start in Brazil and be carried right through to Hills Brothers or Folgers in San Francisco." Fairley, The ILWU–PMA Mechanization and Modernization Agreement, 12 Lab. L. J. 664, 665 (1961).

The first big change in technology along the docks, notes Mr. Fairley, was the use of lift trucks, propelled by wartime demands for greater efficiency during World War II. Since that time, new methods of bulk handling of cargo have been developed, and unit loads have been increasingly used (such as those made by gluing items together or strapping them together or containerizing them). *Id.*, at 666. One of the most efficient operations of containerization has been used by the Matson Navigation Co. In August 1964 that company cut its rates by nearly 10%, citing cost reductions made possible by a ship improvement and "containerization" plan. The plan relates to container cargo, where the containers are boxes

equipment, employers were further hampered by highly restrictive work rules that had been in effect since the 1930's, such as multiple handling,[15] sling-load weight,[16] and gang-size restrictions.[17]

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holding up to 40 tons of freight. They are loaded at a factory or distribution point and lifted aboard a ship and unloaded as single units. Matson Co. reported that it took about 850 man-hours to load and unload a specially designed container ship carrying 6,500 tons using mechanized equipment. The same cargo carried in conventional loose form would take 11,000 man-hours (about 13 times as much labor) to load and unload. An added attraction of this saving in time is the fact that ships get in and out of port faster, providing additional cost savings. For example, Matson's container ships stay in port less than a day, compared with five days for a conventional ship. Shippers estimate that it cost in 1964 about $3,000 to $5,000 for such things as depreciation, seamen's wages and pier charges for each day a ship stays in port. The Wall Street Journal, Nov. 20, 1964, at 8, col. 2. For a more thorough consideration of the changes in technology that promise great benefits for the shipping industry, see the comprehensive eight-volume study of the United States Department of Labor, Manpower Utilization, Job Security in the Longshore Industry (1964). See also Shils, Industrial Unrest in the Nation's Maritime Industry, 15 Lab. L. J. 337, 356–358 (where the author notes improvements in construction of vessels, the use of highly mechanized cargo ships, changes in engine room operation, in the Deck Department and in the Steward Department, and a new line of semi-automated vessels); O. Hagel & L. Goldblatt, Men and Machines, Joint Publication of the I. L. W. U. and P. M. A. (San Francisco, 1963).

[15] Multiple handling refers to the labor practice requiring the cargo to touch the "skin of the dock" after being unloaded before someone other than a longshoreman can handle it. For loading of cargo, only the longshoreman can place it on the ship after a teamster has unloaded it from his truck onto the dock. Kossoris, *supra*, n. 4, at 2.

[16] Sling-load weight is the weight limit for a load of cargo. In 1961 the maximum weight was usually about 2,100 pounds per pallet (although much heavier loads apparently could have been carried safely). Larger pallets were "skimmed down" to 2,100 pounds by longshoremen. *Ibid.*

[17] Each major port would have its own rules stipulating the number of men needed on gangs. Frequently, the number was more

It is only against this background of chronic strikes and restrictive labor practices that the tremendous impact of the Mech Fund can be appreciated. That was the heart of the 1960–1961 settlement. As noted by one commentator intimately acquainted with the negotiations of the parties, "[t]his agreement did not spring full-blown from the brow of Zeus, or from the brain of Bridges." [18] Rather, "[t]he agreement, which was hammered out in 5 months of negotiations ending in October 1960, culminated 4 years of discussion between the PMA and the ILWU." [19]

Earnest bargaining began in 1957. PMA wanted to obtain a guarantee from the ILWU that strikes and work stoppages would not result from the introduction and use of mechanization and other labor-saving devices. In return, the union wanted its workers to share in the cost savings resulting from modernization, and desired assurances that changes in work methods would neither create unsafe working conditions nor accelerate the productivity required of individual workers. After two years of preliminary negotiations, an agreement was made in August 1959 which provided for a further study of the problems of mechanization and for the establishment by PMA of a fund of $1,500,000 for the benefit of union workers.[20]

Negotiations beginning in May 1960 led to a "Memorandum of Agreement on Mechanization and Moderni-

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than was needed for the job. For example, the "four-on four-off" gang required eight men in the hold of a ship, although only four actually worked while the other four rested. *Id.*, at 3. See generally Killingsworth, *supra,* n. 7; P. Hartman, Union Work Rules: A Brief Theoretical Analysis and Some Empirical Results, U. of Ill. Bull., Institute of Labor & Industrial Relations (1967).

[18] Fairley, *supra,* n. 14, at 666.

[19] Kossoris, *supra,* n. 4, at 1.

[20] Although the method of raising this amount of money was not specified in the agreement, PMA accumulated the fund by assessing its members under a man-hour formula.

zation," concluded in October 1960, and providing for a $29,000,000 trust fund to be financed by PMA. The fund was to consist of the $1,500,000 due under the 1959 agreement plus another $27,500,000 to be accumulated over a five-and-one-half-year period at the rate of $5,000,000 per year. The fund was to be used to protect longshoremen and marine clerks from the consequences of reduced employment caused by mechanization. The agreement was to enter into force upon approval by the members of PMA and the ILWU, and was to expire on July 1, 1966.[21] The agreement also provided management with the relatively free rein it had sought to eliminate restrictive work practices. The former practice of multiple handling was eliminated, and the minimum size of a gang for loading and unloading operations was specified. The sling-load limit for loads was to remain unchanged if the manner of operation was the same as when the limit was first negotiated; otherwise, the employer could set the weight, provided that he acted "within

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[21] In August 1966 a new agreement was signed which continued the Mech Fund until 1971; but this time the employers agreed to pay even more into the fund each year—$6,900,000. Both the union and the employers were highly satisfied with the way the plan had worked. For a general description of the 1966 contract, see Business Week, July 30, 1966, at 108; Kossoris, 1966 West Coast Longshore Negotiations, 89 Monthly Labor Rev. 1067. Kossoris points out the great effect which abolition of restrictive work practices and increased use of modern technology had had for the employers: "Tonnage increased by about 32 percent; but man-hours remained about the same. Despite an increase over the period of 56 cents in the basic wage and liberalization of fringe benefits, including the $5 million the employers paid into the fund, the cost per ton dropped from $6.26 to $6.16. . . . Making allowance for all important factors involved, the gain to employers from the M&M agreement may be placed conservatively as well in excess of $150 million. Subtracting from this the $27.5 million paid into the M&M fund over the 5½ year period of the last contract makes the employer estimate of $120 million net gain appear realistic." *Id.*, at 1068–1069.

safe and practical limits and without speed up of the individual."

Thus, the agreement satisfied the desire of employers to modernize and eliminate outmoded and restrictive work rules, and at the same time provided a measure of security for the workers whose jobs would be affected by the use of the new devices. The agreement, however, left open the question of how the employers' contributions of $5,000,000 a year would be raised. The question of a proper method of assessment had been discussed by the union and management during the preceding negotiations; several suggestions were offered by the parties. But in return for a commitment from the PMA members obligating themselves individually and collectively to the payment of the fund, the ILWU agreed to permit PMA to establish the method of payment.

PMA then set up a Work Improvement Fund Committee to determine the best method of raising the money. That Committee considered various bases for assessing contributions—man-hours of each employer, cargo tonnage, a combination of the two, cargo tonnage moving in containers, measurement of improvements in longshore productivity. The Committee majority recommended a cargo tonnage basis; its reasons for doing so were summarized by the court below as follows:

> "The Committee recommended a formula based on cargo tonnage as a 'rough-and-ready' way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It considered that cargo volume though not necessarily proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.

> "The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to prevent the continuation of any hardship or inequity that might develop." [22]

In recommending the tonnage formula, the Committee noted that the same system was used for assessing a part of PMA dues. It had also been the practice of PMA to use a tonnage formula for assessments allocating other types of labor costs, such as joint maintenance of dispatch halls and the payment of arbitrators' salaries.[23] In fact, it appears that the ILWU had itself proposed a tonnage formula during the negotiations and asked that it be incorporated into the collective bargaining agreement; but PMA resisted this approach, apparently wishing to keep its options open and fearing that incorporation in the agreement might tend to commit the PMA to a fixed formula that would also be included in a future agreement. The tonnage formula recommended by the Committee was subsequently adopted by the PMA membership.

It was specifically provided in the agreement that each employer would abide by the formula adopted by the

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[22] 125 U. S. App. D. C. 282, 293, 371 F. 2d 747, 758 (1967).

[23] We are told that this is not the first time that PMA members have entered into agreements among themselves to form and finance their collective bargaining agreements. They have agreed to the presentation of uniform bargaining terms, and have provided, through agreements among themselves, for the administration and implementation of their union contracts. All of these would affect transportation rates. In essence, such agreements, no less than the funding method employed by PMA, have established uniform costs for all employers of maritime labor—indeed the primary object of industry-wide bargaining has been to establish uniform wages, fringe benefits, and working conditions.

Association; and this promise to comply was the *quid pro quo* for the union's agreement not to write any particular formula into the contract or take part in the determination of the method of assessment.[24] Thus the PMA decision on the method of assessment was part and parcel of the collective bargaining agreement. Indeed, the

[24] Mr. Paul St. Sure, President of PMA, testified:

"It [the method of payment of the fund] was a definite part of the negotiations in that the union took a position with regard to the method of collection. PMA took a position with regard to the method of collection. There were discussions with the union during negotiation as to the problems that had been presented by the method of collection used with relation to the million dollars and a half.

"We discussed with the union the differences of opinion among our own members as to the equitable method of providing for the collection of this money.

"We ended up with an agreement by the union that, inasmuch as the employer members of the bargaining unit had committed themselves specifically to the payment of the sum, that whereas they were interested in the assurance that the sum would be collected, they would allow us to work out among ourselves the method of actual collection within the membership of PMA."

Such action, however, did not make the union a disinterested party; rather, the union certainly had a continuing interest in the method of financing the fund. Mr. St. Sure, who was deeply involved since 1948 in negotiations with the ILWU, testified:

"There was a continuing interest and a continuing concern as to whether or not the collections under the fund were being met. Obviously they have, by joint trusteeship, joint custody of the fund, and I can assure you that they were alert as to whether or not the method of the custody, was working, because they believed this and, in fact, knew it was their money to spend in accordance with the agreement.

. . . . .

"After all, this was a continuing relationship that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations."

The Hearing Examiner stated in his opinion that "Mr. St. Sure testified that the ILWU's interest in the method to be adopted,

modernization plan was the heart of that agreement, and the subsequent assessment plan merely implemented the employers' duty under the collective bargaining agreement to establish a fund specifically marked to protect maritime workers against the far-reaching effects of modernization.

PMA treated the financing of the fund as an integral part of the collective bargaining process. The Committee established by PMA to recommend a funding formula was appointed by the negotiating committee which worked on the collective bargaining agreement; [25] and the PMA membership ratified both the collective bargaining agreement and the funding formula at the same time.

It is not, I submit, possible, as a practical matter, to separate the Mech Fund provision in the collective bargaining agreement from the subsequent decision of

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ceased after it was agreed that the method of collection was to be reserved to PMA." In the printed record before the Court, however, I find no reference in Mr. St. Sure's testimony to a lack of interest on the part of the union concerning the method of collection of the fund. The Hearing Examiner does not indicate the testimony on which his interpretation of Mr. St. Sure's presentation is based; and, at the least, that part of his testimony quoted would appear to raise a strong doubt whether it could be said that the interest of the union ceased. In any event, it is clear from Mr. St. Sure's testimony that the method of collection was a prime topic of negotiations between the parties, and that the employers' decision on the matter was intimately tied with the collective bargaining agreement.

[25] Mr. St. Sure testified:

"Well, this was still part of the bargaining process. We were still actually trying to conclude the bargain which we had developed and had signed a memorandum to cover. We still had the responsibility as a negotiating committee of reporting back to the board of directors, and then to the membership, and this was simply a convenient means of calling in some men that we felt were more expert in this field than the negotiators were who were operating people to make a recommendation as to a method of payment."

the PMA membership concerning how the fund was to be raised. A collective bargaining agreement is the product of negotiations. How can negotiators sitting at a table arrive at an agreement if they know that a major part of it depends on the approval of the Federal Maritime Commission? How many months—or years—will it take to get approval? What will happen meanwhile? Will not the imposition of that kind of administrative supervision bring an end to, or at least partially paralyze, collective bargaining?

The Mech Fund is a labor expense. Increased labor costs normally are passed on at least in part by increased prices. When the Auto Workers were recently negotiating with General Motors for a guaranteed annual wage, what would have been the consequence if nothing could have been decided until a federal agency had determined whether the impact on prices or on the economy was proper? I can imagine a regime of total controls where such prior approval would be required. But we have no such regime at present; and I can see no possible justification for a judicially created one in the explosive maritime field. To meet the costs increased by any collective bargaining agreement, a company might have to raise its prices and pass at least part of the added cost on to the consumer. But this happens all the time in the maritime industry, as well as in other industries, and does not constitute rate fixing of the type at which the Shipping Act is aimed. There is nothing in the legislative history of the Shipping Act which suggests that § 15 gives the FMC the power or license to oversee labor negotiations. But that is the effect of what the Court does today when it decides that the employers' agreement here must be submitted to that body for approval.

My Brother HARLAN suggests that the assessment agreement can be distinguished from the collective bargaining agreement because "[t]he union was concerned

that the question [of how the cost burden of the fund was to be allocated] receive *some* answer, but had no proper interest in *which* of the possible cost allocation plans was adopted . . . ." (*Ante,* at 290.) But to argue that the union does not care from what source the PMA gets the money for the fund is both questionable [26] and irrelevant, for such an approach ignores the fact that there are two parties to a collective bargaining agreement. The PMA members do care how they will be assessed $27,500,000 for a fund dedicated to the benefit of their employees. The Mech Fund was the key provision in the agreement, and without it there may well have been no agreement at all. The parties should not be expected to wait to settle their differences while the FMC decides under § 15 whether the employers' funding plan is in the public interest. Speedy resolution of labor disputes by collective bargaining has been the consistent federal policy.

The Solicitor General would have us atomize the collective bargaining agreement and treat the schedule of charges that create the fund as a mere "side agreement." But without the so-called "side agreement" there would have been no collective bargaining agreement. And it must be remembered that § 15, if applicable, requires that an agreement be filed "immediately with the Commission." What would have to be filed is the entire agreement, not merely the proviso to which petitioner now objects. The Commission then must give notice and a hearing and "disapprove, cancel or modify" the agreement. Which persons would be entitled to participate in the hearing presents an initial problem.[27] Thereafter, what provisions would become the target in the hearing

[26] See n. 24, *supra.*

[27] See FMC Rule 5 (1), 46 CFR § 502.72 (petitions for intervention in FMC proceedings). See also FMC Rule 10 (c), 46 CFR § 502.143 (notice of hearings).

is conjectural. The target might be small or large. But certainly no collective bargaining agreement could become operative until its underpinning—the fund—was thoroughly litigated. Meanwhile years might pass as the contest wound its way slowly through various tribunals and the labor problems continued to fester.

This is what my Brother HARLAN overlooks when he suggests that advance approval of "labor-related agreements" might be more desirable from the standpoint of facilitating collective bargaining than leaving open the question whether the agreement, or parts of it, would be subject to the antitrust laws. Presumably, he means that legal uncertainty concerning the possible vulnerability of certain provisions of an agreement to attack under the antitrust laws might stall negotiations or lead some association members to decline to cooperate in carrying out the agreement, fearing a treble-damage action. To be sure, the parties to a collective bargaining pact must frame their agreement to fit within the standards of the antitrust laws or any other governing statutes. But without a requirement of advance approval of the terms of the agreement, they remain free to bargain speedily. Frustration of the collective bargaining process comes not so much from the possibility that one or more provisions in a collective bargaining pact might be found illegal at some future date under the antitrust laws, or other statutes such as §§ 16 and 17 of the Shipping Act, but rather from the undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems while an intimate part of the proposed agreement is sent to the FMC for approval.

With all respect, the Court's approach in requiring the funding plan to be submitted to the FMC for approval under § 15 of the Shipping Act will frustrate legitimate and speedy collective bargaining in the maritime indus-

try. Neither the Court nor my Brother HARLAN is able to refer to any legislative history which indicates that Congress considered the Shipping Act to require the filing of labor agreements or provisions of those agreements under § 15.[28] The Court instead takes the approach that the Shipping Act provisions were purposely drawn broad enough to encompass association agreements which have more than a *de minimis* effect on commerce. This rationale would require the filing of any collective bargaining provision agreed to by PMA members that raised labor costs beyond the point at which PMA members could be expected to absorb those costs without raising prices or charges.

The Court may well mean, as my Brother HARLAN suggests, that the "obligation to collect the Mech Fund," contained in the collective bargaining agreement, is not to be examined by the Commission on remand, but rather the question is to be limited to the "propriety of the choice of the route to that objective." But that misses the mark. My point is that the latter question is as much a part of the bargaining process as the former. Commission control over either question runs substantial risk of frustrating agreement by the parties on both issues, not to mention other matters in the collective bargaining pact. For example, if an allocation formula satisfactory to PMA members and to the Commission could not be devised, the fund might never be established, requiring perhaps other changes in the agreement, such as higher wages or continuance of some or all of the restrictive work rules.

If the present practice is an abuse, there is an existing remedy. This agreement between employers could of

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[28] Indeed, the legislative history would appear to be to the contrary. See n. 9, *supra*.

course be challenged in the courts as violative of the antitrust laws.[29] Moreover, §§ 16 and 17 of the Shipping Act afford protection to foreign commerce in cases of undue discrimination or unreasonable practices affecting that commerce. While I cannot say that the Commission erred in finding no violation of § 16, I concur in a remand to the Commission for further findings under § 17.[30]

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[29] The circumstance that the funding plan originated in collective bargaining and was a part of a collective bargaining agreement would not automatically create an exemption from the antitrust laws. See *Mine Workers* v. *Pennington,* 381 U. S. 657; *Meat Cutters* v. *Jewel Tea,* 381 U. S. 676; *Allen Bradley Co.* v. *Union,* 325 U. S. 797.

[30] The Commission held under § 16 that that section is violated only if there is discrimination between competitors, which was not the situation here because the marine terminal companies have imposed no higher charges on Volkswagens than on other automobiles. Although such an interpretation is supported by the construction placed on § 3 (1) of the Interstate Commerce Act, 49 U. S. C. § 3 (1), *United States* v. *Great Northern R. Co.,* 301 I. C. C. 21, 26–27, on which § 16 of the Shipping Act is modeled, *United States Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 480–481, it has been suggested that the Commission has undermined its own rule by not requiring a competitive relationship in cases not involving freight rates: *Investigation of Free Time Practices—Port of San Diego,* 9 F. M. C. 525 (1966) (port free time); *New York Foreign Freight Forwarders and Brokers Assn.* v. *FMC,* 337 F. 2d 289 (C. A. 2d Cir. 1964), cert. denied, 380 U. S. 910 (billing methods of freight forwarders); *Swift & Co.* v. *Gulf & South Atlantic Havana Conference,* 6 F. M. B. 215 (1961) (route restrictions); *Storage Practices at Longview, Washington,* 6 F. M. B. 178 (1960) (storage charges). Moreover, it is argued that the competitive relationship test employed by the ICC under § 3 (1) of the Interstate Commerce Act is not "an indispensable element in a situation of undue prejudice and preference . . . ." *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.,* 229 I. C. C. 497, 501. The Maritime Commission's refusal to require a competitive relationship in certain cases, however, has diluted that principle only in those situations in which there are services that are not dependent upon the nature of the cargo and the various charges therefor. In the instant case, how-

If the finding is for petitioner, there may be an incidental and after-the-fact effect on the provisions of the collective bargaining agreement. But it will not produce

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ever, there are different charges levied depending upon the nature of the cargo involved. Petitioner conceded before the Hearing Examiner that "[w]e do not claim that the measurement formula 'regardless of how manifested' subjects Volkswagen automobiles to 'prejudice or disadvantage' as compared to other automobiles, and we admit that there is no other cargo classification in competition with automobiles." The competitive relationship rule has been applied consistently by the Commission in appropriate circumstances. The same rule has also been used by the ICC. Since I cannot say in the circumstances of this case that the requirement of a competitive relationship is unreasonable or inconsistent with the provisions of the Shipping Act, I would defer to the Commission's expertise. *Consolo* v. *FMC*, 383 U. S. 607.

With respect to § 17, the Commission expressly noted that (1) the measurement basis for assessing automobiles resulted in an assessment almost 10 times greater than a weight basis ($2.35 per vehicle as against approximately $0.25); (2) that although other cargo was assessed as manifested, vehicles were always assessed on a measurement basis; and (3) while automobile cargo would probably receive only general benefits from the mechanization plan (such as freedom from strikes and slowdowns), such cargo, unlike some other cargo, was unlikely to benefit from technological improvements in loading and unloading. Yet, the Commission held that the difference in treatment was not unreasonable because although automobile cargo may not have benefited as much as other cargo, it did receive "substantial benefits" from the mechanization agreement. As the Court holds, however, such a standard, which focuses on only the benefits received, represents too narrow a view of § 17. What petitioner is contesting essentially is PMA's decision to adopt as the revenue ton for automobiles not a weight ton (2,000 pounds) but a measurement ton expressed in volumetric terms (40 cubic feet/ton). Since the average Volkswagen weighs only 1,800 pounds, but measures about 8.7 tons on a volume basis, it is being assessed $2.35 compared with the $0.25 it would otherwise have to pay on the basis of a weight-ton measurement. It is argued that this exaction is grossly disproportionate in light of the limited benefits which petitioner could expect to receive from the mechanization agreement as compared with those which other shippers could antici-

the paralyzing effect which will follow when prior approval is required. The application of §§ 16 and 17 in particular instances can indeed realistically be compared with enforcement of federal antitrust laws directed against specific practices.

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pate. To focus an inquiry solely on the benefits received may obscure the disparity between the charges ultimately falling upon petitioner and those exacted from other shippers. The Commission should compare the benefits received with the charges imposed on petitioner's cargo and with those levied upon other cargo, which receives substantially similar benefits, before the question of reasonableness can be resolved. This determination is for the Commission to make in the first instance.

NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* MISSOURI STATE TAX COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 324. Argued January 25, 1968.—Decided March 11, 1968.

Appellant N & W, a predominantly coal-carrying railroad with operations centered in the eastern part of the country and which owned no fixed property and only minimal rolling stock in Missouri, leased the property of the Wabash Railroad and became obligated to pay 1965 taxes on fixed property and rolling stock located in Missouri. A state statute prescribes a formula for determining the amount of rolling stock of an interstate railroad that Missouri shall assess for purposes of *ad valorem* taxation. The statute apportions to Missouri a part of the entire value of all rolling stock of an interstate railroad on the ratio of miles operated in Missouri to the railroad's total road mileage. Applying that formula, which resulted in the postulation that N & W's rolling stock in Missouri constituted 8.2824% of its total rolling stock, the Missouri Tax Commission put N & W's rolling stock assessment at $19,981,757. N & W challenged the assessment, which it showed was more than 2½ times the value of N & W's rolling stock in the State on tax day and more than twice Wabash's assessment for practically the same property in the previous year. Neither N & W's rolling stock in Missouri (about 2.71% of N & W's total rolling stock by number of units and 3.16% by value), the overwhelming amount of which had been leased from Wabash, nor the Missouri operations of N & W and Wabash had materially increased in the intervening period. N & W's coal operations require a great deal of specialized equipment, scarcely any of which enters Missouri, and traffic density on Missouri tracks is but 54% of traffic density on the N & W system as a whole. The Tax Commission's assessment against N & W was affirmed on appeal. The Missouri Supreme Court held that use of the mileage formula could be justified on the theory that the rolling stock regularly employed in one State has an "enhanced

value" when connected to "an integrated operational whole." *Held:*

1. Application of the mileage formula resulted in an assessment which on the record in this case went far beyond the value of appellants' rolling stock in Missouri and violated the Due Process and Commerce Clauses. Pp. 323–329.

(a) A State may impose a property tax upon its fair share of an interstate transportation enterprise, including a portion of the enterprise's intangible value. Pp. 323–324.

(b) Though a State has considerable latitude in devising formulas to measure tangible property within its borders, it is not entitled to tax tangible or intangible property unconnected with the State. Pp. 324–325.

(c) Appellants' evidence satisfied the burden which rests on a railroad attacking a mileage formula of showing that the formula reached assets outside the State, and Missouri has not countered such evidence here. Pp. 326–327.

(d) Though this Court's decisions recognize the practical difficulties in applying a mileage formula, they forbid an unexplained discrepancy as gross as that here revealed. P. 327.

(e) The record is totally barren of evidence relating to the enhanced value of property in Missouri by reason of the incorporation of such property into the entire N & W system. Pp. 327–329.

2. The Missouri Supreme Court may remand the case to the appropriate tribunal to reopen the record for additional evidence supporting the assessment. P. 330.

426 S. W. 2d 362, vacated and remanded.

William H. Allen argued the cause for appellants. With him on the briefs were *Charles L. Bacon, Frederick Beihl, James E. Carr, Melvin J. Strouse* and *Christopher S. Bond.*

William A. Peterson, Assistant Attorney General of Missouri, argued the cause for appellees. With him on the brief were *Norman H. Anderson,* Attorney General, *Thomas J. Downey,* First Assistant Attorney General, and *Walter W. Nowotny, Jr.,* Assistant Attorney General.

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case brings before us, once again, troublesome problems arising from state taxation of an interstate commercial enterprise. At issue is a tax assessment pursuant to a Missouri statute specifying the manner in which railroad rolling stock is to be assessed for the State's *ad valorem* tax on that property.[1]

In 1964 the Norfolk & Western Railway Co. (N & W), a Virginia corporation with interstate rail operations, leased all of the property of appellant Wabash Railroad Company. The Wabash owned substantial fixed property and rolling stock, and did substantial business in Missouri as well as in other States. Prior to the lease, N & W owned no fixed property and only a minimal amount of rolling stock in Missouri. N & W is primarily a coal-carrying railroad. Much of its equipment and all of its specialized coal-carrying equipment are generally located in the coal regions of Virginia, West Virginia, and Kentucky, and along the coal-ferrying routes from those regions to the eastern seaboard and the Great Lakes. Scarcely any of the specialized equipment ever enters Missouri. According to appellants, the Wabash property in Missouri was leased by N & W in order to diversify its business, not to provide the opportunity for an integrated through movement of traffic.

By the terms of the lease, the N & W became obligated to pay the 1965 taxes on the property of the Wabash in Missouri and elsewhere.[2] Upon receiving notice of the

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[1] The tax in question applies to "all real property . . . [and] tangible personal property . . . owned, hired or leased by any railroad company . . . in this state." Intangible personal property is explicitly exempted from this tax. Mo. Rev. Stat. § 151.010 (1959).

[2] As of January 1, 1966, the N & W purchased the Wabash rolling stock that it had previously leased, while continuing to lease Wabash fixed property. This change in the relationship between N & W and the Wabash has no effect on the issues presented to us. Our

1965 assessment from the appellee Missouri Tax Commission, the N & W filed a request for an adjustment and hearing before the Commission. The hearing was held, and the Commission sustained its assessment against the taxpayer's challenge. On judicial review, the Commission's decision was affirmed without opinion by the Circuit Court of Cole County, and then by the Supreme Court of Missouri. Appellants filed an appeal in this Court, contending that the assessment in effect reached property not located in Missouri and thus violated the Due Process Clause and the Commerce Clause of the United States Constitution. We noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The Missouri property taxable to the N & W was assessed by the State Tax Commission at $31,298,939. Of this sum, $12,177,597 relates to fixed property within the State, an assessment that is not challenged by appellants. Their attack is aimed only at that portion of the assessment relating to rolling stock, $19,981,757.[3]

With respect to the assessment of rolling stock, the Commission used the familiar mileage formula authorized by the Missouri statute. In relevant part, this provides (§ 151.060 subd. 3):

> ". . . when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize

analysis would apply both before and after the purchase of the Wabash rolling stock.

[3] The Commission deducted from the sum of these two figures $860,415, representing an "economic factor" which is allowed to all railroads in varying amounts. Exactly the same deduction had been allowed the Wabash in each of the three preceding years.

> and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

The Commission arrived at the assessment of rolling stock by first determining the value of all rolling stock, regardless of where located, owned or leased by the N & W as of the tax day, January 1, 1965. Value was ascertained by totaling the original cost, less accrued depreciation at 5% a year up to 75% of cost, of each locomotive, car, and other piece of mobile equipment. To the total value, $513,309,877, was applied an "equalizing factor" of 47%, employed in assessing all railroad property in an attempt to bring such assessments down to the level of other property assessments in Missouri. The Commission next found that 8.2824% of all the main and branch line road (excluding secondary and side tracks) owned, leased, or controlled by the N & W was situated in Missouri. This percentage was applied to the equalized value of all N & W rolling stock, and the resulting figure was $19,981,757.

There is no suggestion in this case that the Commission failed to follow the literal command of the statute. The problem arises because of appellants' contention that, in mechanically applying the statutory formula, the Commission here arrived at an unconscionable and unconstitutional result. It is their submission that the assessment was so far out of line with the actual facts of record with respect to the value of taxable rolling stock in the State as to amount to an unconstitutional attempt to exercise state taxing power on out-of-state property.

Appellants submitted evidence based upon an inventory of all N & W rolling stock that was actually in Missouri on tax day. The equalized value of this rolling

stock, calculated on the same cost-less-depreciation basis employed by the Commission, was approximately $7,600,000, as compared with the assessed value of $19,981,000. Appellants also submitted evidence to show that the tax-day inventory was not unusual. The evidence showed that, both before and in the months immediately after the Wabash lease, the equalized value of the N & W rolling stock actually in Missouri never ranged far above the $7,600,000 figure. In the preceding year, 1964, the rolling stock assessment against the Wabash was only $9,177,683, and appellants demonstrated that neither the amount of rolling stock in Missouri nor the Missouri operations of the N & W and Wabash had materially increased in the intervening period.[4] The assessment of the fixed properties (for which no mileage formula was applied) hardly increased between 1964 and 1965. In 1964, prior to the lease, the fixed properties in Missouri were assessed at $12,092,594; in 1965, after the lease, the assessment was $12,177,597.

The Supreme Court of Missouri concluded that the result reached by the Commission was justifiable. It pointed out that the statutory method used by the Commission proceeds on the assumption that "rolling stock is substantially evenly divided throughout the railroad's entire system, and the percentage of all units which are located in Missouri at any given time, or for any given period of time, will be substantially the same as the percentage of all the miles of road of the railroad located in Missouri." It then held that the evaluation found by the Commission could be justified on the theory of "enhance-

[4] Appellants further argue that the arbitrariness of the result reached here is shown by the fact that if the rolling stock in Missouri had been taxable to the Wabash in 1965, rather than to N & W, the application of the formula to the same rolling stock would have resulted in an assessment of little more than half of that which was actually levied ($10,103,340).

ment," although the Commission had not referred to that principle. The court described the theory as follows:

> "The theory underlying such method of assessment is that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole and may, therefore, be taxed according to its value 'as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system.' *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338."

The court correctly noted, however, that "even if the validity of such methods be conceded, the results, to be valid, must be free of excessiveness and discrimination." It concluded that in the present case, the result reached by the Commission was justifiable. We disagree. In our opinion, the assessment violates the Due Process and Commerce Clauses of the Constitution.

II.

Established principles are not lacking in this much discussed area of the law. It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. *Marye* v. *Baltimore & Ohio R. Co.,* 127 U. S. 117, 123–124 (1888); *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 (1891); *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169 (1949); *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment,* 347 U. S. 590 (1954). That fair share may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State, including a portion of the intangible, or "going-concern," value of

the enterprise. *Railway Express Agency* v. *Virginia,* 347 U. S. 359, 364 (1954); *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 455 (1918); *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, 218–225 (1897). The value may be ascertained by reference to the total system of which the intrastate assets are a part. As the Court has stated the rule, "the tax may be made to cover the enhanced value which comes to the [tangible] property in the State through its organic relation to the [interstate] system." *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338 (1923). Going-concern value, of course, is an elusive concept not susceptible of exact measurement. *Rowley* v. *Chicago & N. W. R. Co.,* 293 U. S. 102, 109 (1934); *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 365–366 (1940). As a consequence, the States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders. *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 282 (1919). Such formulas usually involve a determination of the percentage of the taxpayer's tangible assets situated in the taxing State and the application of this percentage to a figure representing the total going-concern value of the enterprise. See, *e. g., Rowley* v. *Chicago & N. W. R. Co.,* 293 U. S. 102 (1934); *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421 (1894). A number of such formulas have been sustained by the Court, even though it could not be demonstrated that the results they yielded were precise evaluations of assets located within the taxing State. See, *e. g., Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 365–366 (1940).

On the other hand, the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State. *The Delaware Railroad Tax,* 18 Wall. 206, 229 (1874); *Fargo* v. *Hart,* 193 U. S. 490, 499 (1904). In some cases

the Court has concluded that States have, in fact, cast their tax burden upon property located beyond their borders. *Fargo* v. *Hart,* 193 U. S. 490, 499–503 (1904); *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 283–286 (1919); *Wallace* v. *Hines,* 253 U. S. 66, 69–70 (1920); *Southern R. Co.* v. *Kentucky,* 274 U. S. 76, 81–84 (1927). The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due.[5] A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders." *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 365 (1940). Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. *Fargo* v. *Hart,* 193 U. S. 490, 499–500 (1904).[6]

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[5] We have said: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 365. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169, 174 (1949). Neither appellants nor appellees contend that these two analyses bear different implications insofar as our present case is concerned.

[6] As the Court stated in *Wallace* v. *Hines,* 253 U. S., at 69: "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not . . . to

III.

Applying these principles to the facts of the case now before us, we conclude that Missouri's assessment of N & W's rolling stock cannot be sustained. This Court has, in various contexts, permitted mileage formulas as a basis for taxation. See, *e. g., Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421 (1894). A railroad challenging the result reached by the application of such a formula has a heavy burden. See *Butler Brothers* v. *McColgan,* 315 U. S. 501, 507 (1942); *Norfolk & Western R. Co.* v. *North Carolina,* 297 U. S. 682, 688 (1936). It is confronted by the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints. Its task is to show that application of the mileage method in its case has resulted in such gross overreaching, beyond the values represented by the intrastate assets purported to be taxed, as to violate the Due Process and Commerce Clauses of the Constitution. Cf. *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, 547 (1950). But here the appellants have borne that burden, and the State has made no effort to offset the convincing case that they have made.

Here, the record shows that rigid application of the mileage formula led to a grossly distorted result. The rolling stock in Missouri was assessed to N & W at $19,981,757. It was practically the same property that had been assessed the preceding year at $9,177,683 to the Wabash. Appellants introduced evidence of the results of an actual count of the rolling stock in Missouri.

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open to taxation what is not within the State. Therefore no property of . . . an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State."

On the basis of this actual count, the equalized assessment would have been less than half of the value assessed by the State Commission. The Commission's mileage formula resulted in postulating that N & W's rolling stock in Missouri constituted 8.2824% of its rolling stock. But appellants showed that the rolling stock usually employed in the State comprised only about 2.71% by number of units (and only 3.16% by cost-less-depreciation value) of the total N & W fleet.

Our decisions recognize the practical difficulties involved and do not require any close correspondence between the result of computations using the mileage formula and the value of property actually located in the State, but our cases certainly forbid an unexplained discrepancy as gross as that in this case.[7] Such discrepancy certainly means that the impact of the state tax is not confined to intrastate property even within the broad tolerance permitted. The facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product.

The basic difficulty here is that the record is totally barren of any evidence relating to enhancement or to going-concern or intangible value, or to any other factor which might offset the devastating effect of the demonstrated discrepancy. The Missouri Supreme Court attempted to justify the result by reference to "en-

[7] "[I]f the ratio of the value of the property in [the State] to the value of the whole property of the company be less than that which the length of the road in [the State] bears to its entire length, . . . a tax imposed upon the property in [the State] according to the ratio of the length of its road to the length of the whole road must necessarily fall upon property out of the State." *The Delaware Railroad Tax,* 18 Wall. 206, 230–231 (1874).

hanced" value, but the Missouri Commission made no effort to show such value or to measure the extent to which it might be attributed to the rolling stock in the State. In fact, N & W showed that it is chiefly a coal-carrying railroad, 70% of whose 1964 revenue was derived from coal traffic. It demonstrated that its coal operations require a great deal of specialized equipment, scarcely any of which ever enters Missouri. It showed that traffic density on its Missouri tracks was only 54% of traffic density on the N & W system as a whole. Finally, it proved that the overwhelming majority of its rolling stock regularly present in Missouri was rolling stock it had leased from the Wabash. As long ago as *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421 (1894), we indicated that an otherwise valid mileage formula might not be validly applied to ascertain the value of tangible assets within the taxing State in exceptional situations, for example, "where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock." *Id.,* at 431.

The Missouri Supreme Court did not challenge the factual data submitted by the N & W. Its decision that these data did not place this case within the realm of "exceptional situations" recognized by this Court was apparently based on the conclusion that the lease transaction between Wabash and the N & W had increased the value of tangible assets formerly belonging to the two separate lines. This may be true, but it does not follow that the Constitution permits us, without evidence as to the amount of enhancement that may be assumed, to bridge the chasm between the formula and the facts of record. The difference between the assessed value and the actual value as shown by the evidence to which we have referred is too great to be explained by the mere assertion, without more, that it is due to an assumed and

nonparticularized increase in intangible value. See *Wallace* v. *Hines,* 253 U. S. 66, 69 (1920).

As the Court recognized in *Fargo* v. *Hart,* 193 U. S. 490, 499–500 (1904), care must be exercised lest the mileage formula

> "be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense."

We repeat that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the State is obliged to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail.

IV.

Accordingly, we conclude that, on the present record, Missouri has in this case exceeded the limits of her constitutional power to tax, as defined by the Due Process

and Commerce Clauses. It will be open to the Missouri Supreme Court, so far as our action today is concerned, to remand the case to the appropriate tribunal to reopen the record for additional evidence to support the assessment. We vacate the judgment of the Supreme Court of Missouri and remand the cause to it for further proceedings not inconsistent with our decision.

Vacated and remanded.

MR. JUSTICE BLACK, dissenting.

It is established law, as the Court apparently recognizes in its opinion, that an interstate company challenging a state apportionment of the company's property taxable in the State has the heavy burden of proving by "clear and cogent evidence" that the apportionment is grossly and flagrantly excessive. See, *e. g., Railway Express Agency* v. *Virginia,* 358 U. S. 434, 444, and cases cited. I agree with the Supreme Court of Missouri that appellant railroad failed to meet that burden and would therefore affirm its judgment. See its opinion at 426 S. W. 2d 362.

It is true that most of the cars used in Missouri by N & W were owned by the Wabash Railroad and that before transfer to N & W they had been assessed at $9,177,683 as against the assessment here of $19,981,757. But this, of course, does not prove that the higher assessment was too much. For, as the Supreme Court of Missouri pointed out, this Court has held that "a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive . . . ." *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 432. The court below held, and this Court agrees, that in pricing the value of the rolling stock the Commission was authorized to consider

intangible values, such as goodwill and values added because of the enhancement to the property in Missouri brought about by being merged into the entire N & W system. This consideration of enhanced value is not new (see, *e. g., Pullman Co.* v. *Richardson,* 261 U. S. 330, 338), and, as the Court points out, it is because of this intangible factor of enhancement that States are allowed wide discretion in determining the value of tangible property located within their borders. Thus, mileage formulas, such as the one used here, have generally been upheld. As this Court said in *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, "In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula [cases cited]." 310 U. S., at 365. It has never been contended that mileage formulas are completely accurate, but because States must consider such intangibles as enhancement value, these formulas are allowed except where the taxpayer can show, as the Court puts it, "that application of the mileage method in its case has resulted in such gross overreaching, beyond the values represented by the intrastate assets purported to be taxed, as to violate the Due Process and Commerce Clauses of the Constitution." I do not believe that appellants have made such a showing here. The fatal flaw with the appellants' case is that they have not proved that the tax is excessive when possible enhancement of value due to the merger is considered. The Court's opinion admits as much when it says that "the record is totally barren of any evidence relating to enhancement or to going-concern or intangible value, or to any other factor . . . ." Where I differ with the Court is that I believe the burden of proof is on the railroad to show that the tax is excessive under all considerations rather than on the Commission to show sufficient enhancement of value to justify the tax.

This Court has recognized before, and indeed the majority pays lip service to the fact today, that it is impossible for a State to develop tax statutes with mathematical perfection. Indeed, as was stated in *International Harvester Co.* v. *Evatt,* 329 U. S. 416: "Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments." 329 U. S., at 422–423. And the "burden is on the taxpayer to make oppression manifest by clear and cogent evidence." *Norfolk & Western R. Co.* v. *North Carolina,* 297 U. S. 682, 688. Since appellants here did not prove that the *enhanced value** of the rolling stock was less than the tax assessment, or that the State was imposing on N & W taxes that were exorbitant on the full value of all its property, cf. *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, I would affirm the decision of the Missouri Supreme Court.

*This is a familiar principle of valuation in such tax cases. See *Fargo* v. *Hart,* 193 U. S. 490, 499; *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 225; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 347; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 282.

LEE, COMMISSIONER OF CORRECTIONS OF ALABAMA, ET AL. *v.* WASHINGTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 75. Argued November 7, 1967.—Decided March 11, 1968.

A three-judge District Court declared Alabama statutes requiring racial segregation in prisons unconstitutional and established a schedule for desegregation. The State's challenges of the judgment based on Fed. Rule Civ. Proc. 23 (relating to class actions), the claimed constitutionality of the statutes, and the failure to allow for necessary prison security and discipline, *held* to be without merit.

263 F. Supp. 327, affirmed.

Nicholas S. Hare, Special Assistant Attorney General of Alabama, argued the cause for appellants. With him on the briefs were *MacDonald Gallion,* Attorney General, *Gordon Madison,* Assistant Attorney General, and *J. M. Breckenridge.*

Charles Morgan, Jr., argued the cause for appellees. With him on the brief were *Orzell Billingsley, Jr.,* and *Melvin L. Wulf.*

PER CURIAM.

This appeal challenges a decree of a three-judge District Court declaring that certain Alabama statutes violate the Fourteenth Amendment to the extent that they require segregation of the races in prisons and jails, and establishing a schedule for desegregation of these institutions. The State's contentions that Rule 23 of the Federal Rules of Civil Procedure, which relates to class actions, was violated in this case and that the challenged statutes are not unconstitutional are without merit. The remaining contention of the State is that the specific orders directing desegregation of prisons and

jails make no allowance for the necessities of prison security and discipline, but we do not so read the "Order, Judgment and Decree" of the District Court, which when read as a whole we find unexceptionable.

The judgment is affirmed.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination.

WALKER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

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

No. 786, Misc. Decided March 11, 1968.

Petitioner, under life sentence for murder, was later sentenced to five years for assault, to commence when he had completed the murder sentence. Petitioner challenged the murder conviction on constitutional grounds, but the District Court denied a writ of habeas corpus on the sole ground that, in view of the sentence for assault, a favorable decision would not result in the petitioner's immediate release from prison, and that the court was therefore powerless to consider his claims. The Court of Appeals rejected his application for a certificate of probable cause. *Held:* Whatever its other functions, the writ of habeas corpus is available to test the legality of a prisoner's current detention, and it is immaterial that another prison term might await him if he should establish the unconstitutionality of his present imprisonment.

Certiorari granted; reversed and remanded.

PER CURIAM.

On September 30, 1960, the petitioner was convicted of first degree murder and was sentenced to life imprisonment. On May 25, 1965, he was found guilty of aggravated assault and was sentenced to five years in the state penitentiary, to commence when he had completed serving the sentence for murder.

Having attempted without success to challenge his murder conviction on federal constitutional grounds in the state courts, the petitioner sought a writ of habeas corpus in the United States District Court for the Southern District of Florida. He contended that he had been deprived of counsel at his preliminary hearing, that a coerced confession had been used against him at trial, and that he had been denied the right to an effective appeal.

The District Court observed that, even if the petitioner's contentions were accepted and his murder conviction reversed, he would still face a five-year prison term for aggravated assault. Because a favorable decision on the murder conviction would not result in the petitioner's immediate release from prison, the District Court thought itself powerless to consider the merits of his claims and therefore denied his habeas corpus petition without further consideration. In short, the District Court held that the petitioner could not challenge his life sentence until after he had served it. The United States Court of Appeals for the Fifth Circuit summarily rejected the petitioner's application for a certificate of probable cause, and he then sought review in this Court.

In reaching its conclusion, the District Court relied upon *McNally* v. *Hill,* 293 U. S. 131, for the broad proposition that the "Writ of Habeas Corpus may not be used as a means of securing judicial decision of a question which, even if determined in the prisoner's favor, could not result in his immediate release." The *McNally* decision, however, held only that a prisoner cannot employ federal habeas corpus to attack a "sentence which [he] has not begun to serve." 293 U. S., at 138. Here the District Court has turned that doctrine inside out by telling the petitioner that he cannot attack the life sentence he *has* begun to serve—until after he has finished serving it. We need not consider the continued vitality of the *McNally* holding in this case, for neither *McNally* nor anything else in our jurisprudence can support the extraordinary predicament in which the District Court has placed this petitioner.

Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention. The petitioner is now serving a life sentence imposed pursuant to a conviction for murder. If, as he contends, that conviction

was obtained in violation of the Constitution, then his confinement is unlawful. It is immaterial that *another* prison term might still await him even if he should successfully establish the unconstitutionality of his present imprisonment.

The motion 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 for further proceedings consistent with this opinion.

It is so ordered.

LOOKRETIS *v.* UNITED STATES.

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

No. 913. Decided March 11, 1968.

Certiorari granted; 385 F. 2d 487, vacated and remanded.

Maurice J. Walsh for petitioner.

Solicitor General Griswold for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded for further consideration in the light of *Chapman* v. *California,* 386 U. S. 18, and *Marchetti* v. *United States, ante,* p. 39.

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

HETTLEMAN ET AL. *v.* CHICAGO LAW INSTITUTE ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 961. Decided March 11, 1968.

Appeal dismissed and certiorari denied.

Julius L. Sherwin for appellants.

William G. Clark, Attorney General of Illinois, *John J. O'Toole,* Assistant Attorney General, *John J. Stamos, Edward J. Hladis* and *Ronald Butler* 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.

WISEMAN, DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OKLAHOMA *v.* BARBY ET UX.

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

No. 871. Decided March 11, 1968.

Certiorari granted; 380 F. 2d 121, reversed.

Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein and *Grant W. Wiprud* for petitioner.

John K. Speck for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260.

MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that the petition for a writ of certiorari should be granted and the case set down for oral argument.

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

FELTON ET AL. *v.* CITY OF PENSACOLA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

No. 934. Decided March 11, 1968.

Certiorari granted; 200 So. 2d 842, reversed.

Stanley Fleishman, Sam Rosenwein and *Hugh W. Gibert* for petitioners.

Dave Caton for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the District Court of Appeal of Florida, First District, is reversed. *Redrup* v. *New York,* 386 U. S. 767.

THE CHIEF JUSTICE would grant the petition and reverse because of the failure of the trial court to adhere to the standard for judging obscenity announced in *Roth* v. *United States,* 354 U. S. 476.

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 his dissenting opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455.

Syllabus.

FEDERAL TRADE COMMISSION *v.* FRED MEYER, INC., ET AL.

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

No. 27. Argued November 6, 1967.—Decided March 18, 1968.

The Federal Trade Commission (FTC) ruled that respondents, the corporate owner of a chain of supermarkets (Meyer) and two of its officers, had unlawfully induced suppliers to engage in discriminatory pricing and sales promotion activities prohibited by §§ 2 (a) and 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act. The FTC held that § 2 (d) prohibits a supplier from granting promotional allowances to a direct-buying retailer like Meyer, unless the allowances are also made available to wholesalers who purchase from the supplier and resell to the direct-buying retailer's competitors. The Court of Appeals adopted respondents' view that the statutory requirement of proportional equality among "customers competing in the distribution" of products concerned competition at the same functional level of distribution, which did not include competition between direct-buying retailers and wholesalers, and that retailers competing with Meyer were not customers of the suppliers but were customers of the wholesalers. The court set aside that portion of the FTC order which barred respondents from inducing suppliers to grant them promotional allowances not available to "customers who resell to purchasers who compete with respondents in the resale of such supplier's products." *Held:* On the facts of this case, § 2 (d) reaches only discrimination between customers competing for resales at the same functional level. Pp. 348–358.

(a) The Act does not mandate proportional equality between the direct-buying retailer, Meyer, and the wholesalers. Pp. 348–349, 355–357.

(b) "Customer" in § 2 (d) includes a retailer who buys through wholesalers and competes with a direct-buying retailer in the resale of the supplier's products. Pp. 348–352.

(c) The FTC found that Meyer competed in the resale of certain suppliers' products with other retailers in the area who

purchased the products through wholesalers, and the Court of Appeals did not disturb this finding. P. 354.

(d) Since in this case the direct impact of the discriminatory promotional allowances is felt by the disfavored retailers, the most reasonable construction of § 2 (d) is one which places on the supplier the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer. P. 357.

(e) A supplier may, consistently with the other provisions of the antitrust laws, utilize his wholesalers to distribute payments or administer promotional programs, as long as the supplier assumes responsibility, under the FTC's rules, for seeing that the allowances are made available to all who compete in the resale of his products. P. 358.

359 F. 2d 351, reversed in part and remanded.

Daniel M. Friedman argued the cause for petitioner. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Francis X. Beytagh, Jr., James McI. Henderson* and *E. K. Elkins.*

Edward F. Howrey argued the cause for respondents. With him on the brief were *Terrence C. Sheehy* and *George W. Mead.*

Morris B. Abram filed a brief for the Atlantic Coast Independent Distributors Association, Inc., as *amicus curiae,* urging reversal.

Gilbert H. Weil filed a brief for Clairol Incorporated, as *amicus curiae,* urging affirmance.

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

The Federal Trade Commission, after extensive proceedings, ruled that respondents, the corporate owner of a chain of supermarkets and two of its officers, had unlawfully induced certain suppliers to engage in discriminatory pricing and sales promotional activities prohibited by §§ 2 (a) and 2 (d) of the Clayton Act, as amended

by the Robinson-Patman Act.[1] 63 F. T. C. —— (1963). The Court of Appeals for the Ninth Circuit disagreed with the Commission's construction of § 2 (d) and reversed in part its ruling that the section had been violated. 359 F. 2d 351 (1966). We granted certiorari, 386 U. S. 907 (1967), because the case presents important questions concerning the scope of a key provision of the Robinson-Patman Act.

I.

Section 2 (d) makes it unlawful for a supplier in interstate commerce to grant advertising or other sales promotional allowances to one "customer" who resells the supplier's "products or commodities" unless the allowances are "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." [2] Although we have limited our review of this case to one aspect of the alleged § 2 (d)

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[1] 38 Stat. 730, as amended, 49 Stat. 1526, 1527, 15 U. S. C. §§ 13 (a), 13 (d). Section 2 (a) provides in pertinent part:

"[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

Section 2 (d) provides in full:

"[I]t shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

[2] See n. 1, *supra*.

violations,[3] full understanding of the issues requires a brief exposition of the facts from which the Commission concluded that respondents had induced violations of both §§ 2 (a) and 2 (d). The relevant facts found by the Commission were not disturbed by the Court of Appeals.

Respondent Fred Meyer, Inc., operates a chain of 13 supermarkets in the Portland, Oregon, area which engage in the retail sale of groceries, drugs, variety items, and a limited line of clothing. In 1957 Meyer's sales exceeded $40,000,000. According to its 1960 prospectus, it made one-fourth of the retail food sales in the Portland area and was the second largest seller of all goods in that area. Since 1936 Meyer has conducted annually a four-week promotional campaign in its stores based on the distribution of coupon books to consumers. The books usually contain 72 pages, each page featuring a single product being sold by Meyer at a reduced price. The consumer buys the book for the nominal sum of 10¢ and must surrender the appropriate coupon when making his purchase of goods. A coupon often represents a reduc-

[3] The Commission and respondents filed separate petitions for certiorari to review different rulings of the Court of Appeals. Respondents contended (1) that the Commission had failed to show that respondents' inducement of §§ 2 (a) and 2 (d) violations had been knowing and (2) that the Commission's order prohibiting future inducement of § 2 (d) violations was too broad. The Commission's petition raised the question "[w]hether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2 (d) of the Robinson-Patman Act." The Commission also presented an additional question which it sought to reserve only if respondents' petition were granted. We denied respondents' petition, 386 U. S. 908 (1967), and specifically limited our review on the Commission's petition to the issue of statutory interpretation therein presented. 386 U. S. 907 (1967).

tion of one-third or more from Meyer's regular price for the featured item, and the cover of the 1957 book stated that the use of all 72 coupons would result in total savings of more than $54. The promotional campaign is highly successful. Meyer sold 138,700 books in 1957 and 121,270 in 1958. Aside from the nominal 10¢ paid by consumers for the coupon books, Meyer finances the promotion by charging the supplier of each featured product a fee of at least $350 for each coupon-page advertising his product.[4] Some participating suppliers further underwrite the promotion by giving Meyer price reductions on its purchases of featured items, by replacing at no cost a percentage of the goods sold by Meyer during the campaign, or by redeeming coupons in cash at an agreed rate.

The Commission concluded that this promotional scheme, as conducted in the years 1956 through 1958, violated §§ 2 (d) and 2 (a) in the following respects: First, the $350 paid to Meyer by each of four suppliers participating in the campaigns represented promotional allowances paid in violation of § 2 (d) because similar allowances were not made available on proportionally equal terms to competing customers. Second, the additional value given Meyer by these suppliers in the form of discounts, free replacements of goods sold and coupon redemptions amounted to price discrimination prohibited by § 2 (a).[5] The Commission held that by inducing the suppliers to discriminate in price, respondents had vio-

[4] The Commission found that the total of $25,200 received by Meyer from 72 participating suppliers in each of the years 1956 and 1957 more than covered Meyer's cost of publishing, distributing, and publicizing the coupon books in those years. The Commission characterized as "clear profit" the $13,870 paid Meyer by consumer purchasers of the books in 1957.

[5] See n. 1, *supra*.

lated § 2 (f) of the Act,[6] and that by inducing them to grant discriminatory promotional allowances, respondents had engaged in an unfair method of competition in violation of § 5 (a) of the Federal Trade Commission Act.[7]

Both before the Commission and in the Court of Appeals, respondents argued that it was not established that two participating suppliers, Tri-Valley Packing Association and Idaho Canning Company, had violated § 2 (d). Meyer purchased directly from both of these suppliers. Tri-Valley participated in the 1957 promotion by paying Meyer $350 for a coupon-page featuring Tri-Valley's brand of canned peaches and by replacing in merchandise every third can sold by Meyer on the coupon's offer of three cans for the price of two. Idaho Canning participated in the 1957 promotion on substantially identical terms, except that the coupon-page it purchased offered three cans of corn for the price of two. The Commission found that two wholesalers, Hudson House and Wadhams & Co., both of which resold to Meyer's retail competitors, had been disfavored in these transactions in that Hudson House had purchased canned peaches from Tri-Valley and both Hudson House and Wadhams had purchased canned corn from Idaho Can-

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[6] 15 U. S. C. § 13 (f):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[7] 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. § 45 (a):

"(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

. . . . . .

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

ning, but neither of the two wholesalers had been accorded promotional allowances comparable to those received by Meyer. Respondents argued that, purely as a matter of statutory construction, Tri-Valley and Idaho Canning could not have violated the requirement of proportional equality among "customers competing in the distribution" of their products because (1) Meyer, a retailer, was not "competing" in the distribution of canned corn and peaches with the disfavored wholesalers, Hudson House and Wadhams, and (2) the retailers found by the Commission to be competing with Meyer in the resale of these products were not "customers" of Tri-Valley and Idaho Canning but were customers of Hudson House and Wadhams.

The Commission rejected this reading of § 2 (d), noting that, if respondents' view prevailed, a retailer buying from a wholesaler and having no direct dealings with his supplier would receive no protection against discriminatory promotional allowances given his competitor who purchased directly from the supplier. The Commission held that § 2 (d) prohibits a supplier from granting promotional allowances to a direct-buying retailer, such as Meyer, unless the allowances are also made available to wholesalers who purchase from the supplier and resell to the direct-buying retailer's competitors. Accordingly, the Commission's cease-and-desist order included a provision barring respondents from inducing suppliers to grant them promotional allowances not available to "customers who resell to purchasers who compete with respondents in the resale of such supplier's products." 63 F. T. C., at ——. One Commissioner, while agreeing with the majority that respondents had induced Tri-Valley and Idaho Canning to violate § 2 (d), dissented in part on the ground that the order should have required the promotional allowances to be made available to the retailers competing with Meyer rather than to

wholesalers who resold to them.[8] Thus, in his view, the competing retailers were "customers" of Tri-Valley and Idaho Canning within the meaning of the statute. The Court of Appeals adopted the interpretation of § 2 (d) urged by respondents. Consequently, it set aside the portion of the Commission's order set out above.

We agree with the Commission that the proscription of § 2 (d) reaches the kind of discriminatory promotional allowances granted Meyer by Tri-Valley and Idaho Canning. Therefore, we reverse the judgment of the Court of Appeals on this point. However, because we have concluded that Meyer's retail competitors, rather than the two wholesalers, were competing customers under the statute, we also remand the case for appropriate modification of the Commission's order. We deal first with respondents' arguments, second with the opinion of the Court of Appeals, and third with the Commission's order.

II.

Respondents press upon us a view of § 2 (d) which leaves retailers who buy from wholesalers for the most part unprotected from discriminatory promotional allowances granted their direct-buying competitors. We are told that § 2 (d) in specific terms requires this result. To benefit from the statute's requirement of proportional equality, it is urged, a buyer must be a "competing customer" within the narrowest sense of that phrase. Thus, the wholesalers in this case are not competing customers because they do not compete with Meyer, and the retailers who do compete with Meyer in the resale of the suppliers' products are outside the protection of § 2 (d) because they are not customers of the suppliers. For reasons stated below, we agree with respondents that, on

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[8] 63 F. T. C., at —— (Commissioner Elman, concurring in part and dissenting in part).

the facts of this case, § 2 (d) reaches only discrimination between customers competing for resales at the same functional level and, therefore, does not mandate proportional equality between Meyer and the two wholesalers.[9] But we cannot accept the second half of this argument, for it rests on a narrow definition of "customer" which becomes wholly untenable when viewed in light of the central purpose of § 2 (d) and the economic realities with which its framers were concerned.

Conceding that the Robinson-Patman amendments by no means represent an exemplar of legislative clarity,[10] we cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate. See, *e. g., FTC* v. *Sun Oil Co.,* 371 U. S. 505, 516–521 (1963); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.,* 150 F. 2d 988, 991–993 (C. A. 8th Cir.), cert. denied, 326 U. S. 773 (1945). We start with the proposition that "[t]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC* v. *Henry Broch & Co.,* 363 U. S. 166, 168 (1960). The role within the statutory scheme which Congress intended for § 2 (d) is well documented in the legislative history. An investigation of chain store buying practices undertaken by the Federal Trade Commission, at Congress' request,[11] had

[9] This case, in its present posture, does not present the question whether the functional label used by a manufacturer or reseller reflects his actual position in the distributive chain. Compare *FTC* v. *Ruberoid Co.,* 343 U. S. 470, 475 (1952); cf. *FTC* v. *Simplicity Pattern Co.,* 360 U. S. 55, 62–63 (1959).

[10] *Automatic Canteen Co.* v. *FTC,* 346 U. S. 61, 65 (1953); see F. Rowe, Price Discrimination Under the Robinson-Patman Act 20 (1962).

[11] S. Res. No. 224, 70th Cong., 1st Sess., 69 Cong. Rec. 7857 (1928).

indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination.[12] The investigation also revealed that certain practices by which large buyers induced concessions which their smaller competitors could not obtain were wholly beyond the reach of § 2.[13] It is significant that congressional concern had focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant.[14] Indeed, before Congress acted, some States had attempted to limit the growth of retail chains through express prohibitions against further extensions and through taxation.[15] One of the practices disclosed by the Commission's investigation was that by which large retailers induced con-

[12] Federal Trade Commission, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess., 63–65, 90–91, 96–97 (1935).

[13] *Id.*, at 57–65. See also Hearings before the Special House Committee on Investigation of American Retail Federation, 74th Cong., 1st Sess. (1935).

[14] See C. Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 6–11 (2d rev. ed. 1959). In presenting his bill to the House Judiciary Committee, Representative Patman stated:

"I believe it is the opinion of everyone who has studied this subject, that the day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive under that system. So we have reached the crossroads; we must either turn the food and grocery business of this . . . country over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist—not to give them any special rights, special privileges, or special benefits, but just to deny their competitors the special benefits that they are getting, that they should not be permitted to have." Hearings on H. R. 8442, 4995, and 5062 before the House Committee on the Judiciary, 74th Cong., 1st Sess., 5–6 (1935).

[15] See Federal Trade Commission, Final Report on the Chain-Store Investigation, *supra,* n. 12, at 78–82.

cessions from suppliers in the form of advertising and other sales promotional allowances.[16] The draftsman of the provision which eventually emerged as § 2 (d) explained that, even when such payments were made for actual sales promotional services, they were a form of indirect price discrimination because the recipient of the allowances could shift part of his advertising costs to his supplier while his disfavored competitor could not.[17] That Congress adopted this view of the practice it sought to eliminate by § 2 (d) is demonstrated by the words used by the Senate Judiciary Committee in recommending enactment of the section:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." [18]

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[16] *Id.*, at 44–46, 61. See also Hearings before the Special House Committee on Investigation of American Retail Federation, 74th Cong., 1st Sess., Vol. 3, No. 1, at 66–88 (1935).

[17] Hearings on Bills to Amend the Clayton Act before a Subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., 464 (1936) (Mr. Teegarden).

[18] S. Rep. No. 1502, 74th Cong., 2d Sess., 7 (1936). The House Judiciary Committee reported the provision favorably in identical terms. H. R. Rep. No. 2287, 74th Cong., 2d Sess., 15–16 (1936).

Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers.

Of course, neither the Committee Report nor other parts of the legislative history in so many words define "customer" to include retailers who purchase through wholesalers and compete with direct buyers in resales. But a narrower reading of § 2 (d) would lead to the following anomalous result. On the one hand, direct-buying retailers like Meyer, who resell large quantities of their suppliers' products and therefore find it feasible to undertake the traditional wholesaling functions for themselves, would be protected by the provision from the granting of discriminatory promotional allowances to their direct-buying competitors. On the other hand, smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this protection. Such a result would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. If we were to read "customer" as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of § 2 (d). We effectuate it by holding that the section includes such competing retailers within the protected class.

III.

The Commission did not press in the Court of Appeals the position of one Commissioner that retailers who purchased through Hudson House and Wadhams and competed with Meyer in resales were customers of Tri-Valley and Idaho Canning. Consequently, that court gave almost no consideration to the construction of § 2 (d) which we hold to be the proper one. Citing its prior

ruling in *Tri-Valley Packing Assn.* v. *FTC,* 329 F. 2d 694, 709–710 (C. A. 9th Cir. 1964), the court merely stated that a § 2 (d) violation could not be made out unless (1) Tri-Valley and Idaho Canning had in some way dealt directly with retailers competing with Meyer, and (2) canned peaches and corn sold by the two suppliers could be traced through Hudson House and Wadhams to the shelves of the competing retailers. 359 F. 2d, at 359–360, 362–363. In the view of the Court of Appeals, these two requirements compose the elements of the "indirect customer" doctrine under which the Commission and the courts impose § 2 (d) liability when a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some of the distributors' accounts over others. See *American News Co.* v. *FTC,* 300 F. 2d 104, 109 (C. A. 2d Cir.), cert. denied, 371 U. S. 824 (1962); *K. S. Corp.* v. *Chemstrand Corp.,* 198 F. Supp. 310, 312–313 (D. C. S. D. N. Y. 1961); *Kay Windsor Frocks, Inc.,* 51 F. T. C. 89, 95–96 (1954); F. Rowe, Price Discrimination Under the Robinson-Patman Act 398–399 (1962), 90 (1964 Supp.). We need not and do not question the validity of this doctrine as applied to pierce a supplier's unrealistic claim that a reseller favored by him is actually the customer of an intermediate distributor. Nor do we reach the question whether a retailer may succeed in a private action based on § 2 (d) without proving that he in fact resold the supplier's product in competition with a favored buyer. In the case before us, it is conceded that Meyer was a customer of Tri-Valley and Idaho Canning. Moreover, as indicated by its approval of the Commission's § 2 (a) ruling, the Court of Appeals did not question the Commission's finding that Meyer competed in the resale of Tri-Valley and Idaho Canning products with retailers who purchased through Hudson

House and Wadhams.[19] Given these findings, it was unnecessary for the Commission to resort to the indirect customer doctrine. Whether suppliers deal directly with disfavored competitors or not, they can, and here did, afford a direct buyer the kind of competitive advantage which § 2 (d) was intended to eliminate. In light of our holding that "customers" in § 2 (d) includes retailers who buy through wholesalers and compete with a direct buyer in the resale of the supplier's product, the requirement of direct dealing between the supplier and disfavored competitors imposed by the Court of Appeals rests on too narrow a reading of the statute. Further, in light of the Commission's finding that Meyer competed in the resale of the Idaho Canning and Tri-Valley products with other retailers in the area who purchased through Hudson House and Wadhams and in light of the fact that the Court of Appeals did not disturb this finding, the court misapprehended the Commission's burden in requiring it to trace those products to the shelves of the disfavored retailers.

IV.

The Commission's view of the impact of respondents' argument in no way conflicts with our own. In rejecting respondents' construction of § 2 (d), the Commission observed:

> "The net result of this argument is that the entire structure of 'independent' food merchants—including the traditional wholesaler and his numerous, small retailer-customers—are placed completely outside

[19] The Commission's § 2 (a) and § 2 (d) rulings were both based on findings that retailers in the Portland area who purchased through Hudson House and Wadhams competed with Meyer in the resale of Idaho Canning corn and Tri-Valley peaches. The Court of Appeals could not have consistently set aside these findings with regard to the § 2 (d) violations while upholding them with respect to § 2 (a).

> the pale of Section 2 (d) of the amended Clayton Act insofar as their competition with the direct-buying 'chains' is concerned.
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> . . . . . .
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> "We are not persuaded that Congress either intended or effected any such result when it passed Section 2 (d). In the first place, such a construction goes squarely against the well-known purposes of the Act itself, namely, to give the 'independent' food sellers an even break in their competition with the 'chains.' " [20]

But rather than concluding, as we have, that retailers who purchased through Hudson House and Wadhams and competed with Meyer in resales were disfavored customers of Tri-Valley and Idaho Canning, a majority of the Commission held that the wholesalers, Hudson House and Wadhams, were the customers entitled to promotional allowances on proportionally equal terms with Meyer. Although we approach the Commission's ruling with the deference due the agency charged with day-to-day administration of the Act, we hold that, at least on the facts before us, § 2 (d) does not require proportional equality between Meyer and the two wholesalers.

The Commission believed it found support for its position in the language of § 2 (d) itself, which requires that promotional allowances be accorded on proportionally equal terms to "customers competing in the *distribution*" of a supplier's product, rather than merely to customers competing in resales. The majority reasoned that Hudson House and Wadhams, when they resold to Meyer's retail competitors, were competing with Meyer in the distribution of Tri-Valley and Idaho Canning products because the two wholesalers were "seeking exactly the same consumer dollars that respond-

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[20] 63 F. T. C., at —.

ents are after." 63 F. T. C., at ——. While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2 (d), we do not believe that the use of the word "distribution" rather than "resale" is a clear indication that it did, and what discussion there was of the promotional allowance provision during the congressional hearings indicates that the section was meant to impose proportional equality only where buyers competed on the same functional level. Thus, in reporting the provision, both the Senate and House Judiciary Committees used the following example:

> "To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manufacturer grants a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis." [21]

This illustration and others which could be cited are not conclusive, but they do strongly suggest that the competition with which Congress was concerned in § 2 (d) was that between buyers who competed in resales of the supplier's products. And, as stated above, Congress' objective was to assure that all sellers, regardless of size, competing directly for the same customers would receive even-handed treatment from their suppliers.[22] We noted in *FTC* v. *Sun Oil Co.*, 371 U. S. 505 (1963), that when Congress wished to expand the meaning of competition to include more than resellers

[21] S. Rep. No. 1502, 74th Cong., 2d Sess., 8 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936).

[22] See n. 14, *supra*.

operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2 (a) of the Act by prohibiting price discrimination which may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *Id.*, at 514–515; see *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 55 (1948). We stated in *Sun Oil* that:

> "There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary." [23]

In the present case, too, we think "the reasonable inference" is that Congress did not intend such a broad meaning of competition in § 2 (d). We recognize that it would be both inappropriate and unwise to attempt to formulate an all-embracing rule applying the elusive language of the section to every system of distribution a supplier might devise for getting his product to the consumer. But, on the concrete facts here presented, it is clear that the direct impact of Meyer's receiving discriminatory promotional allowances is felt by the disfavored retailers with whom Meyer competes in resales. We cannot assume without a clear indication from Congress that § 2 (d) was intended to compel the supplier to pay the allowances to a reseller further up the distributive chain who might or might not pass them on to the level where the impact would be felt directly. We conclude that the most reasonable construction of § 2 (d) is one which places on the supplier the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer.

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[23] 371 U. S., at 515.

The Commission argues here that the view we take of § 2 (d) is impracticable because suppliers will not always find it feasible to bypass their wholesalers and grant promotional allowances directly to their numerous retail outlets. Our decision does not necessitate such bypassing. We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales. Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices,[24] for seeing that the allowances are made available to all who compete in the resale of his product.

The judgment of the Court of Appeals, insofar as it held that the promotional allowances granted Meyer by Tri-Valley and Idaho Canning did not violate § 2 (d), is reversed. The case is remanded to the Court of Appeals with directions to remand to the Commission for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE FORTAS, concurring.

I agree with the result in this case and I join the Court's opinion. The net of our decision, as I see it, is this. The statute permits a supplier to make payment to retailers for services and facilities only if such pay-

[24] See 16 CFR §§ 1.55–1.56; cf. "Guides for Allowances and Services," 1 CCH Trade Reg. Rep. ¶ 3980, at 6073–6079.

ment or its equivalent is made available to all competing retailers handling the supplier's product. If they choose to render the same or equivalent service or furnish the same or equivalent facilities, they are entitled to the same payment.* I believe that this result, obviously intended by the Congress, can best be squared with the language of § 2 (d) by the device of regarding the wholesaler and his retail customer as a unit for purposes of that section. The Court is clearly correct in my view in requiring that the opportunity to participate be afforded to the competing retailer, and not merely to the wholesaler. This is the plain thrust and purpose of the section. The supplier may satisfy this obligation by direct dealing with the competing retailer or by arrangement with the wholesaler reasonably designed to transmit to the retailer participation in the program if the retailer chooses to accept.

MR. JUSTICE HARLAN, dissenting.

I dissent because I believe the time has come for a change in approach to Robinson-Patman Act cases that, as here, can only be decided by a judicial *tour de force*. No doubt, the broad purpose of the Act was to protect small sellers from the advantages their larger competitors can obtain through greater buying power. In implementing this purpose, however, the statute imposes a hodgepodge of confusing,[1] inconsistent,[2] and frequently

*We need not here consider refinements of the problem—*e. g.*, the duty of the supplier to tailor his offer so that it is within the practical capability of all competing retailers; or negatively, to avoid making an offer which does not permit fair participation by all types of retailers of the product, as a practical matter.

[1] See, *e. g.*, F. Rowe, Price Discrimination Under the Robinson-Patman Act 534; Stedman, Twenty-four Years of the Robinson-Patman Act, 1960 Wis. L. Rev. 197, 218.

[2] See, *e. g.*, Levi, The Robinson-Patman Act—Is It in the Public Interest?, 1 ABA Antitrust Section 60 (1952–1953). As Professor

misdirected [3] restrictions. In such a situation it seems to me the wiser course for this Court to hew as closely as possible to the wandering line that the statute has drawn (with due deference to the expertise of the Commission charged with enforcing the statute) and not to read into the Act its own notions of how best to protect "little people" from "big people."

In this case, certain suppliers made promotional allowances to the company, a direct-buying retailer. The Act provides that if promotional allowances are made to one customer they must also be made, on a basis of proportional equality, to all other "customers competing in the distribution" of the supplier's product. The suppliers here involved did not make the promotional allowances given to the company available to certain retailers who compete with it but who buy not from the suppliers themselves but from wholesalers who in turn buy from the suppliers. The Court now holds, for the first time, 32 years after the passage of the Act, that although these disfavored retailers are not literally "customers" of the suppliers, the "broad goals" of the Act require them to be treated as if they were.

Levi noted, published criticism of the Act is unsportingly easy to find: "the literature on the Act has become something of a contest of witticisms to relieve an otherwise dreary picture." *Ibid.* An example is Eine Kleine Juristische Schlummergeschichte, 79 Harv. L. Rev. 921.

[3] See, *e. g.*, Shniderman, The Impact of the Robinson-Patman Act on Pricing Flexibility, 57 Nw. U. L. Rev. 173; Austern, Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act, 81 Harv. L. Rev. 773. The confusion is all the more unfortunate in a field where actual conflicting objectives are many: "competitive" purposes are often at odds with "protective" purposes; the defense of traders at one level of distribution may be inconsistent with the liberty of traders at another level, and with the interests of consumers.

Unfortunately, nothing in the Act and not one word of legislative history the Court has found suggest that Congress meant the word "customers" to mean "non-customers who the Court thinks need protection." The Federal Trade Commission refused to accept the suggestion of one Commissioner that this unexpected non-literal reading of the word would best effectuate the Act's purposes, so that Commission expertise cannot in this instance be brought to bear in support of the Court's construction.

Furthermore, the failure of the Act to extend explicit protection in the present situation cannot be dismissed as mere legislative oversight. Compelling suppliers to make promotional allowances available to retailers with whom they do not deal is no simple matter. The supplier could deal through his wholesalers, imposing restrictions on them to guarantee that an "allowance" is actually passed through to retailers, only by running afoul of the Sherman Act.[4] Nor would it simplify matters to make the allowances directly available to retailers: by hypothesis, the retailers in question are too small to make direct dealing efficient, and in any event the suppliers and retailers would constantly risk a Sherman Act charge, by the wholesaler in the middle, that they were conspiring in restraint of him.[5]

In addition, under the present circumstances the very idea of "proportional equality" is almost meaningless. The supplier is asked to offer "equal" promotional allow-

[4] Under *Albrecht* v. *Herald Co.*, *ante*, p. 145, it would presumably be unlawful *per se* for a supplier to attempt to prevent his wholesalers from absorbing the allowance by charging higher prices.

[5] Under *Albrecht*, *supra*, n. 4, it is difficult to see why an agreement between supplier and retailer sufficient to insure that wholesalers in the middle do not absorb promotional allowances would not constitute a combination in restraint of these wholesalers.

ances to a direct-buying chain and a set of small retailers who buy through wholesalers who presumably carry much of the promotion load; the supplier risks treble damages if his guess as to what is even-handed treatment turns out to be erroneous. Even if it were desirable to force suppliers to submit every promotion to the FTC for advance approval, the Commission's refusal to require equality between customers and noncustomers here does not indicate that the experts are sanguine about the possibility of working out a rational definition of proportional equality under these circumstances.

The supplier can, of course, resolutely refuse to enter into promotional programs, a course of action that would effectively avoid favoring large distributors. In doing so, however, he would be abandoning one significant form of competition with his fellow suppliers, and would risk the disfavor of retailers who might prevail on differently situated and less timorous competitive suppliers for assistance.

Congress, concerned as it was for small retailers, did not explicitly impose the particular restriction on suppliers announced today. Since, for all we know, the omission may have been deliberate in light of practical considerations, I prefer to take the statute as we find it. This course of action here and in similarly opaque cases might at least encourage the Congress to give this notoriously amorphous statute the thorough overhauling that has long been due.[6] On this basis I consider that this case should go for the respondents.

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[6] See Friendly, The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Col. L. Rev. 787, 794: "The tiniest fraction of the time spent by lawyers, legal writers, administrators, and judges in an unsuccessful endeavor to elucidate the obscurities of this statute would have sufficed to put the house in order once the problems were revealed; but that time has not been spent."

MR. JUSTICE STEWART, dissenting.

Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful for a supplier to grant to a customer a promotional allowance which is not available to "all other customers competing in the distribution of such products or commodities." The Federal Trade Commission held that the respondent retailer had violated § 2 (d) by inducing certain of its direct suppliers to grant it promotional allowances which were not available to wholesalers who sold the suppliers' products to retailers competing with the respondent.[1] The Court of Appeals refused to enforce this part of the Commission's order on the ground that the wholesalers were not customers "competing" with the respondent. We granted certiorari limited to a single question:

> "Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2 (d) of the Robinson-Patman Act." 386 U. S. 907.

The Court today agrees with the Court of Appeals' answer to this question and holds that wholesalers are not customers "competing" with the respondent. But the Court nevertheless goes on to hold that § 2 (d) was violated upon a theory not argued here by either party. The theory is that retailers who are in fact customers of independent wholesalers are somehow also "customers" of the suppliers of those wholesalers. The Commission has never suggested that this case should turn on any such construction of the term "customer." [2] Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80.

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[1] In this opinion the term "respondent" refers to Fred Meyer, Inc.

[2] One Commissioner attempted in vain to persuade the Commission to accept the theory which the Court today adopts: "What

Because the Court of Appeals was correct in rejecting the Commission's construction of § 2 (d), I would affirm its judgment. But, at the very least, the case should be remanded in order to give the respondent notice and an opportunity to defend against the novel construction of § 2 (d) under which the Court today finds the respondent to be a violator of the law. Due process requires no less. Cf. *Cole* v. *Arkansas,* 333 U. S. 196.

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made this practice illegal, as I see it, is that the allowances were not also made available on proportionally equal terms to Meyer's retail competitors. But that is not the Commission's view of the law." 63 F. T. C., at —— (Commissioner Elman, concurring in part and dissenting in part).

POAFPYBITTY ET AL. *v.* SKELLY OIL CO.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 65. Argued January 24, 1968.—Decided March 18, 1968.

Petitioners, Comanche Indians, brought this action for breach of an oil and gas lease which they had executed to respondent with the approval of the Acting Commissioner of Indian Affairs involving land which they held under trust patents issued by the United States under the General Allotment Act of 1887, as amended. That Act provided that individual Indians were to be allotted land on their reservations which the United States was to hold "in trust for the sole use and benefit of the Indian" allottees. During the 25-year trust period, which has been repeatedly extended, restricted Indian land may be sold or leased only with the consent of the Secretary of the Interior. Leasing of allotted land for mining purposes "by said allottee" is expressly authorized (25 U. S. C. § 396). The Secretary of the Interior must approve the lease but is not the lessor and cannot generally lease such land on his own authority. The Secretary has promulgated extensive regulations for the operation, development, and control of, and is empowered to cancel, the leases. A provision in the lease here involved (§ 6) authorizes the Secretary to cancel the lease "before restrictions are removed" and provides that the lessor shall have remedies for breach of contract thereafter. The trial court sustained respondent's demurrer. The Oklahoma Supreme Court affirmed, holding that the terms of the lease and Interior Department regulations precluded petitioners from suing. *Held:* Petitioners have standing to maintain this action. Pp. 368–376.

(a) Federal restrictions preventing an Indian from selling or leasing his allotted land without the consent of the Government and the fact that the Government as guardian of the Indian can sue to protect allotments do not preclude the Indian landowner from maintaining a suit to protect his rights. *Heckman* v. *United States,* 224 U. S. 413 (1913). Pp. 368–372.

(b) Nothing in the detailed regulatory scheme for supervision by the Secretary of the Interior of oil and gas leases of allotted land diminishes an Indian's right to maintain an action to protect his lease. Pp. 372–374.

(c) In view of the formidable administrative problems of discharging its trust obligations over the very large number of scattered Indian allotments, the United States has supported petitioners' position that they have capacity to sue under the oil and gas lease. P. 374.

(d) The Secretary's power to cancel a lease of allotted land does not foreclose less drastic relief for breaches of its terms. P. 374.

(e) Section 6 of the lease does not deny all remedies otherwise available to the Indian prior to removal of federal restrictions on his power to alienate the land. P. 375.

(f) Respondent's contention that the judgment should be sustained on available adequate state procedural grounds is not tenable since the Oklahoma Supreme Court's decision rested solely on federal grounds. Pp. 375–376.

Reversed and remanded.

Charles Hill Johns argued the cause for petitioners. With him on the briefs was *Houston Bus Hill.*

John H. Cantrell argued the cause for respondent. With him on the brief was *S. W. Wells.*

Solicitor General Griswold, Acting Assistant Attorney General Williams and *Roger P. Marquis* filed a brief for the United States, as *amicus curiae,* urging reversal.

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

The question presented is whether petitioners, who are Comanche Indians, have standing to sue under an oil and gas lease approved by the Department of the Interior for use on land held by Indians under trust patents issued by the United States.

In 1947 the Acting Commissioner of Indian Affairs approved an oil and gas lease which petitioners had executed to respondent, Skelly Oil Company, on the form prescribed by the Department of the Interior. The first well was drilled in 1956, and seven producing wells were soon completed. In 1961 petitioners retained counsel

with the approval of the Department of the Interior [1] and brought this damage action against respondent in the District Court of Oklahoma County, Oklahoma, alleging that respondent had breached the express and implied covenants in the lease and had thereby impaired petitioners' royalties. Respondent notified the Department of the Interior and the Bureau of Indian Affairs of the litigation, but the Government made no attempt to intervene in the proceedings. The petition filed in the District Court asserted that respondent had permitted natural gas being produced from the wells to escape despite the fact that there was a pipeline less than a mile from the land.[2] Petitioners claimed that respondent ignored their request that the gas be marketed and continued to allow the gas to be wasted in violation of the terms of the lease.[3] The District Court sustained re-

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[1] The Area Director of the Bureau of Indian Affairs approved a contract between petitioners and an attorney for legal services to be rendered in connection with this litigation. The Area Director has been delegated the authority to approve the employment of attorneys for individual Indians who may be compensated on a *quantum meruit* basis from restricted trust funds. Section 269 of Order 551 of the Commissioner of Indian Affairs, 16 Fed. Reg. 2939 (1951), as amended, 22 Fed. Reg. 6066 (1957).

[2] The petition also alleged that the waste of natural gas violated § 86.3 of the Oklahoma Oil and Gas Conservation Act. Okla. Stat. Tit. 52, § 86.3 (1951). In response to a motion to require petitioners to elect between or state separately a cause of action under the lease and one based on tort, the District Court, with the approval of the parties, struck the alleged violation of the conservation statute from the petition. After petitioners announced that the petition then stated only one cause of action which sought recovery for the breach of the lease, the District Court denied the motion.

[3] The lease provides:

"3. In consideration of the foregoing, the lessee hereby agrees:

. . . . . .

"(f) Diligence, prevention of waste.—To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying

spondent's demurrer and dismissed the petition. The Supreme Court of Oklahoma affirmed on the ground that petitioners were precluded from suing by the provisions of the lease and by the regulations promulgated by the Secretary of the Interior to control oil and gas leases on restricted Indian land.[4] We granted certiorari, 389 U. S. 814 (1967), to determine whether the federal restrictions imposed on the Indians prevented them from vindicating their rights. In our view, the decision below unduly restricts the right of the Indians to seek judicial relief for a claimed injury to their interests under the oil and gas lease.

The trust patents to the land in question were issued to petitioners under the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. §§ 331–358, which provided that individual Indians were to be allotted land on their reservations[5] and that the United States was to hold the land "in trust for the sole use and benefit of the Indian" allottees for a 25-year period. 25 U. S. C. § 348. During the trust period, which has been repeatedly extended,[6] restricted Indian land may be sold or leased only with the consent of the Secretary of the Interior. In our view, these restrictions on the Indian's control of his land are mere incidents of the promises

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quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land . . . ."

See 30 CFR §§ 221.18, 221.35 (1967).

[4] The opinion of the Oklahoma Supreme Court is not reported.

[5] Indians are expressly authorized to institute proceedings against the United States to establish their right to an allotment. 25 U. S. C. § 345.

[6] See note following 25 U. S. C. § 348. And see 25 U. S. C. § 462, which provides: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress."

made by the United States in various treaties to protect Indian land and have no effect on the Indian's capacity to institute the court action necessary to protect his property. In order to fulfill these national promises to safeguard Indian land and at the same time "to prepare the Indians to take their place as independent, qualified members of the modern body politic," *Board of County Comm'rs* v. *Seber,* 318 U. S. 705, 715 (1943), the allotment system was created with the Indians receiving ownership rights in the land while the United States retained the power to scrutinize the various transactions by which the Indian might be separated from that property. *Squire* v. *Capoeman,* 351 U. S. 1, 9 (1956). See, *e. g.,* 18 Cong. Rec. 190–192 (1886). This dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment. The obligation and power of the United States to institute such litigation to aid the Indian in the protection of his rights in his allotment were recognized in *United States* v. *Rickert,* 188 U. S. 432 (1903); *Heckman* v. *United States,* 224 U. S. 413 (1912); and *United States* v. *Candelaria,* 271 U. S. 432 (1926). See generally Federal Indian Law 326–341 (Dept. of Interior, 1958). In *Heckman,* an action brought by the United States to set aside an improper conveyance of restricted land, this Court realized that the allotment system created interests in both the Indian and the United States.[7] "A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." 224 U. S., at 438.

[7] "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman* v. *United States,* 224 U. S. 413, 437 (1912), quoted with approval in *United States* v. *Hellard,* 322 U. S. 363, 366 (1944).

In holding that the United States could sue to protect the allotment, the Court indicated that the Government could either bring the necessary suit itself or allow the litigation to be prosecuted by the Indian.

> "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct . . . . And when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property." *Id.*, at 446.

Later decisions followed the implications of *Heckman* and held that the right of the United States to institute a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf. In *Creek Nation* v. *United States,* 318 U. S. 629 (1943), this Court held that Indian tribes had the power to sue a railroad for the improper use of Indian land even though the tribes could not sue the United States for its failure to collect the sums allegedly due.[8] The Court stated, "That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions." *Id.*, at 640. Accord, *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110 (1919); *Skokomish Indian Tribe* v. *France,* 269 F. 2d 555 (C. A. 9th Cir. 1959). Nor does the existence of the Government's power to sue affect the rights

[8] Indians of course are now authorized to bring claims against the United States. See Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U. S. C. §§ 70–70w. For claims arising after August 13, 1946, see 28 U. S. C. § 1505, conferring jurisdiction on the Court of Claims.

of the individual Indian.[9] "A restricted Indian is not without capacity to sue or to be sued with respect to his affairs, including his restricted property. . . . Both the Act of April 12, 1926 and the decision . . . in Heckman v. United States . . . recognize capacity in a restricted Indian to sue or defend actions in his own behalf subject only to the right of the Government to intervene." *Sadler* v. *Public Nat. Bank & Trust Co.,* 172 F. 2d 870, 874 (C. A. 10th Cir. 1949). And in *Choctaw & Chickasaw Nations* v. *Seitz,* 193 F. 2d 456, 459 (C. A. 10th Cir. 1951), the court stated that *Heckman, supra, Lane, supra,* and *Candelaria, supra,* "clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party, brought by the restricted Indian or an Indian tribe or pueblo." In *Brown* v. *Anderson,* 61 Okla. 136, 160 P. 724 (1916), the Oklahoma Supreme Court itself held that *Heckman* had "fully answered" the argument that only the United States as guardian of the Indian could bring a suit to cancel an improper conveyance of a restricted Indian allotment. The court held:

> "Osborne Anderson, the defendant in error, although a full blood Indian, was a citizen of the United States and of the state of Oklahoma. No good reason appears why he should be denied the privilege of appealing to the courts of the state the same as any other citizen to enforce his rights to property, even though such property be land upon

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[9] "[T]he rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands are clearly recognized, although the United States might not be bound by a judgment in such an action to which it was not a party." Federal Indian Law 336 (1958).

> which restrictions against alienation have been imposed by an act of Congress." 61 Okla., at 138–139, 160 P., at 726.

See *Bell* v. *Fitzpatrick,* 53 Okla. 574, 157 P. 334 (1916); L. Mills, Oklahoma Indian Land Laws § 328 (1924). We agree that the federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official do not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights.

There remains the question whether the terms of the oil and gas lease or the regulations promulgated by the Secretary of the Interior to govern those leases prevent the Indians from seeking judicial relief for an alleged impairment of their interests under the lease. Respondent argues that the Secretary has such complete control over the lease that only he can institute the necessary court action.

The leasing of allotted land for mining purposes "by said allottee" is expressly authorized by 25 U. S. C. § 396. Although the approval of the Secretary is required, he is not the lessor and he cannot grant the lease on his own authority.[10] The Secretary is authorized to promulgate regulations controlling the operation and development of the lease and to issue necessary written instructions to the lessee. *Ibid.* See generally 25 CFR §§ 172.1–172.33 (1967); 30 CFR §§ 221.1–221.67 (1967). The lessee is required to furnish a surety bond, in an amount satisfactory to the Secretary, guaranteeing compliance with the terms of the lease, which incorporate the regulations of the Secretary. 25 U. S. C. § 396c.

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[10] A proviso to § 396 does give the Secretary the power to offer leases on his own if the allottee is deceased and the heirs have not been determined or cannot be found. 25 U. S. C. § 396.

The Secretary has the power to inspect the leased premises and the books and records of the lessee. 25 CFR § 172.25 (1967). The Secretary also has the power to impose such restrictions as to the time for the drilling of wells or the production from any well "as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interests of the Indian lessor." 25 CFR § 172.24 (1967). The lessee must furnish the Secretary with a monthly report disclosing all operations conducted on the lease, 30 CFR §§ 221.60–221.65 (1967), and must pay the royalties to the Secretary who deposits them to the credit of the Indian lessor. 25 CFR §§ 172.14, 172.16 (1967). The lessee agrees to drill wells which the Secretary determines are necessary to protect the leased land from drainage by another well on adjoining property. 30 CFR § 221.21 (1967). Finally, the lessee is obligated to prevent the waste of oil and gas and agrees to pay the Indian lessor the full value of all gas wasted, unless the Secretary determines at the request of the lessee that the waste was sanctioned by state and federal law. 30 CFR §§ 221.18, 221.35 (1967).

While the United States has exercised its supervisory authority over oil and gas leases in considerable detail, we find nothing in this regulatory scheme which would preclude petitioners from seeking judicial relief for an alleged violation of the lease. If the Government does determine that there has been waste in violation of a lease, it will of course satisfy its trust obligations by filing the necessary court action. However, there is nothing in the lease or regulations requiring the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own. The existence of the power of the United States to sue upon a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease than

the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment. Furthermore, the Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." H. R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that the Indian's right to sue should not depend on the good judgment or zeal of a government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue under the oil and gas lease.[11]

The regulations do empower the Secretary to cancel a lease "for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated." 25 CFR § 172.23 (1967). However, there is no justification for concluding that the severe sanction of cancellation of the lease is the only relief for all breaches of the lease terms or for any failure to pay royalties. Both the lessor and the lessee may wish to resolve their disagreement by the payment of damages and not by the cancellation of a basically satisfactory lease.

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[11] The Memorandum for the United States as *amicus curiae* states, at 7:

"In sum, respondent's contention that, until the trusteeship is ended, the Indian landowners are disabled from maintaining suit for breach of a lease they have granted of their own property is unsupported in the governing statutes, the implementing regulations, or the terms of the lease."

Nor is the capacity of the Indian defeated by § 6 of the lease, which provides that the Secretary may cancel the lease "before restrictions are removed," and concludes, "*Provided,* That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee." [12] There is no warrant for implying by negative inference from this proviso a denial of all remedies otherwise available to the Indian prior to the removal of the federal restrictions on his power to alienate the land. Section 6 merely provides that when the federal restrictions on alienation are terminated, the federal supervision over the lease will likewise come to an end, without impairing the continuing rights of the Indian. Compare 25 CFR § 172.28 (1967).[13]

Respondent's argument that the judgment in its favor should be sustained on available adequate state pro-

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[12] Section 6 of the lease provides:

"6. Cancellation and forfeiture.—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: *Provided,* That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

[13] The regulation dealing with the removal of restrictions avoids the danger of a negative inference by stating: "Oil and gas leases . . . on land from all of which restrictions against alienation have been or shall be removed, even if such leases contain provisions authorizing supervision by the Department, shall, after such removal of restrictions against alienation, be operated entirely free from such supervision, and the authority and power delegated to the Secretary of the Interior in said leases shall cease . . . ." 25 CFR § 172.28 (1967).

cedural grounds is untenable. Since the Oklahoma Supreme Court's decision rested solely on federal grounds, that court must have either rejected or failed to reach the asserted state grounds. Furthermore, we intimate no view on the merits of the case. If the lessee has conformed to all of the requirements of the federal regulations and has not breached any of the terms of the lease, the suit may fail. We merely hold that the Indian lessors have the capacity to maintain an action seeking damages for the alleged breach of the oil and gas lease. Accordingly, the judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded 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.

SIMMONS ET AL. *v.* UNITED STATES.

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

No. 55. Argued January 15, 1968.—Decided March 18, 1968.

A federally insured savings and loan association (hereafter "the bank") was robbed by two unmasked men. Five bank employees witnessed the robbery, and on the day it occurred gave the FBI written statements. Petitioners, Simmons and Garrett, and another (Andrews) were subsequently indicted for the crime. In the afternoon of the day of the robbery, FBI agents made a warrantless search of Andrews' mother's house and found two suitcases in the basement, one of which contained incriminating items. The next morning FBI agents obtained and (without indicating the progress of the investigation or suggesting who the suspects were) showed separately to each of the five bank employee witnesses some snapshots consisting mostly of group pictures of Andrews, Simmons, and others. Each witness identified pictures of Simmons as one of the robbers. None identified Andrews. Later some of these witnesses viewed indeterminate numbers of pictures and all identified Simmons. Three of the employees identified Garrett as the second robber from other photographs. Before trial Garrett moved to suppress the Government's exhibit of the suitcase containing the incriminating items as having been seized in violation of his Fourth Amendment rights. To establish his standing so to move, Garrett testified that the suitcase was similar to one he had owned and that he owned the clothing found therein. The District Court denied the motion to suppress. Garrett's testimony at the "suppression" hearing was, over his objection, admitted against him at trial. All five bank employee witnesses positively identified Simmons in court as one of the robbers and three identified Garrett, the two others testifying that they did not get a good look at him. The District Court denied a defense request under 18 U. S. C. § 3500 (the Jencks Act) for the production of the photographs shown to the witnesses before trial, the defense apparently claiming that they were incorporated in the written statements, which the Government had made available to the defense. That Act provides that after a witness has testified for the Government in a federal criminal prosecution the Government must, on a defense request, produce

any "statement of the witness" in the Government's possession "which relates to the subject matter as to which the witness has testified." Petitioners and Andrews were convicted. Each petitioner's conviction (but not Andrews') was affirmed by the Court of Appeals. Simmons asserts that the pretrial identification procedure through use of the photographs was so unduly prejudicial as fatally to taint his conviction. Both petitioners claim error in the District Court's refusal to order production of the pictures under the Jencks Act. Garrett urges violation of his constitutional rights when testimony in support of his "suppression" motion was admitted against him at trial. *Held:*

1. In the light of the totality of the circumstances surrounding this case, the identification procedure through use of the photographs was not such as to deny Simmons due process of law or to call for reversal under the Court's supervisory authority. Pp. 383–386.

(a) Each case involving pretrial initial identification by photographs must be considered on its own facts; and convictions based on eyewitness identification at trial following such pretrial identification will be set aside on the ground of prejudice only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. P. 384.

(b) Here resort to photographic identification by the FBI was necessary: a serious felony had been committed; the perpetrators were at large; the inconclusive clues led to Andrews and Simmons; and the agents had to determine swiftly if they were on the right track. Pp. 384–385.

(c) In the circumstances of this case there was little chance that the procedure would lead to misidentification of Simmons. Pp. 385–386.

2. Since none of the photographs was acquired or shown to the witnesses until the day after the witnesses gave statements to the FBI, the District Court correctly held that the photographs were not part of those statements and hence not producible for the defense under the Jencks Act. P. 387.

3. In view of all the attendant circumstances, including the strength of the eyewitness identification of Simmons, the District Court's refusal (apart from any requirement of the Jencks Act) to order production of the photographs was not an abuse of its discretion as to Simmons. Pp. 388–389.

4. When a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not be thereafter admitted against him at trial on the issue of guilt unless he makes no objection. Pp. 389–394.

(a) Garrett justifiably believed that his testimony that he owned the suitcase was necessary to show that he had standing to claim that it was illegally seized; hence, the testimony was an integral part of his Fourth Amendment exclusion claim. Pp. 390–391.

(b) The rationale of the courts below for their holdings that Garrett's testimony was admissible when the motion to suppress had failed was that the testimony had been "voluntarily" given and relevant and therefore was admissible like any other prior testimony or admission. Pp. 391–392.

(c) This rule not only imposes a condition which may deter a defendant from making a Fourth Amendment objection; as a practical matter, it makes a defendant who wishes to establish standing do so at the risk that his words may later be used to incriminate him. P. 393.

(d) In the circumstances of this case, it is intolerable that one constitutional right should have to be surrendered in order to assert another. P. 394.

371 F. 2d 296, affirmed in part, reversed and remanded in part.

Raymond J. Smith argued the cause for petitioners. With him on the brief were *John Powers Crowley* and *George F. Callaghan.*

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents issues arising out of the petitioners' trial and conviction in the United States District Court for the Northern District of Illinois for the armed robbery of a federally insured savings and loan association.

The evidence at trial showed that at about 1:45 p. m.

on February 27, 1964, two men entered a Chicago savings and loan association. One of them pointed a gun at a teller and ordered her to put money into a sack which the gunman supplied. The men remained in the bank about five minutes. After they left, a bank employee rushed to the street and saw one of the men sitting on the passenger side of a departing white 1960 Thunderbird automobile with a large scrape on the right door. Within an hour police located in the vicinity a car matching this description. They discovered that it belonged to a Mrs. Rey, sister-in-law of petitioner Simmons. She told the police that she had loaned the car for the afternoon to her brother, William Andrews.

At about 5:15 p. m. the same day, two FBI agents came to the house of Mrs. Mahon, Andrews' mother, about half a block from the place where the car was then parked.[1] The agents had no warrant, and at trial it was disputed whether Mrs. Mahon gave them permission to search the house. They did search, and in the basement they found two suitcases, of which Mrs. Mahon disclaimed any knowledge. One suitcase contained, among other items, a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed.

The following morning the FBI obtained from another of Andrews' sisters some snapshots of Andrews and of petitioner Simmons, who was said by the sister to have been with Andrews the previous afternoon. These snapshots were shown to the five bank employees who had witnessed the robbery. Each witness identified pictures of Simmons as representing one of the robbers. A week or two later, three of these employees identified photo-

[1] Mrs. Mahon also testified that at about 3:30 p. m. the same day six men with guns forced their way into and ransacked her house. However, these men were never identified, and they apparently took nothing.

graphs of petitioner Garrett as depicting the other robber, the other two witnesses stating that they did not have a clear view of the second robber.

The petitioners, together with William Andrews, subsequently were indicted and tried for the robbery, as indicated. Just prior to the trial, Garrett moved to suppress the Government's exhibit consisting of the suitcase containing the incriminating items. In order to establish his standing so to move, Garrett testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned, and that he was the owner of clothing found inside the suitcase. The District Court denied the motion to suppress. Garrett's testimony at the "suppression" hearing was admitted against him at trial.

During the trial, all five bank employee witnesses identified Simmons as one of the robbers. Three of them identified Garrett as the second robber, the other two testifying that they did not get a good look at the second robber. The District Court denied the petitioners' request under 18 U. S. C. § 3500 (the so-called Jencks Act) for production of the photographs which had been shown to the witnesses before trial.

The jury found Simmons and Garrett, as well as Andrews, guilty as charged. On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery. 371 F. 2d 296.

We granted certiorari as to Simmons and Garrett, 388 U. S. 906, to consider the following claims. First, Simmons asserts that his pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of our supervisory power

over the lower federal courts. Second, both petitioners contend that the District Court erred in refusing defense requests for production under 18 U. S. C. § 3500 of the pictures of the petitioners which were shown to eyewitnesses prior to trial. Third, Garrett urges that his constitutional rights were violated when testimony given by him in support of his "suppression" motion was admitted against him at trial. For reasons which follow, we affirm the judgment of the Court of Appeals as to Simmons, but reverse as to Garrett.

I.

The facts as to the identification claim are these. As has been noted previously, FBI agents on the day following the robbery obtained from Andrews' sister a number of snapshots of Andrews and Simmons. There seem to have been at least six of these pictures, consisting mostly of group photographs of Andrews, Simmons, and others. Later the same day, these were shown to the five bank employees who had witnessed the robbery at their place of work, the photographs being exhibited to each employee separately. Each of the five employees identified Simmons from the photographs. At later dates, some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again, all identified Simmons. At trial, the Government did not introduce any of the photographs, but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers.

In support of his argument, Simmons looks to last Term's "lineup" decisions—*United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263—in which this Court first departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissibility, of identification testimony at trial. The rationale of those cases was that an

accused is entitled to counsel at any "critical stage of the prosecution," and that a post-indictment lineup is such a "critical stage." See 388 U. S., at 236–237. Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. See *Stovall* v. *Denno,* 388 U. S. 293, at 302; *Palmer* v. *Peyton,* 359 F. 2d 199. Viewed in that context, we find the claim untenable.

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.[2] The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.[3] Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actu-

[2] See P. Wall, Eye-Witness Identification in Criminal Cases 74–77 (1965).

[3] See *id.,* at 82–83.

ally seen, reducing the trustworthiness of subsequent lineup or courtroom identification.[4]

Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall* v. *Denno,* 388 U. S. 293, 301–302, and with decisions of other courts on the question of identification by photograph.[5]

Applying the standard to this case, we conclude that petitioner Simmons' claim on this score must fail. In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to

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[4] See *id.,* at 68–70.

[5] See, *e. g., People* v. *Evans,* 39 Cal. 2d 242, 246 P. 2d 636.

Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the "one-man lineup" in *Stovall* v. *Denno, supra.*

In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.

Under these conditions, all five eyewitnesses identified Simmons as one of the robbers. None identified Andrews, who apparently was as prominent in the photographs as Simmons. These initial identifications were confirmed by all five witnesses in subsequent viewings of photographs and at trial, where each witness identified Simmons in person. Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some

respects fallen short of the ideal.[6] We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

II.

It is next contended, by both petitioners, that in any event the District Court erred in refusing a defense request that the photographs shown to the witnesses prior to trial be turned over to the defense for purposes of cross-examination. This claim to production is based on 18 U. S. C. § 3500, the so-called Jencks Act. That Act, passed in response to this Court's decision in *Jencks* v. *United States,* 353 U. S. 657, provides that after a witness has testified for the Government in a federal criminal prosecution the Government must, on request of the defense, produce any "statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." For the Act's purposes, as they relate to this case, a "statement" is defined as "a written statement made by said witness and signed or otherwise adopted or approved by him . . . ."

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[6] The reliability of the identification procedure could have been increased by allowing only one or two of the five eyewitnesses to view the pictures of Simmons. If thus identified, Simmons could later have been displayed to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemented by a corporeal identification, which is normally more accurate. See P. Wall, Eye-Witness Identification in Criminal Cases 83 (1965); Williams, Identification Parades, [1955] Crim. L. Rev. 525, 531. Also, it probably would have been preferable for the witnesses to have been shown more than six snapshots, for those snapshots to have pictured a greater number of individuals, and for there to have been proportionally fewer pictures of Simmons. See Wall, *supra,* at 74–82; Williams, *supra,* at 530.

Written statements of this kind were taken from all five eyewitnesses by the FBI on the day of the robbery. Apparently none were taken thereafter. When these statements were produced by the Government at trial pursuant to § 3500, the defense also claimed the right to look at the photographs "under 3500." The District Judge denied these requests.

The petitioners' theory seems to be that the photographs were incorporated in the written statements of the witnesses, and that they therefore had to be produced under § 3500. The legislative history of the Jencks Act does confirm that photographs must be produced if they constitute a part of a written statement.[7] However, the record in this case does not bear out the petitioners' claim that the pictures involved here were part of the statements which were approved by the witnesses and, therefore, producible under § 3500. It appears that all such statements were made on the day of the robbery. At that time, the FBI and police had no pictures of the petitioners. The first pictures were not acquired and shown to the witnesses until the morning of the following day. Hence, they could not possibly have been a part of the statements made and approved by the witnesses the day of the robbery.

The petitioners seem also to suggest that, quite apart from § 3500, the District Court's refusal of their request for the photographs amounted to an abuse of discretion. The photographs were not referred to by the Government in its case-in-chief. They were first asked for by the defense after the direct examination of the first eye-

[7] In the discussion of the bill on the floor of the Senate, Senator O'Mahoney, sponsor of the bill in the Senate, stated that photographs *per se* were not required to be produced under the bill, but that "[i]f the pictures have anything to do with the statement of the witness . . . of course that would be part of it . . . ." 103 Cong. Rec. 16489.

witness, on the second day of the trial. When the defense requested the pictures, counsel for the Government noted that there were a "multitude" of pictures and stated that it might be difficult to identify those which were shown to particular witnesses. However, he indicated that the Government was willing to furnish all of the pictures, if they could be found. The District Court, referring to the fact that production of the photographs was not required under § 3500, stated that it would not stop the trial in order to have the pictures made available.

Although the pictures might have been of some assistance to the defense, and although it doubtless would have been preferable for the Government to have labeled the pictures shown to each witness and kept them available for trial,[8] we hold that in the circumstances the refusal of the District Court to order their production did not amount to an abuse of discretion, at least as to petitioner Simmons.[9] The defense surely knew that photographs had played a role in the identification process. Yet there was no attempt to have the pictures produced prior to trial pursuant to Fed. Rule Crim. Proc. 16. When production of the pictures was sought at trial, the defense did not explain why they were

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[8] See P. Wall, Eye-Witness Identification in Criminal Cases 84 (1965); Williams, Identification Parades, [1955] Crim. L. Rev. 525, 530.

[9] Garrett was also initially identified from photographs, but at a later date than Simmons. He was identified by fewer witnesses than was Simmons, and even those witnesses had less opportunity to see him during the robbery than they did Simmons. The record is opaque as to the number and type of photographs of Garrett which were shown to these witnesses, and as to the circumstances of the showings. However, it is unnecessary to decide whether Garrett was prejudiced by the District Court's failure to order production of the pictures at trial, since we are reversing Garrett's conviction on other grounds.

needed, but simply argued that production was required under § 3500. Moreover, the strength of the eyewitness identifications of Simmons renders it highly unlikely that nonproduction of the photographs caused him any prejudice.

III.

Finally, it is contended that it was reversible error to allow the Government to use against Garrett on the issue of guilt the testimony given by him upon his unsuccessful motion to suppress as evidence the suitcase seized from Mrs. Mahon's basement and its contents. That testimony established that Garrett was the owner of the suitcase.[10]

In order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure. *Weeks* v. *United States,* 232 U. S. 383. More recently, this Court has held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ." *Mapp* v. *Ohio,* 367 U. S. 643, 657.

However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. See, *e. g., Jones* v. *United States,* 362 U. S. 257, 260–261. At one time, a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of

[10] Although petitioner Simmons objected at trial to the admission of Garrett's testimony, the claim was not pressed on his behalf here. Garrett did not mention Simmons in his testimony, and the District Court instructed the jury to consider the testimony only with reference to Garrett.

the seized property or that he had a possessory interest in the searched premises.[11] In part to avoid having to resolve the issue presented by this case, we relaxed those standing requirements in two alternative ways in *Jones* v. *United States, supra.* First, we held that when, as in *Jones,* possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs. Throughout this case, petitioner Garrett has justifiably, and without challenge from the Government, proceeded on the assumption that the standing requirements must be satisfied.[12] On that premise, he contends that testimony given by a defendant to meet such requirements should not be admissible against him at trial on the question of guilt or innocence. We agree.

Under the standing rules set out in *Jones,* there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing. This case serves as an example.

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[11] See, *e. g., Jones* v. *United States,* 362 U. S. 257, at 262; Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U. L. Rev. 471 (1952).

[12] It has been suggested that the adoption of a "police-deterrent" rationale for the exclusionary rule, see *Linkletter* v. *Walker,* 381 U. S. 618, logically dictates that a defendant should be able to object to the admission against him of *any* unconstitutionally seized evidence. See Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342 (1967); Note, Standing to Object to an Unlawful Search and Seizure, 1965 Wash. U. L. Q. 488. However, that argument is not advanced in this case, and we do not consider it.

Garrett evidently was not in Mrs. Mahon's house at the time his suitcase was seized from her basement. The only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner.[13] Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim. Under the rule laid down by the courts below, he could give that testimony only by assuming the risk that the testimony would later be admitted against him at trial. Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.[14]

The dilemma faced by defendants like Garrett is most extreme in prosecutions for possessory crimes, for then the testimony required for standing itself proves an element of the offense. We eliminated that Hobson's choice in *Jones* v. *United States, supra,* by relaxing the standing requirements. This Court has never considered squarely the question whether defendants charged with non-possessory crimes, like Garrett, are entitled to be re-

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[13] The record shows that Mrs. Mahon, the owner of the premises from which the suitcase was taken, disclaimed all knowledge of its presence there and of its ownership.

[14] The Government concedes that there were no identifying marks on the outside of the suitcase. See Brief for the United States 33.

lieved of their dilemma entirely.[15] The lower courts which have considered the matter, both before and after *Jones,* have with two exceptions agreed with the holdings of the courts below that the defendant's testimony may be admitted when, as here, the motion to suppress has failed.[16] The reasoning of some of these courts would seem to suggest that the testimony would be admissible even if the motion to suppress had succeeded,[17] but the only court which has actually decided that question held that when the motion to suppress succeeds the testimony given in support of it is excludable as a "fruit" of the unlawful search.[18] The rationale for admitting the testimony when the motion fails has been that the testimony is voluntarily given and relevant, and that it is therefore entitled to admission on the same basis as any other prior testimony or admission of a party.[19]

It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amend-

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[15] In *Jones,* the only reference to the subject was a statement that "[The defendant] has been faced . . . with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding . . . ." 362 U. S., at 262.

[16] See *Heller* v. *United States,* 57 F. 2d 627; *Kaiser* v. *United States,* 60 F. 2d 410; *Fowler* v. *United States,* 239 F. 2d 93; *Monroe* v. *United States,* 320 F. 2d 277; *United States* v. *Taylor,* 326 F. 2d 277; *United States* v. *Airdo,* 380 F. 2d 103; *United States* v. *Lindsly,* 7 F. 2d 247, rev'd on other grounds, 12 F. 2d 771. Contra, see *Bailey* v. *United States,* 128 U. S. App. D. C. 354, 389 F. 2d 305; *United States* v. *Lewis,* 270 F. Supp. 807, 810, n. 1 (dictum).

[17] See, *e. g., Heller* v. *United States,* 57 F. 2d 627; *Monroe* v. *United States,* 320 F. 2d 277.

[18] See *Safarik* v. *United States,* 62 F. 2d 892, rehearing denied, 63 F. 2d 369. Accord, *Fowler* v. *United States,* 239 F. 2d 93 (dictum); cf. *Fabri* v. *United States,* 24 F. 2d 185.

[19] See cases cited in n. 16, *supra.*

ment claim. The likelihood of inhibition is greatest when the testimony is known to be admissible regardless of the outcome of the motion to suppress. But even in jurisdictions where the admissibility of the testimony depends upon the outcome of the motion, there will be a deterrent effect in those marginal cases in which it cannot be estimated with confidence whether the motion will succeed. Since search-and-seizure claims depend heavily upon their individual facts,[20] and since the law of search and seizure is in a state of flux,[21] the incidence of such marginal cases cannot be said to be negligible. In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

The rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection—it imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him. Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-Incrimination Clause because the testimony was voluntary.[22] As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he

[20] See, *e. g., United States* v. *Rabinowitz,* 339 U. S. 56, 63.

[21] *E. g.,* compare *Warden* v. *Hayden,* 387 U. S. 294, with *Gouled* v. *United States,* 255 U. S. 298; compare *Camara* v. *Municipal Court,* 387 U. S. 523, with *Frank* v. *Maryland,* 359 U. S. 360.

[22] See, *e. g., Heller* v. *United States,* 57 F. 2d 627.

refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit.[23] However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit.[24] When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

For the foregoing reasons, we affirm the judgment of the Court of Appeals so far as it relates to petitioner Simmons. We reverse the judgment with respect to petitioner Garrett, and as to him remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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

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[23] For example, testimony given for his own benefit by a plaintiff in a civil suit is admissible against him in a subsequent criminal prosecution. See 4 Wigmore, Evidence § 1066 (3d ed. 1940); 8 *id.*, § 2276 (McNaughton rev. 1961).

[24] *Ibid.*

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

I concur in affirmance of the conviction of Simmons but dissent from reversal of Garrett's conviction. I shall first discuss Simmons' case.

1. Simmons' chief claim is that his "pretrial identification [was] so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of law." The Court rejects this contention. I agree with the Court but for quite different reasons. The Court's opinion rests on a lengthy discussion of inferences that the jury could have drawn from the evidence of identifying witnesses. A mere summary reading of the evidence as outlined by this Court shows that its discussion is concerned with the weight of the testimony given by the identifying witnesses. The weight of the evidence, however, is not a question for the Court but for the jury, and does not raise a due process issue. The due process question raised by Simmons is, and should be held to be, frivolous. The identifying witnesses were all present in the bank when it was robbed and all saw the robbers. The due process contention revolves around the circumstances under which these witnesses identified pictures of the robbers shown to them, and these circumstances are relevant only to the weight the identification was entitled to be given. The Court, however, considers Simmons' contention on the premise that a denial of due process could be found in the "totality of circumstances" of the picture identification. I do not believe the Due Process Clause or any other constitutional provision vests this Court with any such wide-ranging, uncontrollable power. A trial according to due process of law is a trial according to the "law of the land"—the law as enacted by the Constitution or the Legislative Branch of Government, and not "laws" formulated by the courts according to

the "totality of the circumstances." Simmons' due process claim here should be denied because it is frivolous.* For these reasons I vote to affirm Simmons' conviction.

2. I agree with the Court, in part for reasons it assigns, that the District Court did not commit error in declining to permit the photographs used to be turned over to the defense for purposes of cross-examination.

3. The Court makes new law in reversing Garrett's conviction on the ground that it was error to allow the Government to use against him testimony he had given upon his unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. The testimony used was Garrett's statement in the suppression hearing that he was the owner of a suitcase which contained money wrappers taken from the bank that was robbed. The Court is certainly guilty of no overstatement in saying that this "was undoubtedly a strong piece of evidence against [Garrett]." *Ante,* at 391. In fact, one might go further and say that this testimony, along with the statements of the eyewitnesses against him, showed beyond all question that Garrett was one of the bank robbers. The question then is whether the Government is barred from offering a truthful statement made by a defendant at a suppression hearing in order to prevent the defendant from winning an acquittal on the false premise that he is not the owner of the property he has already sworn that he owns. My answer to this question is "No." The Court's answer is "Yes" on the premise that "a defendant who knows that his testimony may be admissible against him at trial will some-

*Although Simmons' "questions presented" raise no such contention, the Court declines to use its "supervisory power" to hold Simmons' rights were violated by the identification methods. One must look to the Constitution in vain, I think, to find a "supervisory power" in this Court to reverse cases like this on such a ground.

times be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." *Ante,* at 392–393.

For the Court, though not for me, the question seems to be whether the disadvantages associated with deterring a defendant from testifying on a motion to suppress are significant enough to offset the advantages of permitting the Government to use such testimony when relevant and probative to help convict the defendant of a crime. The Court itself concedes, however, that the deterrent effect on which it relies comes into play, at most, only in "marginal cases" in which the defendant cannot estimate whether the motion to suppress will succeed. *Ante,* at 393. The value of permitting the Government to use such testimony is, of course, so obvious that it is usually left unstated, but it should not for that reason be ignored. The standard of proof necessary to convict in a criminal case is high, and quite properly so, but for this reason highly probative evidence such as that involved here should not lightly be held inadmissible. For me the importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance in their attempts to invoke an evidentiary rule which itself can result in the exclusion of highly relevant evidence.

This leaves for me only the possible contention that Garrett's testimony was inadmissible under the Fifth Amendment because it was compelled. Of course, I could never accept the Court's statement that "testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit." *Ante,* at 394. No matter what Professor Wigmore may have thought about the subject, it has always been clear to me that any threat of harm or promise of benefit is sufficient to render a defendant's statement involuntary. See *Shot-*

well Mfg. Co. v. *United States,* 371 U. S. 341, 367 (1963) (dissenting opinion). The reason why the Fifth Amendment poses no bar to acceptance of Garrett's testimony is not, therefore, that a promise of benefit is not generally fatal. Rather, the answer is that the privilege against self-incrimination has always been considered a privilege that can be waived, and the validity of the waiver is, of course, not undermined by the inevitable fact that by testifying, a defendant can obtain the "benefit" of a chance to help his own case by the testimony he gives. When Garrett took the stand at the suppression hearing, he validly surrendered his privilege with respect to the statements he actually made at that time, and since these statements were therefore not "compelled," they could be used against him for any subsequent purpose.

The consequence of the Court's holding, it seems to me, is that defendants are encouraged to come into court, either in person or through other witnesses, and swear falsely that they do not own property, knowing at the very moment they do so that they have already sworn precisely the opposite in a prior court proceeding. This is but to permit lawless people to play ducks and drakes with the basic principles of the administration of criminal law.

There is certainly no language in the Fourth Amendment which gives support to any such device to hobble law enforcement in this country. While our Constitution does provide procedural safeguards to protect defendants from arbitrary convictions, that governmental charter holds out no promises to stultify justice by erecting barriers to the admissibility of relevant evidence voluntarily given in a court of justice. Under the first principles of ethics and morality a defendant who secures a court order by telling the truth should not be allowed to seek a court advantage later based on a premise

directly opposite to his prior solemn judicial oath. This Court should not lend the prestige of its high name to such a justice-defeating stratagem. I would affirm Garrett's conviction.

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

I concur in Parts I and II of the Court's opinion but dissent from the reversal of Garrett's conviction substantially for the reasons given by MR. JUSTICE BLACK in his separate opinion.

NEWMAN ET AL. *v.* PIGGIE PARK ENTERPRISES, INC., ET AL.

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

No. 339. Argued March 7, 1968.—Decided March 18, 1968.

One who succeeds in obtaining an injunction under Title II of the Civil Rights Act of 1964 should ordinarily recover an attorney's fee under § 204 (b) unless special circumstances would render such an award unjust, and should not be limited, as the Court of Appeals held, to an award of counsel fees only if the defenses advanced were "for purposes of delay and not in good faith."

377 F. 2d 433, modified and affirmed.

Jack Greenberg argued the cause for petitioners. With him on the brief were *James M. Nabrit III, Michael Meltsner, Matthew J. Perry, Lincoln C. Jenkins, Jr.*, and *Hemphill P. Pride II.*

No appearance for respondents.

PER CURIAM.

The petitioners instituted this class action under Title II of the Civil Rights Act of 1964, § 204 (a), 78 Stat. 244, 42 U. S. C. § 2000a–3 (a), to enjoin racial discrimination at five drive-in restaurants and a sandwich shop owned and operated by the respondents in South Carolina. The District Court held that the operation of each of the respondents' restaurants affected commerce within the meaning of § 201 (c)(2), 78 Stat. 243, 42 U. S. C. § 2000a (c)(2), and found, on undisputed evidence, that Negroes had been discriminated against at all six of the restaurants. 256 F. Supp. 941, 947, 951. But the District Court erroneously concluded that Title II does not cover drive-in restaurants of the sort involved in this case. 256 F. Supp., at 951–953. Thus the court en-

joined racial discrimination only at the respondents' sandwich shop. *Id.*, at 953.

The Court of Appeals reversed the District Court's refusal to enjoin discrimination at the drive-in establishments, 377 F. 2d 433, 435–436, and then directed its attention to that section of Title II which provides that "the prevailing party" is entitled to "a reasonable attorney's fee" in the court's "discretion." § 204 (b), 78 Stat. 244, 42 U. S. C. § 2000a–3 (b).[1] In remanding the case, the Court of Appeals instructed the District Court to award counsel fees only to the extent that the respondents' defenses had been advanced "for purposes of delay and not in good faith." 377 F. 2d, at 437. We granted certiorari to decide whether this subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964. 389 U. S. 815. We hold that it does not.

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.[2] A Title II suit is thus private in form only.

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[1] "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U. S. C. § 2000a–3 (b).

[2] In this connection, it is noteworthy that 42 U. S. C. § 2000a–3 (a) permits intervention by the Attorney General in privately initiated Title II suits "of general public importance" and provides that, "in such circumstances as the court may deem just," a district court may "appoint an attorney for [the] complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security." Only where a "pattern or practice" of discrimination is reasonably believed to exist may the Attorney General himself institute a civil action for injunctive relief. 42 U. S. C. § 2000a–5.

When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[3] If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[4]

It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. Because no such circumstances are present here,[5] the District Court on remand should

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[3] See S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1–2 (1963).

[4] If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice 1352 (1966 ed.).

[5] Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable. Thus, for example, the "fact that the defendants had discriminated both at [the] drive-ins and at [the sandwich shop] was . . . denied . . . [although] the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in Katzenbach v. McClung, 379 U. S. 294, . . . that the Act was unconstitu-

include reasonable counsel fees as part of the costs to be assessed against the respondents. As so modified, the judgment of the Court of Appeals is

Affirmed.

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

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tional on the very grounds foreclosed by *McClung;* and defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" 377 F. 2d 433, 437–438 (separate opinion of Judge Winter).

BIGGERS *v.* TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 237. Argued January 15, 1968.—Decided March 18, 1968.

—— Tenn. ——, 411 S. W. 2d 696, affirmed by an equally divided Court.

Michael Meltsner argued the cause for petitioner. With him on the briefs were *Jack Greenberg, Anthony G. Amsterdam, Avon N. Williams* and *Z. Alexander Looby.*

Thomas E. Fox, Deputy Attorney General of Tennessee, argued the cause for respondent. On the brief were *George F. McCanless,* Attorney General, and *Robert F. Hedgepath,* Assistant Attorney General.

PER CURIAM.

The judgment below is affirmed by an equally divided Court.

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

MR. JUSTICE DOUGLAS, dissenting.[1]

Petitioner was indicted for a rape committed when he was 16 years old, was convicted, and after a trial by a jury sentenced to 20 years, first to a juvenile facility and later to prison. The Supreme Court of Tennessee af-

[1] As respects the practice of Justices setting forth their views in a case where the judgment is affirmed by an equally divided Court, see *Communications Assn.* v. *Douds,* 339 U. S. 382, 412–415, 422; *Osman* v. *Douds,* 339 U. S. 846, 847; *In re Isserman,* 345 U. S. 286; 348 U. S. 1; *Raley* v. *Ohio,* 360 U. S. 423, 440; *Eaton* v. *Price,* 364 U. S. 263, 264.

firmed the judgment of conviction. *Biggers* v. *State*, —— Tenn. ——, 411 S. W. 2d 696.

On the night of January 22, 1965, Mrs. Beamer was at home sewing, when an intruder with a butcher knife in his hand grabbed her from the rear. Her screams brought her 13-year-old daughter, who, arriving at the scene, also started to scream. The intruder said to Mrs. Beamer, "You tell her to shut up, or I'll kill you both." Mrs. Beamer ordered her daughter to a bedroom, and the intruder took Mrs. Beamer out of the house to a spot two blocks away and raped her.

During the next seven months the police showed Mrs. Beamer numerous police photographs, one of which, she said, showed a man who "had features" like the intruder. The case lay dormant. Mrs. Beamer was unable to describe the rapist other than to state he was fat and "flabby," had a youthful voice, smooth skin, and "sort of bushy" hair.

On August 17, 1965, petitioner, still only 16 years old, was arrested for the rape of another woman. On the same day the police brought Mrs. Beamer to the police station to "look at a suspect." They brought petitioner to the doorway of the room where she sat. She asked the police to have him speak and they told him to repeat the words spoken by the rapist, "Shut up, or I'll kill you." Only after he had spoken did Mrs. Beamer identify petitioner as the man who had raped her; she testified that it was petitioner's voice that "was the first thing that made me think it was the boy." So far as the record indicates, at the time of this confrontation neither the parents of petitioner nor any attorney acting for him had been advised of the intended meeting with Mrs. Beamer.

The indictment followed. At the trial the daughter testified to what she had seen the evening of the rape, but was unable to identify petitioner as the rapist. The only evidence connecting him with the rape was Mrs.

Beamer's station-house identification. She did not identify him in the courtroom.[2] She testified that she had identified him by his size, his voice, his smooth skin, and his bushy hair. Three of the five police officers who were present at the identification testified over objection in corroboration of Mrs. Beamer's reaction at the confrontation.

This procedure of identification violates, of course, *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263. Those were cases of lineups and this was not. Yet, though they recognized a suspect's right to counsel at that critical stage, the Court announced they would not have retroactive effect. *Stovall* v. *Denno,* 388 U. S. 293, and *Simmons* v. *United States, ante,* p. 377, make it clear, however, that independent of any right to counsel claim, a procedure of identification may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process of law is denied when evidence of the identification is used at trial. *Stovall* v. *Denno, supra,* at 302. The claim that Mrs. Beamer's identification of petitioner falls within this rule "must be evaluated in light of the totality of surrounding circumstances" with the view of determining if the procedure in petitioner's case "was so unduly prejudicial as fatally to taint his conviction." *Simmons* v. *United States, supra.*

In *Simmons,* identification by use of photographs rather than a lineup was upheld because the bank rob-

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[2] Respondent contends that Mrs. Beamer made an in-court identification of petitioner as the rapist. But the portions of the record relied on do not support this claim. After Mrs. Beamer had described the station-house identification, the prosecutor asked her, "Is there any doubt in your mind today?" She replied, "No, there's no doubt." The inference to be drawn is that Mrs. Beamer had no current doubt as to the correctness of her previous identification of petitioner at the police station.

bers were still at large, the FBI had to quickly determine whether it was on the right track in looking for Simmons, the witnesses' memories were fresh since the robbery was but a day old, and because the photos pictured persons in addition to petitioner. In *Stovall,* a single-suspect confrontation held in a hospital room was found to comport with due process because the stabbing victim, the sole source of identification, was in danger of death—to have conducted a lineup would have entailed perhaps fatal delay.

We have no such problem of compelling urgency here. There was ample time to conduct a traditional lineup. This confrontation was crucial. Petitioner stood to be free of the charge or to account for it, dependent on what Mrs. Beamer said. Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections.

As noted, in *Simmons,* where identification was by photograph, the Court stressed that identification was made only a day after the crime while "memories were still fresh." *Id.,* at 385. Here, however, Mrs. Beamer confronted petitioner seven months after the rape, and the sharpness of her recall was being severely tested. In *Simmons,* too, the Court emphasized that the five witnesses had seen the robbers "in a well-lighted bank." *Ibid.* Here, however, there was "[n]o light in the hall" where Mrs. Beamer was first assaulted; from that hall, the assailant took her out of the house through a kitchen where there was "no light," and the railroad track where the rape occurred was illuminated only by

the moon. Indeed, the best view Mrs. Beamer had of petitioner was in the hall by indirect light from a nearby bedroom.

In *Simmons,* the record did not indicate that the FBI told the witnesses which of the men in the photographs were suspects. Here, on the other hand, the police told Mrs. Beamer when they brought her to the station house that the man she would see was a "suspect."

Moreover, unlike the *Simmons* case, identification here rested largely on voice. The fact that petitioner had "the voice of an immature youth," to use Mrs. Beamer's words, merely put him in a large class and did not relate him to speech peculiar to him. Voice identifications involve "grave danger of prejudice to the suspect," as the Court of Appeals for the Fourth Circuit said in *Palmer* v. *Peyton,* 359 F. 2d 199, 201. No one else identified petitioner. The daughter could not; and Mrs. Beamer did not identify him in the courtroom. Petitioner was young and apparently had no previous police record. There was no other shred of evidence against him.

Under the circumstances of this case it seems plain that the police maximized the suggestion that petitioner committed the crime.

Of course, due process is not always violated when the police fail to assemble a lineup but conduct a one-man showup. Plainly here, however, the highly suggestive atmosphere that had been generated by the manner in which this showup was arranged and conducted could not have failed to affect Mrs. Beamer's judgment; when she was presented with no alternative choices, "there [was] then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect." *Palmer* v. *Peyton, supra,* at 201. The conclusion is inescapable that the entire atmosphere created by the police surrounding Mrs. Beamer's identification was so suggestive

that use at trial of her station-house identification constituted a violation of due process. Since this was the only evidence of identification, there can be no question of harmless error. See *Chapman* v. *California,* 386 U. S. 18.

Petitioner is entitled to a new trial unaffected by Mrs. Beamer's station-house identification and the testimony of the police officers who were present when it took place. See *Gilbert* v. *California, supra,* at 272–273.

The fact that petitioner is a Negro, and Mrs. Beamer also, is of course irrelevant to the due process question.

SHAKIN *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1071. Decided March 18, 1968.

Appeal dismissed and certiorari denied.

Burton Marks and *Harvey A. Schneider* 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.

SULLIVAN *v.* GEORGIA.

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

No. 1131, Misc. Decided March 18, 1968.

Certiorari granted; 223 Ga. 643, 157 S. E. 2d 247, reversed.

Charles Morgan, Jr., Morris Brown and *Melvin L. Wulf* for petitioner.

Arthur K. Bolton, Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, *Marion O. Gordon,* Assistant Attorney General, and *William R. Childers, Jr.,* Deputy 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 of the Supreme Court of Georgia is reversed. *Whitus* v. *Georgia,* 385 U. S. 545.

McBRIDE *v.* SMITH, COMMANDANT, UNITED STATES COAST GUARD.

ON PETITION FOR REHEARING.

No. 1105, October Term, 1966. Decided March 18, 1968.

Rehearing granted and denial of certiorari, 387 U. S. 932, vacated. Certiorari granted; 369 F. 2d 65, vacated and remanded.

Melvin L. Wulf and *Marvin M. Karpatkin* for petitioner.

Solicitor General Griswold for respondent.

PER CURIAM.

The petition for rehearing is granted and the order of May 29, 1967, denying certiorari is vacated. The petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Second Circuit vacated and the case is remanded to the United States District Court for the Southern District of New York for further consideration in light of *Schneider* v. *Smith, ante,* p. 17, in accordance with the suggestion of the Solicitor General and upon an independent examination of the entire record.

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

McSURELY ET AL. *v.* RATLIFF ET AL.

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

No. 1113. Decided March 18, 1968.

Appeal dismissed. Stay heretofore granted, *post*, p. 914, continued for 30 days.

Dan Jack Combs, Arthur Kinoy, William M. Kunstler and *Morton Stavis* for appellants.

Solicitor General Griswold for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. The stay heretofore granted, *post*, p. 914, is continued for 30 days in order to afford the appellants an opportunity to apply to the United States Court of Appeals for the Sixth Circuit for a stay. If such timely application is made, the stay entered by this Court shall remain in effect until the Court of Appeals acts on that application.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

REED *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 858, Misc. Decided March 18, 1968.

199 So. 2d 803, appeal dismissed and certiorari denied.

Joe T. Patterson, Attorney General of Mississippi, and *Guy N. Rogers,* Assistant Attorney General, for appellee.

PER CURIAM.

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

MR. JUSTICE DOUGLAS is of the opinion that the papers should be treated as a petition for a writ of certiorari and that certiorari be granted.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. *v.* ANDERSON, TRUSTEE IN BANKRUPTCY, ET AL.

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

No. 38. Argued November 7–8, 1967.—Decided March 25, 1968.

TMT Trailer Ferry, Inc. (TMT), the debtor in this protracted reorganization proceeding, was incorporated in 1954, and engages in transporting loaded truck trailers and other freight between Florida and Puerto Rico on sea-going barges. TMT incurred substantial debts and losses from the unsuccessful conversion of a Navy LSD by a drydock and repair company (M–S). Between 1954 and 1957 TMT issued more than 4,000,000 shares of common stock, many of which were acquired by insiders at low prices and disposed of to the public in alleged violation of the Securities Act of 1933 at relatively high prices. As a result of these and other transactions TMT became unable to meet its obligations and a reorganization proceeding was started by an involuntary petition filed against TMT in June 1957. In 1959 the District Court, solely on the basis of documents and records and without a hearing, declared TMT insolvent. It held that the original stockholders had no further interest in the reorganized company, and confirmed a reorganization plan which would have given control of TMT to the holders of preferred ship mortgages on TMT's vessels (the "Caplan mortgage") even though the District Court had questioned, and the trustee (respondent Anderson) had objected to, the validity of the claims. A successor trustee thereafter petitioned in effect that the order confirming the plan be vacated because of an allegedly illegal agreement between the Caplan mortgage holders and M–S. The petitioner Committee appealed, objecting to the trial court's failure to make an investigation and to conduct a hearing on insolvency. The SEC then petitioned the trial court to investigate its claims that the plan was unfair. The parties agreed on an investigation, which respondent Anderson as reinstated trustee conducted. Anderson's investigation concluded that TMT's business had been "wrecked by gross mismanagement" and "unsound expansion," that TMT

had substantial causes of action against the principal Caplan mortgage holders for diverting corporate opportunities through flagrant abuse of their control and inside positions, and that the mortgage was "a fraudulent transfer not given for fair consideration." Thereafter the trial court vacated its order confirming the 1959 plan and the Court of Appeals affirmed. After the trial court set aside the 1959 plan, no hearings were held on the trustee's and the SEC's objections to the Caplan mortgage claim. The mortgage was not set aside as a fraudulent transfer, nor was it decided to use the claims against the Caplan mortgage holders as setoffs. The SEC, which contended after its own investigation that there were grounds for disallowing the M–S claims, filed detailed specifications of its objections to those claims based upon M–S' alleged negligence and other factors. The SEC and trustee sought reference of the M–S claims to a master but later the trustee moved for the allowance of the claims on the ground that there was only a "remote" possibility of materially reducing them. Despite his own doubts, and without further investigation, the trial judge ultimately confirmed the M–S claims in full as unsecured claims. In 1962 two new reorganization plans were proposed: the "internal plan," recommended by Anderson, involving issuance of new common stock to creditors and "compromises" of (1) the Caplan mortgage whereby the mortgage holders were to receive in cash what they had put up for the mortgage, plus interest on the principal from the original due date, and (2) the M–S claims whereby they were also allowed in their full amount as unsecured claims, under an arrangement whereby M–S would receive 40% of the reorganized company's common stock; and the "cash plan" involving similar "compromises" and selling the debtor's assets for cash to persons unconnected with the company, the cash to be distributed to creditors. The Committee and the SEC objected, *inter alia,* that TMT's stockholders were excluded from both plans. Following valuation hearings which did not include full testimony about the company's future prospects, the District Court concluded that its going-concern value, based on current earnings, was $2,780,000. Since creditors' claims were almost twice that much, the court found the debtor to be insolvent and excluded TMT's stockholders from participation in the reorganized company. The District Court approved both plans, observing in connection with "compromising" the Caplan mortgage and M–S claims that successful litigation against the claimants "would take possibly years to conclude" and holding the compro-

mises "fair and equitable" under the circumstances. A majority of all classes of creditors accepted the internal plan, which that court confirmed in February 1963. The Court of Appeals remanded the case to the District Court to determine the feasibility of the plan if the Government's nontax claims were given priority, which it held was required. The District Court, after hearings, approved the plan as amended to include an immediate cash payment to the Government and assumed that the Court of Appeals had in effect affirmed its other orders and, refusing to reconsider the Committee's and SEC's contentions with regard to the Caplan mortgage and M–S claims, affirmed the plan, which the creditors had accepted. The Committee again appealed. The Court of Appeals ruled that its earlier decision left open all issues not previously discussed or decided but, finding no abuse of discretion or clear error, refused to remand the case and affirmed all judgments and orders of the District Court, stating that "[t]his . . . litigation must at long last be brought to an end." Dealing with the District Court's approval of the compromises in five sentences, the Court of Appeals noted that "not a single creditor has ever complained of either compromise." *Held:*

1. The Court of Appeals erred in affirming the District Court's approval of compromises involving substantial recognition of the claims against the debtor filed by the Caplan group and M–S in view of the inadequacy of the record for assessing the fairness of the proposed compromises. Pp. 424–441.

(a) A bankruptcy judge has the duty of determining that a proposed compromise forming part of a reorganization plan is fair and equitable; he must ascertain all facts necessary to determine the probabilities of success should claims be litigated. P. 424.

(b) The record here provides a reviewing court with no basis for distinguishing between well-reasoned conclusions of the trial court and mere conclusory language unsupported by evaluation of the facts or analysis of law. P. 434.

(c) An unfair reorganization plan may not be approved by a bankruptcy court even though the vast majority of creditors have approved it. P. 435.

(d) Approval of compromises is more questionable when the available facts indicate the inadvisability of compromise than when there are no facts pointing either way. P. 436.

(e) The facts in the record indicate the probable existence of valid and valuable causes of action, and since there were no

facts permitting a reasoned judgment that these claims should be compromised as the plan provides, approval of the compromises was not justified. Pp. 438–441.

2. The District Court erred in relying upon only the debtor's past earnings in determining its value as a going concern. Without having evidence relating to the debtor's future prospects, the court could not assess its going-concern value or properly determine that the debtor was insolvent. Pp. 441–453.

(a) Whether a reorganization plan excluding junior interests (here stockholders) meets the statutory requirement that the plan be "fair and equitable" depends upon the value of the reorganized company. Since the District Court did not apply the proper valuation standards, its determination of insolvency was improper and the reorganization plan cannot stand. P. 441.

(b) The valuation of a company undergoing reorganization must include an estimate based on an informed judgment embracing all facts relevant to future earning capacity. P. 442.

(c) The value of the debtor's business depended "not on the inherent value of its assets but primarily on maintaining a high level of earnings." P. 443.

(d) The trial judge's steadfast refusal to consider the company's value once it was out of the reorganization proceedings constituted an error which infected his conclusion that the debtor was insolvent. P. 444.

(e) In the circumstances of this case, which involve a company which had established and increased its share of a highly competitive market despite intense competition and major internal crises, an adequate notion of its going-concern value required looking to the future as well as the past. P. 446.

(f) The information introduced at the two insolvency hearings was inadequate for even a rough evaluation of TMT's future prospects, a situation which resulted from the trial judge's hostility to evidence concerning the company's future. Pp. 447–451.

364 F. 2d 936, reversed and remanded.

Irwin L. Langbein argued the cause for petitioner. With him on the briefs was *Irma S. Mason.*

William P. Simmons, Jr., argued the cause and filed a brief for respondent Anderson. *M. James Spitzer*

argued the cause for respondents Shaffer et al. With him on the brief were *Ronald J. Offenkrantz* and *Jackson L. Peters.*

David Ferber, by special leave of Court, argued the cause for respondent Securities and Exchange Commission. With him on the briefs were *Solicitor General Griswold, Ralph S. Spritzer, Daniel M. Friedman, Philip A. Loomis, Jr.,* and *Paul Gonson.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves a corporate reorganization under Chapter X of the Bankruptcy Act, 52 Stat. 883, 11 U. S. C. §§ 501–676. In the most recent proceedings [1] the District Court approved an amended plan of reorganization and discharged the petitioner Committee.[2] The Court of Appeals for the Fifth Circuit affirmed, 364 F. 2d 936 (1966). We granted certiorari, 387 U. S. 929 (1967), because this case presents important questions under the bankruptcy laws. Since we believe the Court of Appeals erred in affirming the decision of the District Court, we reverse the judgment and remand for further proceedings consistent with the views expressed below.

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[1] This case has been in the federal courts for over 10 years. The earlier reported decisions consist of the following: *Caplan* v. *Anderson,* 256 F. 2d 416 (C. A. 5th Cir. 1958); *Caplan* v. *Anderson,* 259 F. 2d 283 (C. A. 5th Cir. 1958); *TMT Trailer Ferry, Inc.* v. *Anderson,* 292 F. 2d 455 (C. A. 5th Cir. 1961), cert. denied *sub nom. Shaffer* v. *Anderson,* 368 U. S. 956 (1962); *United States* v. *Anderson,* 334 F. 2d 111 (C. A. 5th Cir.), cert. denied, 379 U. S. 879 (1964); *In re TMT Trailer Ferry, Inc.,* 334 F. 2d 118 (C. A. 5th Cir. 1964).

[2] The order of the District Court discharging the petitioner Committee was later modified to permit the Committee to prosecute appeals from that decision.

I.

The debtor, TMT Trailer Ferry, Inc., was incorporated in 1954. Its principal business is transporting freight between Florida and Puerto Rico. It pioneered "fishy-back" transport, the ocean-going equivalent of "piggy-back" transport. Freight loaded into highway trailers is rolled on and off sea-going barges without rehandling. In its original operations TMT used rented tugs to tow converted Navy LST's loaded with such trailers and other freight. Later it undertook to convert a self-propelled Navy LSD for use in its business. Substantial debts and losses arose from the unsuccessful conversion and consequent failure in service of this ship, dubbed the *Carib Queen.*

In addition, between 1954 and 1957, more than 4,000,000 shares of TMT common stock were issued, many of them acquired at low prices by persons close to the company and disposed of to the public at relatively high prices. As a result of these transactions and others, TMT became unable to meet its obligations, and a reorganization proceeding was initiated against it by involuntary petition in June 1957. The debtor consented to reorganization, and C. Gordon Anderson was appointed trustee. The motion of the holders of preferred ship mortgages on the debtor's vessels (the Caplan mortgage) to foreclose their liens was denied by the trial court. On appeal from this order, it was pointed out that no plan of reorganization had yet been proposed, that the possibility of successful reorganization had not been explored, and that no evidence had been received to support any of the court's orders. The Court of Appeals reversed and remanded with instructions that the holders of the Caplan mortgage be permitted to foreclose unless adequate provision was made to protect their interests or unless they would not be prejudiced by further delay.

Upon remand the trial court held appropriate hearings. It was determined that the debtor was being operated in a manner which would produce substantial profits. A plan of reorganization was proposed which would have given the Caplan mortgage group all the common stock in the reorganized company, a substantial portion of the preferred stock, and control of the board of directors. In February 1959, without a hearing called for that purpose and solely on the basis of documents and records, the trial court declared the debtor insolvent and held that the original stockholders had no further interest in the reorganized corporation. In March 1959 the plan of reorganization was confirmed, and Anderson resigned as trustee to become president of the reorganized company. A new trustee was appointed, and he sought in effect to vacate the order confirming the plan. His petition alleged that the holders of the Caplan mortgage and Merrill-Stevens Dry Dock & Repair Co. (M–S), another substantial creditor, had entered into an undisclosed agreement in violation of § 221 of Chapter X, 52 Stat. 897, 11 U. S. C. § 621, an agreement according to which the Caplan mortgage group would pay M–S in order to procure its consent to the plan of reorganization. This petition was denied, the successor trustee was removed, and Anderson was reinstated as trustee.

The petitioner Committee appealed from the order confirming the reorganization plan. Objection was made to the failure of the trial court to order an investigation into the claims of certain creditors and to the failure to conduct a hearing on insolvency. While that appeal was pending, the Caplan group, supported by Anderson, petitioned the trial court to consummate the confirmed plan. The Securities and Exchange Commission, however, filed a petition in the trial court seeking an investigation.[3] It

[3] The SEC participated as a party in both the District Court and the Court of Appeals, and has appeared as an unnamed respondent before this Court. See 52 Stat. 890, 894, 11 U. S. C. §§ 572,

alleged that an investigation would disclose that the plan was unfair because it turned the corporation over to persons who had dealt extensively in the stock of the debtor in transactions which were probably illegal. It was agreed among the parties that an investigation should be made.

Anderson, in his re-established role as trustee, conducted the investigation. Fourteen days of hearings were held, 2,200 pages of testimony transcribed, and some 60 exhibits collected. Anderson's report from this investigation covers 40 pages in the original record. He concluded that the debtor's business had been "wrecked by gross mismanagement, by unwise and unsound expansion financed primarily through the sale of securities in disregard of the protective provisions of the Securities Act of 1933," and that the debtor had substantial causes of action against holders of the Caplan mortgage. Upon the recommendation of Anderson, the trial court vacated its order confirming the 1959 plan, and the Court of Appeals affirmed.[4]

Early in 1962 two new plans of reorganization were proposed. The "internal plan," recommended by Anderson, provided for reorganizing the debtor by issuing new common stock to creditors and involved "compromises" of the Caplan mortgage and M–S claims. The "cash plan" entailed similar "compromises" as well as selling the debtor's assets for cash to persons unconnected with the company and distributing the cash

608. This Court requested the Government to express its views at the petition stage, 386 U. S. 901 (1967). For the most part the SEC has taken positions consistent with those of the petitioner Committee.

[4] *TMT Trailer Ferry, Inc.* v. *Anderson,* 292 F. 2d 455 (C. A. 5th Cir. 1961), cert. denied *sub nom. Shaffer* v. *Anderson,* 368 U. S. 956 (1962). The Committee's earlier appeal attacking the confirmation of the 1959 plan, which had been consolidated with this appeal by the Caplan mortgage group, was mooted by the order of the trial court vacating the confirmation.

to creditors. Neither plan provided for any participation by stockholders. The Committee, supported by the SEC, objected to the exclusion of stockholders from both plans, and opposed the internal plan because it contemplated that Anderson would become president of the reorganized company. After hearings on valuation, the District Court found the debtor insolvent and approved both plans as fair, equitable, and feasible. A majority of all classes of creditors other than the United States accepted the internal plan, and the District Court confirmed it in February 1963. The Committee appealed, supported by the SEC, arguing that the plan wrongly excluded stockholders and improperly contemplated that Anderson would become president. The Court of Appeals ruled, without reaching the other contentions, that it was permissible for the plan to contemplate that Anderson would become president,[5] but it held in a separate appeal that the plan was defective for not giving priority to the Government's nontax claims.[6] The case was accordingly remanded to the District Court for determination of whether the plan would be feasible if the Government's claims were given full priority.

On remand further hearings were held, the District Court found that if the Government's nontax claims were given priority the plan would be feasible, and amendments were authorized which provided for immediate cash payment to the Government. The court regarded the failure of the Court of Appeals to reverse its other orders as in effect an affirmance of them, and it refused to consider again the contentions of the Committee and the SEC. The creditors accepted the amended plan and, over the objections of the Committee and the SEC that the plan was not fair or equitable, the District

[5] *In re TMT Trailer Ferry, Inc.*, 334 F. 2d 118 (C. A. 5th Cir. 1964).

[6] *United States* v. *Anderson*, 334 F. 2d 111 (C. A. 5th Cir.), cert. denied, 379 U. S. 879 (1964).

Court affirmed it. The Committee again appealed, and the Court of Appeals ruled that its earlier decision had left open all issues not in terms discussed and decided.[7] Passing over the fact that the District Court had considered the case in erroneous legal perspective, and emphasizing that its obligation was to determine whether the trial judge had "abused his discretion" or reached conclusions which were "clearly erroneous," the Court of Appeals refused to remand the case. Stating that "[t]his . . . litigation must at long last be brought to an end," the Court of Appeals affirmed all judgments and orders of the District Court. The Committee, again supported by the SEC, has presented a number of questions on certiorari to this Court.[8] Because of the view we take of this case, it is necessary to consider only the questions of whether it was error to affirm the District Court's approval of compromises of substantial claims against the debtor, and whether it was error to affirm the District Court's judgment that the debtor was insolvent, when that judgment was rendered without considering the future estimated earnings of the reorganized company.

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[7] *Protective Committee* v. *Anderson,* 364 F. 2d 936, 939 (C. A. 5th Cir. 1966).

[8] The other issues, briefed and argued at length, are succinctly stated in the brief filed by the SEC:

"1. Whether under Chapter X of the Bankruptcy Act, which provides for a disinterested trustee as the focal point of the reorganization, the trustee is precluded from assuming the presidency of the reorganized company; and whether a plan that contemplates that result may be confirmed.

. . . . . .

"4. Whether the courts below erred in refusing to consider the merits of the stockholders' claims based on asserted violations of the securities laws.

"5. Whether the district court erred in discharging the Stockholders' Committee before the reorganization proceedings were completed, on the basis of its finding that the debtor was insolvent." Brief for SEC 2, 3.

II.

Compromises are "a normal part of the process of reorganization." *Case* v. *Los Angeles Lumber Prods. Co.*, 308 U. S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive the "informed, independent judgment" of the bankruptcy court. *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436 (1933). The requirements of §§ 174 and 221 (2) of Chapter X, 52 Stat. 891, 897, 11 U. S. C. §§ 574, 621 (2), that plans of reorganization be both "fair and equitable," apply to compromises just as to other aspects of reorganizations. *Ashbach* v. *Kirtley*, 289 F. 2d 159 (C. A. 8th Cir. 1961); *Conway* v. *Silesian-American Corp.*, 186 F. 2d 201 (C. A. 2d Cir. 1950). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. *In re Chicago Rapid Transit Co.*, 196 F. 2d 484 (C. A. 7th Cir. 1952). There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every

instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. It is here that we must start in the present case.

The Caplan mortgage, consisting of preferred ship mortgages on the debtor's vessels, bears a face amount of $330,000. The holders paid $280,500 for it. Under the proposed compromise, the holders would receive $280,500 paid in five annual cash installments, plus interest from the original due date.[9] The claims filed against the debtor's estate by M–S totaled $1,628,284, of which $574,580 was said to be secured by maritime liens on the debtor's vessels. Under the terms of the compromise, these claims are to be allowed in full, after reducing them all to the status of unsecured claims. As with other unsecured claims, they would be paid for by issuing common stock in the reorganized company. M–S would wind up holding approximately 40% of the stock in the new company.[10] A glance at these terms makes it clear that the compromises involve substantial recognition of the claims filed by the Caplan group and M–S against the debtor. Whether compromising on these terms was fair and equitable to the debtor, the other creditors, and the stockholders depends upon the proper assessment of the claims which the debtor allegedly had against both the Caplan group and M–S.

The Caplan mortgage was the focal point of the 1960 investigation conducted by the trustee, Anderson. The

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[9] The interest is to be treated as an unsecured claim payable in common stock in the reorganized company. The plan confirmed by the court was later amended to provide that the holders of the Caplan mortgage would receive $250,000 in cash at the date of consummation of the reorganization plan, rather than $280,500 over five years.

[10] Since the rest of the voting stock will go to the other numerous and scattered general creditors, petitioner argues that M–S' 40% ownership will give it initial working control of the reorganized company. Petitioner's Brief 28, 29.

mortgage was entered into shortly before the petition in bankruptcy was filed. It was needed to raise cash to meet payments due on the *Carib Queen*. After an extensive investigation, Anderson concluded that the mortgage was a fraudulent transfer not given for fair consideration. Anderson's report succinctly stated the unfairness of the terms of the mortgage:

> "The Caplan Group paid $280,500 cash for the mortgage to TMT which paid all of the expenses of the transaction. The mortgage was for $330,000 payable in seven months and is convertible into common stock at the option of the holders, one share of common for each $1.25 of principal amount of the mortgage. This gave the Caplan Group an effective interest rate of 30% per annum prior to maturity and an opportunity to straddle because of the conversion feature. If TMT prospered, they could convert the mortgage into common stock for which they would have paid little more than $1.00 per share; if TMT did not, the Caplan Mortgage was in a senior position and constituted a lien on TMT's prime assets, absolutely necessary to the Company's operation. Since the Carib Queen had broken down, the vessels encumbered by the mortgage were the main producers of income for the company."

Anderson found that there was "ample evidence" to support this view of the mortgage, and that therefore the mortgage should be treated as null and void. So treating it would not release TMT from the obligation to repay the money received, but in claiming that amount the holders of the mortgage would have no higher status than general unsecured creditors.[11]

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[11] Accordingly, to pay holders of the Caplan mortgage $280,500 in cash, even though only the amount they paid for the mortgage,

In addition, Anderson's report concluded that the principal holders of the Caplan mortgage, Abrams, Shaffer, and Erdman, had diverted corporate opportunities through the flagrant abuse of their control, fiduciary or inside positions, and should be made to account for the profits they had made. Nearly half of the roughly 4,000,000 shares of outstanding TMT common stock reached the public via purported private offerings through Abrams and Shaffer. These two men exercised a high degree of control over the affairs of the company, and Erdman went along with them and participated in many of their transactions. Anderson found that these three occupied a fiduciary relationship with TMT, at least insofar as issuance of capital stock to them was concerned. "They took advantage of their inside position to obtain stock for less than the market price which they sold to the public without any registration under the Securities Act and in apparent violation of the private offering exemption under which all of the stock was issued." The activities of these three men substantially lessened TMT's chances of obtaining financing from reputable financial institutions "and by the time the Caplan mortgage was executed they were in a position to dictate terms which TMT would be forced to accept." Anderson's report continued:

> "It is the opinion of the trustee that persons such as Abrams, Shaffer and Erdman who come in as creditors of TMT under the Caplan Mortgage . . . should be barred in this equity proceeding from profiting at TMT's expense. Their claims should be reduced by the profits they have made on sales of TMT stock which they acquired for private in-

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would be a substantial preferment of them when the reorganization plan allows general unsecured creditors only a pro rata portion of some 1,300,000 shares of new common stock in the reorganized company.

> vestment purposes, but which they sold in violation of the law at great profit to themselves. These profits are either admitted or readily ascertainable and should be returned to the company."

Characterizing the conduct of Abrams, Shaffer, and Erdman in acquiring unregistered TMT stock with no intention of holding it for investment as a "fraud," Anderson indicated the possibility of liability under the SEC's Rule 10b–5.[12] Anderson said that at a minimum their claims should be subordinated to those of innocent creditors.[13]

As a result of the report filed by trustee Anderson, the order confirming the 1959 plan of reorganization was vacated. Both the trustee and the SEC filed objections to the Caplan mortgage claim, grounded on the reasons presented in the report of the investigation. The District Court never held hearings on these objections. The mortgage was not set aside as a fraudulent transfer, nor was it decided to use the claims against Abrams, Shaffer, and Erdman as setoffs or as a means of subordinating the mortgage claims. Rather, the internal plan of reorganization was approved by the District Court, providing for a "compromise" of the Caplan mortgage along the lines already indicated. The holders of the mortgage were to receive in cash what they had put up for the mortgage, plus interest on the principal from the original due date.[14]

Separate from the Caplan mortgage claims were the claims filed by M–S, the company in charge of convert-

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[12] 17 CFR § 240.10b–5; promulgated by the SEC pursuant to § 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j.

[13] Such subordination would effectively eliminate their claims if TMT were as insolvent as the court subsequently found.

[14] These terms were later modified, as indicated in n. 9, *supra*.

ing the Navy LSD into the self-propelled trailership which TMT christened the *Carib Queen*. These claims totaled $1,628,284, of which over $1,000,000 was for the unpaid balance due for converting the *Carib Queen*. Maritime liens on other vessels owned by TMT allegedly secured $574,580 worth of these claims. The United States, in its position as a substantial creditor of TMT, filed objections to M–S claims, stating that none of them were entitled to status as secured claims "for the reason that they arose more than one year prior to the commencement of the reorganization proceedings herein." It also contended that the claims had no status as secured lien claims, for "it is a recognized principle of Admiralty and Maritime law that claims for the construction or reconstruction of vessels do not give rise to Maritime liens." Whether the portion of the claims for which M–S asserts secured status is actually entitled to that status has never been determined. The "compromise" of the M–S claims amounted to allowing them in their entirety as unsecured claims.

On the maiden voyage of the *Carib Queen* a series of boiler failures caused the vessel to break down and necessitated extensive repairs. In November 1958 the petitioner Committee notified the District Court that in its opinion the "series of catastrophes" which had befallen the *Carib Queen* was due to "faulty design, inadequate inspection, defective work on the remodeling and later repair of the ship, hasty and improper preparations for a hazardous sea voyage and utilization of the ship in a service for which she was not fitted and in an unseaworthy condition." The Committee thought that TMT had causes of action which could lead to the recovery of substantial sums of money. Although Anderson's report on his subsequent investigation of the affairs of TMT dealt with causes of action other than those associated

with the Caplan mortgage, it made no mention of any claims TMT might have against M–S. The SEC objected to the M–S claims, stating that there were grounds for disallowing them and that the matter should be referred to a special master for investigation. Trustee Anderson also sought reference of these claims to a special master. On September 1, 1961, the SEC filed detailed specifications of its objections to the M–S claims, based on its own investigation into them. The SEC stated that the debtor

> "has meritorious defenses and an offset or counterclaim because M–S (a) did not properly convert the vessel; (b) did not comply with the terms of the contract; (c) did not properly repair the vessel; and (d) performed certain work for and furnished certain materials to TMT, with no agreement as to price; M–S has failed to establish the value of such work and materials."

The SEC described with some particularity the facts which had led it to this conclusion. The most important of these related to the boiler failure which occurred shortly after M–S delivered the *Carib Queen* for its maiden voyage. Within 48 hours of sailing from Jacksonville, Florida, bound for San Juan, Puerto Rico, it was discovered that a boiler and several tubes were leaking. Tubes overheated, ruptured, and were distorted as a result of scale which had formed on their inner surfaces. The SEC attributed the scale to M–S' negligence in running the boilers with raw water. The SEC also stated that the improper priming of the boilers that occurred on the first trip was due to installation of incorrect baffles by M–S. M–S had undertaken to make the required repairs, and the SEC stated that this repair work was performed negligently, leading to further tube fail-

ures. Part of the M–S claims was for unpaid charges for this repair work. M–S filed an answer on September 1 which admitted that when the *Carib Queen* was delivered it was suffering from "certain construction deficiencies," but denied any liability. It contended that its asserted lien claims were secured and that it had performed the repair work in a proper manner.

Although the SEC and the trustee had sought reference of the M–S claims to a special master for a hearing, no such hearing was ever held. Instead, the trustee subsequently moved for the summary allowance of the claims on the ground that there was only a "remote" possibility of materially reducing them by litigating the objections filed against them, and that such litigation would cause "unnecessary delay." [15] At the hearing during which the trustee presented his motion for allowing the M–S claims in full, no further explanation of this recommendation was provided. Counsel for the Committee protested that "this is not a report, this is a bare statement of conclusion." The trial judge himself recognized the importance of the question. He said:

> "I am concerned myself. I do know that whoever turned that vessel [the *Carib Queen*] loose with the

[15] The trustee reached this conclusion after an investigation described by him in full as follows: "[T]he trustee, with the assistance of attorneys in the office of his counsel, investigated the facts alleged in the specifications of objections filed by the SEC and in the answer of Merrill-Stevens. This investigation consisted of an examination of numerous documents assembled by the SEC during its investigation, together with copies of statements made by individuals which had been obtained during the investigation. Also examined were numerous documents and statements furnished by Merrill-Stevens in support of its answer to the specifications of objections by the SEC." The trustee did not set out any findings of fact which he arrived at in the course of this "investigation," and provided no explanation of the reasoning which had led to his "considered opinion" that the M–S claims should be allowed in full.

boilers in it, somebody made a bad mistake. I don't know who it was."

The matter was put over, and subsequently the Committee, supported by the Commission, the Department of Justice, and the Caplan mortgage group, filed objections. Notwithstanding these objections, and the doubts that he had earlier expressed, the trial judge confirmed the claims in full as unsecured claims without further investigation of them. M–S, under the confirmed plan, is to receive 40% of the common stock of the reorganized company.

On July 11, 1962, the trial court filed its opinion and order approving both the internal and the cash plans of reorganization. The internal plan contained the provisions for "compromising" the Caplan mortgage and M–S claims. With regard to these sets of claims, the trial court stated that "it was apparent" that successful litigation of the claims TMT had against the holders of these claims "would take possibly years to conclude. . . ." The court continued:

> "It is the opinion of the court that these compromises are fair and equitable under the circumstances and they are hereby approved for inclusion in the Internal Plan. The court approves the opinion expressed by the attorney for the trustee that no better compromises can be obtained for the debtor, that the prospect of material reduction in the amount of these claims does not warrant the extensive litigation that would otherwise be required, and that the prospect of recoveries beyond the amount of the claims as urged by the Securities and Exchange Commission and the Stockholders' Committee is too remote for serious consideration. . . . The alternative to approval of these compromises is extensive litigation at heavy expense to the debtor and un-

> necessary delay in reorganization contrary to the intent and purpose of Chapter X of the Bankruptcy Act."

This statement constitutes the only, and the last,[16] word that the trial court said on the merits of the compromises of the Caplan mortgage and M–S claims. Without reference to any of the objections that had been filed or to the substantial facts in the record tending to cast doubt upon the Caplan mortgage and M–S claims, the court accepted the bald conclusions of the trustee. This despite the fact that the trustee had once concluded that the Caplan mortgage was null and void and that TMT had sizeable setoffs against its holders. This despite the fact that the trustee had once sought reference of the M–S claims to a special master for investigation. This despite the fact that the trustee had never placed on the record any of the facts of his subsequent investigation

[16] In December 1964, after the case had been remanded for the second time by the Court of Appeals, the Committee sought an order for production of documents relating to the *Carib Queen*, alleging they would show that TMT had a cause of action against M–S and the Caplan group. The Committee said these parties had acted "in collusion with members of the debtor's old management and control group to defraud the Maritime Administration and the debtor by misrepresentation of the reconversion contract price and by premature release of the vessel without proper compliance with the requirements of the reconversion contract. The same documents also bear on the propriety of the compromises . . . ." At the hearing held on this motion it appeared that these documents were held by the Maritime Administration, which had no objection to turning them over but wished the court to issue a formal order so that all parties could have access to them. The court denied the motion, saying "there is nothing in the motion that shows that these documents are material to any issue before this Court."

When reconfirming the plan after the second remand, the court added nothing to the explanation quoted in the text, for it erroneously concluded that approval of the settlement had already been affirmed by the Court of Appeals.

and had never provided any explanation of why he had completely reversed his field on these claims. Although at this point in the proceedings it was clear that Anderson was to become president of the reorganized company, and though the trial court was understandably eager to wind up these protracted proceedings, there nowhere appears an adequate explanation for the trustee's cursory, conclusory recommendation of these "compromises," or the perfunctory, almost offhand, manner in which the court accepted that recommendation.

If the quoted statement of the trial court had been the result of an adequate and intelligent consideration of the merits of the claims, the difficulties of pursuing them, the potential harm to the debtor's estate caused by delay, and the fairness of the terms of settlement, then it would without question have been justifiable to approve the proposed compromises. It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law. Here there is no explanation of how the strengths and weaknesses of the debtor's causes of action were evaluated or upon what grounds it was concluded that a settlement which allowed the creditor's claims in major part was "fair and equitable." Although we are told that the alternative to settlement was "extensive litigation at heavy expense" and "unnecessary delay," there is no evidence that this conclusion was based upon an educated estimate of the complexity, expense, and likely duration of the litigation. Litigation and delay are always the alternative to settlement, and whether that alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of litigation. The complaint voiced by

counsel for the petitioner Committee to the trustee's report on the compromises, that "this is a bare statement of conclusion," seems equally applicable to the trial court's statement approving those compromises. In these circumstances it was error to affirm that aspect of the District Court's judgment approving inclusion of the proposed compromises in the internal plan of reorganization.

The Court of Appeals dealt with the District Court's approval of the compromises in five sentences. Noting that it was only the Committee and the SEC that were complaining, and remarking that it was unlikely that disallowance of the compromises would result in solvency, it felt that it was "significant that not a single creditor has ever complained of either compromise." 364 F. 2d 936, 941. The question of insolvency will be returned to shortly. The argument that the compromises were properly approved because no creditors objected to them seems doubly dubious. When a bankruptcy court either fails adequately to investigate potential legal claims held by the debtor, or refuses to provide an adequate explanation of the basis for approving compromises, it is scarcely surprising that creditors fail to come forward with objections to the compromises. Moreover, this Court has held that a plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it.[17]

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[17] *Case* v. *Los Angeles Lumber Prods. Co.*, 308 U. S. 106 (1939). "[W]here a plan is not fair and equitable as a matter of law it cannot be approved by the court . . . . Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a substitute for the latter." *Id.*, at 114.

The principal argument of the respondent supporting affirmance of the order approving the compromises is that "the district court had before it a thorough record concerning the facts and issues with respect to the compromises of these two claims." Respondent's Brief 38. With regard to the Caplan mortgage claim, respondent points out that the facts and circumstances surrounding it were thoroughly documented in Anderson's report of his investigation. It is difficult to see how this strengthens respondent's position, however, for the report carefully documented the conclusion that the Caplan mortgage was a fraudulent transfer and that claims against the individual holders of the mortgage could be used as setoffs. The District Court's approval of the proposed compromise in the face of the facts and conclusions contained in the trustee's report is more difficult to understand than would be approval entered on a blank slate. Respondent also points out that the trial court had before it an answer to Anderson's report, the various objections filed to the mortgage claim, the claim itself, and the recommendations of the Creditors' Committee, the trustee and the trustee's counsel favoring the proposed settlement. The objections filed to the claim militate against the advisability of compromise, however, and the other matters referred to consist either of conclusory denials of liability or conclusory statements that the claims should be compromised. There is nothing in all these documents which could provide a sound basis for concluding that the claims against the mortgage and its holders were unmeritorious.[18] If the

[18] The answer filed to the Anderson report occupies seven pages in the record. Aside from bare statements that insufficient facts were found and that the trustee's conclusions were not conceded, it opposes vacating the original plan of reorganization almost wholly on grounds of estoppel, laches, *res judicata,* and reliance. The claim itself merely details the terms of the mortgage and the amounts

trial court ever had before it facts which showed the claims against the Caplan mortgage and its holders to be without merit, or if the court ever discovered sound grounds for thinking that the delay incident to litigation or the unlikelihood of obtaining an adequate recovery, made compromise advisable, nothing in this record indicates it.

With regard to the M–S claims, respondent contends that the record contains "an abundance of pleadings and allegations" respecting them. Respondent's Brief 33. To make an informed and independent judgment, however, the court needs facts, not allegations. Respondent also contends that there were sufficient facts in the record, and provides a long list of references to the places in the record where these facts can be found. If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based. The deficiency in this case, however, is not a merely formal one. The evidence referred to by respondent is analyzed at greater length in the margin.[19]

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due under it. The recommendations favoring settlement stated only that the merits of the claims had been examined, that the possibility of recovery was remote, and that litigation would cause "unnecessary delay."

[19] Respondent contends that the trial court could have rendered an informed decision on the merits of the M–S compromise on the basis of the following matters in the record:

(1) *The summary of M–S' proof of claim* (the full proof not having been included in the record). This merely stated the amounts claimed by M–S and the liens asserted to secure some of the claims.

(2) *The 1958 letter from the Committee to the Court.* This asserted that TMT had good causes of action against M–S which would result in substantial recovery. With regard to the *Carib Queen,* it accused M–S of "faulty design, inadequate inspection, defective work on the remodeling and later repair of the ship, hasty

Here it is enough to say that to the extent that the record contains solid facts of the sort necessary for appraising the merits of the claims against M–S, virtually all of them point to the probable existence of valid

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and improper preparations for a hazardous sea voyage and utilization of the ship in a service for which she was not fitted and in an unseaworthy condition."

(3) *The trustee's report.* This merely stated a few facts relating to the breakdown of the *Carib Queen* on her maiden voyage, and the expenses incurred in connection with the *Carib Queen.*

(4) *The SEC's specifications in support of the objections to the M–S claims.* This was a report of the SEC's independent investigation of the M–S claims. It set out in some detail the facts supporting its contention that TMT had good defenses or setoffs because "M–S (a) did not properly convert the vessel; (b) did not comply with the terms of the contract; (c) did not properly repair the vessel; and (d) performed certain work for and furnished certain materials to TMT, with no agreement as to price; M–S has failed to establish the value of such work and materials."

(5) *The M–S answer to these specifications.* This was principally a formal document and contained no additional facts or arguments. It admitted that the *Carib Queen* was suffering construction deficiencies when delivered to TMT and that there was a boiler failure on the first voyage, but denied liability.

(6) *The motion for allowance of the claim filed on behalf of the trustee.* This summarized the proceedings relating to the M–S claims. Noting that the SEC had filed detailed specifications of its objections, and that the special master appointed by the court had held no hearings, it stated that the trustee and his attorneys had examined the documents relating to the M–S claims. The motion stated that the trustee had tried unsuccessfully to get M–S to reduce its claims, that the possibility of recovering through litigation was remote, and that litigation would cause unnecessary delay. These conclusions were neither expanded upon nor explained.

(7) *Objections of the United States to the above motion.* The United States opposed the M–S claims on the grounds that none of them were entitled to secured status. They had arisen more than a year prior to the bankruptcy proceedings, and claims for reconstructing vessels do not give rise to maritime liens.

(8) *The transcript of the hearings held on the motion for allowance of the claims.* The transcript of this portion of the hearing

and valuable causes of action. Balancing these facts are nothing but bald assertions to the contrary and general conclusions for which foundations nowhere appear. Particularly noteworthy is the fact that, despite frequent

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occupies five pages. Most of it was devoted to the question of how much time the Committee would be allowed for filing a memorandum objecting to the proposed compromise. The court was told that the trustee and his lawyers had looked at the relevant papers, that the possibility of recovery was remote, and that litigation would cause unnecessary delay. No facts or arguments to support these conclusions were presented. Counsel for the Committee objected that this was not a report but a bare statement of conclusion. The court indicated that someone had been at fault over the boiler breakdown.

(9) *The Committee's specification of objections to the M–S claims.* This 35-page report, 22 pages of which are devoted to the *Carib Queen* contract, was the result of an independent examination conducted by the Committee into the M–S claims. The Committee charged M–S with faulty design, construction, and repair of the *Carib Queen*. With regard to two other ships on which M–S worked for TMT, the Committee charged M–S with responsibility for the swamping of one on its trial trip, and with failing to get Coast Guard approval of the other. The Committee also claimed that the maritime liens asserted by M–S had been reduced by payments on account, and that the original TMT management, M–S, and Abrams and Shaffer had worked together in a collusive relationship designed to make large profits by selling cheaply purchased stock to the public at inflated values. Some idea of the factual particularity of the Committee's objections is provided by the abbreviated subheadings of their charges against M–S in connection with the *Carib Queen*. The Committee stated that TMT had causes of action growing out of the fact that M–S (a) failed to secure proper certificates of work completion affecting the classification and rating of the vessel, (b) failed to fit riveted crack-arresting seams, (c) failed to produce a vessel of 3,050 shaft-horsepower per shaft, propeller speed of 216 r. p. m., and speed in service of 15½ knots, (d) failed to produce a ship of high enough classification and rating, (e) failed to clean the boilers chemically, (f) wrongly assumed that the boilers had been properly protected up to the time of conversion, (g) failed to use distilled water in its preliminary running of the boilers, (h) improperly connected the

requests for an investigation, and notwithstanding the fact that the available evidence pointed to probably valid claims against M–S, no investigation of these matters was ever undertaken or ordered by the trial court. It is difficult to imagine how an informed and independent decision in favor of compromising the M–S claims in the full amount as unsecured claims could have been reached on the present state of the record.

The record before us leaves us completely uninformed as to whether the trial court ever evaluated the merits of the causes of actions held by the debtor, the prospects and problems of litigating those claims, or the fairness of the terms of compromise. More than this, the record is devoid of facts which would have permitted a rea-

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piping, (i) installed incorrect baffle plates, (j) failed to clean the boilers adequately when performing the repair work, (k) failed to install the ventilating system properly, (*l*) installed an inadequate and inappropriate evaporator, (m) failed to put the feed water regulator and the feed pump governor into proper working order, (n) failed to install a boiler compound injector pump, (*o*) failed to provide equipment for coping with the excessive oxygen content of the water in the system, and (p) was responsible for deficiencies in the electrical system. In addition, the Committee stated that M–S was improperly claiming for repair work done under its guarantee obligation, and that M–S had included claims for work done as to which no amount had ever been agreed upon.

(10) *The statement by the SEC supporting the Committee's specification of objections.* The SEC, while not necessarily agreeing with all the allegations and contentions of the Committee, felt that the Committee had demonstrated that M–S should be required to prove its claims at a judicial hearing.

In addition to these matters of record, respondent refers to several matters not in the record, which are said to support the propriety of accepting the compromises. Matters not in the record and not properly the subject of judicial notice cannot form the basis of judicial confirmation of a plan of reorganization. They are equally unavailing on review.

soned judgment that the claims of actions should be settled in this fashion. In reaching this conclusion, however, it is necessary to emphasize that we intimate no opinion as to the merits of the debtor's causes of action or as to the actual fairness of the proposed compromises. To the contrary, it is clear that the present record is inadequate for assessing either, and that a remand is necessary to permit further hearings to be held. Only after further investigation can it be determined whether, and on what terms, these claims should be compromised.

III.

Under §§ 174, 221 (2), of Chapter X, 52 Stat. 891, 897, 11 U. S. C. §§ 574, 621 (2), a bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be "fair and equitable." This standard incorporates the absolute priority doctrine under which creditors and stockholders may participate only in accordance with their respective priorities, and "in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts . . . ." *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 452 (1940). Since participation by junior interests depends upon the claims of senior interests being fully satisfied, whether a plan of reorganization excluding junior interests is fair and equitable depends upon the value of the reorganized company. In the present case the District Court excluded the stockholders from participation because of its finding that the debtor was insolvent. Since the determination of insolvency was not made in accordance with the proper standards of valuation, neither the approval nor the confirmation of the plan can stand.

The appropriate standard for valuing a company undergoing reorganization was set out at length in *Con-*

solidated Rock Products Co. v. *Du Bois,* 312 U. S. 510, 526 (1941):

> "As Mr. Justice Holmes said in *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 226, 'the commercial value of property consists in the expectation of income from it.' . . . Such criterion is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties. . . . The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. . . . Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance." [20]

In the present case the book value of the debtor's assets on May 31, 1962, was $1,887,185.77. Claims against the

[20] Further on the subject of valuation, see 2 J. Bonbright, Valuation of Property 880–881 (1937); 6A Collier, Bankruptcy ¶¶ 10.13 and 11.05 (14th ed. 1965); H. Guthmann & H. Dougall, Corporate Financial Policy 656–657 (4th ed. 1962). See also Frank, Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act, 18 N. Y. U. L. Q. Rev. 317, 342, n. 68 (1941): "Value is the present worth of *future* anticipated earnings. It is not directly dependent on *past* earnings; these latter are important only as a guide in the prediction of future earnings."

debtor totaled $5,477,370.05. The actual fair value of the debtor's total assets was $2,238,387.62 and their net value was $1,978,481.73. Although these figures show that liabilities far exceeded assets, they are not of controlling importance. The District Court recognized that going-concern value, not book or appraisal value, must govern determination of the fairness of the plans of reorganization, and respondent concedes that the value of TMT's business depended "not on the inherent value of its assets but primarily on maintaining a high level of earnings." Brief for Respondent 42.

At the valuation hearings the trustee stated that his analysis of the financial structure and business of the debtor resulted in a going-concern value of $2,031,403.72. A valuation expert presented by the trustee estimated the going-concern value at between $1,607,692 and $1,800,000. He arrived at his conclusion by multiplying his estimate of the future earnings of the company by 7.7, a figure based on the assumption that earnings would be 13% of value. The valuation expert presented by the Committee concluded that estimated future earnings after taxes would be $327,500, and multiplying this by a price-earnings ratio of 13.8, arrived at the conclusion that TMT had a value of $4,519,500. The trial judge took an intermediate position. By projecting current earnings of the debtor for the first five months of 1962 over the remainder of the year, he concluded that pre-tax earnings would be $568,000. Reduced by estimated income taxes and capitalized at 10%, this yielded a going-concern value of $2,780,000. Since this figure fell well below the $5,477,370.05 of outstanding claims, he concluded that the debtor was insolvent. On this basis the plan was approved and confirmed.

When the Court of Appeals remanded to the District Court for determination of the feasibility of the reorganization plan after giving full priority to the Govern-

ment's claims, the District Court concluded that TMT was "more insolvent now than it was in 1962," for earnings had declined from the high point of 1962, and the Court's initial determination had been based on the projected earnings for that year. The decline in earnings had occurred even though the volume of business had grown substantially, for increased competition from large steamship lines serving Puerto Rico had forced TMT to lower its rates and thus its margin of profit. The District Court reaffirmed its finding of insolvency. On appeal, the Court of Appeals stated that it did not have to determine whether or not the District Court's finding of insolvency was accurately computed, but merely whether it was "clearly erroneous." On this basis the conclusion of insolvency was affirmed.

In a complex case of this nature it is not the province of this Court to attempt to retry issues of fact which have been fully litigated below. Indeed, as the Court of Appeals stated, much weight must be given to the long familiarity of the District Judge with the debtor and to his evaluation of the witnesses who testified in his presence. In the face of conflicting expert testimony as to the going-concern value of the debtor based on current earnings, the trial judge adopted a position in between. We are not disposed to dispute the conclusion of the Court of Appeals that this determination by the trial judge was not "clearly erroneous." However, examination of the facts of this case demonstrates that the District Court did not have before it all of the evidence and testimony relating to the future problems and prospects of the company which were necessary to assess its value as a going concern. Indeed, the trial judge steadfastly refused to consider the value of the company once it was out of the reorganization proceedings. In this there was error, and it was an error which infected the conclusions of the trial court that the debtor was insol-

vent. Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations.

TMT plays a minor but unique role in carrying goods between Puerto Rico and the United States. This domestic offshore trade is highly competitive and generally unprofitable. The high density, high volume, and high operating-cost trade with Puerto Rico flows in and through the North Atlantic ports. TMT, operating in a triangle between San Juan, Miami, and Jacksonville, is confined to the low density, low investment South Atlantic trade. TMT carries only about 2% of the total trade with Puerto Rico, and the dominant carrier in the market is in direct competition with it in its home port of Jacksonville. When TMT entered the market with its novel idea of carrying roll-on and roll-off freight in towed vessels, the market was ripe for an innovation of this sort. However, the ills which plagued its early years threw TMT into bankruptcy in 1957. Prevented by the exigencies of the bankruptcy proceeding from capitalizing on the novel idea it had introduced, TMT has watched the development of container shipping, which has taken over a large share of the United States-Puerto Rico trade for which it might otherwise have hoped to compete. Nonetheless, TMT remains the only roll-on and roll-off carrier in the trade, and it has seen its own business rise 10% to 20% a year due to the increased frequency of direct interchange with piggyback rail transport. Despite the inability of TMT to capitalize on its novel idea, it has remained in a strong competitive position. Trade with Puerto Rico has increased steadily and rapidly, and TMT's business has grown commensurately. Despite a destructive rate war which markedly lowered the revenues earned per voyage, TMT increased its revenue from $3,801,000 in 1962, when the first insolvency hear-

ing was held, to $4,779,000 in 1964, the latest year in the record. Between the 1962 and the 1965 hearings the fleet of vessels was increased from three to five and the number of truck trailers from 350 to 670. Moreover, in the 1965 hearing the business manager could report that after it paid the forthcoming installment for the reconversion of one of its vessels, the company would have no further significant outstanding indebtedness. TMT has continued to be the only unsubsidized carrier in the South Atlantic trade, the only one that makes money. Despite the increase in volume and revenue, however, the rate war and other factors such as rising costs caused net earnings to drop after 1962, and they have not yet regained the level established that year. TMT's tax-loss carry-over has expired, with the result that earnings are now substantially reduced by federal taxes. The general trade picture between Puerto Rico and the United States is in flux, and the rates applicable to the trade are undergoing continuing revision and investigation. The vessels TMT uses are old and in need of replacement. The supply of LST's has nearly dried up, and it seems to be understood that the replacement vessels will have to be built from scratch.

In short, TMT would seem to be a company which has established, preserved, and increased its share of a highly competitive market despite intense competition and major internal crises. It operates in a market undergoing substantial change and is itself faced with the imminent need to re-equip its fleet. In these circumstances, an adequate notion of the going-concern value of TMT could be obtained only by looking to the future as well as the past. Against this background we must examine the information which the trial court had before it for assessing the future prospects of TMT. The basic source for information on these matters was, of course, the trustee and his business manager. A short summary of

the highlights of their testimony as it related to the future prospects of TMT will demonstrate the inadequacy of the information provided the trial judge for making this crucial determination.

At the first insolvency hearing the business manager attempted to estimate the earnings of the company for the next four years, but he made his projections solely on the business as it then was. Although TMT had attained the maximum number of voyages possible with the fleet it then had, the business manager had not looked into the possibility of chartering additional vessels. The trustee testified that several vessels would have to be replaced in the next two years, but admitted that he was unable to predict what such vessels would cost. When the trustee was asked if there was foreseeable room for expansion of TMT's business, the Court agreed with an objection that this was beyond the scope of the valuation hearing. The trustee's expert on valuation gave his opinion as to going-concern value solely on the basis of the trustee's projection of earnings, which in turn was based wholly on past earnings. Those earnings figures had been drawn up some time prior to the hearing, and it was conceded that they might have come out differently if the projection had been made at the time of the valuation hearing. When asked if he would attempt to predict whether the company would be able to pay dividends once it was out of reorganization, or whether large capital investments would soak up all earnings, the trustee's expert replied that he had not been asked to consider that question and did not think it legitimate. Although he agreed that reasonably foreseeable changes and improvements should be taken into account in valuing the company, he stated that he had been given no information on which to make such predictions.

At the second hearing on the value of the company, the business manager admitted that he had made no new projection of future expenses, revenue, or income, even though three years had passed and the business outlook of the firm was markedly different. Although TMT's fleet had grown in the interim from three to five vessels, and there was an imminent need for replacement of the older ships, the business manager was unable to predict the likely impact on earnings of the acquisition of newer vessels. He stated that the new vessels would be towed craft that loaded from the stern, and that they were apt to cost between $1,250,000 and $1,500,000 each. However, though some studies and inquiries had been conducted, there were no final or definite plans or drawings for the new ships. Although new, better, and more efficient vessels were needed soon to improve the company's competitive situation, in the present state of planning it would be two years after the company was out of reorganization before new vessels would be obtained. At the second hearing, as at the first, the business manager could give no estimate of what portion of the administration costs of running TMT was due to the reorganization proceedings. Although he thought that trade between the United States and Puerto Rico was increasing, he did not know how much or in what ways. Though he thought that TMT's share of the Puerto Rican trade was remaining comparatively constant, he did not know for certain. He also did not know what portion of TMT's present volume of business was attributable to direct piggyback interchange.

The data which the trustee and his business manager had submitted with regard to past income and expenses undoubtedly provided a clear picture of what the company had been experiencing in the past. Given, however, that it was a relatively small and young company

much in need of internal rebuilding and operating in a market undergoing important economic and technological change, it was essential that some clear idea be gained of its future prospects. It seems perfectly obvious that the information introduced at the two hearings was inadequate for gaining even a rough idea of TMT's future prospects.

The fundamental reason that there was insufficient evidence concerning the future prospects of TMT was that the trial court showed itself unalterably hostile to inquiries directed to TMT's future. During the first hearing the following interchange took place when the court cut off a question aimed at determining whether the volume of TMT's southbound traffic could be increased during the off-peak season:

> "Q. But if this enterprise were out from under the proceedings, would it?
>
> "The COURT. Well, we are dealing with an organization that is in. Let's assume that it will stay right there and try to get the value. It is not going to get out until it is reorganized.
>
> "Mr. MASON. We are trying to get the value when reorganized.
>
> "The COURT. That is of no importance to me. Let's value it as it now exists to determine what should be done in these proceedings."

At a later time, when counsel again sought to establish that the proper way to value the company was to try to determine foreseeable factors which would affect future earnings, the court pre-empted the answer by remarking, "Mr. Witness, we do not want possibilities." Still later, the judge said:

> "All these projections into the future are not going to bother the Court. These creditors have waited

> too long to get their money. We have had this thing for years and years. I imagine most of them long since have gone to the poorhouse or given up."

One can easily sympathize with the desire of a court to terminate bankruptcy reorganization proceedings, for they are frequently protracted. The need for expedition, however, is not a justification for abandoning proper standards. It is also easy to share the court's concern that creditors receive their money as promptly as possible. However, the right of stockholders to participate at all hung on the result of the valuation proceedings; sedulously eliminating all inquiry into the future may, in this context, have caused the rights of the stockholders to have been relinquished by default.

Although three years elapsed before the next hearing, the judge displayed the same unwillingness to permit inquiry into the future prospects of TMT. When counsel for the SEC tried to open up the subject, the following dialogue occurred:

> "Mr. GONSEN. We have no startling figures, but a series of questions relating to the possible future prospects of this company.
>
> "The COURT. There is no possible future prospects other than what is going on. It is possible it will become the greatest fleet in the world and it is possible to go bankrupt in a few months. As a matter of fact, if the competition had succeeded in their plans, you would have no problem here, they would have been sold.
>
> "Mr. GONSEN. Do I understand Your Honor does not desire me to examine as to evaluation?
>
> "The COURT. You do."

Perhaps the proper reading of the reluctance of the judge to go into future prospects at the second hearing was that in his view the issue of insolvency was no longer in

the case. The Court of Appeals had ruled on the question of whether the trustee could be the president of the reorganized company and whether the Government's nontax claims should be allowed in full without discussing the other issues. In the trial judge's view, the Court of Appeals' failure to speak on other issues constituted affirmance. On the appeal from the second hearing, however, the Court of Appeals took pains to point out the error in this conclusion. The result of the trial court's ruling was to exclude from the hearing the general issue of insolvency and to limit the hearing to the question of whether developments between the first and second hearings had rendered the plan unfeasible in light of the necessity of giving full priority to the Government's nontax claims. In such circumstances it might be expected that the Court of Appeals would have examined the record to see if the facts supported the conclusion which the trial judge had felt foreclosed from having to make again, but which was in fact still in the case. Instead, however, the Court of Appeals merely quoted at length from the trial court's conclusions that the plan was feasible and stated that the ruling that the company was still insolvent was not clearly erroneous.

At the close of the second hearing the SEC and the Committee argued vigorously that the issue of valuation was still open and that future prospects should have been considered by the judge. Although its view of the effect of the appeal from the first hearing did not require it to do so, the court addressed itself to the merits of this contention in its opinion and order approving the amended plan of reorganization:

> "The SEC and the Stockholders Committee insist, as they did during the valuation hearings in 1962, that the court should have required evidence of future earnings, subsequent to reorganization, based upon estimates of revenues and expenses after sub-

> stantial changes in operations and acquisition and substitution of new type vessels and other equipment, and based upon expanded operations expected to take place under private management. However, neither the trustee [n]or the court can anticipate what the reorganized company will do, and any estimates of future earnings under different circumstances of operation would be speculative and unreliable."

This was not a correct statement or application of the law. This Court has declared that in every case it is incumbent upon the reorganization court to consider "all facts relevant to future earning capacity . . . including . . . all circumstances which indicate whether or not [the past earnings] record is a reliable criterion of future performance." *Consolidated Rock Products Co.* v. *Du Bois, supra.* If it is shown that the record of past earnings is not a reliable criterion of future performance, the court must form an estimate of future performance by inquiring into all foreseeable factors which may affect future prospects. In forming this estimate, "mathematical certitude" is neither expected nor required.

In this case we have a company engaged in a hotly competitive market, a market experiencing a severe rate war which would probably alter the relative standings of the competitors. The market as a whole was witnessing substantial technological change, and TMT itself was one of the prime innovators. TMT's principal market, Puerto Rico, was undergoing considerable expansion. It was shown without contradiction that TMT needed to replace its present fleet with new and different ships. It should have been clear to the trial court that the circumstances brought out at the two hearings showed that the past earnings record was not a reliable criterion of future performance, and that sound evaluation of the

company as a going concern required examination of the future prospects of the company. The court was not dealing with an established company in a static market, nor was it being asked to value the company's future prospects by hypothesizing unforeseeable changes in operations or market structure. It was evident that certain specific and predictable alterations would have to be made in the equipment and operations of the company in order to meet foreseeable alterations in the market. The trial court shut its eyes to these important developments and in so doing ignored a cardinal principle of proper evaluation.

IV.

Because only past earnings were relied upon in this case in determining the value of the debtor as a going concern, we reverse and remand to the Court of Appeals with directions to remand to the District Court to hold new hearings on valuation. Without in any way prejudging the issue, it is possible that when the compromises discussed in Part II of this opinion are reconsidered, and when the company is properly valued by taking into account its future prospects, the company will be found not to be insolvent. Such a finding would permit stockholders to participate. There is, therefore, no point in considering at this juncture the question presented by the petitioner concerning the stockholders' claims under the federal securities laws. Since the Committee will, of course, be entitled to participate in the new hearings on valuation and insolvency, the order of the District Court discharging it is vacated. So doing, however, reflects no opinion on the merits of the arguments presented in this Court by petitioner as to why it should not have been discharged. Finally, there is no necessity to determine whether it was improper to contemplate making the trustee president of the reorganized company. A great deal of time has passed since that was deemed

an advisable plan, and intervening circumstances may well have altered the views of the participants. Since new hearings on valuation and insolvency will further protract these proceedings, it seems advisable to put that question aside.

For the reasons stated in this opinion, we reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

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

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

In my opinion, the only question which could be thought even remotely to justify the presence of this case in this Court is whether the trustee, by virtue of his office, was as a matter of law disqualified from being selected as president of the reorganized company. The Court, however, does not decide that question. The review of the massive record in these reorganization proceedings, which have been in the courts for over 10 years and on six occasions before the Court of Appeals at various stages, is not in my view an appropriate task for this Court. Believing that this decision bodes little but further delay in bringing this protracted proceeding to a conclusion, I feel justified in voting to dismiss the writ as improvidently granted, despite the fact that the case was brought here on an unrestricted writ. Since the Court does not reach the "disqualification" issue, I consider it inappropriate for me, as an individual Justice, to express my own views upon it.

ALITALIA-LINEE AEREE ITALIANE, S. P. A. *v.* LISI ET AL.

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

No. 70. Argued March 11, 1968.—Decided March 25, 1968.

370 F. 2d 508, affirmed by an equally divided Court.

George N. Tompkins, Jr., argued the cause for petitioner. With him on the briefs was *Austin P. Magner*.

Theodore E. Wolcott argued the cause and filed a brief for respondents.

Briefs of *amici curiae*, urging reversal, were filed by *Edwin Longcope* for the United Kingdom of Great Britain and Northern Ireland; by *Robert MacCrate* for Canada; by *Alfred C. Clapp* for the Republic of Italy; and by *John E. Stephen, Joseph F. Healy, Jr., Harold L. Warner, Jr., Carl S. Rowe* and *Paul G. Pennoyer, Jr.*, for the Air Transport Association of America et al.

Briefs of *amici curiae*, urging affirmance, were filed by *Samuel Langerman* and *Walter H. Beckham, Jr.*, for the American Trial Lawyers Association, by *Stuart M. Speiser* for Arnold Holtzman, and by *Lee S. Kreindler* for Bates Block.

Briefs of *amici curiae* were filed by *Solicitor General Griswold, Morton Hollander* and *Joseph B. Goldman* for the Civil Aeronautics Board, and by *William A. Jennings* for the Airline Passengers Association.

PER CURIAM.

The judgments are affirmed by an equally divided Court.

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

ANDERSON *v.* JOHNSON, WARDEN.

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

No. 700. Argued March 6, 1968.—Decided March 25, 1968.

371 F. 2d 84, judgment remains in effect.

J. Brad Reed argued the cause and filed a brief for petitioner.

Ed R. Davies argued the cause for respondent. With him on the brief was *George F. McCanless,* Attorney General of Tennessee.

PER CURIAM.

Four members of the Court would reverse. Four members of the Court would dismiss the writ as improvidently granted. Consequently, the judgment of the United States Court of Appeals for the Sixth Circuit remains in effect.

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

REED ENTERPRISES ET AL. *v.* CLARK, ATTORNEY GENERAL, ET AL.

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

No. 1092. Decided March 25, 1968.

278 F. Supp. 372, affirmed.

Stanley Fleishman, David Rein and *Sam Rosenwein* for appellants.

Solicitor General Griswold, Assistant Attorney General Vinson and *Philip R. Monahan* for appellees.

PER CURIAM.

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

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

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

ORTEGA *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1163, Misc. Decided March 25, 1968.

Appeal dismissed.

PER CURIAM.

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

FERIS ET AL., DBA FERIS BROS. TRUCKING CO. *v.* BALCOM ET AL., DBA D & L LOGGING CO., ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1101. Decided March 25, 1968.

— Ore. —, 432 P. 2d 684, appeal dismissed.

Robert W. Gilley for appellants.

PER CURIAM.

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

LAHMAN, ADMINISTRATRIX *v.* W. E. GOULD & CO. ET AL.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 1103. Decided March 25, 1968.

82 Ill. App. 2d 220, 226 N. E. 2d 443, appeal dismissed and certiorari denied.

Raymond Harkrider for appellant.

Calvin P. Sawyier for appellees W. E. Gould & Co. et al.

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.

Syllabus.

BANKS *v.* CHICAGO GRAIN TRIMMERS ASSN., INC., ET AL.

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

No. 59. Argued January 17, 1968.—Decided April 1, 1968.

Petitioner filed a claim against her late husband's employer for compensation death benefits under the Longshoremen's and Harbor Workers' Compensation Act, alleging that his fall at home on January 30, 1961, from which he later died, resulted from a work-connected injury sustained on January 26. A Department of Labor Deputy Commissioner rejected the claim for failure to establish a work-connected injury. Thereafter, petitioner discovered an eyewitness to a work-connected injury to her husband on January 30 about two hours before the fall at home which resulted in his death, and filed a second compensation claim against the employer. Prior to the hearing thereon, petitioner brought a wrongful death action against a third party based on the January 30 injury. The jury returned a verdict for $30,000, but the judge ruled that a motion for a new trial would be granted unless petitioner consented to a remittitur of $11,000. Without consulting the employer, petitioner accepted the remittitur and a judgment for $19,000 was entered. The Deputy Commissioner, after hearings, entered an award for petitioner in the second compensation claim. Respondents brought an action in the District Court to set aside the award. The District Court affirmed, but the Court of Appeals reversed, holding that the second compensation action was barred by the doctrine of res judicata. *Held:*

1. The second claim was not barred by res judicata, but comes within the scope of § 22 of the Act, which provides for review "because of a mistake in a determination of fact" by the Deputy Commissioner "at any time prior to one year after rejection of a claim," and permits him to "award compensation" after such review. Pp. 462–465.

2. An order of remittitur is a judicial determination of recoverable damages, and petitioner's acceptance of the remittitur in her third-party lawsuit was not a compromise within the meaning of § 33 (g) of the Act. Pp. 465–467.

3. The Deputy Commissioner's finding that there was a causal connection between the January 30 work-connected injury to petitioner's husband and his fall at home two hours later was supported by substantial evidence on the record as a whole and must be affirmed. P. 467.

369 F. 2d 344, reversed.

Harold A. Liebenson argued the cause for petitioner. With him on the brief was *Edward G. Raszus.*

Mark A. Braun argued the cause for respondents. With him on the brief was *Thomas P. Smith.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On January 30, 1961, shortly after returning home from work, the petitioner's husband suffered a fall that resulted in his death on February 12. On February 20, 1961, the petitioner on behalf of herself and her three minor children filed a claim against her husband's employer,[1] the respondent, for compensation death benefits under the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, 33 U. S. C. §§ 901–950. The petitioner alleged that her husband's fall on January 30 had resulted from a work-connected injury suffered on January 26. A hearing was held before a Department of Labor Deputy Commissioner; and on June 8, 1961, the Deputy Commissioner rejected the petitioner's claim for failure to establish that her husband's death had resulted from a work-connected injury.[2] The petitioner did not

[1] The petitioner's husband had worked for the Chicago Grain Trimmers Association, Inc. (hereafter respondent) as a grain trimmer since 1934. Grain trimmers load and unload grain-carrying barges and vessels.

[2] It is not entirely clear from the Deputy Commissioner's decision whether it rested on insufficient proof of a causal nexus between the January 26 injury and the January 30 fall or on insufficient proof that the alleged January 26 injury in fact occurred at all.

bring an action in District Court to set aside the Deputy Commissioner's ruling. 33 U. S. C. § 921. Some time after the Deputy Commissioner's decision, the petitioner discovered an eyewitness to a work-connected injury suffered by her husband on January 30, the same day as his fall at home. On August 22, 1961, the petitioner filed a second compensation action against the respondent—this time alleging that the fall resulted from an injury suffered on January 30.

On September 8, 1961, the petitioner began a wrongful-death action in the Northern District of Illinois against a third party, the Norris Grain Company, alleging that her husband's fall resulted from the same January 30 injury. On May 3, 1963, a jury rendered a verdict of $30,000 for the petitioner in that lawsuit. The grain company moved for a new trial, and the trial judge ruled that the motion would be granted unless the petitioner consented to a remittitur of $11,000. On May 16, 1963, without consulting the respondent, the petitioner accepted the remittitur. Judgment was entered for $19,000.

On August 29, 1963, a hearing on the petitioner's second compensation action commenced. On January 27, 1964, the Deputy Commissioner entered findings of fact and an award for the petitioner. The respondent brought an action in District Court to set the award aside. The District Court affirmed, but the Court of Appeals reversed. 369 F. 2d 344. We granted certiorari to consider questions concerning the administration of the Longshoremen's and Harbor Workers' Compensation Act. 389 U. S. 813.

The Court of Appeals held that the petitioner's second compensation action was barred by the doctrine of res judicata. The petitioner contends that that doctrine

is displaced in this case by the operation of § 22 of the Act,[3] which provides:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or *because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may,* at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or *at any time prior to one year after the rejection of a claim, review a compensation case* in accordance with the procedure prescribed [for original claims], *and* in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or *award compensation.*" 33 U. S. C. § 922. (Emphasis added.)

The petitioner asserts that her second compensation action came under § 22 because it challenged a "determination of fact by the deputy commissioner" in her original compensation action—namely, the finding that her husband's fall did not result from a work-connected injury. The respondent argues that "a mistake in a determination of fact" in § 22 refers only to clerical errors and matters concerning an employee's disability, not to matters concerning an employer's liability. Conceding that nothing in the statutory language supports this reading, the respondent contends that the legislative history reveals Congress' limited purpose.[4]

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[3] The petitioner also contends that (1) the doctrine of res judicata does not apply to administrative compensation cases generally, and (2) if res judicata does apply, her second action did not arise out of the same cause of action as did her first. We do not reach these contentions.

[4] The respondent does not rely on either of the reasons given by the Court of Appeals for holding § 22 inapplicable: (1) that the

Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1437. At that time the section provided for review by the Deputy Commissioner only on the ground of a "change in conditions." The Deputy Commissioner was authorized by the section to "terminate, continue, increase, or decrease" the original compensation award; review was permitted only "during the term of an award."

From 1930 to 1933, the United States Employees' Compensation Commission, which was charged with administering the Act, recommended in its annual reports that § 22 be amended to permit review by the Deputy Commissioner at any time. 14th Ann. Rep. of the United States Employees' Compensation Commission (hereafter USECC) 75 (1930); 15th Ann. Rep. USECC 77 (1931); 16th Ann. Rep. USECC 49 (1932); 17th Ann. Rep. USECC 18 (1933).[5] In 1934 Congress, while not

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Deputy Commissioner was not aware of Banks' January 30 injury until more than one year after the petitioner's original claim was rejected, and (2) that the petitioner's second compensation action did not dispute the original findings of fact of the Deputy Commissioner. The petitioner filed her second compensation action within a few months after the original claim was rejected; it is irrelevant that the hearing occurred more than a year later. *Candado Stevedoring Corp.* v. *Willard,* 185 F. 2d 232. The question of the causation of the petitioner's husband's fall is obviously one of fact, cf. *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504; the case cited by the Court of Appeals, *Flamm* v. *Hughes,* 329 F. 2d 378, is utterly inapposite since it dealt with the possibility of litigating a question of constitutional law in a § 22 proceeding.

[5] In 1928 the Commission recommended that "an amendment be adopted which will give deputy commissioners the continuing authority to reopen cases that is usually conferred upon compensation boards" because "situations are continually arising in which the action taken by a deputy commissioner in correcting an error in an order may give rise to controversy and result in a failure to do

adopting the recommendation entirely, responded by amending § 22 to permit review "any time prior to one year after the date of the last payment of compensation." [6] 48 Stat. 807. At the same time Congress added a second ground for review by the Deputy Commissioner: "a mistake in a determination of fact." The purpose of this amendment was to "broaden the grounds on which a deputy commissioner can modify an award" by allowing modification where "a mistake in a determination of fact makes such modification desirable in order to render justice under the act." S. Rep. No. 588, 73d Cong., 2d Sess., 3–4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934).

In its annual reports for 1934–1936, the Compensation Commission recommended that § 22 be further amended to apply in cases where the original compensation claim is rejected by the Deputy Commissioner. 18th Ann. Rep. USECC 38 (1934); 19th Ann. Rep. USECC 49 (1935); 20th Ann. Rep. USECC 52 (1936). Congress responded in 1938 by amending § 22 to permit review by the Deputy Commissioner "at any time prior to one year after the rejection of a claim" and to allow the Deputy Commissioner after such review to "award compensation." 52 Stat. 1167. The purpose of this amendment

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justice to either the employer or the employee." 12th Ann. Rep. USECC 40 (1928). It is not at all clear just what the Commission thus meant to recommend. In any event this recommendation was not repeated in later annual reports, and there is no evidence that Congress at any time sought to adopt it. (Compare the committee reports to the 1934 amendment to § 22, which contain specific references to the 17th Ann. Rep. USECC (1933). S. Rep. No. 588, 73d Cong., 2d Sess., 3 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934).)

[6] Congress also added authority for the Deputy Commissioner to "reinstate" compensation as well as to terminate, continue, increase, or decrease it.

was to extend "the enlarged authority therein [1934 amendment] provided to cases in which the action of the deputy commissioner has been a rejection of the claim." S. Rep. No. 1988, 75th Cong., 3d Sess., 8 (1938); H. R. Rep. No. 1945, 75th Cong., 3d Sess., 8 (1938).

We find nothing in this legislative history to support the respondent's argument that a "determination of fact" means only some determinations of fact and not others. The respondent points out that the recommendations of the Compensation Commission prior to the 1934 amendment referred to analogous state laws; but those recommendations dealt with the time period in which review was to be available, not with the grounds for review. The respondent has referred us to no decision, state or federal, holding that a statute permitting review of determinations of fact is limited to issues relating to disability. In the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning,[7] and we hold that the petitioner's second compensation action, filed a few months after the rejection of her original claim, came within the scope of § 22.[8]

The respondent raised two other issues in the Court of Appeals, which that court found unnecessary to reach.

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[7] It is true that the statute as enacted in 1927, permitting review only "on the ground of a change in conditions," might have supported a distinction between issues of disability and liability. But after the 1934 and 1938 amendments, permitting review of "a determination of fact" and authorizing the Deputy Commissioner to "award compensation" even where the original claim is rejected, the asserted distinction can draw no support from the statutory language.

[8] It is irrelevant for purposes of § 22 that the petitioner labeled her second action a claim for compensation rather than an application for review so long as the action in fact comes within the scope of the section. *Candado Stevedoring Corp.* v. *Willard,* 185 F. 2d 232.

These issues have been fully briefed and argued in this Court; and in order to bring this litigation to a close, we dispose of them here.

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act permits an individual entitled to compensation to sue a third party for damages. 33 U. S. C. § 933 (a). If no such suit is brought and compensation is accepted from the employer under an award, the rights of the employee against third parties are assigned to the employer. 33 U. S. C. § 933 (b) and (c). If, as in this case, a suit is brought against a third party, the employer is liable in compensation only to the extent that allowable compensation benefits exceed the recovery from the third party. 33 U. S. C. § 933 (f). Section 33 (g) of the Act further provides:

> "If compromise with such third person is made by the person entitled to compensation . . . of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation . . . only if such compromise is made with his written approval." 33 U. S. C. § 933 (g).

The respondent contends that the petitioner's acceptance of the judicially ordered remittitur of $11,000 in her third-party lawsuit was a "compromise" within the meaning of § 33 (g). We disagree.

The Longshoremen's and Harbor Workers' Compensation Act was modeled on the New York employees' compensation statute. *Lawson* v. *Suwannee S. S. Co.,* 336 U. S. 198, 205; H. R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926). Under the analogous provision of that act, the New York Court of Appeals has held that a remittitur is not a compromise.

> "Plaintiff's stipulation consenting to take that portion of the verdict judicially determined as being

> not excessive, does not fall within any recognized meaning of the word 'compromise.'" *Gallagher* v. *Carol Construction Co.*, 272 N. Y. 127, 129, 5 N. E. 2d 63, 64.

An order of remittitur is a judicial determination of recoverable damages; it is not an agreement among the parties involving mutual concessions. Section 33 (g) protects the employer against his employee's accepting too little for his cause of action against a third party. That danger is not present when damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge. Cf. *Bell* v. *O'Hearne,* 284 F. 2d 777.

Finally, the respondent attacks the Deputy Commissioner's finding of fact that there was a causal connection between the work-connected injury suffered by the petitioner's husband on January 30 and his fall at home some two hours later. The Deputy Commissioner's finding must be affirmed if supported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504. The District Court held that the Deputy Commissioner's finding was supported by substantial evidence, and we agree. While some of the testimony of the petitioner's medical expert was arguably inconsistent with other parts of his testimony, it was within the province of the Deputy Commissioner to credit part of the witness' testimony without accepting it all.

The judgment of the Court of Appeals is

Reversed.

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

PEORIA TRIBE OF INDIANS OF OKLAHOMA ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 219. Argued January 15, 1968.—
Decided April 1, 1968.

Petitioner Indian Tribe and the United States entered into a treaty in 1854, pursuant to which certain tribal lands were to be sold at public auction by the United States for the Tribe's benefit. The President could at any time pay to the Tribe any or all of the proceeds, with the balance to be invested in bonds, "the interest to be annually paid" to the Tribe. The Indian Claims Commission found that the United States violated the treaty by selling most of the lands in 1857 by private sales at prices lower than would have prevailed at public auction, and found the difference to be $172,726. Petitioner sought review in the Court of Claims on the issue of the measure of its damages for the treaty's violation, contending that the United States is liable for that sum plus the amount it would have produced if invested and the income "annually paid." The Court of Claims rejected this contention. *Held:* The Government's obligation under the treaty was to invest the sum and to pay its annual income to the Tribe "until the money is paid over," and the case is remanded to the Court of Claims for further remand to the Indian Claims Commission to determine, not interest on the claim, but the measure of damages resulting from the Government's failure to invest the proceeds that would have been received had the treaty not been violated. Pp. 471–473.

177 Ct. Cl. 762, 369 F. 2d 1001, reversed and remanded.

Jack Joseph argued the cause for petitioners. With him on the briefs was *Louis L. Rochmes.*

Robert S. Rifkind argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Acting Assistant Attorney General Harrison* and *Roger P. Marquis.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On May 30, 1854, the Peoria Tribe of Indians of Oklahoma, petitioner,[1] and the United States, respondent, entered into a treaty under which the Tribe reserved a portion of its lands and ceded the remainder, amounting to some 208,585 acres, to be sold at public auction by the United States for the Tribe's benefit. 10 Stat. 1082. This was provided for in Article 4 of the treaty:

> "[T]he President shall immediately cause the residue of the ceded lands to be offered for sale at public auction . . . . And in consideration of the cessions hereinbefore made, the United States agree to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same."

Article 7 of the treaty further provided:

> "And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement."

In this case the Indian Claims Commission found that the United States violated the treaty in 1857 by selling most of the ceded lands, some 207,759 acres, not by

[1] The singular form is used throughout for the petitioners, who were previously known as the Confederated Tribe of the Peoria, Kaskaskia, Wea and Piankeshaw Indians.

public auction, but by private sales at appraised prices lower than would have prevailed at public auction. The Commission found that the United States thus received for the lands $172,726 less than it would have received if the sales had been made as required by the treaty. 15 Ind. Cl. Comm. 123. Neither party questions these findings.

The petitioner, however, sought review in the Court of Claims upon the issue of the measure of its damages for the treaty's violation—contending that by virtue of Article 7 of the treaty, the United States is liable not only for the $172,726, but in addition for the amount that that sum would have produced if "invested in safe and profitable stocks, the interest to be annually paid . . . ." [2] The Court of Claims, two judges dissenting, rejected this contention, 177 Ct. Cl. 762, 369 F. 2d 1001, and we granted certiorari to consider it. 389 U. S. 814.

In supporting the judgment of the Court of Claims, the respondent relies heavily upon the general rule that the United States is not liable for interest on claims against it.[3] This general rule, as the respondent points out, has been held to be fully applicable to the claims of Indian tribes.[4] But this is not a case where the Court

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[2] The parties are agreed that "the terms 'stocks' and 'interest' should be understood to include bonds or other securities and dividends or other income, respectively." Respondent's Brief 11, n. 4. The term "stocks" was used in other treaties of the period to refer to what would today be called bonds. See, *e. g., Cherokee Nation* v. *United States,* 270 U. S. 476, 492. See also Report of the Commissioner of Indian Affairs, November 26, 1853, H. Doc. No. 1, 33d Cong., 1st Sess., 243, 263. The investments actually made pursuant to the treaty in the present case were purchases of state bonds.

[3] See, *e. g., United States* v. *Thayer-West Point Hotel Co.,* 329 U. S. 585; *United States* v. *N. Y. Rayon Importing Co.,* 329 U. S. 654; *United States* v. *Goltra,* 312 U. S. 203.

[4] See, *e. g., United States* v. *Alcea Band of Tillamooks,* 341 U. S. 48; *United States* v. *Omaha Tribe of Indians,* 253 U. S. 275,

is asked to exercise "the power to award interest against the United States," *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 663. The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty.

Under Article 7 of the treaty, the United States could at any time pay to the Tribe all or any part of the proceeds received from the sales of the lands at public auction. But until the proceeds were paid over, the United States was obligated to invest them and pay the annual income to the Tribe. The United States was not free merely to hold the proceeds without investing them. The issue in this case, therefore, is whether the obligation of the United States to invest unpaid proceeds applies to proceeds which, by virtue of the United States' violation of the treaty, were never in fact received.

Our decision is largely controlled by *United States* v. *Blackfeather*, 155 U. S. 180. There an 1831 treaty obligated the United States to sell certain Indian lands at public auction and to place all proceeds in excess of a stated amount in a fund for the benefit of the Indians. The fund could be dissolved and paid over to the Indians "during the pleasure of Congress," but until its dissolution, the United States was obligated to pay the Indians an "annuity" upon the retained fund. The lands were sold and the proceeds were paid to the Indians in 1852. In 1893 the Court of Claims held that the United States had violated the treaty by selling some of the lands at private sales rather than at public auction, resulting in the realization of lower prices.[5] This Court held that the obligation to pay the "annuity" applied to the differential that would have been received if the lands had been

283; *Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451.

[5] *Blackfeather* v. *United States*, 28 Ct. Cl. 447.

sold at public auction in accord with the treaty, and that this obligation extended beyond the dissolution of the fund by Congress in 1852:

> "While the treaty bound the government to pay a five per cent annuity until the dissolution of the fund, which dissolution took place September 28, 1852, when the sum of $37,180.58, the amount of the fund resulting from actual sales, was paid over to the chiefs of the tribe, this dissolution terminated the stipulation for the annuity only *pro tanto.* If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity continues until the money is paid over. . . ." 155 U. S., at 193.

Similarly in the case before us, we hold that the obligation to invest the $172,726 and to pay its annual income to the Tribe "continues until the money is paid over." Cf. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498. As the dissenters in the Court of Claims rightly pointed out,

> "Indian treaties 'are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.' *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116 (1938). '[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent

people." *Tulee* v. *Washington,* 315 U. S. 681, 684–85. . . .' " 177 Ct. Cl., at 771, 369 F. 2d, at 1006–1007.

Since the Indian Claims Commission and the Court of Claims erroneously held that the United States is not liable for its failure to invest the proceeds that would have been received had the United States not violated the treaty, they had no occasion to determine the measure of damages resulting from this liability. Accordingly, we remand this case to the Court of Claims for further remand to the Indian Claims Commission in order to determine that question.[6]

The judgment of the Court of Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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

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[6] The respondent did not brief or argue the question of how to measure these damages. The petitioner suggested that these damages might be measured by looking to the rate of interest which the United States has paid on Indian funds over the same period, arguing for this approach by analogy to private trust law. The petitioner also points out that Congress at one time considered the United States' treaty obligations to "invest in safe and profitable stocks" satisfied by an annual appropriation for the Indians of an amount equivalent to an interest payment. See Report of the Commissioner of Indian Affairs, November 30, 1852, S. Doc. No. 1, 32d Cong., 2d Sess., 293, 300–301; Report of the Commissioner of Indian Affairs, November 26, 1853, *supra,* n. 2.

Because the United States is not liable for interest on judgments in the absence of an express consent thereto, it cannot be liable for interest on the annual income payments not made. Therefore, if an interest rate measure is adopted by the Commission, it must be simple and not compound interest.

AVERY *v.* MIDLAND COUNTY ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 39. Argued November 14, 1967.—Decided April 1, 1968.

The Midland County, Texas, Commissioners Court is the governing body for that county, and like other such bodies is established by the State's Constitution and statutes. It consists of five members—a County Judge, elected at large from the entire county, and four commissioners, one elected from each of the four districts (precincts) into which the county is divided. Commissioners courts exercise broad governmental functions in the counties including the setting of tax rates, equalization of assessments, issuance of bonds, and allocation of funds; and they have wide discretion over expenditures. One district of Midland County, which includes almost all the City of Midland, had a population of 67,906, according to 1963 estimates. The others, all rural areas, had populations respectively, of about 852; 414; and 828. In this action challenging the County's districting petitioner alleged that the gross disparity in population distribution among the four districts violated the Equal Protection Clause of the Fourteenth Amendment. Three of the four commissioners testified at trial that population was not a major factor in the districting process. The trial court ruled for petitioner that each district under the State's constitutional apportionment standard should have "substantially the same number of people." An intermediate appellate court reversed. The State Supreme Court reversed that judgment, holding that under the Federal and State Constitutions the districting scheme was impermissible "for the reasons stated by the trial court." It held, however, that the work actually done by the County Commissioners "disproportionately concerns the rural areas" and that such factors as "number of qualified voters, land areas, geography, miles of county roads, and taxable values" could justify apportionment otherwise than on a basis of substantially equal populations. *Held:* Local units with general governmental powers over an entire geographic area may not, consistently with the Equal Protection Clause of the Fourteenth Amendment, be apportioned among single-member districts of substantially unequal population. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). Pp. 478–486.

(a) The Equal Protection Clause reaches the exercise of state power, whether exercised by the State or a political subdivision. P. 479.

(b) Although the state legislature may itself be properly apportioned the Fourteenth Amendment requires that citizens not be denied equal representation in political subdivisions which also have broad policy-making functions. P. 481.

(c) The commissioners court performs some functions normally thought of as "legislative," and others typically characterized in other terms; but, regardless of the labels, this body has the power to make a large number of decisions having a broad impact on all the citizens of the county. Pp. 482–483.

(d) Though the Midland County Commissioners may concentrate their attention on rural roads, their decisions also affect citizens in the City of Midland. P. 484.

406 S. W. 2d 422, vacated and remanded.

Lyndon L. Olson argued the cause and filed a brief for petitioner.

W. B. Browder, Jr., and *F. H. Pannill* argued the cause and filed a brief for respondents.

Francis X. Beytagh, Jr., by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Acting Solicitor General Spritzer* and *Assistant Attorney General Doar.*

Louis J. Lefkowitz, Attorney General, and *Daniel M. Cohen* and *Robert W. Imrie,* Assistant Attorneys General, filed a brief for the State of New York, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, a taxpayer and voter in Midland County, Texas, sought a determination by this Court that the Texas Supreme Court erred in concluding that selection of the Midland County Commissioners Court from single-member districts of substantially unequal population did

not necessarily violate the Fourteenth Amendment. We granted review, 388 U. S. 905 (1967), because application of the one man, one vote principle of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), to units of local government is of broad public importance. We hold that petitioner, as a resident of Midland County, has a right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident.

Midland County has a population of about 70,000. The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote only to break a tie. The other four are Commissioners chosen from districts. The population of those districts, according to the 1963 estimates that were relied upon when this case was tried, was respectively 67,906; 852; 414; and 828. This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.

The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with a variety of functions. According to the commentary to Vernon's Texas Statutes, the court:

> "is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments." [1]

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[1] Interpretive Commentary, Vernon's Ann. Tex. Const., Art. V, § 18 (1955). See also W. Benton, Texas: Its Government and

The court is also authorized, among other responsibilities, to build and run a hospital, Tex. Rev. Civ. Stat. Ann., Art. 4492 (1966), an airport, *id.*, Art. 2351 (1964), and libraries, *id.*, Art. 1677 (1962). It fixes boundaries of school districts within the county, *id.*, Art. 2766 (1965), may establish a regional public housing authority, *id.*, Art. 1269k, § 23a (1963), and determines the districts for election of its own members, Tex. Const., Art. V, § 18.

Petitioner sued the Commissioners Court and its members in the Midland County District Court, alleging that the disparity in district population violated the Fourteenth Amendment and that he had standing as a resident, taxpayer, and voter in the district with the largest population. Three of the four commissioners testified at the trial, all telling the court (as indeed the population statistics for the established districts demonstrated) that population was not a major factor in the districting process. The trial court ruled for petitioner. It made no explicit reference to the Fourteenth Amendment, but said the apportionment plan in effect was not "for the convenience of the people," the apportionment standard established by Art. V, § 18, of the Texas Constitution. The court ordered the defendant commissioners to adopt a new plan in which each precinct would have "substantially the same number of people."

The Texas Court of Civil Appeals reversed the judgment of the District Court and entered judgment for the respondents, 397 S. W. 2d 919 (1965). It held that neither federal nor state law created a requirement that Texas county commissioners courts be districted according to population.

Politics 360–370 (1966); Municipal and County Government (J. Claunch ed. 1961); C. McCleskey, The Government and Politics of Texas (1966).

The Texas Supreme Court reversed the Court of Civil Appeals, 406 S. W. 2d 422 (1966). It held that under "the requirements of the Texas and the United States Constitutions" the present districting scheme was impermissible "for the reasons stated by the trial court." 406 S. W. 2d, at 425. However, the Supreme Court disagreed with the trial court's conclusion that precincts must have substantially equal populations, stating that such factors as "number of qualified voters, land areas, geography, miles of county roads and taxable values" could be considered. 406 S. W. 2d, at 428. It also decreed that no Texas courts could redistrict the Commissioners Court. "This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate." 406 S. W. 2d, at 428–429.[2]

In *Reynolds* v. *Sims, supra,* the Equal Protection Clause was applied to the apportionment of state legislatures. Every qualified resident, *Reynolds* determined, has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population. The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. As has

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[2] The Texas Supreme Court determined that neither the State nor the Federal Constitution requires that population be the sole basis for apportioning the Midland County Commissioners Court. There is therefore no independent state ground for the refusal to award the relief requested by petitioner. And since the Supreme Court opinion contemplated no further proceedings in the lower Texas courts, a "final judgment" that population does not govern the apportionment of the Commissioners Court is before us. See *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555 (1963); *Construction Laborers* v. *Curry,* 371 U. S. 542 (1963); *Radio Station WOW* v. *Johnson,* 326 U. S. 120 (1945).

almost every court which has addressed itself to this question,[3] we hold that it does.[4]

The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying

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[3] Cases in which the highest state courts applied the principles of *Reynold* v. *Sims* to units of local government include *Miller* v. *Board of Supervisors,* 63 Cal. 2d 343, 405 P. 2d 857, 46 Cal. Rptr. 617 (1965); *Montgomery County Council* v. *Garrott,* 243 Md. 634, 222 A. 2d 164 (1966); *Hanlon* v. *Towey,* 274 Minn. 187, 142 N. W. 2d 741 (1966); *Armentrout* v. *Schooler,* 409 S. W. 2d 138 (Mo. 1966); *Seaman* v. *Fedourich,* 16 N. Y. 2d 94, 209 N. E. 2d 778, 262 N. Y. S. 2d 444 (1965); *Bailey* v. *Jones,* 81 S. D. 617, 139 N. W. 2d 385 (1966); *State ex rel. Sonneborn* v. *Sylvester,* 26 Wis. 2d 43, 132 N. W. 2d 249 (1965). *Newbold* v. *Osser,* 425 Pa. 478, 230 A. 2d 54 (1967), seemed to assume application of *Reynolds.* In opposition to these cases are only the decision of the Texas Supreme Court in the case before us and *Brouwer* v. *Bronkema,* 377 Mich. 616, 141 N. W. 2d 98 (1966), in which the eight justices of the Michigan Supreme Court divided evenly on the question.

Among the many federal court cases applying *Reynolds* v. *Sims* to local government are *Hyden* v. *Baker,* 286 F. Supp. 475 (D. C. M. D. Tenn. 1968); *Martinolich* v. *Dean,* 256 F. Supp. 612 (D. C. S. D. Miss. 1966); *Strickland* v. *Burns,* 256 F. Supp. 824 (D. C. M. D. Tenn. 1966); *Ellis* v. *Mayor of Baltimore,* 234 F. Supp. 945 (D. C. Md. 1964), affirmed and remanded, 352 F. 2d 123 (C. A. 4th Cir. 1965).

[4] A precedent frequently cited in opposition to this conclusion is *Tedesco* v. *Board of Supervisors,* 43 So. 2d 514 (La. Ct. App. 1949), appeal dismissed for want of a substantial federal question, 339 U. S. 940 (1950). Petitioner points out that the Equal Protection Clause was not invoked in *Tedesco,* where the districting of the New Orleans City Council was challenged under the Privileges and Immunities Clause. A more realistic answer is that *Tedesco,* decided 12 years before *Baker* v. *Carr,* 369 U. S. 186 (1962), has been severely undermined by *Baker* and the succeeding apportionment cases. See, among the great many cases so concluding, *Delozier* v. *Tyrone Area School Bd.,* 247 F. Supp. 30 (D. C. W. D. Pa. 1965).

> equal protection of the laws; whatever the agency of the State taking the action . . . ." *Cooper* v. *Aaron,* 358 U. S. 1, 17 (1958).

Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment.[5] The actions of local government *are* the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.

When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. If the five senators representing a city in the state legislature may not be elected from districts ranging in size from 50,000 to 500,000, neither is it permissible to elect the members of the city council from those same districts. In either case, the votes of some residents have greater weight

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[5] *Cooper* v. *Aaron,* 358 U. S. 1, 16 (1958); see, *e. g., See* v. *City of Seattle,* 387 U. S. 541 (1967); *Thompson* v. *City of Louisville,* 362 U. S. 199 (1960); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

than those of others; in both cases the equal protection of the laws has been denied.

That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds* v. *Sims,* between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.[6]

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[6] Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that

We are urged to permit unequal districts for the Midland County Commissioners Court on the ground that the court's functions are not sufficiently "legislative." The parties have devoted much effort to urging that alternative labels—"administrative" versus "legislative"—be applied to the Commissioners Court. As the brief description of the court's functions above amply demonstrates, this unit of local government cannot easily be classified in the neat categories favored by civics texts. The Texas commissioners courts are assigned some tasks which would normally be thought of as "legislative," others typically assigned to "executive" or "administrative" departments, and still others which are "judicial." In this regard Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties, towns, and villages.[7] One knowledgeable commentator has written of "the states' varied, pragmatic approach in establishing governments." R. Wood, in Politics and Government in the United States 891–892 (A. Westin ed. 1965). That approach has

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to be paid by equally situated members of the majority. Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment. *Lucas* v. *Colorado General Assembly,* 377 U. S. 713 (1964), stands as a square adjudication by this Court of these principles.

[7] Midland County is apparently untypical in choosing the members of its local governing body from districts. "On the basis of available figures, coupled with rough estimates from samplings made of the situations in various States, it appears that only about 25 percent of . . . local government governing boards are elected, in whole or in part, from districts or, while at large, under schemes including district residence requirements." Brief for the United States as Amicus Curiae 22, n. 31, filed in *Sailors* v. *Board of Education,* 387 U. S. 105 (1967), and the other 1966 Term local reapportionment cases.

produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 "units of government" in the United States [8]—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. In many cases citizens reside within and are subject to two such governments, a city and a county.

The Midland County Commissioners Court is such a unit. While the Texas Supreme Court found that the Commissioners Court's legislative functions are "negligible," 406 S. W. 2d, at 426, the court does have power to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built, and land set aside for schools—and immediate choices among competing needs.

The Texas Supreme Court concluded that the work actually done by the Commissioners Court "disproportionately concern[s] the rural areas," 406 S. W. 2d, at 428. Were the Commissioners Court a special-purpose unit of government assigned the performance of func-

[8] U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, Governmental Units in 1967, at 1 (prelim. rept. Oct. 1967).

tions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions. That question, however, is not presented by this case, for while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland. The Commissioners maintain buildings, administer welfare services, and determine school districts both inside and outside the city. The taxes imposed by the court fall equally on all property in the county. Indeed, it may not be mere coincidence that a body apportioned with three of its four voting members chosen by residents of the rural area surrounding the city devotes most of its attention to the problems of that area, while paying for its expenditures with a tax imposed equally on city residents and those who live outside the city. And we might point out that a decision not to exercise a function within the court's power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision.

The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. The conclusion of *Reynolds* v. *Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Constitution

permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors* v. *Board of Education,* 387 U. S. 105 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch* v. *Davis,* 387 U. S. 112 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population.

The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called "the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations . . . ." R. Wood, 1400 Governments, at 175 (1961). Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire

geographic area not be apportioned among single-member districts of substantially unequal population.

The judgment below is vacated and the case is remanded for disposition 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 HARLAN, dissenting.

I could not disagree more with this decision, which wholly disregards statutory limitations upon the appellate jurisdiction of this Court in state cases and again betrays such insensitivity to the appropriate dividing lines between the judicial and political functions under our constitutional system.

I.

I believe that this Court lacks jurisdiction over this case because, properly analyzed, the Texas judgment must be seen either to rest on an adequate state ground or to be wanting in "finality." The history of the Texas proceedings, as related in the Court's opinion, *ante,* at 477–478, clearly reveals that the decision of the Texas Supreme Court disallowing the present county apportionment scheme rests upon a state as well as a federal ground. The state ground—Art. V, § 18, of the Texas Constitution—was clearly adequate to support the result. This should suffice to defeat the exercise of this Court's jurisdiction. See, *e. g., Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194; *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126.

Nor does this Court have jurisdiction to review the Texas Supreme Court's statement that in reapportioning the county in the future the county commissioners may take into account factors other than population. That

holding obviously does not amount to a "[f]inal judgment" within the meaning of 28 U. S. C. § 1257.[1] The traditional test of finality of state court judgments has been whether the judgment leaves more than a ministerial act to be done. See, *e. g., Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 382; *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 68. It is clear that the acts which must be performed in order to bring about a new apportionment of Midland County are very far from ministerial in character, and conceivably might even result in satisfying petitioner's demands without further litigation. For example, since the statement of the Texas Supreme Court regarding nonpopulation factors was merely advisory and not mandatory, the county commissioners might choose to reapportion the county solely on the basis of population, thus leaving petitioner with nothing about which to complain. Since the requirement of finality is an unwaivable condition of this Court's jurisdiction, see, *e. g., Market St. R. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 551, I consider that this case is not properly before us.

On these scores, I would dismiss the writ as improvidently granted.

II.

On the merits, which I reach only because the Court has done so, I consider this decision, which extends the state apportionment rule of *Reynolds* v. *Sims,* 377 U. S. 533, to an estimated 80,000 units of local government throughout the land, both unjustifiable and ill-advised.

I continue to think that these adventures of the Court in the realm of political science are beyond its constitutional powers, for reasons set forth at length in my dissenting opinion in *Reynolds,* 377 U. S., at 589 *et seq.*

[1] 28 U. S. C. § 1257 provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . ."

However, now that the Court has decided otherwise, judicial self-discipline requires me to follow the political dogma now constitutionally embedded in consequence of that decision. I am not foreclosed, however, from remonstrating against the extension of that decision to new areas of government. At the present juncture I content myself with stating two propositions which, in my view, stand strongly against what is done today. The first is that the "practical necessities" which have been thought by some to justify the profound break with history that was made in 1962 by this Court's decision in *Baker* v. *Carr*, 369 U. S. 186,[2] are not present here. The second is that notwithstanding *Reynolds* the "one man, one vote" ideology does not provide an acceptable formula for structuring local governmental units.

A.

The argument most generally heard for justifying the entry of the federal courts into the field of state legislative apportionment is that since state legislatures had widely failed to correct serious malapportionments in their own structure, and since no other means of redress had proved available through the political process, this Court was entitled to step into the picture.[3] While I continue to reject that thesis as furnishing an excuse for the federal judiciary's straying outside its proper constitutional role, and while I continue to believe that it bodes ill for the country and the entire federal judicial system if this Court does not firmly set its face against this loose

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[2] The magnitude of this break was irrefutably demonstrated by Mr. Justice Frankfurter in his dissenting opinion in *Baker*, 369 U. S., at 266, 300–323.

[3] See the concurring opinion of Mr. Justice Clark in *Baker* v. *Carr*, 369 U. S. 186, 251, 258–259; Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 Sup. Ct. Rev. 1, 68–70.

and short-sighted point of view, the important thing for present purposes is that no such justification can be brought to bear in this instance.

No claim is made in this case that avenues of political redress are not open to correct any malapportionment in elective local governmental units, and it is difficult to envisage how such a situation could arise. Local governments are creatures of the States, and they may be reformed either by the state legislatures, which are now required to be apportioned according to *Reynolds,* or by amendment of state constitutions.[4] In these circumstances, the argument of practical necessity has no force. The Court, then, should withhold its hand until such a supposed necessity does arise, before intruding itself into the business of restructuring local governments across the country.

There is another reason why the Court should at least wait for a suitable period before applying the *Reynolds* dogma to local governments. The administrative feasibility of judicial application of the "one man, one vote" rule to the apportionment even of state legislatures has not yet been demonstrated. A number of significant administrative questions remain unanswered,[5] and the burden on the federal courts has been substantial. When

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[4] See, *e. g.,* United States Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions Upon the Structural, Functional, and Personnel Powers of Local Government 23–61 (1962); Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col. L. Rev. 21, 23, n. 9 (1965).

[5] One such question is the extent to which an apportionment may take into account population changes which occur between decennial censuses. Cf. *Lucas* v. *Rhodes,* 389 U. S. 212 (dissenting opinion of this writer). Another is the degree of population variation which is constitutionally permissible. See *Swann* v. *Adams,* 385 U. S. 440; cf. *Rockefeller* v. *Wells,* 389 U. S. 421 (dissenting opinion of this writer).

this has thus far been the outcome of applying the rule to 50 state legislatures, it seems most unwise at this time to extend it to some 80,000 units of local government, whose bewildering variety is sure to multiply the problems which have already arisen and to cast further burdens, of imponderable dimension, on the federal courts. I am frankly astonished at the ease with which the Court has proceeded to fasten upon the entire country at its lowest political levels the strong arm of the federal judiciary, let alone a particular political ideology which has been the subject of wide debate and differences from the beginnings of our Nation.[6]

B.

There are also convincing functional reasons why the *Reynolds* rule should not apply to local governmental units at all. The effect of *Reynolds* was to read a long debated political theory—that the only permissible basis for the selection of state legislators is election by majority vote within areas which are themselves equal in population—into the United States Constitution, thereby foreclosing the States from experimenting with legislatures rationally formed in other ways. Even assuming that this result could be justified on the state level, because of the substantial identity in form and function of the state legislatures, and because of the asserted practical necessities for federal judicial interference referred to above, the "one man, one vote" theory is surely a hazardous generalization on the local level. As has been noted previously, no "practical necessity" has been asserted to justify application of the rule to local governments. More important, the greater and more varied range of functions performed by local governmental units implies that flexibility in the form of their structure is

[6] See the dissenting opinion of Mr. Justice Frankfurter in *Baker* v. *Carr*, 369 U. S. 186, 266, 300–324.

even more important than at the state level, and that by depriving local governments of this needed adaptability the Court's holding may indeed defeat the very goals of *Reynolds*.

The present case affords one example of why the "one man, one vote" rule is especially inappropriate for local governmental units. The Texas Supreme Court held as a matter of Texas law:

> "Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government . . . is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers." 406 S. W. 2d 422, 428.

Despite the specialized role of the commissioners court, the majority has undertaken to bring it within the ambit of *Reynolds* simply by classifying it as "a unit of local government with general responsibility and power for local affairs." See *ante*, at 483. Although this approach is intended to afford "equal protection" to all voters in Midland County, it would seem that it in fact discriminates against the county's rural inhabitants. The commissioners court, as found by the Texas Supreme Court, performs more functions in the area of the county outside Midland City than it does within the city limits. Therefore, each rural resident has a greater interest in its activities than each city dweller. Yet under the majority's formula the urban residents are to have a dominant voice in the county government, precisely proportional to their numbers, and little or no allowance may be made

for the greater stake of the rural inhabitants in the county government.

This problem is not a trivial one and is not confined to Midland County. It stems from the fact that local governments, unlike state governments, are often specialized in function.[7] Application of the *Reynolds* rule to such local governments prevents the adoption of apportionments which take into account the effect of this specialization, and therefore may result in a denial of equal treatment to those upon whom the exercise of the special powers has unequal impact. Under today's decision, the only apparent alternative is to classify the governmental unit as other than "general" in power and responsibility, thereby, presumably, avoiding application of the *Reynolds* rule. Neither outcome satisfies *Reynolds'* avowed purpose: to assure "equality" to all voters. The result also deprives localities of the desirable option of establishing slightly specialized, elective units of government, such as Texas' county commissioners court, and varying the size of the constituencies so as rationally to favor those whom the government affects most. The majority has chosen explicitly to deny local governments this alternative by rejecting even the solution of the Texas Supreme Court, which held that the present county apportionment was impermissible but would have allowed the new apportionment to reflect factors related to the special functions of the county commissioners court, such as "land areas, geography, miles of county roads and taxable values," 406 S. W. 2d, at 428, as well as population.

Despite the majority's declaration that it is not imposing a "straitjacket" on local governmental units, see *ante*, at 485, its solution is likely to have other undesirable

[7] See generally W. Anderson & E. Weidner, State and Local Government 85–103 (1951).

"freezing" effects on local government. One readily foreseeable example is in the crucial field of metropolitan government. A common pattern of development in the Nation's urban areas has been for the less affluent citizens to migrate to or remain within the central city, while the more wealthy move to the suburbs and come into the city only to work.[8] The result has been to impose a relatively heavier tax burden upon city taxpayers and to fragmentize governmental services in the metropolitan area.[9] An oft-proposed solution to these problems has been the institution of an integrated government encompassing the entire metropolitan area.[10] In many instances, the suburbs may be included in such a metropolitan unit only by majority vote of the voters in each suburb.[11] As a practical matter, the suburbanites often will be reluctant to join the metropolitan government unless they receive a share in the government proportional to the benefits they bring with them and not

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[8] See, *e. g.*, W. Anderson & E. Weidner, *supra*, at 171–174; United States Advisory Commission on Intergovernmental Relations for use of House Committee on Government Operations, 87th Cong., 1st Sess., Governmental Structure, Organization, and Planning in Metropolitan Areas 7 (Comm. Print 1961).

[9] See, *e. g.*, United States Advisory Commission on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas 8–9 (1962); United States Advisory Commission on Intergovernmental Relations for use of House Committee on Government Operations, 87th Cong., 1st Sess., Governmental Structure, Organization, and Planning in Metropolitan Areas 15–16 (Comm. Print 1961).

[10] See, *e. g.*, W. Anderson & E. Weidner, *supra*, at 174–179; United States Advisory Commission on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas (1962).

[11] See, *e. g.*, United States Advisory Commission on Intergovernmental Relations, State Constitutional and Statutory Restrictions Upon the Structural, Functional, and Personnel Powers of Local Government 38, 44–53 (1962).

merely to their numbers.[12] The city dwellers may be ready to concede this much, in return for the ability to tax the suburbs. Under the majority's pronouncements, however, this rational compromise would be forbidden: the metropolitan government must be apportioned solely on the basis of population if it is a "general" government.

These functional considerations reinforce my belief that the "one man, one vote" rule, which possesses the simplistic defects inherent in any judicially imposed solution of a complex social problem,[13] is entirely inappropriate for determining the form of the country's local governments.

No better demonstration of this proposition could have been made than that afforded by the admirable analysis contained in the dissenting opinion of my Brother FORTAS. But, with respect, my Brother's projected solution of the matter is no less unsatisfactory. For it would bid fair to plunge this Court into an avalanche of local reapportionment cases with no firmer constitutional anchors than its own notions of what constitutes "equal protection" in any given instance.

With deference, I think that the only sure-footed way of avoiding, on the one hand, the inequities inherent in today's decision, and on the other, the morass of pitfalls that would follow from my Brother FORTAS' approach, is for this Court to decline to extend the constitutional experiment of *Reynolds,* and to leave the structuring of local governmental units to the political process where it belongs.

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[12] See Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col. L. Rev. 21, 37 and n. 67 (1965); cf. United States Advisory Commission on Intergovernmental Relations, Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas 26–27 (1962).

[13] Cf. H. Hart & A. Sacks, The Legal Process 662–669 (tent. ed. 1958).

MR. JUSTICE FORTAS, dissenting.

I would dismiss the writ in this case as improvidently granted. The Texas Supreme Court held the districting scheme unlawful under the Texas Constitution. It ordered redistricting. In this difficult and delicate area I would await the result of the redistricting so that we may pass upon the final product of Texas' exercise of its governmental powers, in terms of our constitutional responsibility, and not upon a scheme which Texas itself has invalidated.[1]

The Court's opinion argues (*ante,* at 478, n. 2) that the Texas Supreme Court's order is a final judgment because it contemplates no further proceedings in the Texas courts, although it holds the present districting unlawful and requires the Commissioners Court to redistrict. I do not reach this point.

The Court acts now to superimpose its own formula because it disagrees with the standard for redistricting that the Texas Supreme Court states. That standard directed redistricting on the basis of the "number of qualified voters, land areas, geography, miles of county roads and taxable values." 406 S. W. 2d 422, 428. This standard may or may not produce a result which this Court or I would find constitutionally acceptable. We cannot know in advance how the melange of factors stated by the Texas court would emerge from the mixing machine of the Texas authorities who would deal with the problem. It is clear that the extreme imbalance now prevailing would be eliminated, because the Texas Supreme Court has held it unconstitutional. It might be

[1] The Texas Supreme Court noted that the Commissioners Court, and not Texas' judicial courts, has power to redistrict. This view may prove to be troublesome, but we are not bound to anticipate either that the Commissioners Court will not properly do the job or that Texas will not otherwise put its house in order in Midland County.

that the substitute finally worked out would be such that a majority of this Court would not reject it as a denial of equal protection of the laws. After all, at the last Term of this Court, we accepted as passing the scrutiny of the Constitution, the less-than-mathematically perfect plans in *Dusch* v. *Davis,* 387 U. S. 112 (1967), and *Sailors* v. *Board of Education,* 387 U. S. 105 (1967).

The Court, however, now plunges to adjudication of the case of Midland County, Texas, in midstream, apparently because it rejects *any* result that might emerge which deviates from the literal thrust of one man, one vote. Since it now adopts this simplistic approach, apparently the majority believes that it might as well say so and save Texas the labor of devising an answer.

I am in fundamental disagreement. I believe, as I shall discuss, that in the circumstances of this case equal protection of the laws may be achieved—and perhaps can only be achieved—by a system which takes into account a complex of values and factors, and not merely the arithmetic simplicity of one equals one. *Dusch* and *Sailors* were wisely and prudently decided. They reflect a reasoned, conservative, empirical approach to the intricate problem of applying constitutional principle to the complexities of local government. I know of no reason why we now abandon this reasonable and moderate approach to the problem of local suffrage and adopt an absolute and inflexible formula which is potentially destructive of important political and social values. There is no reason why we should insist that there is and can be only one rule for voters in local governmental units—that districts for units of local government must be drawn solely on the basis of population. I believe there are powerful reasons why, while insisting upon reasonable regard for the population-suffrage ratio, we should reject a rigid, theoretical, and authoritarian approach to the

problems of local government. In this complex and involved area, we should be careful and conservative in our application of constitutional imperatives, for they are powerful.

Constitutional commandments are not surgical instruments. They have a tendency to hack deeply—to amputate. And while I have no doubt that, with the growth of suburbia and exurbia, the problem of allocating local government functions and benefits urgently requires attention, I am persuaded that it does not call for the hatchet of one man, one vote. It is our duty to insist upon due regard for the value of the individual vote but not to ignore realities or to bypass the alternatives that legislative alteration might provide.

I.

I agree that application of the Equal Protection Clause of the Constitution, decreed by this Court in the case of state legislatures, cannot stop at that point. Of course local governmental units are subject to the commands of the Equal Protection Clause. *Cooper* v. *Aaron,* 358 U. S. 1, 17 (1958). That much is easy. The difficult question, and the one which the Court slights, is: What does the Equal Protection Clause demand with regard to local governmental units?

Reynolds v. *Sims,* 377 U. S. 533 (1964), stands for the general proposition that the debasement of the right to vote through malapportionment is offensive to the Equal Protection Clause. It holds that where the allegedly debased vote relates to the State Legislature, a judicial remedy is available to adjudicate a claim of such debasement, and that, subject to some permissible deviation, the remedy is to require reapportionment on a population basis. Although the Court's opinion carefully emphasizes the appropriateness of allowing latitude to meet local and special conditions, 377 U. S., at 577–581, its insist-

ence upon the need for general correspondence of voting rights to population has come to be called the one man, one vote rule.[2]

This rule is appropriate to the selection of members of a State Legislature. The people of a State are similarly affected by the action of the State Legislature. Its functions are comprehensive and pervasive. They are not specially concentrated upon the needs of particular parts of the State or any separate group of citizens. As the Court in *Reynolds* said, each citizen stands in "the same relation" to the State Legislature. Accordingly, variations from substantial population equality in elections for the State Legislature take away from the individual voter the equality which the Constitution mandates. They amount to a debasement of the citizen's vote and of his citizenship.[3]

But the same cannot be said of all local governmental units, and certainly not of the unit involved in this case.

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[2] *Reynolds* v. *Sims* did not put the Equal Protection Clause to a radical or new use. Its holding is in the mainstream of our equal protection cases. Our cases hold that people who stand in the same relationship to their government cannot be treated differently by that government. To do so would be to mark them as inferior, "implying inferiority in civil society" (*Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1880)), or "inferiority as to their status in the community" (*Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954)). It would be to treat them as if they were, somehow, less than people.

[3] "Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen." 377 U. S., at 565, 567.

Midland County's Commissioners Court has special functions—directed primarily to its rural area and rural population. Its powers are limited and specialized, in light of its missions. Residents of Midland County do not by any means have the same rights and interests at stake in the election of the Commissioners. Equal protection of their rights may certainly take into account the reality of the rights and interests of the various segments of the voting population. It does not require that they all be treated alike, regardless of the stark difference in the impact of the Commissioners Court upon them. "Equal protection" relates to the substance of citizens' rights and interests. It demands protection adapted to substance; it does not insist upon, or even permit, prescription by arbitrary formula which wrongly assumes that the interests of all citizens in the elected body are the same.

In my judgment, the Court departs from *Reynolds* when it holds, broadly and generally, that "the Fourteenth Amendment . . . forbids the election of local government officials from districts of disparate population." *Ante,* at 478. This holding, literally applied as the Court commands, completely ignores the complexities of local government in the United States—complexities which, *Reynolds* itself states, demand latitude of prescription. The simplicity of the Court's ruling today does not comport with the lack of simplicity which characterizes the miscellany which constitutes our local governments.

II.

As of the beginning of 1967, there were 81,253 units of local government in the United States. This figure includes 3,049 county governments, 18,051 municipal governments, 17,107 township governments, 21,782 school

districts, and 21,264 other special districts.[4] These units vary greatly in powers, structure, and function. The citizen is usually subject to several local governments with overlapping jurisdiction.

The Court in this case concedes that in a "special-purpose unit of government," the rights of certain constituents may be more affected than the rights of others. It implies that the one man, one vote rule may not apply in such cases. See *ante,* at 483–484. But it says that we do not here have to confront the implications of such a situation. I do not agree.

I submit that the problem presented by many, perhaps most, county governments (and by Midland County in particular) is precisely the same as those arising from special-purpose units. The functions of many county governing boards, no less than the governing bodies of special-purpose units, have only slight impact on some of their constituents and a vast and direct impact on others. They affect different citizens residing within their geographical jurisdictions in drastically different ways.[5]

Study of county government leaves one with two clear impressions: that the variations from unit to unit are great; and that the role and structure of county government are currently in a state of flux.[6] County gov-

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[4] U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, Governmental Units in 1967, at 1 (prelim. rept. Oct. 1967).

[5] If these complexities do not exist in a given case (that is, if the functions of the governing unit involved have an essentially equal impact upon all the citizens within its geographical jurisdiction), then the one man, one vote rule would apply as it did in *Reynolds.* Some city councils, for example, are in effect miniature state legislatures. Some county governing units have geographical jurisdiction which is co-extensive with a city or which includes only reasonably homogeneous rural areas.

[6] See C. Adrian, State and Local Governments 210–217 (1960); C. Snider, Local Government in Rural America 119–139 (1957)

ernments differ in every significant way: number of constituents, area governed,[7] number of competing or overlapping government units within the county,[8] form, and means of selection of the governing board,[9] services provided,[10] the number and functions of independent county officials,[11] and sources of revenue.[12]

Some generalizations can be made about county governments. First, most counties today perform certain basic functions delegated by the State: assessment of property, collection of property taxes, recording of deeds and other documents, maintenance of rural roads, poor relief, law enforcement, and the administration of electoral and judicial functions. Some counties have begun to do more, especially by the assumption of municipal and policy-making functions.[13] But most counties still act largely as administrative instrumentalities of the State.[14]

Second, "[t]he absence of a single chief executive and diffusion of responsibility among numerous independently elected officials are general characteristics of county

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(hereafter cited as Snider); International Union of Local Authorities, Local Government in the United States of America 13–14 (1961) (hereafter cited as Local Government); National Municipal League, Model County Charter xi–xxxviii (1956). See generally S. Duncombe, County Government in America (1966) (hereafter cited as Duncombe).

[7] See Duncombe 3–5.

[8] See U. S. Dept. of Commerce, Bureau of the Census, Census of Governments: 1962, Governmental Organization, Table 17.

[9] See U. S. Dept. of Commerce, Bureau of the Census, Governing Boards of County Governments: 1965.

[10] See Duncombe 70–102.

[11] See Duncombe 41–63.

[12] See U. S. Dept. of Comerce, Bureau of the Census, Census of Governments: 1962, Finances of County Governments, Table 11.

[13] See Duncombe 13–14.

[14] See W. Anderson & E. Weidner, State and Local Government 30–31 (1951); Snider 131–134.

government in the United States." [15] Those who have written on the subject have invariably pointed to the extensive powers exercised within the geographical region of the county by officials elected on a countywide basis and by special districts organized to perform specific tasks. Often these independent officials and organs perform crucial functions of great importance to all the people within the county.[16]

These generalizations apply with particular force in this case. The population of Midland County is chiefly in a single urban area.[17] That urban area has its own municipal government which, because of home rule,[18] has relative autonomy and authority to deal with urban problems. In contrast, the Midland County government, like county governments generally, acts primarily as an administrative arm of the State. It provides a convenient agency for the State to collect taxes, hold elections, administer judicial and peace-keeping functions, improve roads, and perform other functions which are the ordinary duties of the State. The powers of the Commissioners Court, which is the governing body of Midland County, are strictly limited by statute and constitutional provision.[19] Although a mere listing of

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[15] Local Government, at 14.

[16] See, *e. g., ibid.;* Duncombe 41–63; Snider 44–45, 252–254.

[17] In 1962 the population of Midland County was 67,717. More than 62,000 lived in the urban area governed by the municipal government. U. S. Dept. of Commerce, Bureau of the Census, Census of Governments: 1962, Governmental Organization 186.

[18] Tex. Const., Art. XI, § 5; R. Young, The Place System in Texas Elections (Institute of Public Affairs, University of Texas, 1965) 38.

[19] See W. Benton, Texas, Its Government and Politics 360–362 (1966) (hereafter cited as Benton); S. MacCorkle and D. Smith, Texas Government 339–340 (1964) (hereafter cited as MacCorkle); C. Patterson, S. McAlister, and G. Hester, State and Local Government in Texas 384–385, 388 (1961) (hereafter cited as Patterson); Municipal and County Government 113–114 (J. Claunch ed. 1961); F. Gantt, I. Dawson, and L. Hagard (eds.), Governing Texas,

these authorizing statutes and constitutional provisions would seem to indicate that the Commissioners Court has significant and general power, this impression is somewhat illusory because very often the provisions which grant the power also circumscribe its exercise with detailed limitations.

For example, the petitioner cites Art. VIII, § 9, of the Texas Constitution and Article 2352 of the Texas Civil Statutes as granting the Commissioners Court authority to levy taxes. Yet, at the time this suit was tried, Art. VIII, § 9, provided that no county could levy a tax in excess of 80¢ on $100 property valuation. And Article 2352 allocated that 80¢ among the four "constitutional purposes" mentioned in Art. VIII, § 9 (not more than 25¢ for general county purposes, not more than 15¢ for the jury fund, not more than 15¢ for roads and bridges, and not more than 25¢ for permanent improvements).[20]

Another example is the authority to issue bonds. It is true, as the majority notes, that the Commissioners Court does have this authority. Yet Title 22 of the Texas Civil Statutes sets up a detailed code concerning how and for what purposes bonds may be issued. Significantly, Article 701 provides that county bonds "shall never be issued for any purpose" unless the bond issue

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Documents and Readings 254 (1966); C. McCleskey, The Government and Politics of Texas 303–304, 305 (1966) (hereafter cited as McCleskey). There is a home-rule provision in the Texas Constitution which applies to counties, Art. IX, § 3. But that provision is virtually unworkable and, as of 1966, there were no counties operating under home rule. Benton 372–375. See also McCleskey 304, and MacCorkle 341.

[20] The 1967 amendment to Art. VIII, § 9, maintains the 80¢ limitation and still speaks of "the four constitutional purposes." It provides, though, that the county "may" put all tax money into one general fund without regard to the purpose or the source of each tax. For a discussion of the county's taxing power and other sources of county revenue, see Benton 367–368.

has been submitted to the qualified property-taxpaying voters of the county.

More important than the statutory and constitutional limitations, the limited power and function of the Commissioners Court are reflected in what it actually does. The record and briefs do not give a complete picture of the workings of the Commissioners Court. But it is apparent that the Commissioners are primarily concerned with rural affairs, and more particularly with rural roads. One Commissioner testified below that the largest item in the county budget was for roads and bridges.[21] And, according to that Commissioner, the county does not maintain streets within the City of Midland. The Commissioners seem quite content to let the city council handle city affairs. "The thing about it is, the city of Midland has the city council and the mayor to run its business, . . . and we have a whole county to run . . . ."

As the Texas Supreme Court stated:

> "Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers." 406 S. W. 2d, at 428.

Moreover, even with regard to those areas specifically delegated to the county government by statute or constitutional provision, the Commissioners Court some-

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[21] This testimony appears in the typed transcript of record but not in the portions printed by the parties.

times does not have the power to make decisions. Within the county government there are numerous departments which are controlled by officials elected independently of the Commissioners Court and over whom the Commissioners Court does not exercise control. The Commissioners view themselves primarily as road commissioners. "The other department heads really have the say in that department. We merely approve the salary. We do not hire anyone in any department in Midland County except the road department. The department heads of the other departments do hire the employees." [22]

As the Texas Supreme Court stated, "the county commissioners court is not charged with the management and control of all of the county's business affairs . . . . [T]he various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp." 406 S. W. 2d, at 428. These officials, elected on a direct, one man, one vote, countywide basis, include the Assessor and Collector of Taxes, the County Attorney, the Sheriff, the Treasurer, the County Clerk, and the County Surveyor.[23] The County Judge, who is the presiding officer of the Commissioners Court, is also elected on a countywide basis.[24] Other county officials and employees are appointed by the Commissioners Court.[25]

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[22] See n. 21, *supra*. Commentators on Texas local government have noted this lack of control by the Commissioners Court. See, *e. g.*, MacCorkle 344–345; McCleskey 307, 310; Benton 369.

[23] Article VIII, § 14; Art. V, § 21; Art. V, § 23; Art. XVI, § 44; Art. V, § 20; and Art. XVI, § 44, of the Texas Constitution respectively.

[24] Article V, §§ 15, 18, of the Texas Constitution.

[25] For a description of county officials generally and of their functions, see McCleskey 306–310, MacCorkle 335–339, and Patterson 390–392. For a listing of county officials who are elected see

The elected officials are generally residents of the city, probably because of its preponderant vote. A Commissioner testified that "Every elected official . . . in Midland County today [except the three rural commissioners], and it has been way back for years, has been elected by the people that live here in the city limits of Midland." Another Commissioner testified that of about 150 employees of the county, only four of those who were not elected lived in the rural precincts. Of all the elected officials only the three rural commissioners lived outside the city limits.[26] And, as I have noted, the fifth member of the Commissioners Court, its Chairman, is the County Judge who is elected at large in the county.[27] It is apparent that the city people have much more control over the county government than the election of the Commissioners Court would indicate. Many of the county functions which most concern the city, for example, tax assessment and collection, are under the jurisdiction of officials elected by the county at large.[28]

U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, Elective Offices of State and Local Governments 117–118 (prelim. rept. Aug. 1967).

[26] See n. 21, *supra*.

[27] Note 24, *supra*. There was testimony below to the effect that the county judge votes only in case of a tie vote. But it appears that this limitation may be self-imposed. "The county judge enjoys equal voting rights with all the other members of the commissioners' court, which includes the right to make or second any motion and the right to vote whether there be a tie among the votes of other members of the court or not." 1 Opinions of the Attorney General of Texas 453 (No. 0–1716, 1939). See McCleskey 307, n. 27.

[28] The Assessor and Collector of Taxes is elected by the qualified voters of the county at large. Tex. Const., Art. VIII, § 14; U. S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, Elective Offices of State and Local Governments 117 (prelim. rept. Aug. 1967). The Commissioners Court has power to adjust the Assessor and Collector's valuation. Art. VIII, § 18, of the Texas Constitution. However, testimony below indicated that the Com-

In sum, the Commissioners Court's functions and powers are quite limited, and they are defined and restricted so that their primary and preponderant impact is on the rural areas and residents. The extent of its impact on the city is quite limited. To the extent that there is direct impact on the city, the relevant powers, in important respects, are placed in the hands of officials elected on a one man, one vote basis. Indeed, viewed in terms of the realities of rights and powers, it appears that the city residents have the power to elect the officials who are most important to them, and the rural residents have the electoral power with respect to the Commissioners Court which exercises powers in which they are primarily interested.

In face of this, to hold that "no substantial variation" from equal population may be allowed under the Equal Protection Clause is to ignore the substance of the rights and powers involved. It denies—it does not implement—substantive equality of voting rights. It is like insisting that each stockholder of a corporation have only one vote even though the stake of some may be $1 and the stake of others $1,000. The Constitution does not force such a result. Equal protection of the laws is not served by it.

Despite the fact, as I have shown, that many governmental powers in the county are exercised by officials elected at large and that the powers of the Commissioners Court are limited, the Court insists that the Commissioners Court is a unit with "general governmental powers." This simply is not so except in the most superficial sense. The Court is impressed by the fact that the jurisdiction of the Commissioners Court extends

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missioners Court sits to hear taxpayer complaints only a few days each year. The Commissioners Court does not go over the Assessor and Collector's tax rendition sheets before he sends notices to the taxpayers.

over the entire area of the county. But this is more form than reality.

Substance, not shibboleth, should govern in this admittedly complex and subtle area; and the substance is that the geographical extent of the Commissioners Court is of very limited meaning. Midland County's Commissioners Court has its primary focus in nonurban areas and upon the nonurban people. True, the county's revenues come largely from the City of Midland. But the Commissioners Court fixes the tax rate subject to the specific limitations provided by the legislature. It must spend tax revenues in the categories and percentages which the legislature fixes. Taxes are assessed and collected, not by it, but by an official elected on a county-wide basis. It is quite likely that if the city dwellers were given control of the Commissioners Court, they would reduce the load because it is spent primarily in the rural area. This is a state matter. If the State Legislature, in which presumably the city dwellers are fairly represented (*Reynolds* v. *Sims*), wishes to reduce the load, it may do so. But unless we are ready to adopt the position that the Federal Constitution forbids a State from taxing city dwellers to aid their rural neighbors, the fact that city dwellers pay most taxes should not determine the composition of the county governing body. We should not use tax impact as the sole or controlling basis for vote distribution. It is merely one in a number of factors, including the functional impact of the county government, which should be taken into account in determining whether a particular voting arrangement results in reasonable recognition of the rights and interests of citizens. Certainly, neither tax impact nor the relatively few services rendered within the City of Midland should compel the State to vest practically all voting power in the city residents to the

virtual denial of a voice to those who are dependent on the county government for roads, welfare, and other essential services.

III.

I have said that in my judgment we should not decide this case but should give Texas a chance to come up with an acceptable result. Texas' own courts hold that the present system is constitutionally intolerable. The 1963 population estimates relied upon in this case show that the district which includes most of the City of Midland with 67,906 people has one representative, and the three rural districts, each of which has its own representative, have 852; 414; and 828 people respectively. While it may be that this cannot be regarded as satisfying the Equal Protection Clause under any view, I suggest that applying the Court's formula merely errs in the opposite direction: Only the city population will be represented, and the rural areas will be eliminated from a voice in the county government to which they must look for essential services. With all respect, I submit that this is a destructive result. It kills the very value which it purports to serve. Texas should have a chance to devise a scheme which, within wide tolerance, eliminates the gross underrepresentation of the city, but at the same time provides an adequate, effective voice for the nonurban, as well as the urban, areas and peoples.[29]

MR. JUSTICE STEWART, dissenting.

I would dismiss the writ as improvidently granted for the reasons stated by MR. JUSTICE HARLAN and MR. JUSTICE FORTAS.

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[29] Cf. Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Col. L. Rev. 21, 40–49 (1965).

Since the Court does reach the merits, however, I add that I agree with most of what is said in the thorough dissenting opinion of MR. JUSTICE FORTAS. Indeed, I would join that opinion were it not for the author's unquestioning endorsement of the doctrine of *Reynolds* v. *Sims,* 377 U. S. 533. I continue to believe that the Court's opinion in that case misapplied the Equal Protection Clause of the Fourteenth Amendment—that the apportionment of the legislative body of a sovereign State, no less than the apportionment of a county government, is far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth-grade arithmetic. My views on that score, set out at length elsewhere,* closely parallel those expressed by MR. JUSTICE FORTAS in the present case.

**Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 744 (dissenting opinion).

JOHNSON *v.* MASSACHUSETTS.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 702. Argued March 6–7, 1968.—Decided April 1, 1968.

After hearing oral argument and studying the record of this case involving the issue of the voluntariness of a confession, the Court dismisses the writ of certiorari as improvidently granted.

352 Mass. 311, 225 N. E. 2d 360, certiorari dismissed.

John M. Harrington, Jr., argued the cause for petitioner. With him on the briefs was *John A. Pike.*

Brian E. Concannon, Special Assistant Attorney General of Massachusetts, argued the cause for respondent. With him on the brief were *Elliot L. Richardson,* Attorney General, *John M. Finn,* Deputy Assistant Attorney General, and *Howard M. Miller,* Assistant Attorney General.

PER CURIAM.

In 1964 petitioner was tried and convicted in a Massachusetts Superior Court for murder, armed robbery, and other offenses. The conviction was affirmed by the Supreme Judicial Court of Massachusetts. *Commonwealth* v. *Johnson,* 352 Mass. 311, 225 N. E. 2d 360. We granted certiorari because there appeared to be substantial questions concerning the voluntariness of a confession of petitioner which was admitted in evidence at his trial. After oral argument and study of the record, we have reached the conclusion that the record relevant to the constitutional claims now asserted is insufficient to permit decision of those claims.* The writ is there-

*Petitioner's claim on *voir dire* was that his confession was beaten out of him by police. The trial judge found as a fact that it was not. At the trial itself petitioner did not attack the voluntariness

fore dismissed as improvidently granted. Cf. *Smith* v. *Mississippi*, 373 U. S. 238; *Massachusetts* v. *Painten*, 389 U. S. 560.

It is so ordered.

MR. JUSTICE MARSHALL, with whom THE CHIEF JUSTICE and MR. JUSTICE FORTAS join, dissenting.

Petitioner was convicted of the first-degree murder of a police officer and sentenced to death. He urges that an involuntary confession was used in evidence against him, in violation of due process.

The facts concerning the making of the statement are not in controversy. After the shooting of the police officer in the evening of August 1, 1963, petitioner drove off in a car. He was seen by other police officers who had been called to the scene by a police alarm and who proceeded to pursue him in their car. After a chase at high speeds for several blocks, during the course of which petitioner's automobile struck a wall and caromed off several parked cars, petitioner crashed into a bus. He limped away from the heavily damaged car in an attempt to flee but was almost immediately apprehended by the police.

Petitioner was taken to a police station and booked at 9:35 p. m. He was first placed in a cell and then taken to police headquarters sometime after 10:15 p. m. Between midnight and 5 a. m. he was placed in a lineup

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of the confession on any other ground, or raise the other constitutional challenges argued in this Court. The defense at the trial was primarily directed at persuading the jury not to impose the death penalty. The petitioner made an unsworn statement to the jury at the close of summations in which he said, "all the evidence which the prosecutor presented to you was true. There was no sense in my taking the stand because all the evidence points to me. . . . All that I ask is just clemency . . . . I put my life into your hands. Please recommend clemency, life imprisonment."

for identification purposes upon four separate occasions. During this period petitioner was constantly surrounded by large numbers of policemen. Various police witnesses estimated the number of officers present in the lineup room alone at from 45 to 100, and at least 32 officers testified at the hearing on the new trial motion to having had some contact with petitioner during the course of the night. Numerous witnesses identified petitioner as the killer during the four lineups, although he continually maintained his innocence in the face of their accusations. Apart from the lineups, petitioner was also questioned intermittently during this period. At about 5:50 a. m., August 2, petitioner began to give the inculpatory statements, in response to police questions, that were introduced against him. It is clear that the interrogation of petitioner was carried on for the sole purpose of eliciting incriminating statements from him, since he had already been positively identified numerous times, while in lineups, as the killer.

Petitioner has a sixth-grade education and an I. Q. of 86. During the period of over eight hours in which he was in police custody prior to confessing, he was at no time advised of his right to remain silent or his right to consult with an attorney, and the trial judge found as a fact that petitioner was not aware of his rights at the time he confessed. At the time of his arrest petitioner was bleeding from a cut an inch or an inch and one-half long on the side of his head. During the various lineups to which he was subjected, petitioner constantly had blood visible on his face or head. Two doctors later examined petitioner, one on August 10, and the other on August 14. They reported the following: "He [petitioner] has headaches and dizziness when he bends down and gets up. He had a blackout spell in the police station. Things appear blurry to him. He has vomited a couple of times." Two weeks after his arrest and con-

fession, petitioner underwent a brain operation for a subdural hematoma; the surgeon who operated on him testified that the hematoma "could have been there anywhere from one to two weeks."

On these facts the trial court found petitioner's confession voluntary, that is the result of his "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California,* 314 U. S. 219, 241 (1941). While it is true that some of this Court's earlier decisions in voluntariness cases (relied on by the State here) are not inconsistent with such a holding, *e. g., Lisenba* v. *California, supra; Gallegos* v. *Nebraska,* 342 U. S. 55 (1951); *Stein* v. *New York,* 346 U. S. 156 (1953), I had thought that more recent decisions of this Court would have made it abundantly clear that a confession obtained under the circumstances present here would be involuntary and constitutionally inadmissible against its maker. See, *e. g., Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Haynes* v. *Washington,* 373 U. S. 503 (1963); *Davis* v. *North Carolina,* 384 U. S. 737 (1966); *Clewis* v. *Texas,* 386 U. S. 707 (1967).

The Court says that it finds the record in this capital case too "insufficient" to permit a resolution of petitioner's constitutional claim. I am unable to agree, since the evidence on the question of voluntariness is largely undisputed. I am particularly unable to understand the Court's disposition of this case, after full oral argument, in light of its disposition of *Greenwald* v. *Wisconsin, post,* p. 519, in which it finds a confession involuntary and reverses, without argument, on facts which are, if anything, less compelling on the issue of involuntariness than the facts in the present case.

To be sure, petitioner challenged the voluntariness of his confession at trial only on the theory, which was rejected, that he had been subjected to physical abuse by the police. However, in the course of the hearing

on that challenge the circumstances as outlined above emerged from the testimony of the police and were specifically found as facts by the trial judge. Yet, once he concluded there had been no physical abuse, the trial judge did not go on to consider the voluntariness of petitioner's confession in light of "the totality of the circumstances," *Greenwald* v. *Wisconsin, supra,* at 521, under which it was obtained. While the Supreme Judicial Court stated that petitioner should have raised at trial the theory of involuntariness on which he now relies, its opinion reveals that it then went on to pass on that evidence itself, in the course of ruling on petitioner's request for a new trial, and found the confession voluntary. Accordingly, I do not feel that it is necessary for us to decide whether the trial judge was under a duty *sua sponte* to consider a theory of involuntariness not initially raised by petitioner, since it appears that such facts were considered and passed on in the course of appellate review in the state court.

I respectfully dissent.

HOGUE *v.* SOUTHERN RAILWAY CO.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 889. Decided April 1, 1968.

Plaintiff under the Federal Employers' Liability Act who attacks a previously executed release on grounds of mutual mistake of fact is not required to tender back to his employer the consideration received for the release in order to maintain the action. Except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due the injured employee.

116 Ga. App. 194, 156 S. E. 2d 412, reversed and remanded.

Samuel D. Hewlett, Jr., for petitioner.

Charles A. Horsky for respondent.

PER CURIAM.

We granted the petition for certiorari in this case over the opposition of the respondent carrier. *Post*, p. 903. The writ presents for review a judgment in favor of the respondent carrier entered by the Georgia Court of Appeals upon a holding that a plaintiff under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, who attacks a previously executed release on grounds of mutual mistake of fact, must, as a condition to bringing his suit, tender back to his carrier employer the consideration he received for the release. 116 Ga. App. 194, 156 S. E. 2d 412, certiorari denied by the Supreme Court of Georgia. Respondent carrier has now filed before argument a "Memorandum Confessing Error" which states "that its insistence before the Georgia courts that the applicable law required a tender, and the decision of the Georgia Court of Appeals requiring a tender were erroneous. Accordingly, respondent does not desire to offer brief or argument against petitioner on this issue, and confesses error."

Petitioner had suffered an injury to a knee while working in respondent carrier's shops. He executed a release for a consideration of $105, and did not offer to return the consideration before instituting this action. He pleaded that the release was obtained by reason of a mistake of fact of both parties as to the extent of his injuries, alleging specifically that he and the carrier had relied on the assurances of the carrier's doctor that he had only a bruised knee and was not permanently injured, whereas later it was determined that his injury was permanent and resulted in his having two operations, one of which caused him to lose a kneecap.

The question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361. We reject the suggestion that a tender back of the consideration is excused only where fraud enters into the execution of the release. See, *e. g.*, *Graham* v. *Atchison, T. & S. F. R. Co.*, 176 F. 2d 819, 826. We hold that a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries. We have held that an express agreement of an injured employee who obtained funds from a carrier to help defray living expenses first to return the sum paid as a prerequisite to the filing and maintenance of an action under the FELA was void under § 5 of the Act.* *Duncan* v.

*Section 5, as set forth in 45 U. S. C. § 55, is as follows:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity

Thompson, Trustee, 315 U. S. 1. There is no occasion to decide whether the release here involved violated § 5. It is sufficient for the purposes of this decision to note that a rule which required a refund as a prerequisite to institution of suit would be "wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers." *Dice* v. *Akron, C. & Y. R. Co., supra,* at 362. Rather it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee. Cf. *Callen* v. *Pennsylvania R. Co.,* 332 U. S. 625.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, upon consideration of the confession of error filed here by the respondent and in light of the record, would vacate the judgment of the Court of Appeals of the State of Georgia and remand the case for further appropriate proceedings.

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that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

GREENWALD *v.* WISCONSIN.

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

No. 417, Misc. Decided April 1, 1968.

On the "totality of the circumstances" surrounding petitioner's inculpatory statements admitted into evidence at the trial which resulted in his convictions (lack of: counsel (despite petitioner's remark that he was "entitled" to counsel), food, sleep, medication, and adequate warnings as to constitutional rights), *held* such statements were not voluntary.

Certiorari granted; 35 Wis. 2d 146, 150 N. W. 2d 507, reversed.

Bronson C. La Follette, Attorney General of Wisconsin, for respondent.

PER CURIAM.

Petitioner was charged with two burglaries and one attempted burglary. He entered pleas of not guilty to each count. Before trial, petitioner requested a hearing on the voluntariness of certain oral admissions and a written confession he had given while in police custody. The hearing was held and the trial court found that the statements had been voluntarily made. Petitioner waived jury trial. The statements were admitted in evidence and he was convicted on all three counts. On each of them he was sentenced to an indeterminate term of not more than five years, with the sentences to run concurrently. The Wisconsin Supreme Court, on appeal, affirmed the convictions. It agreed with the trial court that the statements in question were voluntary. Petitioner sought a writ of certiorari. We grant the motion for leave to proceed *in forma pauperis,* grant the writ, and reverse the judgment below.

Petitioner, who has a ninth-grade education, was arrested on suspicion of burglary shortly before 10:45 on the evening of January 20, 1965. He was taken to a

police station. He was suffering from high blood pressure, a condition for which he was taking medication twice a day. Petitioner had last taken food and medication, before his arrest, at 4 p. m. He did not have medication with him at the time of the arrest. At the police station petitioner was interrogated from 10:45 until midnight. He was not advised of his constitutional rights. Petitioner repeatedly denied guilt. No incriminating statements were made at this time.

Petitioner was booked and fingerprinted and, sometime after 2 a. m., he was taken to a cell in the city jail. A plank fastened to the wall served as his bed. Petitioner claims he did not sleep. At 6 a. m., petitioner was led from the cell to a "bullpen." At 8:30 he was placed in a lineup. At 8:45, his interrogation recommenced. It was conducted by several officers at a time, in a small room. Petitioner testified that in the course of the morning he was not offered food and that he continued to be without medication. For an hour or two he refused to answer any questions. When he did speak, it was to deny, once again, his guilt.

Sometime after 10 a. m., petitioner was asked to write out a confession. He refused, stating that "it was against my constitutional rights" and that he was "entitled to have a lawyer." These statements were ignored. No further reference was made to an attorney, by petitioner or by the police officers.

At about 11 a. m. petitioner began a series of oral admissions culminating in a full oral confession at about 11:30. At noon he was offered food. The confession was reduced to writing around 1 p. m. Just before the confession was reduced to writing, petitioner was advised of his constitutional rights. According to his testimony, he confessed because "I knew they weren't going to leave me alone until I did."

It is our duty, in a case such as this, to make an examination of the record in order to ascertain whether peti-

tioner's statements were voluntary.* See *Davis* v. *North Carolina,* 384 U. S. 737, 741–742 (1966). We believe that, considering the "totality of the circumstances" surrounding the statements, see *Clewis* v. *Texas,* 386 U. S. 707 (1967), it was error for the Supreme Court of Wisconsin to conclude that they were voluntarily made. We reach this decision as in *Clewis,* without reference to disputed testimony taken at the pretrial hearing.

All of the above recited facts are, under our decisions, relevant to the claim that the statements were involuntary: the lack of counsel, especially in view of the accused's statement that he desires counsel (see *Johnson* v. *New Jersey,* 384 U. S. 719, 730, 735 (1966); cf. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964)); the lack of food, sleep, and medication (see *Clewis* v. *Texas,* 386 U. S. 707 (1967)); the lack or inadequacy of warnings as to constitutional rights (see *Culombe* v. *Connecticut,* 367 U. S. 568, 630 (1961); *Johnson* v. *New Jersey,* 384 U. S. 719, 730 (1966)). Considering the totality of these circumstances, we do not think it credible that petitioner's statements were the product of his free and rational choice.

Accordingly, the judgment below is reversed.

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

I cannot agree that the petitioner's confession was involuntary as a matter of law. When he was taken to the police station for questioning he was nearly 30 years old and was by no means a stranger to the criminal law. He was questioned for little more than an hour one evening

*Petitioner's trial began before the date of our decision in *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Although petitioner's trial was after the date of our decision in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), we need not and do not decide whether that decision would, in itself, require reversal of petitioner's convictions. See *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

and for less than four hours the next morning. He was neither abused nor threatened and was promised no benefit for confessing. The Court says that the officers did not tell him about his "constitutional rights." But what the Court fails to mention is that the petitioner himself testified that, during his interrogation, "he knew he had a constitutional right to refuse to answer any questions, . . . he knew anything he said could be used against him, and . . . he knew he had a constitutional right to retain counsel." 35 Wis. 2d 146, 151, 150 N. W. 2d 507, 509. Moreover, although the Court's opinion might convey a contrary impression, the petitioner himself testified that at no time between his arrest and his confession did he express to anyone a desire for food or for medication.

The judge who conducted the pretrial hearing held that the State had the burden of proving "beyond a reasonable doubt" that the petitioner's decision to confess was the product of his own unfettered will. Applying this standard, the judge found that the "totality of the circumstances" confronting the petitioner was not "coercive in any physical or psychological respect" and that he had made a "free and deliberate choice to admit his guilt." These findings were reviewed and affirmed by the Supreme Court of Wisconsin in a conscientious and thorough opinion. 35 Wis. 2d 146, 150 N. W. 2d 507.

Given the evidence on which the conclusions of the state courts were based, it is not surprising that the petitioner has completely abandoned any claim that his confession was coerced. That claim is advanced here not by the petitioner but by this Court, which has not only raised the issue on its own motion but decided it in the petitioner's favor, without giving Wisconsin any opportunity to brief or argue the question on the merits.*

*The petitioner does not raise, and the Court does not reach, the question whether his confession was inadmissible under *Escobedo* v. *Illinois*, 378 U. S. 478.

ANDERSON *v.* NELSON, WARDEN.

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

No. 652, Misc. Decided April 1, 1968.

Comment on petitioner's failure to testify cannot be labeled harmless error where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for conviction, and where there is evidence that could have supported acquittal.

Certiorari granted; 379 F. 2d 330, reversed.

Charles A. Legge for petitioner.

Thomas C. Lynch, Attorney General of California, for respondent.

PER CURIAM.

Petitioner Anderson was convicted after jury trial in California courts of forgery and the State District Court of Appeal affirmed, finding all errors nonprejudicial under the State's harmless error rule. After the California Supreme Court returned to petitioner unfiled his petition for hearing in that court, with the notation that it was not timely, petitioner sought habeas corpus relief in Federal District Court. The District Court issued the writ, holding that the prosecutor's comment on the failure of petitioner to testify at his trial, made in violation of *Griffin* v. *California,* 380 U. S. 609, was not harmless error. The State appealed. One week after oral argument, our decision in *Chapman* v. *California,* 386 U. S. 18, was handed down. Applying the *Chapman* standard, the majority of the Court of Appeals concluded that the *Griffin* error was harmless "beyond a reasonable doubt." *Wilson* v. *Anderson,* 379 F. 2d 330, 335. Judge Ely dissented.

We agree with Judge Ely that comment on a defendant's failure to testify cannot be labeled harmless

error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal. We find this is such a case.

The bookkeeper for a trucking firm had written a $196 payroll check to employee Michael Pittman and had placed it in the firm's office. The check disappeared at a time either shortly before or after petitioner was in the firm's office asking for a job. Two days later petitioner had possession of the check and asked gasoline station operator Kernen to cash it for him. According to Kernen, petitioner told him he had been working for the trucking firm and it was his payroll check. Kernen was acquainted with petitioner, knew him as Willy, and knew he was the brother of Jim Anderson, who had a charge account with Kernen. Kernen told petitioner he did not have enough money on hand to cash the $196 check, but they agreed to apply $112 to Jim Anderson's account, with petitioner taking $84. According to Kernen's testimony, petitioner then borrowed a pen from him and endorsed the name Michael Pittman on the check. When the check was returned to Kernen by the bank, he met with police and identified petitioner from a police "mug shot."

The arresting officer testified that he asked petitioner about the incident and that petitioner admitted cashing the check but denied he endorsed it. Petitioner told the officer he was in a bar when an unknown person came up to him and said he wanted to cash a check. Petitioner took it to the service station and substituted $112 he had on his person for the amount withheld by Kernen.

Petitioner did not testify and presented no evidence. The trial court instructed the jury on inferences to be drawn from petitioner's silence as follows:

> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or

> explain because of facts within his knowledge, if he does not testify . . . the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom, those unfavorable to the defendant are the more probable."

It is conceded that those instructions violated *Griffin*. It is also conceded that the prosecutor's comments* violated *Griffin*.

While the evidence against petitioner was sufficient to convict, the facts that petitioner allegedly forged the name Michael Pittman in the presence of an acquaintance of petitioner's who knew him as Willy, the brother of Jim Anderson, that petitioner allegedly chose to cash a worthless check at a place where he was known and openly agreed to have the major portion of the proceeds applied to his brother's account and yet, after all this, did not flee the county could be viewed as casting doubt on the prosecution's case, perhaps on Kernen's veracity. In this posture, we cannot say that the prosecutor's extensive argument asking the jury to overlook inferences favorable to petitioner because he invoked his constitutional right not to testify was, in the words of *Chapman*, "harmless beyond a reasonable doubt." 386 U. S., at 24. Since petitioner is entitled to relief for this reason, we do not reach the other questions he seeks to raise. Nor are we persuaded by respondent's contention that petitioner's late filing of a petition for hearing in the State Supreme Court constituted a deliberate bypass of state remedies, precluding him from habeas corpus relief in federal courts. See *Fay* v. *Noia*, 372 U. S. 391. Cf. *Henry* v. *Mississippi*, 379 U. S. 443.

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*See the Appendix to this opinion.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted and the judgment is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would affirm the judgment of the Court of Appeals.

APPENDIX TO PER CURIAM.

The prosecutor stated in argument:

"Now, one other thing the Judge will instruct you—he told you—he touched on this when we were picking the jury: The defendant, as Mr. Anderson has done, in a criminal case, he doesn't have to take the stand. That's his choice. He can take the stand if he chooses. He doesn't have to. I can't call him to the stand; the Judge can't demand that he get on the stand. That's completely up to him. He is not required to, under our law, to testify.

"The Judge will also instruct you that the jury may consider that, because of his failure to testify, that if he had certain facts which would be expected to be within his knowledge, that he could explain or deny certain things, that the jury may consider this. In other words, by that I mean such as in this case, Mr. Anderson could have gotten on the stand and told you, 'No, I didn't sign that,' or, 'I wasn't up to the Calverts [trucking firm] and somebody else told me about it, as I told Sergeant Sonberg [the arresting officer].'

"In other words, you can consider that, when a person could be expected to know something about something, and he doesn't tell you what obviously he must know, why, then you can draw certain inferences from that.

"And, as I say, ladies and gentlemen, there is no evidence on behalf—that the defendant has put in here.

"So, the only way we can be attacked is that we haven't proven case, we haven't made out a case because of certain suspicions or inferences or something like that, showing there was another man, or something like that. That hasn't been testified to here.

"Now, you can't guess as to what Mr. Anderson would or would not have testified to if he did get on the stand, because you haven't heard it. You will have to base your decision on those documents and the people you have heard here. If you don't believe any of them, you will probably not find him guilty; but if you do believe them—there has been no contradiction, nobody has contradicted them at all—then you are only led to one conclusion, and that simply is the fact that the defendant is the one that passed that check, and is guilty here.

"Remember, you have no conflicting evidence on the other side. You either would have to disbelieve the Calverts, Michael Pittman, and Mr. Kernen and Sergeant Sonberg and the rest of them.

"No one came in and said, 'No, that isn't it; he was somewhere else.' You heard nothing like that, ladies and gentlemen.

"There hasn't been any evidence that has been produced to controvert it. Nobody has come in here and told you Mr. Anderson was somewhere else, or he didn't do it, or he didn't come up and get that check, and 'I didn't know anything about it, and I went in there innocently to pass it.' He didn't tell you that at all.

"I give him credit for not getting up on the stand and trying to tell you a lie. At least he had the ability to sit there and not say anything, rather than try to get up and tell you a whole lot of hogwash. I'll at least give him that much credit.

"There is some disputed evidence that Mr. Anderson showed up with this check and passed it on Kernen on the 29th.

"Now, if he got it some innocent way, if somebody gave it to him, that he didn't know, then he should have gotten up on the stand to tell us about it. And don't you think if that is what happened, he would have? I would; you would. You would beat a path to that stand, at least to get up there and tell them what happened. But that isn't the situation here.

"Now, we don't know what Mr. Anderson's story is, because you haven't heard it.

"That's what he told Sergeant Sonberg, three completely phony, different versions of it.

"You didn't see him get up, you didn't hear the words from him, because he didn't get up on the stand. You don't know what his story may be today. He might have told you another story, that he was flying around up in Alaska, or something like that. I don't know."

ATLANTIC INSURANCE CO. ET AL. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA.

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

No. 1129. Decided April 1, 1968.

255 Cal. App. 2d 1, 62 Cal. Rptr. 784, appeal dismissed and certiorari denied.

Bert W. Levit and *Victor B. Levit* for appellants.

Thomas C. Lynch, Attorney General of California, and *Harold B. Haas,* Assistant Attorney General, for appellee.

PER CURIAM.

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

VARNUM *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 869, Misc. Decided April 1, 1968.

66 Cal. 2d 808, 427 P. 2d 772, 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.

HOPKINS *v.* COHEN, ACTING SECRETARY OF HEALTH, EDUCATION, AND WELFARE.

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

No. 276. Argued March 11–12, 1968.—Decided April 2, 1968.

The provision in § 206 (b) (1) of the Social Security Act limiting an attorney's fee to "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment," *held*, does not restrict the fee to the percentage of the accrued benefits awarded the permanently disabled claimant, but includes as well the benefits accrued to his dependents by virtue of the disability. Pp. 531–535.

374 F. 2d 726, reversed.

Allen Sharp and *Harold H. Gearinger* argued the cause for petitioner. With them on the briefs was *Israel Steingold.*

Harris Weinstein argued the cause for respondent. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Weisl* and *Morton Hollander.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question is whether the ceiling on an attorney's fee under § 206 (b) (1) of the Social Security Act, as amended,[1] 79 Stat. 403, 42 U. S. C. § 406 (b) (1) (1964

[1] 42 U. S. C. § 406 (b) (1) presently provides:

"Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405 (i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case

ed., Supp. II), is based on the benefits received by the claimant alone or may be based also on the benefits that other dependent members of his family receive by virtue of the claimant's disability.

Respondent ruled that petitioner [2] was not totally and permanently disabled within the meaning of the Act. The District Court reversed and awarded the claimant's attorney a fee equal to 25% of the benefits accruing to the claimant alone. The Court of Appeals for the Seventh Circuit affirmed. 374 F. 2d 726. Because its ruling as to attorney fees conflicted with decisions of the Fourth Circuit (see *Redden* v. *Celebrezze,* 361 F. 2d 815; *Lambert* v. *Celebrezze,* 361 F. 2d 677), we granted the petition for certiorari. 389 U. S. 811.

The disabled claimant qualifies under § 223 of the Act (42 U. S. C. § 423 (1964 ed., Supp. II)) and figures his primary benefits under § 215 of the Act (42 U. S. C. § 415 (1964 ed., Supp. II)).

The claimants who receive benefits as relatives of the disabled person who qualifies under § 223, figure their eligibility and amount of benefits under § 202 of the Act (42 U. S. C. § 402 (1964 ed., Supp. II); wife, § 202 (b); child, § 202 (d); widow, § 202 (e); widower, § 202 (f); mother, § 202(g); parent, § 202 (h)).

Section 202 of the Act describes in (b)(1) and (b)(2) the benefits payable to the wife on the disability of the husband, and in (d) (1) and (d) (2) the disability benefits of the child of the disabled claimant. The wife (§ 202 (b)(1)(A)) and the child (§ 202 (d)(1)(A)) may

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of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph."

[2] "Petitioner," as used in this opinion, refers to Raymond Hopkins, the Social Security claimant. The interest involved in the case, as it reaches this Court on the issue of the proper amount of the attorney's fee, is, however, that of Hopkins' attorney, Allen Sharp.

file for these benefits. But they need not always do so themselves,[3] for the Act makes the right to such benefits dependent primarily on the status and condition of those dependent persons.

The wife and child each compute their benefits on the basis of a percentage share of the disabled claimant's primary benefits determined under § 223. See §§ 202 (b)(2)[4] and 202 (d)(2). The maximum family benefit depends upon the amount of the primary benefit to which the disabled claimant is entitled. See §§ 215 (a) and 203 (a). The scheme of the Act thus proceeds from a recognition of an intimate relationship between the varying amounts of benefits due the disabled claimant and his dependents.

Hopkins was receiving disability payments under § 223 between March 1961 and December 1962; his wife and two children were also receiving benefits during this same period as dependents of a recipient of disability payments (§ 202). In December 1962 these benefits were terminated, on the ground that petitioner was no longer "disabled" within the meaning of the Act. Petitioner exhausted his administrative remedies, and then sought review in the District Court. The District Court's order reversed the administrative decision as to disability.

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[3] See 20 CFR §§ 404.603–404.604. Nor are the wife and children required to become parties to proceedings on review of an administrative determination. See 42 U. S. C. §§ 405 (b) and (g); and 20 CFR §§ 404.909–404.910; 404.916–404.919; 404.945; 404.951.

[4] The Social Security Amendments of 1967 changed former § 202 (b) to read:

"Except as provided in subsection (q), such wife's insurance benefit for each month shall be equal to whichever of the following is the smaller: (A) one-half of the primary insurance amount of her husband (or, in the case of a divorced wife, her former husband) for such month, or (B) $105." Pub. L. No. 90–248, § 103 (Jan. 2, 1968).

And pursuant to this order the Director of the Bureau of Disability Insurance wrote petitioner as follows:

> "Based on the recent amendments to the Social Security Act, you are entitled to receive $123.10. Your wife and the two children are each entitled to receive $51.50. These new monthly rates are effective beginning January 1965.
>
> "Section 206 (b)(1) of the Social Security Act provides that [y]our attorney may ask the court to approve a fee not to exceed 25 percent of past-benefits due you. We are, therefore, withholding the amount of $936.20, which represents 25 percent of your past-due benefits of $3,744.00 pending action by the court on the amount of the attorney fee. The amount withheld will be applied against the fee set by the court and will be mailed directly to your attorney; any remaining amount will be sent to you.
>
> "Benefit payments for you and your wife will continue to be combined. The next husband-wife check will be for $5,032.60. This represents payment for January 1963 through December 1965. You will receive this check within a few days. After that, the regular monthly check for $174.60 will be sent shortly after the month for which it is payable.
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> "The children's check for the period of January 1963 through December 1963, [*sic*], in the amount of $3,463.50, will be sent to you shortly. After that, their monthly, regular check for $103.00 will be sent to you as usual."

Section 206 (b)(1), restricting the amount of an attorney's fee, speaks of "the past-due benefits to which the claimant is entitled." Respondent argues that only a plaintiff can satisfy such a description, not a nonparty. It is also urged that dependents who are not

joined as parties have not received a judgment and that the benefits accruing to the wife and the children are not benefits to which the husband, the only claimant, is "entitled" within the meaning of § 206 (b)(1).

That seems to us to be too technical a construction of the Act which we need not adopt. In this instance, proof of the husband's "claim" [5] results in a package of benefits to his immediate family; and those benefits inure to the benefit of the head of the family who files the "claim."

The legislative history of § 206 (b)(1) speaks of the desire of Congress to reduce "contingent fee" arrangements and to restrict an attorney's fee to an amount "not in excess of 25 percent of accrued benefits." [6] We find

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[5] The record reveals that petitioner applied for benefits for his two children in his initial application for disability payments. Although that application did not encompass a claim for benefits on behalf of his wife, it is made clear in the application that his wife was also applying for benefits. It does not appear, however, whether the separate application for wife's benefits was filed by her or by petitioner on her behalf. See n. 3, *supra*. No question is raised concerning the propriety of the claims that were filed. Nor is this a case where any question has been raised concerning the right of the wife or children to benefits. Rather, the wife and children had been receiving them as dependents of a disabled person until they were terminated by respondent's erroneous decision that the husband was no longer disabled. When that decision was reversed by the District Court, the only impediment standing in the way of the receipt of past-due benefits by the wife and children was removed. In a realistic sense, then, the attorney was representing fully the interests of the wife and children when he litigated the question of the husband's disability.

[6] S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess., 122.

"It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of

nothing in the history of § 206 (b)(1) that would likewise restrict those "accrued benefits" to amounts owed the claimant, as distinguished from his dependents, *viz.*, the wife and the children.

Reversed.

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

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, dissenting.

As the Court recognizes, § 206 (b)(1) entitles the attorney of a Social Security benefits claimant to a fee "not in excess of 25 percent of the total of the past-due benefits to which the *claimant* is entitled by reason of such judgment . . . ." (Emphasis added.) The Court characterizes the normal and natural reading of this language as "too technical a construction . . . which we need not adopt." From the undisputed fact that benefits accruing to the dependents of a claimant inure to the benefit of the claimant as head of the family, the Court seems to conclude that it may read "claimant" to mean "claimant and his dependents." Because I see no justification for this result, either in the language of the statute or its history, I dissent.

Section 206 (b)(1) deals with the attorney's fees payable with respect to "a claimant under this title who was represented before the court by an attor-

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the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

"The committee bill would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee, not in excess of 25 percent of accrued benefits, for services rendered in connection with the claim; no other fee would be payable. . . ."

ney . . . ." The attorney may receive no more than 25% of the benefits payable to such a claimant "by reason of such judgment . . . ." Only plaintiffs can meet the § 206 (b)(1) definition of a "claimant." Therefore, dependents who are not joined as parties in a suit for past-due benefits are not "claimants," for they are not before the court, are not represented in court, and do not receive a judgment. In this case only petitioner, and not his wife and children, was the plaintiff in the court below. As is true in most such cases, petitioner's wife and children were determined in separate administrative proceedings to be dependents eligible for secondary benefits under § 202. Their entitlement to § 202 benefits should petitioner be found entitled to benefits under § 223 was not disputed and was not an issue before the court below. Since petitioner was the sole claimant before the court, and the only party for whom his lawyer provided representation in that court, I cannot escape the conclusion that the lawyer was only entitled to a maximum of 25% of the past-due benefits payable to petitioner. The situation might well be different in a case where the dependents were active plaintiffs before the court and where the primary claimant's attorney provided effective representation for the secondary claimants as well.

As the Court makes clear, the purpose of § 206 (b)(1) was to reduce contingent fee arrangements by limiting the maximum fees recoverable by attorneys. The Court somehow concludes that this clear legislative purpose militates for a construction of the statute which is against its clear wording and which has the result of once again permitting attorneys to obtain a very high percentage of the benefits payable to Social Security claimants. The legislative history, however, supports the plain language of the statute. Indeed, the Court fails to mention that this very case was generated initially by a claim

made by petitioner's lawyer that a contingent fee contract signed by petitioner, which would have given his lawyer 40% of the award, should be given effect because entered into prior to the passage of § 206 (b)(1). It was just such contingent fees that Congress meant to prohibit. By its present ruling the Court gives mere lip service to the legislative mandate while effectively undoing it in practice. For the foregoing reasons I respectfully dissent.

EDWARDS *v.* PACIFIC FRUIT EXPRESS CO.

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

No. 465. Argued March 14, 1968.—Decided April 8, 1968.

Petitioner, an employee of respondent company which owns, maintains, and leases refrigerator cars to railroads, was injured and brought this action against respondent charging it was a "common carrier by railroad" and liable for damages under the Federal Employers' Liability Act. The District Court granted respondent's motion for summary judgment and the Court of Appeals affirmed. *Held:* In light of the legislative history, consistent judicial decisions holding refrigerator car companies not common carriers by railroad, and the administration of the Act for 60 years, such companies are not within the coverage of the Act. Pp. 539–543.

378 F. 2d 54, affirmed.

Arne Werchick argued the cause for petitioner. With him on the briefs was *David S. Levinson.*

John J. Corrigan argued the cause for respondent. With him on the brief was *Donald O. Roy.*

Clifton Hildebrand filed a brief for the Brotherhood of Railway Carmen of America et al., as *amici curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Federal Employers' Liability Act provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages for the injury or death of its employees resulting in whole or in part from the negligence of the railroad or its agents or resulting from defects in its equipment due to its negligence.[1] The question in this case is whether the respondent

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51.

Pacific Fruit Express Company is a "common carrier by railroad."

The respondent is the largest company of its kind in the United States. It owns, maintains, and leases refrigerator cars to railroads to transport perishable products in commerce. Because it repairs its own cars, it also owns buildings, plants, switching tracks, and equipment to make these repairs. While the railroads to which its cars are leased transport them as directed, the respondent Express Company reserves the right to have the cars diverted to carry out its own business plans. The petitioner Edwards works as an iceman at one of respondent's repair and concentration plants. His duties are to transport ice and help store it in cars for carriage by the railroads. While driving a company motor vehicle in the performance of his duty as an employee for respondent, he was thrown violently to the ground, covered with burning gasoline and severely burned. He later brought this action against respondent, charging it was a "common carrier by railroad" and liable for damages under the Federal Employers' Liability Act. Contending that it was not a railroad within the meaning of the Act, respondent company moved for a summary judgment which the District Court granted. The Court of Appeals affirmed, 378 F. 2d 54, and we granted certiorari. 389 U. S. 912. We agree with both courts and affirm.

In conducting its business of providing and servicing insulated railroad cars for the carriage of perishable commodities, it is undoubtedly true that respondent performs some railroad functions. For example, it maintains and takes care of railroad cars which are leased to railroads for transportation in interstate commerce. It services these cars while in transit and controls their eventual destination. And respondent has yards and facilities for the repair and storage of its refrigerator cars. The ques-

tion is whether such functions as these are sufficient to constitute respondent a "common carrier by railroad." For the answer to this question we must look to past judicial decisions interpreting the Federal Employers' Liability Act and also the legislative history surrounding the Act.

This Court has held that the words "common carrier by railroad" mean "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a *going railroad* . . . ." *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 187–188. (Emphasis added.) This interpretation of the Act with its references to "operat[ing] a railroad" and a "going railroad" would indicate that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a "common carrier by railroad." And indeed the *Wells Fargo* decision held that express companies were not within the coverage of the Act.[2] In an even earlier case, *Robinson* v. *Baltimore & Ohio R. Co.,* 237 U. S. 84, this Court held that a Pullman car porter was not an employee of a railroad, hence, not within the coverage of the Act. These decisions are based on the rationale that there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself. In fact, this Court pointed out in the *Robinson* case, in discussing the coverage of the Federal Employers' Liability Act, that, "It was well known that there were on interstate trains

[2] Express companies were again excluded in the subsequent case of *Jones* v. *New York Cent. R. Co.,* 182 F. 2d 326 (C. A. 6th Cir. 1950), relying on the *Wells Fargo* decision.

persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." 237 U. S., at 94.

In 1939 Congress substantially amended the Federal Employers' Liability Act. Because of such decisions as *Wells Fargo, supra,* and *Robinson, supra,* one of the proposed amendments [3] would have changed the coverage language of § 1 of the Act to read as follows: "Every common carrier by railroad, including every express company, freight forwarding company, and sleeping-car company, engaged in commerce . . . ." Obviously the proposal was designed to nullify this Court's construction of the Act which had excluded employees of sleeping-car companies and express companies. In committee the proposal received little support and was even opposed by certain segments of organized labor, and it failed to pass.[4] By refusing to broaden the meaning of railroads, Congress declined to extend the coverage of the Act to activities and facilities intimately associated with the business of common carrier by railroad.

Equally significant is the fact that in the years immediately preceding the 1939 amendment to the Federal Employers' Liability Act, Congress had enacted other major labor and social transportation legislation in which refrigerator car companies were expressly included. For example, in the decade of the 1930's Congress passed the following Acts which specifically extend coverage to "any company . . . which operates any equipment or facilities or performs any service . . . in connection

[3] S. 1708, 76th Cong., 1st Sess. (1939).

[4] Hearings before Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act, 76th Cong., 1st Sess., 57, 58 (1939).

with . . . refrigeration or icing . . . of property transported by railroad . . .": (1) An amendment to the Railway Labor Act, 48 Stat. 1185 (1934), 45 U. S. C. § 151. The Act as originally passed, 44 Stat. 577 (1926), did not specifically include refrigerator car companies. Congress amended it to do so. (2) The Railroad Retirement Act of 1934, 48 Stat. 1283, held unconstitutional in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). (3) The Railroad Retirement Act (1935), 49 Stat. 967, and (4) The Carriers' Taxing Act, 49 Stat. 974 (1935), both of which were passed to overcome the constitutional objection to the Act of 1934. (5) The Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. § 228a *et seq.* (1937). (6) The Carriers' Taxing Act of 1937, 50 Stat. 435. (7) The Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. C. § 351 *et seq.* (1938). Yet in 1939, when it came to the amendment of the Federal Employers' Liability Act, Congress made no mention of refrigerator car companies.

In light of this history it is not surprising that there are only four reported cases where suits have been filed alleging that refrigerator car companies like respondent are covered by the Federal Employers' Liability Act—all refusing to hold liability under the Act. The first was *Gaulden* v. *Southern Pacific Co.*, 174 F. 2d 1022 (C. A. 9th Cir. 1949), where suit was brought by an iceman employed by the very refrigerator car company involved here. The Court of Appeals affirmed the District Court's opinion (78 F. Supp. 651) holding that such a refrigerator car company was not a "common carrier by railroad." In a subsequent case the Third Circuit, citing the *Gaulden* opinion, held that another refrigerator car company "which conducted a business similar in all critical aspects to that of" Pacific Fruit Express Company, was not a "common carrier by railroad." *Hetman* v. *Fruit Growers Express Co.*, 346 F.

2d 947 (C. A. 3d Cir. 1965). There have also been two state cases involving this very respondent which denied liability. In both *Aguirre* v. *Southern Pacific Co.*, 232 Cal. App. 2d 636, 43 Cal. Rptr. 73, and *Moleton* v. *Union Pac. R. Co.*, 118 Utah 107, 219 P. 2d 1080, cert. denied, 340 U. S. 932, the courts concluded that respondent was not a "common carrier by railroad."

Thus, for 60 years the Federal Employers' Liability Act has been administered with the understanding that refrigerator car companies are not included within the terms of the Act. During that time injured employees have been taken care of under state compensation laws. In fact the petitioner here has already drawn more than $6,000 under the California compensation law. The question of whether employees shall rely on state compensation or on the Federal Employers' Liability Act is a pure question of legislative policy, concerning which apparently even the labor organizations most interested have been divided. Under these circumstances we do not think this Court should depart from 60 years of history to do what is a job for Congress.

Affirmed.

IN RE RUFFALO.

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

No. 73. Argued March 4, 1968.—Decided April 8, 1968.

Petitioner, a trial lawyer who handled many Federal Employers' Liability Act (FELA) cases, was charged by the Ohio Board of Commissioners on Grievances and Discipline with 12 misconduct counts. Two charges involved soliciting FELA plaintiffs as clients through Orlando, a railroad employee. At the hearings before the Board both Orlando and petitioner testified that Orlando did not *solicit* clients for petitioner but merely *investigated* cases for him, in some of which Orlando's employer was a defendant. Thereafter the Board added a misconduct charge, No. 13, based on petitioner's hiring of Orlando to *investigate* Orlando's own employer. The Board found petitioner guilty of seven counts of misconduct, including No. 13, concerning which the Board relied solely on the testimony of petitioner and Orlando. On review the Ohio Supreme Court found the evidence sufficient to sustain only No. 13 and one other charge. The court's order indefinitely suspending petitioner from the practice of law became final and is not here on review. There followed proceedings based on the state court's suspension order to bar petitioner from practicing in the Court of Appeals. The Court of Appeals, relying solely on the Ohio court's record and findings, held that one charge, No. 13, justified petitioner's disbarment in that court. *Held:* The lack of notice to petitioner, prior to the time he and Orlando testified, that petitioner's employment of Orlando would be considered a disbarment offense deprived petitioner of procedural due process. Pp. 547–552.

(a) Though state disbarment action is entitled to respect, it is not conclusively binding on the federal courts. *Theard* v. *United States,* 354 U. S. 278, 281–282. P. 547.

(b) A lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process, which includes fair notice of the charge. P. 550.

(c) Petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both petitioner and Orlando had testified. Pp. 550–551.

370 F. 2d 447, reversed.

Craig Spangenberg argued the cause and filed briefs for petitioner.

Thomas V. Koykka argued the cause for the Ohio State and Mahoning County Bar Associations. With him on the brief were *Samuel T. Gaines, Walter A. Porter, P. Paul Pusateri* and *Henry C. Robinson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of Ohio on two findings of alleged misconduct. *Mahoning County Bar Assn.* v. *Ruffalo,* 176 Ohio St. 263, 199 N. E. 2d 396. That order became final and is not here on review. The Federal District Court, after ordering petitioner to show cause why he should not be disbarred, found that there was no misconduct. *In re Ruffalo,* 249 F. Supp. 432 (D. C. N. D. Ohio). The Court of Appeals likewise ordered petitioner to show cause why he should not be stricken from the roll of that court on the basis of Ohio's disbarment order. The majority held that while one of the two charges might not justify discipline, the other one did; and it disbarred petitioner from practice in that Court. 370 F. 2d 447 (C. A. 6th Cir.). The dissenting judge thought that neither charge justified suspension from practice.[1] *Id.,* at 460. The case is here on a writ of certiorari. 389 U. S. 815.

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[1] After the Court of Appeals decision disbarring petitioner, the District Court, which had deferred a final order pending the decision of the Court of Appeals, suspended petitioner from practice in the District Court. The District Court judge said he had an "abiding conviction" that his prior decision finding no grounds for suspension was correct but concluded that orderly administration of justice required the District Court to defer to its Court of Appeals. The District Court's order is not before us for review.

Petitioner was an active trial lawyer who handled many Federal Employers' Liability Act cases. The Association of American Railroads investigated his handling of claims and referred charges of impropriety to the President of the Mahoning County Bar Association who was also local counsel for the Baltimore & Ohio Railroad Co. See *In re Ruffalo*, 249 F. Supp. 432, 435, n. 3. The Mahoning County Bar Association then filed the charges against petitioner.

In the state court proceedings, upon which the decision of the Court of Appeals relied (see Rule 6 (3) of the United States Court of Appeals for the Sixth Circuit), the Ohio Board of Commissioners on Grievances and Discipline originally charged petitioner with 12 counts of misconduct. Charges Nos. 4 and 5 accused petitioner of *soliciting* FELA plaintiffs as clients through an agent, Michael Orlando. At the hearings which followed, both Orlando and petitioner testified that Orlando did not solicit clients for petitioner but merely *investigated* FELA cases for him. It was brought out that some of Orlando's investigations involved cases where his employer, the Baltimore & Ohio Railroad, was defendant. Immediately after hearing this testimony, the Board, on the third day of hearings, added a charge No. 13 against petitioner based on his hiring Orlando to *investigate* Orlando's own employer. Counsel for petitioner objected, stating:

> "Oh, I object to that very highly. There is nothing morally wrong and there is nothing legally wrong with it. . . . When does the end of these amendments come? I mean the last minute you are here, [counsel for the county Bar Association] may bring in another amendment. I think this gentleman [petitioner] has a right to know beforehand what the charges are against him and be heard on those charges."

Motion to strike charge No. 13 was denied, but the Board gave petitioner a continuance in order to have time to respond to the new charge.

The State Board found petitioner guilty of seven counts of misconduct, including No. 13. On review, the Supreme Court of Ohio found the evidence sufficient to sustain only two charges, one of them being No. 13, but concluded that the two violations required disbarment. The only charge on which the Court of Appeals acted was No. 13, which reads as follows:

> "That Respondent did conspire with one, Michael Orlando, and paid said Michael Orlando moneys for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all the periods of time extending from 1957 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company."

Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court. Though that state action is entitled to respect, it is not conclusively binding on the federal courts. *Theard* v. *United States,* 354 U. S. 278, 281–282.

Petitioner, active in the trial of FELA cases, hired a railroad man to help investigate the cases. He was Orlando, a night-shift car inspector for the Baltimore & Ohio Railroad Co. There was no evidence that Orlando ever investigated a case in the yard where he worked as inspector. There was no evidence that he ever investigated on company time. Orlando had no access to confidential information; and there was no claim he ever revealed secret matters or breached any trust. It is clear

from the record that petitioner chose a railroad man to help him investigate those claims because Orlando knew railroading.

One federal guidepost in this field is contained in § 10 of the Federal Employers' Liability Act, as amended, 53 Stat. 1404, 45 U. S. C. § 60, which was enacted to encourage employees of common carriers to furnish information "to a person in interest," as to facts incident to the injury or death of an employee.[2]

The Ohio Supreme Court, however, concluded that "one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar." 176 Ohio St., at 269, 199 N. E. 2d, at 401.

We are urged to hold that petitioner's efforts to conceal this employment relationship and the likelihood of a conflict of interest require the federal courts to respect the decision of the Ohio Supreme Court as being within the range of discretion.

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[2] 45 U. S. C. § 60 provides in part:

"Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

We do not pursue that inquiry. Nor do we stop to inquire whether the proceeding was defective because the Bar Association, the agency that made the charges against petitioner, was headed by counsel for the Baltimore & Ohio Railroad Co. against which petitioner filed several of his claims. For there is one other issue dispositive of the case which requires reversal.

As noted, the charge (No. 13) for which petitioner stands disbarred was not in the original charges made against him. It was only after both he and Orlando had testified that this additional charge was added. Thereafter, no additional evidence against petitioner relating to charge No. 13 was taken. Rather, counsel for the county bar association said:

> "We will stipulate that as far as we are concerned, the only facts that we will introduce in support of Specification No. 13 are the statements that Mr. Ruffalo has made here in open court and the testimony of Mike Orlando from the witness stand. Those are the only facts we have to support this Specification No. 13."

There was no *de novo* hearing before the Court of Appeals. Rather, it rested on the Ohio court's record and findings:

> "We have before us, and have reviewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo. The facts as to these are not in dispute. We consider whether we find insupportable the Ohio Court's determination that such facts disclosed unprofessional conduct warranting the discipline imposed and whether they warrant similar discipline by us." 370 F. 2d, at 449.

The Court of Appeals proceeded to analyze the "admitted facts of Charge No. 13" as found by the Ohio court and the Ohio court's ruling on those facts. *Id.*, at 450–452.

If there are any constitutional defects in what the Ohio court did concerning Charge 13, those defects are reflected in what the Court of Appeals decided. The Court of Appeals stated:

> "We do not find in the record of the state proceedings, 'Such an infirmity of proof as to the facts found to have established the want of . . . [Ruffalo's] fair private and professional character' to lead us to a conviction that we cannot, consistent with our duty, 'accept as final the conclusion' of the Supreme Court and the Ohio bar." *Id.*, at 453.

We turn then to the question whether in Ohio's procedure there was any lack of due process.

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall. 333, 380; *Spevack* v. *Klein,* 385 U. S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver,* 333 U. S. 257, 273. It was said in *Randall* v. *Brigham,* 7 Wall. 523, 540, that when proceedings for disbarment are "not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence." Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." *Selling* v. *Radford,* 243 U. S. 46, 51.

In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified

at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." [3] 370 F. 2d, at 462.

These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault,* 387 U. S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.[4]

How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

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[3] Rule 15 (a), Federal Rules of Civil Procedure, provides in part: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

[4] The Ohio State Bar Association and Mahoning County Bar Association, *amici curiae* in support of the order of the Court of Appeals, argue that there was no due process violation because the State Board gave petitioner several months to respond to charge No. 13. This argument overlooks the fact that serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled "into a false sense of security" (*Bouie* v. *City of Columbia,* 378 U. S. 347, 352) that he could rebut charges Nos. 4 and 5 by proof that Orlando was his investigator rather than a solicitor of clients. In that posture he had "no reason even to suspect" (*ibid.*) that in doing so he would be, by his own testimony, irrevocably assuring his disbarment under charges not yet made.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.

Reversed.

MR. JUSTICE BLACK, for reasons stated in the Court's opinion and many others, agrees with the Court's judgment and opinion.

MR. JUSTICE STEWART took no part in the decision of this case.

MR. JUSTICE HARLAN, concurring in the result.

I see no need to decide whether the notice given petitioner of the charge that formed the basis of his subsequent federal disbarment was adequate to afford him constitutional due process in the state proceedings. For I think that *Theard* v. *United States,* 354 U. S. 278, leaves us free to hold, as I would, that such notice should not be accepted as adequate for the purposes of disbarment from a federal court. On that basis, I concur in the judgment of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

The Court reverses petitioner's disbarment by the Court of Appeals for the Sixth Circuit because petitioner had inadequate notice prior to his earlier state disbarment proceeding of the charges which the Mahoning County Bar Association was bringing against him at that proceeding. The state disbarment, however, is not before us. We denied a petition for certiorari seeking review of it. *Ruffalo* v. *Mahoning County Bar Assn.,* 379 U. S. 931 (1964). Our writ in the instant case extends only to petitioner's disbarment by the Court of Appeals for the Sixth Circuit. The question therefore

is whether the defective notice in petitioner's state disbarment proceeding so infected that federal proceeding that justice requires reversal of the federal determination.

In answering that question we must inquire into the nature of the proceeding that took place in the Court of Appeals. That court was obligated to determine for itself the facts of the attorney's conduct and whether that conduct had been so grievous as to require disbarment. *Theard* v. *United States,* 354 U. S. 278 (1957). The Court of Appeals asked petitioner to "show cause if any he has . . . why he should not be stricken from the roll of counsel of this Court." In response to that order petitioner filed a response and brief. The Ohio State Bar Association filed a brief also, urging petitioner's disbarment. The cause was argued orally to a panel of the Court of Appeals.

In his brief and oral argument, petitioner did not take issue with the determinations of fact that had been made by the Ohio Supreme Court. The Court of Appeals gave petitioner a full opportunity to assert that the state court had not accurately determined the facts of his conduct—and to assert, had he wished to do so, that the late point at which he learned that employing car inspector Orlando would be one ground for disbarment had prejudiced the factual record formed in the state court. Petitioner, not disputing the lower court's factual conclusions, made no such objection.[1] Instead petitioner's response in the Court of Appeals was that the agreed facts of his conduct were not a sufficient basis for disbarment. In reaching its conclusion on that question the Court of Appeals properly gave weight to the views of the state court judges who had passed on the issue. Petitioner, however, had full and fair opportunity to

[1] Indeed, petitioner did not suggest to this Court, as a reason for reversal, that he had learned of the ground for disbarment too late in the state court proceeding.

put to the Court of Appeals his contrary view. I must therefore conclude that no procedural defect supports reversal of the decision of the Court of Appeals, and that the asserted defect relied upon by the Court, since not raised by petitioner below or here, is not properly before us. I am therefore constrained to deal with the central question posed by this case, whether it was proper for the Court of Appeals, in making the independent determination of petitioner's fitness to remain a member of its bar mandated by *Theard* v. *United States, supra,* to disbar petitioner for having hired an employee of the B. & O. Railroad to investigate facts relevant to damage suits against the railroad brought by other employees who had retained petitioner to represent them. We must determine whether the Court of Appeals satisfied its duty "not to disbar except upon the conviction that, under the principles of right and justice, [it is] constrained so to do." *Selling* v. *Radford,* 243 U. S. 46, 51 (1917).

A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals for the Sixth Circuit had provided petitioner and the other members of its bar with a general standard for 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, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred

from practice before the court." Rule 6 (3), Court of Appeals for the Sixth Circuit.[2]

Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as *malum in se*. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession.

The conduct for which the Court of Appeals disbarred petitioner cannot, however, be so characterized. Some responsible attorneys, like the judge who refused to order petitioner disbarred from practice in the Northern District of Ohio, 249 F. Supp. 432 (1965), would undoubtedly find no impropriety at all in hiring a railroad worker, a man with the knowledge and experience to select relevant information and appraise relevant facts, to "moonlight"—work on his own time—collecting data. On the other hand some, like the officials of the Mahoning County and Ohio State Bar Associations, would believe that encouraging a man to do work arguably at odds with his chief employer's interests is unethical. The

[2] The Court of Appeals did not apply its rule literally: "We should preliminarily observe that our own Rule 6 (3) . . . could be read as automatically striking from our roll of counsel the name of any lawyer disbarred in any court of record. It has been amended and we consider this matter in keeping with the requirements and admonitions of Theard v. United States, 354 U. S. 278, . . . and Selling v. Radford, 243 U. S. 46 . . . . These decisions forbid Federal Courts from acting in total reliance on a state judgment. We have before us, and have reviewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo. The facts as to these are not in dispute." 370 F. 2d 447, 449 (1966) (note omitted).

appraisal of petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question.[3] I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct. I express no opinion about whether the Court of Appeals, as part of a code of specific rules for the members of its bar, could proscribe the conduct for which petitioner was disbarred.

[3] As the Court points out, there was no evidence before any of the state or federal courts which appraised petitioner's conduct that the man he employed had ever investigated a case in the yard where he worked, investigated on company time, or been given access to confidential railroad information.

AVCO CORP. *v.* AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ET AL.

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

No. 445. Argued March 11, 1968.—Decided April 8, 1968.

Petitioner, employer, brought suit in a Tennessee court to enjoin respondent union and its members from striking in violation of a "no-strike" clause in the collective bargaining agreement. The state court issued an *ex parte* injunction. Respondents moved in Federal District Court for removal of the case, and dissolution of the injunction. The District Court ruled that the action was within its original jurisdiction, denied a motion to remand to the state court, and dissolved the injunction. The Court of Appeals affirmed. *Held:*

1. Since this action is based on § 301 of the Labor Management Relations Act, it is controlled by federal substantive law, even though brought in a state court, and removal is but one aspect of the "primacy of the federal judiciary in deciding questions of federal law." P. 560.

2. This suit clearly arises under the "laws of the United States," within the meaning of the removal statute, 28 U. S. C. § 1441 (b), and is within the "original jurisdiction" of the District Court under §§ 1441 (a) and (b). P. 560.

3. The nature of the relief available after jurisdiction attaches is different from the question whether the court has jurisdiction to adjudicate the controversy. P. 561.

376 F. 2d 337, affirmed.

J. Mack Swigert argued the cause for petitioner. With him on the briefs were *Warren G. Sullivan, Don A. Banta, William Waller, Robert G. McCullough* and *John B. Hollister.*

Bernard Dunau argued the cause for respondents. With him on the brief were *Plato E. Papps, Cecil D. Branstetter* and *Carrol D. Kilgore.*

Briefs of *amici curiae,* urging reversal, were filed by *Jerome Powell, Robert M. Scott* and *William H. Willcox* for the Chamber of Commerce of the United States et al., and by *Herman Lazarus* and *Harold Jacobs* for the Labor Relations Committee of Council of State Chambers of Commerce et al.

Brief of *amicus curiae,* urging affirmance, was filed by *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner filed a suit in a state court in Tennessee to enjoin respondent union and its members and associates from striking at petitioner's plant. The heart of the complaint was a "no-strike" clause in the collective bargaining agreement by which "grievances" were to be settled amicably or by binding arbitration. The eligibility of employees for promotion engendered disputes—allegedly subject to the grievance procedure—which so far as appears involved no violence or trespass but which resulted in work stoppages and a walkout by employees. The state court issued an *ex parte* injunction.

Respondents then moved in the Federal District Court for removal of the case.[1] A motion to remand to the

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[1] 28 U. S. C. § 1441 provides in relevant part:

"Actions removable generally.

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original

state court was made and denied, the District Court ruling that the action was within its original jurisdiction. The District Court granted respondents' motion to dissolve the injunction issued by the Tennessee court. The Court of Appeals affirmed. 376 F. 2d 337. We granted the petition for certiorari (389 U. S. 819) because of an apparent conflict between the decision below and *American Dredging Co.* v. *Local 25,* 338 F. 2d 837, from the Court of Appeals for the Third Circuit.

The starting point is § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, which, we held in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes. We stated:

> "We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal

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jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . ."

> policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." 353 U. S., at 456–457.

An action arising under § 301 is controlled by federal substantive law even though it is brought in a state court.[2] *Humphrey* v. *Moore,* 375 U. S. 335; *Local 174* v. *Lucas Flour Co.,* 369 U. S. 95; *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502. Removal is but one aspect[3] of "the primacy of the federal judiciary in deciding questions of federal law." See *England* v. *Medical Examiners,* 375 U. S. 411, 415–416.

It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute. 28 U. S. C. § 1441 (b). It likewise seems clear that this suit is within the "original jurisdiction" of the District Court within the meaning of 28 U. S. C. §§ 1441 (a) and (b). It is true that the Court by a 5-to-3 decision in *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, held that although a case was properly in the federal district court by reason of § 301, the Norris-LaGuardia Act bars that court from issuing an injunction in the labor dispute.

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[2] We find it unnecessary to rule on the holding of the Court of Appeals below that "the remedies available in State Courts are limited to the remedies available under Federal law." 376 F. 2d, at 343. That conclusion would suggest that state courts are precluded by § 4 of the Norris-LaGuardia Act from issuing injunctions in labor disputes, even though the defendant does not exercise his right—which we confirm today—to remove the case to the District Court under 28 U. S. C. § 1441 (b), and the state court therefore retains jurisdiction over the action. We have no occasion to resolve that matter here, since respondents did elect to have the case removed.

[3] See A. Dobie, Handbook of Federal Jurisdiction and Procedure 346 (1928); H. Hart & H. Wechsler, The Federal Courts and the Federal System 727–733, 1019–1020 (1953).

The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. The relief in § 301 cases varies—from specific performance of the promise to arbitrate (*Textile Workers* v. *Lincoln Mills, supra*), to enforcement or annulment of an arbitration award (*United Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593), to an award of compensatory damages (*Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238), and the like. See *Smith* v. *Evening News Assn.*, 371 U. S. 195, 199–200. But the breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter. Any error in granting or designing relief "does not go to the jurisdiction of the court." *Swift & Co.* v. *United States*, 276 U. S. 311, 331. Cf. *Zwickler* v. *Koota*, 389 U. S. 241, 254–255. When the Court in *Sinclair Refining Co.* v. *Atkinson, supra*, at 215, said that dismissal of a count in the complaint asking for an injunction was correct "for lack of jurisdiction under the Norris-LaGuardia Act," it meant only that the Federal District Court lacked the general equity power to grant the particular relief.[4]

Title 28 U. S. C. § 1337 says that "The district courts shall have original jurisdiction of any civil action or pro-

[4] Another question raised here is whether the District Court, to which the action had been removed, should have dissolved the injunction issued by the Tennessee state court. There is, of course, no question of the power of the District Court to dissolve the injunction. See 28 U. S. C. § 1450. Whether it did so because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, or because of its equity powers or both is not clear. But the Court of Appeals went much further and said in a dictum that "the remedies available in State Courts are limited to the remedies available under Federal law." 376 F. 2d, at 343. We reserve decision on those questions.

ceeding arising under any Act of Congress regulating commerce . . . ." It is that original jurisdiction that a § 301 action invokes. *Textile Workers* v. *Lincoln Mills, supra,* at 457.

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN join, concurring.

I agree that the case before us was removable to the Federal District Court under 28 U. S. C. § 1441.

The District Judge not only denied a motion to remand the case to the state court but also dissolved the state court injunction, and it is only by virtue of the latter order that an appeal was possible at this stage of the litigation. *American Dredging Co.* v. *Local 25,* 338 F. 2d 837, 838, n. 2.

As the Court says, it is not clear whether or not the District Judge dissolved the injunction "because [he] felt that action was required by *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195," *ante,* at 561, n. 4. Accordingly, the Court expressly reserves decision on the effect of *Sinclair* in the circumstances presented by this case. The Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion.

UNITED STATES *v.* JOHNSON ET AL.

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

No. 482. Argued March 14, 1968.—Decided April 8, 1968.

Though the exclusive-remedy provision of the Civil Rights Act of 1964, § 207 (b), confines the enforcement of substantive rights under the Act to injunctive relief, and thus bars criminal action against proprietors and owners of facilities for refusal to serve Negroes, it does not foreclose criminal action against outsiders having no relation to the proprietors or owners. The District Court, therefore, erred in dismissing an indictment under 18 U. S. C. § 241 against outside hoodlums for conspiring to assault Negroes for exercising their federal rights under the Act. Pp. 564–567.

269 F. Supp. 706, reversed.

Ralph S. Spritzer argued the cause for the United States. On the brief were *Solicitor General Griswold* and *Assistant Attorney General Doar.*

Robert B. Thompson, by appointment of the Court, *post,* p. 917, argued the cause for appellees. With him on the brief was *Reuben A. Garland.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether conspiracies by outside hoodlums to assault Negroes for exercising their right to equality in public accommodations under § 201 of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a, are subject only to a civil suit for an injunction as provided in § 204 of that Act, 42 U. S. C. § 2000a–3, or whether they are also subject to criminal prosecution under 18 U. S. C. § 241, which provides fine and imprisonment for a conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution

or laws of the United States, or because of his having so exercised the same . . . ."

The indictment charged a conspiracy to injure and intimidate three Negroes in the exercise of their right to patronize a restaurant. The defendants, who were outsiders, not connected with the restaurant, are charged with having used violence against these Negroes for having received service at the restaurant, the purpose of the conspiracy being in part "to discourage them and other Negro citizens from seeking service" there "on the same basis as white citizens."

The facts are not developed because the District Court granted a motion to dismiss the indictment on the ground that § 207 (b) of the Act [1] makes the provision for relief by injunction the exclusive remedy under the Act. The case is here on appeal. 18 U. S. C. § 3731. We noted probable jurisdiction. 389 U. S. 910.

The legislative history contains language which to the District Court seemed to preclude remedy by indictment. Senator Humphrey, floor manager of the bill, explained § 207 (b):

> "This would mean, for example, that a proprietor who, in the first instance, legitimately—but erroneously—believes his establishment is not covered by section 201 or 202 need not fear a jail sentence or a damage action if his judgment as to coverage of title II is wrong." 110 Cong. Rec. 9767.

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[1] Section 207 (b) of the Act, 42 U. S. C. § 2000a–6 (b), provides:

"The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Senator Young agreed:

> "The enforcement provisions of title II are based on the specific prohibition in section 203 against denying or interfering with the right to the nondiscriminatory use of facilities covered by the title. In case of a violation, the aggrieved person would be able to sue for an injunction to end the denial or interference. . . . The prohibitions of title II would be enforced only by civil suits for an injunction. Neither criminal penalties nor the recovery of money damages would be involved." 110 Cong. Rec. 7384.

Senator Magnuson added:

> "Moreover, in every case, a judicial determination of coverage must be made prior to the entry of any order requiring the owner to stop discrimination. Thus, no one would become subject to any contempt sanctions—the only sanctions provided for in the act, until after it has been judicially determined that his establishment is subject to the act and he has been ordered by the Court to end this discrimination, and he has violated that Court order." 110 Cong. Rec. 7405.

That legislative history makes clear that the "proprietor" or "owner" is not to be subjected to criminal liability, where he has not had a chance to litigate whether his facilities are subject to the Act. But no proprietor or owner is here involved. Outside hoodlums are charged with the conspiracy; and the history of federal law, as applicable to them, is clear. 18 U. S. C. § 241 is derived from the Enforcement Act of 1870, § 6, 16 Stat. 141, and, as noted, protects the citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The right to service in a restaurant is such a "right," at least

by virtue of the 1964 Act. We said in *United States* v. *Price,* 383 U. S. 787, 801, in reference to 18 U. S. C. § 241, "We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language."

We have over the years given protection to many federal rights under § 241.[2] We refuse to believe that hoodlums operating in the fashion of the Ku Klux Klan, were given protection by the 1964 Act for violating those "rights" of the citizen that § 241 was designed to protect.

Immediately after the provision in § 207 (b) stating that the remedies provided "shall be the exclusive means of enforcing the rights based on this title," is a further provision stating that "nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title . . . or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right." There is, therefore, within the four corners of § 207 (b) evidence that it was not designed as pre-empting every other mode of protecting a federal "right" or as granting immunity to those who had long been subject to the regime of § 241.

It is, of course, true that § 203 (b) of the Act, 42 U. S. C. § 2000a–2 (b), bars the use of violence against those who assert their rights under the Act, and that therefore a remedy by way of an injunction could be obtained by the party aggrieved under § 204 (a). A like remedy is

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[2] See, *e. g., United States* v. *Classic,* 313 U. S. 299 (the right to vote); *United States* v. *Guest,* 383 U. S. 745 (right to travel); *United States* v. *Waddell,* 112 U. S. 76 (the right to perfect a homestead); *Logan* v. *United States,* 144 U. S. 263 (the right to be free of violence while in the custody of a federal marshal); *United States* v. *Mason,* 213 U. S. 115 (the right of federal officers to perform their duties); *United States* v. *Price,* 383 U. S. 787 (Fourteenth Amendment rights).

available to the Attorney General by reason of § 206 (a). But as we read the Act, the exclusive-remedy provision of § 207 (b) was inserted *only to make clear that the substantive rights to public accommodation defined in § 201 and § 202 are to be enforced exclusively by injunction.* Proprietors and owners are not to be prosecuted criminally for mere refusal to serve Negroes. But the Act does not purport to deal with outsiders; nor can we imagine that Congress desired to give them a brand new immunity from prosecution under 18 U. S. C. § 241—a statute that encompasses "*all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." *United States* v. *Price, supra,* at 800.

Reversed.

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

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

I regret that I cannot join the opinion of the Court. There is, of course, no question of the reprehensibility of the appellees' alleged conduct. But the issue is whether Congress has subjected this conduct to federal criminal prosecution.

Section 201 of Title II of the Civil Rights Act of 1964, 78 Stat. 243, secures the right to equal enjoyment of places of public accommodation. Section 203 prohibits interference with that right in any of three ways:

> "No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or

> coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

Section 204 authorizes private injunctive actions against violations of § 203. Section 206 provides for injunctive actions by the Attorney General against patterns or practices of resistance to enjoyment of Title II rights. Finally § 207 (b) states:

> "The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title . . . ." [1]

The plain language of the exclusive remedies clause of § 207 thus clearly precludes a criminal prosecution for interfering with rights secured by Title II.[2] And the very legislative history cited by the Court leaves no doubt that a specific purpose of that clause was to prevent criminal prosecutions under 18 U. S. C. § 241. It was upon that understanding that Congress enacted the legislation.

The Court's effort to distinguish between refusal of service by a proprietor and violent interference by third parties is not only without any support in the language

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[1] Section 207 contains a proviso; but the United States, which brought this prosecution, is conspicuously absent from the list of those to whom the proviso applies:

"[N]othing in this title shall preclude *any individual or any State or local agency* from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right." (Emphasis added.)

[2] The indictment did not allege injury to any rights other than those established by Title II of the Civil Rights Act of 1964.

of § 207 but also is belied by § 203 of the Title, quoted above. That section clearly prohibits intimidation and coercion by third persons as well as refusal of service by a proprietor. Congress, therefore, was explicitly aware of the kind of conduct alleged in this case when it enacted Title II, and Congress provided in § 207 that the exclusive remedy to prohibit such conduct must be by injunction.

The exclusive remedies provided by Congress to protect the rights secured by Title II of the 1964 Act are undoubtedly ineffective in a case like this. But I cannot, for that reason, join in rewriting the law that Congress so clearly enacted.

I respectfully dissent.

UNITED STATES *v.* JACKSON ET AL.

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

No. 85. Argued December 7, 1967.—Decided April 8, 1968.

The Federal Kidnaping Act provides that interstate kidnapers "shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." The District Court dismissed the count of an indictment charging appellees with violating the Act because it makes "the risk of death" the price for asserting the right to trial by jury and thus "impairs . . . free exercise" of that constitutional right. The Government appealed directly to this Court. *Held:* The death penalty clause imposes an impermissible burden upon the exercise of a constitutional right, but that provision is severable from the remainder of the Act and the unconstitutionality of that clause does not require the defeat of the Act as a whole. Pp. 572–591.

262 F. Supp. 716, reversed and remanded.

Ralph S. Spritzer argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Vinson, Richard A. Posner, Beatrice Rosenberg* and *Marshall Tamor Golding.*

Steven B. Duke argued the cause for appellees. With him on the brief for appellee Jackson was *Stephen I. Traub. Ira B. Grudberg* was on the brief for appellee Walsh.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Federal Kidnaping Act, 18 U. S. C. § 1201 (a), provides:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or other-

> wise . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

This statute thus creates an offense punishable by death "if the verdict of the jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.

On October 10, 1966, a federal grand jury in Connecticut returned an indictment charging in count one that three named defendants, the appellees in this case, had transported from Connecticut to New Jersey a person who had been kidnaped and held for ransom, and who had been harmed when liberated.[1] The District Court dismissed this count of the indictment,[2] holding the Federal Kidnaping Act unconstitutional because it makes "the risk of death" the price for asserting the right to jury trial, and thereby "impairs . . . free exercise" of that constitutional right.[3] The Government appealed

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[1] Count one:

"On or about September 2, 1966, CHARLES JACKSON, also known as 'Batman,' also known as 'Butch'; and GLENN WALTER ALEXANDER DE LA MOTTE; and JOHN ALBERT WALSH, JR., the defendants herein, did knowingly transport in interstate commerce from Milford in the District of Connecticut to Alpine, New Jersey, one John Joseph Grant, III, a person who had theretofore been unlawfully seized, kidnapped, carried away and held by the defendants herein, for ransom and reward and for the purpose of aiding the said defendants to escape arrest, and the said John Joseph Grant, III, was harmed when liberated, in violation of Title 18, United States Code, Section 1201 (a)."

[2] Count two, charging transportation of a stolen motor vehicle from Connecticut to New York in violation of 18 U. S. C. § 2312, has not been challenged and is not now before us.

[3] 262 F. Supp. 716, 718.

directly to this Court,[4] and we noted probable jurisdiction.[5] We reverse.

We agree with the District Court that the death penalty provision of the Federal Kidnaping Act imposes an impermissible burden upon the exercise of a constitutional right, but we think that provision is severable from the remainder of the statute. There is no reason to invalidate the law in its entirety simply because its capital punishment clause violates the Constitution. The District Court therefore erred in dismissing the kidnaping count of the indictment.

I.

One fact at least is obvious from the face of the statute itself: In an interstate kidnaping case where the victim has not been liberated unharmed, the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury—and only the jury—to return a verdict of death. The Government does not dispute this proposition. What it disputes is the conclusion that the statute thereby subjects the defendant who seeks a jury trial to an *increased* hazard of capital punishment. As the Government construes the statute, a defendant who elects to be tried by a jury cannot be put to death even if the jury so recommends—unless the trial judge agrees that capital punishment should be imposed. Moreover, the argument goes, a defendant cannot avoid the risk of death by attempting to plead guilty or waive jury trial. For even if the trial judge accepts a guilty plea or approves a jury waiver, the judge remains free, in the Government's view of the statute, to convene a special jury for the limited purpose of deciding whether to recommend the death penalty. The Government thus contends that, whether or not the

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[4] 18 U. S. C. § 3731.

[5] 387 U. S. 929.

defendant chooses to submit to a jury the question of his guilt, the death penalty may be imposed if and only if both judge and jury concur in its imposition. On this understanding of the statute, the Government concludes that the death penalty provision of the Kidnaping Act does not operate to penalize the defendant who chooses to contest his guilt before a jury. It is unnecessary to decide here whether this conclusion would follow from the statutory scheme the Government envisions,[6] for it is not in fact the scheme that Congress enacted.

At the outset, we reject the Government's argument that the Federal Kidnaping Act gives the trial judge discretion to set aside a jury recommendation of death. So far as we are aware, not once in the entire 34-year history of the Act has a jury's recommendation of death been discarded by a trial judge.[7] The Government would

[6] Even if the Government's interpretation were sound, the validity of its conclusion would still be far from clear. As the District Court observed, "even if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain." 262 F. Supp. 716, 717–718. The Government assumes that a judge who would accept the death penalty recommendation appended to a jury verdict of guilt is a judge who would exercise his discretionary power to convene a penalty jury if the defendant were to plead guilty or submit to a bench trial. But the mere fact that a judge would defer to the jury's recommendation hardly implies that he would take the extraordinary step of convening a penalty jury after accepting a plea of guilty or approving a waiver of jury trial. Even if the Government's statutory position were correct, the fact would remain that the defendant convicted on a guilty plea or by a judge completely escapes the threat of capital punishment unless the trial judge makes an affirmative decision to commence a penalty hearing and to impanel a special jury for that purpose, whereas the defendant convicted by a jury automatically incurs a risk that the same jury will recommend the death penalty and that the judge will accept its recommendation.

[7] One district judge has indicated that he would not feel bound by a jury recommendation of death in a kidnaping case, see *Robinson* v. *United States*, 264 F. Supp. 146, 151–153, but the question

apparently have us assume either that trial judges have always agreed with jury recommendations of capital punishment under the statute—an unrealistic assumption at best [8]—or that they have abdicated their statutory duty to exercise independent judgment on the issue of penalty. In fact, the explanation is a far simpler one. The statute unequivocally states that, "if the verdict of the jury shall so recommend," the defendant "shall be punished . . . by death . . . ." The word is "shall," not "may." [9] In acceding without exception to jury recom-

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was not directly before him since the case involved a petition for post-conviction relief. Although federal juries have recommended capital punishment in a number of kidnaping cases, counsel for the Government stated at oral argument in this Court that he was aware of no case in which such a recommendation had been set aside.

[8] See H. Kalven & H. Zeisel, The American Jury 436–444 (1966).

[9] The Government notes that the word "shall" precedes *both* alternative punishments: The offender "shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment . . . ." But the notion that judicial discretion is thereby authorized is dispelled by the qualification attached to the second alternative: "by imprisonment . . . *if the death penalty is not imposed.*" Although it is true that the judge rather than the jury is formally responsible for imposing sentence in a federal criminal case, those qualifying words would state a pointless truism unless they were meant to refer to the jury's recommendation: The offender "shall be punished (1) by death . . . if the verdict of the jury shall so recommend, or (2) by imprisonment" if the jury's verdict does *not* so recommend. To accept the Government's reading of the statute would make its final phrase a complete redundancy, anomalous indeed in a statute that Congress has twice pruned of excess verbiage. See Reviser's Note following 18 U. S. C. § 1201.

Nothing in the language or history of the Federal Kidnaping Act points to any such result. On the contrary, an examination of the death penalty provision in its original form demonstrates that

mendations of death, trial judges have simply carried out the mandate of the statute.

The Government nonetheless urges that we overlook Congress' choice of the imperative. Whatever might have been assumed in the past, we are now asked to construe the statute so as to eliminate the jury's power to fix the death penalty without the approval of the presiding judge. "[T]his reading," it is said, would conform "to the long tradition that makes the trial judge in the federal courts the arbiter of the sentence." And so it would. The difficulty is that Congress intentionally discarded that tradition when it passed the Federal Kidnaping Act. Over the forcefully articulated objection that jury sentencing would represent an unwarranted departure from settled federal practice,[10] Congress rejected a version of the Kidnaping Act that would have

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Congress could not have intended the meaning the Government now seeks to attribute to it. For the statute as it stood in 1934 provided that the offender "shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine . . . ." 48 Stat. 781. In this form, the statutory language simply will not support the interpretation that the offender "shall be punished by death *or* by imprisonment" if the jury recommends the death penalty. For the statute in this form makes unmistakably clear that, if the death penalty applies—*i. e.,* if the jury has recommended death—then the punishment *shall* be death unless, before the judge has imposed sentence, the victim has been liberated unharmed. There is absolutely no reason to think that the purely formal transformations through which the statute has passed since 1934 were intended to alter this basic penalty structure.

[10] See 75 Cong. Rec. 13288, 13295–13297 (1932).

left punishment to the court's discretion [11] and instead chose an alternative that shifted from a single judge to a jury of 12 the onus of inflicting the penalty of death.[12] To accept the Government's suggestion that the jury's sentencing role be treated as merely advisory would return to the judge the ultimate duty that Congress deliberately placed in other hands.

The thrust of the clause in question was clearly expressed by the House Judiciary Committee that drafted it: Its purpose was, quite simply, "to permit the jury to *designate* a death penalty for the kidnaper." [13] The fact that Congress chose the word "recommend" to describe what the jury would do in designating punishment cannot obscure the basic congressional objective of making the jury rather than the judge the arbiter of the death sentence. The Government's contrary contention cannot stand.

Equally untenable is the Government's argument that the Kidnaping Act authorizes a procedure unique in the federal system—that of convening a special jury, without the defendant's consent, for the sole purpose of deciding

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[11] As originally drafted, the Kidnaping Act had provided for punishment "by death or imprisonment . . . for such term of years as the court in its discretion shall determine. . . ." 75 Cong. Rec. 13288 (1932).

[12] A number of Congressmen feared that empowering judges to impose capital punishment might make some jurors unduly reluctant to convict. See 75 Cong. Rec. 13289, 13294 (1932). To the extent that this concern was responsible for the decision to require a jury recommendation of death as a prerequisite to the imposition of capital punishment, it is of course immaterial whether or not the jury's recommendation is binding on the trial judge. But, as the Government concedes, many of the Congressmen who favored jury determination of the death penalty did so largely because such a scheme would take from the judge the onus of inflicting capital punishment. See, *e. g.*, 75 Cong. Rec. 13297.

[13] H. R. Rep. No. 1457, 73d Cong., 2d Sess., 2 (1934) (emphasis added).

whether he should be put to death. We are told initially that the Federal Kidnaping Act authorizes this procedure by implication. The Government's reasoning runs as follows: The Kidnaping Act permits the infliction of capital punishment whenever a jury so recommends. The Act does not state in so many words that the jury recommending capital punishment must be a jury impaneled to determine guilt as well. Therefore the Act authorizes infliction of the death penalty on the recommendation of a jury specially convened to determine punishment. The Government finds support for this analysis in a Seventh Circuit decision construing the Federal Kidnaping Act to mean that the death penalty may be imposed whenever "an affirmative recommendation [is] made by a jury," including a jury convened solely for that purpose after the court has accepted a guilty plea. *Seadlund* v. *United States,* 97 F. 2d 742, 748. Accord, *Robinson* v. *United States,* 264 F. Supp. 146, 153. But the statute does not say "a jury." It says "*the* jury." At least when the defendant demands trial by jury on the issue of guilt, the Government concedes that "the verdict of the jury" means what those words naturally suggest: the general verdict of conviction or acquittal returned by the jury that passes upon guilt or innocence. Thus, when such a jury has been convened, the statutory reference is to that jury alone, not to a jury impaneled after conviction for the limited purpose of determining punishment.[14] Yet the Government argues that, when the issue of guilt has been tried to a judge or has been eliminated altogether by a plea of guilty, "the verdict of the jury" at once assumes a completely new meaning. In such a case, it is said, "the verdict of the jury" means the recommen-

[14] If the jury's verdict of guilt includes no death penalty recommendation, the judge can impose no penalty beyond imprisonment. He cannot convene another jury to recommend capital punishment. See *United States* v. *Dressler,* 112 F. 2d 972, 980.

dation of a jury convened for the sole purpose of deciding whether the accused should live or die.

The Government would have us give the statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme. Not a word in the legislative history so much as hints that a conviction on a plea of guilty or a conviction by a court sitting without a jury might be followed by a separate sentencing proceeding before a penalty jury. If the power to impanel such a jury had been recognized elsewhere in the federal system when Congress enacted the Federal Kidnaping Act, perhaps Congress' total silence on the subject could be viewed as a tacit incorporation of this sentencing practice into the new law. But the background against which Congress legislated was barren of any precedent for the sort of sentencing procedure we are told Congress impliedly authorized.

The Government nonetheless maintains that Congress' failure to provide for the infliction of the death penalty upon those who plead guilty or waive jury trial was no more than an oversight that the courts can and should correct. At least twice, Congress has expressly authorized the infliction of capital punishment upon defendants convicted without a jury,[15] but even on the assumption

[15] In a statute forbidding the wrecking of trains, Congress provided that "[w]hoever is convicted of any such crime, which has resulted in the death of any person, shall be subject . . . to the death penalty . . . if the jury shall in its discretion so direct, *or, in the case of a plea of guilty, if the court in its discretion shall so order.*" 62 Stat. 794 (1948), 18 U. S. C. § 1992 (emphasis added). And in a statute prohibiting the destruction of aircraft, Congress provided that violators whose conduct causes death "shall be subject . . . to the death penalty . . . if the jury shall in its discretion so direct, *or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.*" 70 Stat. 540 (1956), 18 U. S. C. § 34 (emphasis added).

The language of the aircraft-wrecking statute, 18 U. S. C. § 34, is of particular interest here because it reflects a congressional

that the failure of Congress to do so here was wholly inadvertent, it would hardly be the province of the courts to fashion a remedy. Any attempt to do so would be fraught with the gravest difficulties: If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy? Congress, unlike the state legislatures that have authorized jury proceedings to determine the penalty in capital cases,[16] has addressed itself to none of these questions.[17]

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awareness of the precise problem the Government suggests Congress overlooked in the kidnaping area: In a letter addressed to the Chairman of the House Committee on Interstate and Foreign Commerce, William P. Rogers, then Deputy Attorney General, suggested on behalf of the Justice Department that the bill then under consideration should be amended by the addition of the phrase "or in the case of a plea of not guilty where the defendant has waived trial by jury." The letter stated:

"Under the present phraseology it is doubtful whether the court could invoke the death penalty in a situation where the defendant has entered a plea of not guilty, waived his right to a trial by jury, and asked to be tried by the court." 2 U. S. Code Congressional and Administrative News, 84th Cong., 2d Sess., 3149–3150 (1956).

Congress inserted the suggested language in the aircraft statute as enacted on July 14, 1956. Less than a month later, Congress reconsidered the Kidnaping Act and added a technical amendment, 70 Stat. 1043 (1956), but included no provision to authorize the imposition of the death penalty upon defendants who plead guilty or waive the right to jury trial.

[16] See Cal. Penal Code § 190.1 (Supp. 1966); Conn. Gen. Stat. Rev. § 53–10 (Supp. 1965); Pa. Stat. Ann., Tit. 18, § 4701 (1963); N. Y. Penal Law §§ 125.30, 125.35 (1967).

[17] The complex problems presented by separate penalty proceedings have frequently been noted. See, *e. g.*, *Frady* v. *United States*, 121 U. S. App. D. C. 78, 109–110, 348 F. 2d 84, 115–116 (Burger, J., concurring in part and dissenting in part); Note, The California Penalty Trial, 52 Calif. L. Rev. 386 (1964); Note, The Two-Trial

It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. We recognize that trial judges sitting in federal kidnaping cases have on occasion chosen the latter course, attempting to fashion on an *ad hoc* basis the ground rules for penalty proceedings before a jury.[18] We do not know what kinds of rules particular federal judges have adopted, how widely such rules have varied, or how fairly they have been applied. But one thing at least is clear: Individuals forced to defend their lives in proceedings tailor-made for the occasion must do so without the guidance that defendants ordinarily find in a body of procedural and evidentiary rules spelled out in advance of trial.[19] The Government notes with approval

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System in Capital Cases, 39 N. Y. U. L. Rev. 50 (1964). See also Kuh, A Prosecutor Considers the Model Penal Code, 63 Col. L. Rev. 608, 615 (1963). It is not surprising that courts confronted with such problems have concluded that their solution requires "comprehensive legislative and not piecemeal judicial action." *State* v. *Mount*, 30 N. J. 195, 224, 152 A. 2d 343, 358 (concurring opinion). See also *People* v. *Friend*, 47 Cal. 2d 749, 763, 306 P. 2d 463, 471, n. 7. But see *United States* v. *Curry*, 358 F. 2d 904, 914–915.

[18] The Government informs us that at least three of the defendants who pleaded guilty in cases arising under the Federal Kidnaping Act have been sentenced to death on the recommendation of special penalty juries convened to determine punishment.

[19] Even in States with legislatively established jury proceedings on the penalty issue, defense attorneys have not always been prepared to take advantage of those features of the penalty trial designed to benefit their clients. See Note, Executive Clemency in Capital Cases, 39 N. Y. U. L. Rev. 136, 167 (1964). If the relative novelty of penalty proceedings has thus impaired effective representation in jurisdictions where the contours of such proceedings have been fixed by statute, it seems clear that the difficulties for the defense would be even more formidable under the amorphous

"the decisional trend which has sought . . . to place the most humane construction on capital legislation." Yet it asks us to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without the compulsion of a legislative mandate and without the benefit of legislative guidance. That we decline to do.

II.

Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty [20] and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of man-

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case-by-case system that the Government asks us to legitimize today. It is no wonder that the Second Circuit, while not foreclosing two-stage trials altogether, was "loath to compel unwilling defendants to submit" to them. *United States* v. *Curry,* 358 F. 2d 904, 914.

[20] It is established that due process forbids convicting a defendant on the basis of a coerced guilty plea. See, *e. g., Herman* v. *Claudy,* 350 U. S. 116.

datory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide.[21]

The Government suggests that, because the Act thus operates "to mitigate the severity of punishment," it is irrelevant that it "may have the incidental effect of inducing defendants not to contest in full measure." [22] We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States* v. *Robel,* 389 U. S. 258; *Shelton* v. *Tucker,* 364 U. S. 479, 488–489. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. In some States, for example, the choice between life imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt has been determined.[23] Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justi-

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[21] See *United States* v. *Curry,* 358 F. 2d 904, 913–914 and n. 8. See also *Andres* v. *United States,* 333 U. S. 740, 753–754 (Frankfurter, J., concurring).

[22] See *McDowell* v. *United States,* 274 F. Supp. 426, 431. See also *Laboy* v. *New Jersey,* 266 F. Supp. 581, 585.

[23] See, *e. g.,* Wash. Rev. Code §§ 9.48.030, 10.01.060, 10.49.010 (1956). Cf. Cal. Penal Code § 190.1 (Supp. 1966).

fied by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See *Griffin* v. *California,* 380 U. S. 609.[24]

It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.[25] The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnaping Act.

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[24] In an opinion by Justice Zenoff, *Spillers* v. *State,* — Nev. —, —, 436 P. 2d 18, 22–23, the Supreme Court of Nevada has recently held unconstitutional a state penalty scheme imposing capital punishment for forcible rape resulting in great bodily injury "if the jury by their verdict affix the death penalty." Nev. Rev. Stat. § 200.360 (1) (1963).

[25] See *Laboy* v. *New Jersey,* 266 F. Supp. 581, 584. So, too, in *Griffin* v. *California,* 380 U. S. 609, the Court held that comment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled.

The Government alternatively proposes that this Court, in the exercise of its supervisory powers, should simply instruct federal judges sitting in kidnaping cases to reject all attempts to waive jury trial and all efforts to plead guilty, however voluntary and well-informed such attempted waivers and pleas might be. In that way, we could assure that every defendant charged in a federal court with aggravated kidnaping would face a possible death penalty, and that no defendant tried under the federal statute would be induced to forgo a constitutional right. But of course the inevitable consequence of this "solution" would be to force all defendants to submit to trial, however clear their guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings. It is true that a defendant has no constitutional right to insist that he be tried by a judge rather than a jury, *Singer* v. *United States,* 380 U. S. 24, and it is also true "that a criminal defendant has [no] absolute right to have his guilty plea accepted by the court." *Lynch* v. *Overholser,* 369 U. S. 705, 719. But the fact that jury waivers and guilty pleas may occasionally be rejected hardly implies that all defendants may be required to submit to a full-dress jury trial as a matter of course. Quite apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt, it is clear—as even the Government recognizes—that the automatic rejection of all guilty pleas "would rob the criminal process of much of its flexibility." As one federal court has observed: [26]

> "The power of a court to accept a plea of guilty is traditional and fundamental. Its existence is necessary for the . . . practical . . . administration

[26] *United States* v. *Willis,* 75 F. Supp. 628, 630.

> of the criminal law. Consequently, it should require an unambiguous expression on the part of the Congress to withhold this authority in specified cases."

If any such approach should be inaugurated in the administration of a federal criminal statute, we conclude that the impetus must come from Congress, not from this Court. The capital punishment provision of the Federal Kidnaping Act cannot be saved by judicial reconstruction.

III.

The remaining question is whether the statute as a whole must fall simply because its death penalty clause is constitutionally deficient. The District Court evidently assumed that it must, for that court dismissed the kidnaping indictment. We disagree. As we said in *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 234:

> "The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." [27]

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[27] The appellees correctly note that *Champlin* was a case where Congress had included a clause expressly authorizing the severance of any invalid provision, a fact upon which this Court relied in recognizing "a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained . . . ." 286 U. S. 210, 235. But whatever relevance such an explicit clause might have in creating a presumption of severability, see *Electric Bond Co.* v. *Comm'n,* 303 U. S. 419, 434, the ultimate determination of severability will rarely turn on the presence or absence of such a clause. Thus, for example, the Court in *Champlin,* after stating the basic test quoted above, cited cases in which invalid statutory provisions had been severed despite the absence of any provision for severability. *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S.

Under this test, it is clear that the clause authorizing capital punishment is severable from the remainder of the kidnaping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole. See *McDowell* v. *United States,* 274 F. Supp. 426, 429. Cf. *Spillers* v. *State,* — Nev. —, —, 436 P. 2d 18, 23–24.

The clause in question is a functionally independent part of the Federal Kidnaping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us.[28]

In this case it happens that history confirms what common sense alone would suggest: The law as originally enacted in 1932 contained no capital punishment provision.[29] A majority of the House had favored the

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601, 635; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 395–396; *Field* v. *Clark,* 143 U. S. 649, 695–696.

[28] As this Court observed in *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 396, "it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment."

[29] The original Federal Kidnaping Act, 47 Stat. 326, provided:

"That whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward shall, upon conviction, be punished by imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine . . . ."

death penalty but had yielded to opposition in the Senate as a matter of expediency.[30] Only one Congressman had expressed the view that the law would not be worth enacting without capital punishment.[31] The majority obviously felt otherwise.[32] When the death penalty was added in 1934, the statute was left substantially un-

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[30] The Senate Judiciary Committee had opposed capital punishment and had reported the kidnaping law in a version that authorized no penalty beyond "imprisonment . . . for such term of years as the court, in its discretion, shall determine." S. Rep. No. 765, 72d Cong., 1st Sess., 2 (1932); 75 Cong. Rec. 11878 (1932). In the ensuing debates, some members of the House opposed the death penalty on principle. 75 Cong. Rec. 13285, 13289–13290, 13294 (1932). Others argued that the threat of capital punishment would encourage kidnapers to kill their victims lest their testimony lead to conviction and execution. *Id.*, at 13285, 13304. Most favored the death penalty in some form, see *id.*, at 13283–13284, 13286–13287, 13295, but feared that efforts to persuade the Senate to accept a capital punishment provision would occasion further delay and might cause ultimate defeat. *Id.*, at 13288, 13299, 13303. The majority therefore compromised their views and accepted the Senate version of the bill. *Id.*, at 13304. See Bomar, The Lindbergh Law, 1 Law & Contemp. Prob. 435, 440 (1934).

[31] Congressman Dyer of Missouri had stated that without the death penalty "the legislation would not be worth anything, because every State now has a kidnaping law and few of them provide the death penalty." 75 Cong. Rec. 13287 (1932).

[32] Congressman Cochran of Missouri, who had introduced the original bill (H. R. 5657) with a death penalty clause, stressed that his objective was the prompt enactment of a federal kidnaping law; to that end, he was "willing to go along and strike out the death penalty." 75 Cong. Rec. 13296 (1932); see also *id.*, at 13284, 13299, 13304. Congressman LaGuardia of New York put the matter succinctly: "[I]f what Congress is looking for is a headline, leave the death penalty in; but if we are looking for a real bill that will be a deterrent to kidnaping, take the Senate bill. [Applause.]" *Id.*, at 13299. Shortly thereafter, the House passed the Senate version of the Act. *Id.*, at 13304.

changed in every other respect.[33] The basic problem that had prompted enactment of the law in 1932—the difficulty of relying upon state and local authorities to

[33] By 1934, the Senate's attitude toward capital punishment had changed markedly. In that year the Senate passed a bill (S. 2841) authorizing punishment "by imprisonment for not less than 10 years, or by death" for killing or kidnaping in connection with a bank robbery. 78 Cong. Rec. 5738 (1934). The House Judiciary Committee amended the Senate provision to its present form, see 18 U. S. C. § 2113 (e), limiting the death penalty to those cases where "the verdict of the jury shall so direct." H. R. Rep. No. 1461, 73d Cong., 2d Sess., 1 (1934).

The House Judiciary Committee had not forgotten that its attempt to include similar language in the Kidnaping Act of 1932, see H. R. Rep. No. 1493, 72d Cong., 1st Sess., 1 (1932), had been defeated "in the rush to draft and enact a [kidnaping] bill suitable to both houses before adjournment." Finley, The Lindbergh Law, 28 Geo. L. J. 908, 914, n. 24 (1940). Taking its cue from the bank robbery legislation, the House Committee found an ideal opportunity to reassert its 1932 position in a Senate bill (S. 2252) that had begun as a technical amendment to the 1932 Kidnaping Act. See 78 Cong. Rec. 5737 (1934). In S. 2252, the Senate retained the basic punishment of "imprisonment in the penitentiary for such term of years as the court, in its discretion, shall determine," see n. 29, *supra*, but the House Judiciary Committee added the alternative penalty of "death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed . . . ." H. R. Rep. No. 1457, 73d Cong., 2d Sess., 1 (1934); 78 Cong. Rec. 8127–8128 (1934).

After initial disagreement in the Senate, *id.*, at 8263–8264, and a conference, *id.*, at 8322; H. R. Rep. No. 1595, 73d Cong., 2d Sess. (1934), the Senate accepted the House addition to S. 2252 without debate, 78 Cong. Rec. 8767, 8775, 8778, 8855–8857 (1934), and the resulting statute, 48 Stat. 781 (1934), employed substantially the same language as that now appearing in 18 U. S. C. § 1201 (a). As amended in 1934, the Federal Kidnaping Act, 48 Stat. 781, thus provided:

"Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled,

investigate and prosecute interstate kidnaping [34]—had not vanished during the intervening two years. It is therefore clear that Congress would have made interstate kidnaping a federal crime even if the death penalty provision had been ruled out from the beginning. It would be difficult to imagine a more compelling case for severability.

In an effort to suggest the contrary, the appellees insist that the 1934 amendment "did not merely increase the penalties for kidnaping; it changed the whole thrust of the Act." They note that Congress deliberately lim-

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decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine . . . ."

[34] In late 1931 the American public became seriously concerned about the mounting incidence of professional kidnaping and the apparent inability of state and local authorities to cope with the interstate aspects of the problem. See Fisher & McGuire, Kidnapping and the So-Called Lindbergh Law, 12 N. Y. U. L. Q. Rev. 646, 652–653 (1935). Because of its geographical position, the city of St. Louis "had experienced numerous kidnapings in which the handicap of state lines had hindered or defeated her police officers." Bomar, The Lindbergh Law, 1 Law & Contemp. Prob. 435 (1934). Largely in response to this experience, Senator Patterson and Congressman Cochran, both of Missouri, introduced identical bills (S. 1525, H. R. 5657) in the House and Senate, 75 Cong. Rec. 275, 491 (1931), forbidding the transportation in interstate or foreign commerce of any person "kidnaped . . . and held for ransom or reward, or . . . for any other unlawful purpose." Several months after the kidnaping of the Lindbergh baby in March 1932, Congress enacted the first Federal Kidnaping Act, see n. 29, *supra*, a slightly modified version of the bills introduced by Patterson and Cochran.

ited capital punishment to those kidnapers whose victims are not liberated unharmed. Such a differential penalty provision, the appellees argue, is needed to discourage kidnapers from injuring those whom they abduct.[35] The appellees contend that, without its capital punishment clause, the Federal Kidnaping Act would not distinguish "the penalties applicable to those who do and those who do not harm or kill their victims." Stressing the obvious congressional concern for the victim's safety, they conclude that "it is doubtful that Congress would intend for the statute to stand absent such a feature." This argument is wrong as a matter of history, for Congress *enacted* the statute "absent such a feature."[36] It is

[35] See Bomar, The Lindbergh Law, 1 Law & Contemp. Prob. 435, 440 and n. 36. One might legitimately doubt the ability of the death penalty clause to achieve this supposed objective. In that regard, it has been observed that "[t]he advantage to the kidnapper in killing his victim is obvious and immediate, for the [Government's] best witness, perhaps its whole case, will be put out of the way. Thus a sentence of life imprisonment instead of death may not suffice to induce a kidnapper to refrain from killing his victim, even if the kidnapper is aware of the mitigation provision—itself a supposition not always true." Note, A Rationale of the Law of Kidnapping, 53 Col. L. Rev. 540, 550 (1953).

Moreover, as this Court has interpreted the statute, the death penalty may be imposed so long as "the kidnapped person . . . was still suffering from . . . injuries when liberated." *Robinson* v. *United States,* 324 U. S. 282, 285. As a result, "[o]nce [an] injury has taken place, the inducement held out by the statute necessarily is either to hold the victim until cure is effected or to do away with him so that evidence, both of the injury and of the kidnapping, is destroyed." *Id.,* at 289 (Rutledge, J., dissenting).

[36] Congress was certainly aware when it passed the original Kidnaping Act of 1932 that "[t]he victim may be murdered or slain" if the kidnaper "has nothing to gain by [keeping] the victim . . . alive." 75 Cong. Rec. 13285 (1932). Such considerations might have been influential in the omission of any death penalty provision in 1932, see *Robinson* v. *United States,* 324 U. S. 282, 289, n. 4 (Rutledge, J., dissenting), but not a single member of Congress

wrong as a matter of fact, for the length of imprisonment imposed under the Act can obviously be made to reflect the kidnaper's treatment of his victim. And it is wrong as a matter of logic, for nothing could more completely obliterate the distinction between "the penalties applicable to those who do and those who do not harm or kill their victims" than the total invalidation of *all* the penalties provided by the Federal Kidnaping Act—the precise result sought by the appellees.

Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose—that of making interstate kidnaping a federal crime. By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection. The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

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

The Court strikes down a provision of the Federal Kidnaping Act which authorizes only the jury to impose the death penalty. No question is raised about the death penalty itself or about the propriety of jury participation in its imposition, but confining the power to impose the death penalty to the jury alone is held to

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even hinted that the anti-kidnaping law should be defeated altogether in the interest of the victim's safety. Given the law's fundamental objective of preventing interstate kidnaping in the first instance, any such suggestion would have been unthinkable.

burden impermissibly the right to a jury trial because it may either coerce or encourage persons to plead guilty or to waive a jury and be tried by the judge. In my view, however, if the vice of the provision is that it may interfere with the free choice of the defendant to have his guilt or innocence determined by a jury, the Court needlessly invalidates a major portion of an Act of Congress. The Court itself says that not every plea of guilty or waiver of jury trial would be influenced by the power of the jury to impose the death penalty. If this is so, I would not hold the provision unconstitutional but would reverse the judgment, making it clear that pleas of guilty and waivers of jury trial should be carefully examined before they are accepted, in order to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury.

Because this statute may be properly interpreted so as to avoid constitutional questions, I would not take the first step toward invalidation of statutes on their face because they arguably burden the right to jury trial.

FONTAINE *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 854, Misc. Decided April 8, 1968.

Petitioner was convicted on the basis of circumstantial evidence of selling marihuana to an informer, who disappeared during the period the State delayed bringing the case to trial. The District Court of Appeal (on the basis of *Griffin* v. *California,* 380 U. S. 609 (1965), decided after petitioner's trial) held that the prosecutor's comments on petitioner's failure to testify and the trial court's instruction that the jury could draw adverse inferences from petitioner's silence violated petitioner's privilege against self-incrimination but that the error was harmless. The State Supreme Court denied review. Following this Court's remand of the case in the light of *Chapman* v. *California,* 386 U. S. 18 (1967), the Court of Appeal reinstated its former opinion but recited that the constitutional error was harmless "beyond a reasonable doubt." *Held:* In the absence of testimony of the informer supporting the State's version of disputed issues, the State has not met its burden of proving beyond a reasonable doubt that the erroneous comments of the prosecutor and the trial judge's instruction did not contribute to the petitioner's conviction. *Chapman* v. *California, supra,* at 24, 25–26.

Certiorari granted; 252 Cal. App. 2d 73, 60 Cal. Rptr. 325, reversed.

Thomas C. Lynch, Attorney General of California, and *Derald E. Granberg* and *Louise H. Renne,* Deputy Attorneys General, for respondent.

PER CURIAM.

The petitioner allegedly made two sales of marihuana to an informer in June and July 1963. He was not indicted until mid-October 1963. According to the State, the delay was due to the State's desire to use the informer in other narcotics cases. By the time the case came to trial, the informer had disappeared. Evidence as to the

alleged purchases from petitioner consisted of taped telephone conversations which petitioner claims are ambiguous, and the testimony of police officials. Some of the police observed the transactions between petitioner and the informer, but under circumstances which petitioner argues leave substantial doubt that the seller was in fact the petitioner.

The jury found petitioner guilty, but the trial judge ordered a new trial because of the State's delay which had made the informer unavailable. The California District Court of Appeal reversed the trial judge's ruling, 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965). It held that the failure to produce the informer did not deny a fair trial.

At the trial, which took place before our decision in *Griffin* v. *California,* 380 U. S. 609 (1965), the prosecutor had commented upon petitioner's failure to take the stand. His comment was as follows:

> "How do we know the defendant knew it was marijuana? Well, I guess if he didn't know it was marijuana he could have taken the stand and told us that he didn't know it was marijuana and thereby subject himself to cross-examination, if he chose not to.
>
> "His Honor will instruct you then on the effect that it may have, any conclusions or inferences you may draw from the fact that he wouldn't take the stand and testify . . . .
>
> "Well, Ladies and Gentlemen, that is the case. You heard the evidence. You heard the arguments of counsel. You haven't heard from the defendant. I will ask you to take that into consideration, take into consideration the inference which you may draw because he didn't choose to defend himself and what he may have said in that respect."

The trial judge had instructed the jury that it could draw adverse inferences from petitioner's silence.* *Griffin* was decided between the time of trial and the appellate decision. The District Court of Appeal held that the prosecutor's argument and the judge's comment violated petitioner's privilege against self-incrimination under *Griffin*. However, the Court of Appeal found the constitutional error harmless under the California harmless-error rule prevailing at that time. The State Supreme Court declined to review the case.

Subsequently, we decided *Chapman* v. *California,* 386 U. S. 18 (1967), which disapproved of California's harmless-error rule as applied to federal constitutional errors. Thereafter, we granted a petition for a writ of certiorari in the instant case, vacated the judgment below, and remanded for further consideration in light of *Chapman.* 386 U. S. 263 (1967). On remand, the District Court of Appeal reinstated its former opinion except that it rewrote the portion dealing with harmless error. This time it recited that the constitutional error in this case was harmless "beyond a reasonable doubt"—the standard announced in *Chapman. People* v. *Fontaine,* 252 Cal. App. 2d 73, 60 Cal. Rptr. 325.

The disputed issues at the trial centered principally upon whether the petitioner knowingly transferred wax bags of marihuana to the informer. The petitioner

*"It is a Constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

claimed prejudice as a result of the unavailability of the informer. We need not decide whether this, standing alone, would entitle the petitioner to reversal of the decision below because it is clear that in the absence of testimony of the informer supporting the State's version of the disputed issues, it was error for the court below to hold that the comments of the prosecutor and the trial judge were harmless "beyond a reasonable doubt."

These comments upon petitioner's failure to take the stand violated his constitutional privilege against self-incrimination. *Griffin* v. *California, supra.* The jury had been asked to convict petitioner on the basis of circumstantial evidence, in the absence of testimony from the State's agent who allegedly made the purchases from petitioner. In these circumstances, the State has not met its burden of proving beyond a reasonable doubt that the erroneous comments and instruction did not contribute to petitioner's conviction. *Chapman* v. *California,* 386 U. S., at 24, 25–26.

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted and the judgment is

Reversed.

Mr. Justice Black and Mr. Justice Harlan would affirm the judgment of the state court.

BERTERA'S HOPEWELL FOODLAND, INC. *v.* MASTERS, DISTRICT ATTORNEY, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 1132. Decided April 8, 1968.

428 Pa. 20, 236 A. 2d 197, appeal dismissed.

Hubert I. Teitelbaum and *Martin M. Sheinman* for appellant.

PER CURIAM.

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

INCORPORATED VILLAGE OF PORT JEFFERSON ET AL. *v.* BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1152. Decided April 8, 1968.

Appeal dismissed.

William M. Johnson for appellants.

Stanley S. Corwin for Board of Supervisors of Suffolk County et al., and *Frederick Mars* for Receiver of Taxes of the Town of Brookhaven, appellees.

PER CURIAM.

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

JEHOVAH'S WITNESSES IN THE STATE OF WASHINGTON ET AL. *v.* KING COUNTY HOSPITAL UNIT NO. 1 (HARBORVIEW) ET AL.

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

No. 1111. Decided April 8, 1968.

278 F. Supp. 488, affirmed.

Victor V. Blackwell, Daniel Brink and *Kenneth S. Jacobs* for appellants.

John J. O'Connell, Attorney General of Washington, *James B. Wilson,* Assistant Attorney General, and *James E. Kennedy* for appellees.

PER CURIAM.

The judgment is affirmed, *Prince* v. *Massachusetts,* 321 U. S. 158.

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

UNITED STATES ET AL. *v.* COLEMAN ET AL.

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

No. 630. Argued March 28, 1968.—Decided April 22, 1968.

Respondent Coleman sought a patent to lands in a national forest predicated on 30 U. S. C. § 22, under which title to land owned by the United States containing "valuable mineral deposits" may be issued to the discoverer of the deposits, and on 30 U. S. C. § 161 allowing claims to lands "chiefly valuable for building stone." Coleman contended that deposits of quartzite (one of the most common of all solid materials) qualified under those provisions. The Secretary of the Interior denied the patent application, holding (1) that to qualify for a patent under § 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit," a test which on the largely undisputed evidence Coleman could not meet, and (2) that the quartzite was a "common variety of stone" which, under 30 U. S. C. § 611, could not qualify for a claim under the mining laws. When Coleman remained on the land, the Government brought this ejectment action against Coleman and his lessee and they counterclaimed for issuance of a patent. The District Court rendered summary judgment for the Government. The Court of Appeals reversed. *Held:*

1. The determination of the Secretary of the Interior that the quartzite did not qualify as a valuable mineral deposit because it could not be marketed at a profit must be upheld as a reasonable interpretation of 30 U. S. C. § 22. Pp. 601–603.

2. The Secretary correctly ruled that "[i]n view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety'" and thus under 30 U. S. C. § 611 is excluded from the mining laws. Pp. 603–605.

363 F. 2d 190, 379 F. 2d 555, reversed and remanded.

Frank J. Barry argued the cause for the United States et al. On the brief were *Solicitor General Griswold, Assistant Attorney General Martz, Robert S. Rifkind, Roger P. Marquis* and *George R. Hyde.*

Howard A. Twitty argued the cause for respondents. With him on the brief were *George W. Nilsson, W. Howard Gray, Edward A. McCabe* and *Monta W. Shirley.*

Winston S. Howard and *Don H. Sherwood* filed a brief for the New Jersey Zinc Co., as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1956 respondent Coleman applied to the Department of the Interior for a patent to certain public lands based on his entry onto and exploration of these lands and his discovery there of a variety of stone called quartzite, one of the most common of all solid materials. It was, and still is, respondent Coleman's contention that the quartzite deposits qualify as "valuable mineral deposits" under 30 U. S. C. § 22 [1] and make the land "chiefly valuable for building stone" under 30 U. S. C. § 161.[2] The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U. S. C. § 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit"—the so-called "marketability test." Based on the largely undisputed evidence in the record, the Secretary concluded that the

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[1] The cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U. S. C. § 22, which provides in § 1 that citizens may enter and explore the public domain and, if they find "valuable mineral deposits," may obtain title to the land on which such deposits are located by application to the Department of the Interior. The Secretary of the Interior is "charged with seeing . . . that valid claims . . . [are] recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron* v. *United States,* 252 U. S. 450, 460.

[2] The 1872 Act, *supra,* was supplemented in 1892 by the passage of the Act of August 4, 1892, 27 Stat. 348, 30 U. S. C. § 161, which provides in § 1 in pertinent part: "That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims . . . ."

deposits claimed by respondent Coleman did not meet that criterion. As to the alternative "chiefly valuable for building stone" claim, the Secretary held that respondent Coleman's quartzite deposits were a "common variet[y]" of stone within the meaning of 30 U. S. C. § 611,[3] and thus they could not serve as the basis for a valid mining claim under the mining laws. The Secretary denied the patent application, but respondent Coleman remained on the land, forcing the Government to bring this present action in ejectment in the District Court against respondent Coleman and his lessee, respondent McClennan. The respondents filed a counterclaim seeking to have the District Court direct the Secretary to issue a patent to them. The District Court, agreeing with the Secretary, rendered summary judgment for the Government. On appeal the Court of Appeals for the Ninth Circuit reversed, holding specifically that the test of profitable marketability was not a proper standard for determining whether a discovery of "valuable mineral deposits" under 30 U. S. C. § 22 had been made and that building stone could not be deemed a "common variet[y]" of stone under 30 U. S. C. § 611. We granted the Government's petition for certiorari because of the importance of the decision to the utilization of the public lands. 389 U. S. 970.

We cannot agree with the Court of Appeals and believe that the rulings of the Secretary of the Interior

[3] Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U. S. C. § 611, provides in pertinent part as follows: "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws . . . . 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value . . . ."

were proper. The Secretary's determination that the quartzite deposits did not qualify as valuable mineral deposits because the stone could not be marketed at a profit does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" which the Secretary has been using to interpret the mining laws since 1894. Under this "prudent-man test" in order to qualify as "valuable mineral deposits," the discovered deposits must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . ." *Castle* v. *Womble,* 19 L. D. 455, 457 (1894). This Court has approved the prudent-man formulation and interpretation on numerous occasions. See, for example, *Chrisman* v. *Miller,* 197 U. S. 313, 322; *Cameron* v. *United States,* 252 U. S. 450, 459; *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334, 335–336. Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes.[4] The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the

[4] 17 Stat. 92, 30 U. S. C. § 29, provides in pertinent part as follows: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person . . . having claimed and located a piece of land *for such purposes* . . . may file . . . ." (Emphasis added.)

marketability test which the Secretary has used here merely recognizes this fact.

The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. Indeed, as the Government points out, the facts of this case—the thousands of dollars and hours spent building a home on 720 acres in a highly scenic national forest located two hours from Los Angeles, the lack of an economically feasible market for the stone, and the immense quantities of identical stone found in the area outside the claims—might well be thought to raise a substantial question as to respondent Coleman's real intention.

Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

We believe that the Secretary of the Interior was also correct in ruling that "[i]n view of the immense quanti-

ties of identical stone found in the area outside the claims, the stone must be considered a 'common variety' " and thus must fall within the exclusionary language of § 3 of the 1955 Act, 69 Stat. 368, 30 U. S. C. § 611, which declares that "[a] deposit of common varieties of . . . stone . . . shall not be deemed a valuable mineral deposit within the meaning of the mining laws . . . ." Respondents rely on the earlier 1892 Act, 30 U. S. C. § 161, which makes the mining laws applicable to "lands that are chiefly valuable for building stone" and contend that the 1955 Act has no application to building stone, since, according to respondents, "[s]tone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone." This was also the reasoning of the Court of Appeals. But this argument completely fails to take into account the reason why Congress felt compelled to pass the 1955 Act with its modification of the mining laws. The legislative history makes clear that this Act (30 U. S. C. § 611) was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws, under which they served as a basis for claims to land patents, and to place the disposition of such materials under the Materials Act of 1947, 61 Stat. 681, 30 U. S. C. § 601, which provides for the sale of such materials without disposing of the land on which they are found. For example, the Chairman of the House Committee on Interior and Insular Affairs explained the 1955 Act as follows:

> "The reason we have done that is because sand, stone, gravel . . . are really *building materials,* and are not the type of material contemplated to be handled under the mining laws, and that is precisely where we have had so much abuse of the mining laws. . . ." 101 Cong. Rec. 8743. (Emphasis added.)

Similarly, the Senate Committee Report stated that the bill was intended to:

> "Provide that deposits of common varieties of sand, *building stone,* gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 (61 Stat. 681), rather than under the mining law of 1872." S. Rep. No. 554, 84th Cong., 1st Sess., 2. (Emphasis added.)

Thus we read 30 U. S. C. § 611, passed in 1955, as removing from the coverage of the mining laws "common varieties" of building stone, but leaving 30 U. S. C. § 161, the 1892 Act, entirely effective as to building stone that has "some property giving it distinct and special value" (expressly excluded under § 611).

For these reasons we hold that the United States is entitled to eject respondents from the land and that respondents' counterclaim for a patent must fail. The case is reversed and remanded to the Court of Appeals for the Ninth Circuit for further proceedings to carry out this decision.

It is so ordered.

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

STERN *v.* SOUTH CHESTER TUBE CO.

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

No. 486. Argued March 25, 1968.—Decided April 22, 1968.

The District Court dismissed a diversity action brought by petitioner, a stockholder of respondent, a Pennsylvania corporation, seeking an order directing respondent to permit him to inspect its records, as authorized by state statute (enforceable by compulsory state judicial order), on the ground that such an order is in the nature of a writ of mandamus and the court did not have jurisdiction under the All Writs Act to issue such order where that is the only relief sought. The Court of Appeals affirmed. *Held:* Neither the All Writs Act nor any other principle of federal law bars the granting of the mandatory equitable relief sought in this case. *Knapp* v. *Lake Shore R. Co.*, 197 U. S. 536 (1905), distinguished. Pp. 608–610.

378 F. 2d 205, reversed and remanded.

David Freeman argued the cause for petitioner. With him on the brief was *Richard H. Wels.*

Richard P. Brown, Jr., argued the cause for respondent. With him on the brief was *Ralph Earle II.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, a resident of New York, who owned stock worth $10,000 or more in the respondent South Chester Tube Company, a corporation, brought this action in the United States District Court for the Eastern District of Pennsylvania, where respondent was incorporated and maintained its business headquarters. Alleging that the corporation had many times denied petitioner's requests to inspect its books and records as authorized by Pa. Stat. Ann., Tit. 15, § 2852–308B (1958),[1] the complaint re-

[1] "Every shareholder shall have a right to examine, in person or by agent or attorney, at any reasonable time or times, for any

quested the court to enter an order directing the corporation to permit such an inspection. Jurisdiction was invoked under 28 U. S. C. § 1332 (a), which vests jurisdiction in the district courts where the matter in controversy exceeds the sum of $10,000 and where the parties are citizens of different States. The respondent answered, admitting parts of the allegations of the complaint and denying others. Respondent also moved to dismiss the action for lack of jurisdiction of the subject matter on the two following grounds:

> "1. The only relief sought in this diversity action is an order to compel the defendant company to allow the plaintiff, a minority shareholder, to inspect certain corporate records. Such an order is in the nature of a writ of mandamus. Under the All Writs Act, this United States District Court does not have jurisdiction to issue an order in the nature of a writ of mandamus in a case in which that writ is the only relief sought.
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> "2. . . . That right of inspection is not subject to any monetary valuation. Since diversity jurisdiction depends upon the existence of an amount in controversy which is capable of such monetary valuation [in excess of $10,000], no jurisdiction exists in this Court."

The District Court dismissed on the first ground of the motion, 252 F. Supp. 329 (D. C. E. D. Pa. 1966), and the Court of Appeals affirmed on the same ground, 378 F. 2d 205 (C. A. 3d Cir. 1967). For reasons to be stated we hold that these rulings on the mandamus point were erroneous and reverse the judgment below.

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reasonable purpose, the share register, books or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom."

The courts below viewed petitioner's complaint as in effect a plea for a writ of mandamus and relied on a long line of cases which have interpreted the All Writs Act [2] to deny power to issue this writ when it is the only relief sought. A writ of mandamus, so these cases hold, can issue only in aid of jurisdiction acquired to grant some other form of relief. See *M'Intire* v. *Wood,* 7 Cranch 504 (1813); *Rosenbaum* v. *Bauer,* 120 U. S. 450 (1887); *Covington Bridge Co.* v. *Hager,* 203 U. S. 109 (1906). We think, however, that the courts below erred in concluding that the relief sought here is "mandamus" within the meaning of these cases. Practically all the cases relied on by respondent and the courts below involved mandamus in its original sense—a suit against a public officer to compel performance of some "ministerial" duty. Although the word "mandamus" is also frequently used to describe orders that compel affirmative action by private parties, the considerations that come into play here certainly differ from the problems involved when the courts seek to compel action by public officials.

So far as we are aware, there is only one case in which this Court has held a federal district court without jurisdiction to issue a writ of mandamus against a private party. In *Knapp* v. *Lake Shore R. Co.,* 197 U. S. 536 (1905), the Interstate Commerce Commission had filed a "petition for mandamus" in the federal court, seeking to compel a railroad company to file certain reports as required by § 20 of the Interstate Commerce Act. The Court applied the principle of the earlier cases involving public officers and held that mandamus would not lie against the railroad company defendant. But the Court was careful to note that relief against the railroad might

[2] 1 Stat. 81 (1789), as amended, 28 U. S. C. § 1651 (a):

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

be available in the form of a "writ of injunction or other proper process, mandatory or otherwise." *Id.*, at 543. The distinction drawn by the Court in *Knapp* between mandamus and a mandatory injunction seems formalistic in the present day and age, but it must be remembered that *Knapp* was decided before the simplification of the rules of pleading and, more importantly, before the merger of law and equity. Since a writ of mandamus could be issued only in an action at law, while an injunction, whether mandatory or prohibitive, was an equitable remedy, the distinction referred to in *Knapp* was a familiar one in the judicial system of the time.

We need not now decide whether *Knapp* properly extended the mandamus bar to suits for relief against private parties or even whether the distinction between mandamus and mandatory injunctions can survive the merger of law and equity and the simplification of the rules of pleading. In the present case petitioner did not even fall into the trap of using the possibly fatal label, "mandamus"; instead he simply asked the court "to order the defendant to permit plaintiff to examine [its records]." Thus, even under the broadest possible reading of the *Knapp* decision, the All Writs Act would not deny a federal court power to issue the relief sought here.

We find no other principle of federal law, whether judge-made, statutory, or constitutional, which bars the granting of a mandatory remedy here. Petitioner undoubtedly has a right, under the substantive law of the State, to inspect the records of the corporation in which he holds stock, and since he has no adequate remedy at law, the federal court has jurisdiction to grant relief under its traditional equity power. We need not decide whether this is a case where such a federal remedy can be provided even in the absence of a similar state remedy, *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 674 (1950);

cf. *Guffey* v. *Smith,* 237 U. S. 101 (1915), because it is clear that state law here also provides for enforcement of the shareholder's right by a compulsory judicial order. See Pa. Stat. Ann., Tit. 12, § 1911 (1967). While the State labels the right of action "mandamus," what the Pennsylvania statute actually does is to authorize an action to compel Pennsylvania corporations to permit inspection of their records by their shareholders, and the label used under state practice of course has no bearing on the question whether the federal courts have power to grant the kind of relief actually sought. Consequently the District Court here does have power to issue the proper orders to enforce petitioner's state-granted right to inspect the corporate records.

The judgment of the Court of Appeals is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

CAMERON ET AL. *v.* JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 699. Argued March 5–6, 1968.—Decided April 22, 1968.

Appellants, to protest racial voting discrimination and encourage Negro registration, picketed the Forrest County, Mississippi, voting registration office in the county courthouse each weekday from January 23 to May 18, 1964, walking in a "march route" set off by the sheriff with barricades to facilitate access to the courthouse. On April 8 the legislature enacted the Mississippi Anti-Picketing Law, which, as amended, prohibits "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any county . . . courthouses . . . ." On April 9 the sheriff read the new law to the pickets, ordered them to disperse, and removed the barricades. When the pickets the next morning resumed marching along the now unmarked route they were arrested for violating the Anti-Picketing statute. Other arrests were made that afternoon, on April 11, and on May 18. On April 13 appellants brought this action seeking a judgment declaring that the Anti-Picketing Law is an invalid regulation of expression because of overbreadth and vagueness and an injunction against its enforcement in the prosecutions against them or otherwise, contending that the prosecutions were solely to discourage their freedom of expression. Following initial dismissal of the complaint and this Court's remand (381 U. S. 741) for reconsideration in the light of the intervening decision in *Dombrowski* v. *Pfister,* 380 U. S. 479, an evidentiary hearing was held and the three-judge District Court again dismissed the complaint, holding that the statute was not void on its face and that appellants had failed to show sufficient irreparable injury to warrant injunctive relief. *Held:*

1. The Mississippi Anti-Picketing Law is a valid regulatory statute; it is clear and precise and is not overly broad since it does not prohibit picketing unless it obstructs or unreasonably interferes with ingress and egress to or from the courthouse. Pp. 615–617.

2. This Court's independent examination of the record does not disclose that the officials acted in bad faith to harass appellants' exercise of the right to free expression; that the statute was adopted to halt appellants' picketing; or that the State had no expectation of securing valid convictions. This is therefore not a case where a federal equity court "by withdrawing the determination of guilt from state courts could rightly afford [appellants] any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette,* 319 U. S. 157, 164. *Dombrowski, supra,* distinguished. Pp. 617–622.

262 F. Supp. 873, affirmed.

Benjamin E. Smith and *Arthur Kinoy* argued the cause for appellants. With them on the brief were *William M. Kunstler, Morton Stavis* and *Bruce C. Waltzer.*

Will S. Wells, Assistant Attorney General of Mississippi, argued the cause for appellees. With him on the brief were *Joe T. Patterson,* Attorney General, and *William A. Allain,* Assistant Attorney General.

Mr. Justice Brennan delivered the opinion of the Court.

Appellants brought this action for declaratory and injunctive relief in the District Court for the Southern District of Mississippi. They sought a judgment declaring that the Mississippi Anti-Picketing Law [1] is an overly

[1] The statute as amended is codified as Miss. Code Ann. § 2318.5 (Supp. 1966), and in pertinent part provides:

"1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere

broad and vague regulation of expression, and therefore void on its face. They also sought a permanent injunction restraining appellees—the Governor and other Mississippi officials—from enforcing the statute in pending or future criminal prosecutions or otherwise, alleging that the then pending prosecutions against them for violating the statute [2] were part of a plan of selective enforcement engaged in by appellees with no expectation of securing convictions, but solely to discourage appellants from picketing to protest racial discrimination in voter registration and to encourage Negro citizens to attempt to register to vote.

A three-judge court initially considered the issues on the amended complaint and answers, and dismissed the complaint "in the exercise of its sound judicial discretion" and "in furtherance of the doctrine of abstention," having concluded "that such extraordinary relief is not due or suggested in this case. . . ." 244 F. Supp. 846, 849. We vacated the dismissal, 381 U. S. 741, and remanded for reconsideration in light of our intervening decision in *Dombrowski* v. *Pfister,* 380 U. S. 479.[3] On remand the three-

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with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto.

"2. Any person guilty of violating this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than Five Hundred Dollars ($500.00), or imprisoned in jail not more than six (6) months, or both such fine and imprisonment."

[2] All of the prosecutions were removed under 28 U. S. C. § 1443 to the federal courts. Following our opinion in *City of Greenwood* v. *Peacock,* 384 U. S. 808, the cases were remanded to the state courts. *Hartfield* v. *Mississippi,* 363 F. 2d 869. They were subsequently stayed by the District Court and are presently stayed pending our decision on this appeal.

[3] Our *per curiam* stated, 381 U. S. 741–742: "On remand, the District Court should first consider whether 28 U. S. C. § 2283 (1958 ed.) bars a federal injunction in this case, see 380 U. S., at 484, n. 2. If § 2283 is not a bar, the court should then determine whether

judge court [4] conducted an evidentiary hearing and again dismissed, this time with prejudice. 262 F. Supp. 873. We noted probable jurisdiction. 389 U. S. 809. We affirm.

I.

The Mississippi Anti-Picketing Law was enacted by the Mississippi Legislature and signed by the Governor on April 8, 1964, and became effective immediately. The Forrest County voting registration office is housed in the county courthouse in Hattiesburg. The courthouse is set back a distance from the street and is reached by several paved walks surrounding grass plots and a monument. On January 22, 1964, civil rights organizations fostering increased voter registration of Negro citizens staged a large demonstration on the courthouse site. Thereafter they maintained a picket line on the grounds every day except Sunday from January 23 until May 18, 1964. To facilitate access to the courthouse the sheriff at the outset blocked off with barricades a small "march route" area within the grounds to the right of the main entrance to the courthouse, where the pickets, usually few in number, were allowed to picket until April 9. On April 9, the day following the enactment of the Anti-Picketing Law, the sheriff accompanied by other county

relief is proper in light of the criteria set forth in *Dombrowski*." The District Court held that § 2283 prohibited the court from enjoining or abating the criminal prosecutions initiated against the appellants prior to the filing of the suit on April 13, 1964, and further, that 42 U. S. C. § 1983 creates no exception to § 2283. 262 F. Supp. 873, 878. We find it unnecessary to resolve either question and intimate no view whatever upon the correctness of the holding of the District Court.

[4] The three-judge District Court which rendered the initial decision consisted of Circuit Judge Rives and District Court Judges Mize and Cox. Upon the death of Judge Mize, Circuit Judge Coleman was designated to serve in his stead. Circuit Judge Rives dissented from his colleagues on both occasions. See 244 F. Supp., at 856, 262 F. Supp., at 881.

officials, read the new law to the pickets at the "march route" and directed them to disperse, which they did. The sheriff also removed the barricades marking the "march route." On the morning of April 10, the pickets, now increased to 35 or 40 persons, appeared at the courthouse and resumed picketing along the now unmarked "march route." The pickets were arrested and formally charged with violation of the Anti-Picketing statute. Others were arrested that afternoon. Seven more pickets were arrested and charged on the morning of April 11. The complaint in this action was filed April 13. Picketing nonetheless continued on the "march route" every day until May 18, but no further arrests were made until May 18, when nine pickets were arrested and charged. All picketing stopped thereafter.

II.

The District Court's response on the remand to reconsider the case in light of *Dombrowski* was first to render a declaratory judgment, cf. *Zwickler* v. *Koota,* 389 U. S. 241,[5] that the statute was not void on its face, rejecting appellants' contention that it is so broad, vague, indefinite, and lacking in definitely ascertainable standards as to be unconstitutional on its face. We agree with the District Court.

Appellants advance a two-pronged argument. First, they argue that the statute forbids picketing in terms

[5] In the initial decision the District Court declined to pass on the statute's constitutionality, holding that the case was one for abstention. 244 F. Supp., at 855–856. In *Zwickler* we held that it was error in the absence of special circumstances to abstain and refuse to render a declaratory judgment and, further, said, at 254: "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."

"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.[6] But the statute prohibits only "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . . ." The terms "obstruct" and "unreasonably interfere" plainly require no "guess[ing] at [their] meaning." Appellants focus on the word "unreasonably."[7] It is a widely used and well understood word and clearly so when juxtaposed with "obstruct" and "interfere." We conclude that the statute clearly and precisely delineates its reach in words of common understanding.[8] It is "a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be . . . proscribed." *Edwards* v. *South Carolina*, 372 U. S. 229, 236.

The second prong of appellants' argument is that the statute, even assuming that it is "lacking neither clarity nor precision, is void for 'overbreadth,' that is, that it offends the constitutional principle that 'a govern-

[6] See *Ashton* v. *Kentucky*, 384 U. S. 195, 200–201.

[7] The appellants suggest that the amendment to the statute which twice inserts the word "unreasonably" "raises new questions of unconstitutional vagueness and overbreadth not before this Court on the original appeal." The District Court rejected this argument, 262 F. Supp., at 879: "Plaintiffs . . . argue that the addition of the word 'unreasonably' to the statute made it even more vague and indefinite, but we disagree. The word 'unreasonable' seems to have been well understood by the founders of the Republic when they used it in the Fourth Amendment, where it remains, and is enforced, as it should be, to this day." Judge Rives, in dissent, 262 F. Supp., at 897, n. 58, found that the addition of the word to the statute did not alter its scope. "On the contrary, the defendants argue that the statute should always have been interpreted as if this word were present and that the persons arrested did unreasonably block the Court House."

[8] See *Cameron* v. *Johnson*, 381 U. S., at 749–750 (dissenting opinion of BLACK, J.); *id.*, at 757 (dissenting opinion of WHITE, J.).

mental 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.' " *Zwickler* v. *Koota, supra,* at 250.[9] The argument centers on the fact that the proscription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But "picketing and parading [are] subject to regulation even though intertwined with expression and association," *Cox* v. *Louisiana,* 379 U. S. 559, 563,[10] and this statute does not prohibit picketing so intertwined unless engaged in in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect does not abridge constitutional liberty "since such activity bears no necessary relationship to the freedom to . . . distribute information or opinion." *Schneider* v. *State,* 308 U. S. 147, 161. The statute is therefore "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Cox* v. *Louisiana, supra,* at 564.

III.

The District Court's further response on remand to reconsider the case in light of *Dombrowski* was to deny

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[9] See *NAACP* v. *Alabama,* 377 U. S. 288, 307; see also *Zwickler* v. *Koota,* 389 U. S. 241, 249–250; *Keyishian* v. *Board of Regents,* 385 U. S. 589, 609; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508–509; *NAACP* v. *Button,* 371 U. S. 415, 438; *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304–307; *Schneider* v. *State,* 308 U. S. 147, 161, 165.

[10] See *Schneider* v. *State,* 308 U. S. 147, 161; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 499–500; *NAACP* v. *Alabama,* 357 U. S. 449, 460–462; *NAACP* v. *Button,* 371 U. S. 415, 438–439.

injunctive relief, after an evidentiary hearing, on findings that appellants failed to show sufficient irreparable injury to justify such relief. Appellants argue in this Court that the record discloses sufficient irreparable injury to entitle them to the injunction sought, even if the statute is constitutional on its face.

Dombrowski recognized, 380 U. S., at 483–485, the continuing validity of 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; see *Zwickler* v. *Koota, supra,* at 253. Federal interference with a State's good-faith administration of its criminal laws "is peculiarly inconsistent with our federal framework" and a showing of "special circumstances" beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding of irreparable injury sufficient to justify the extraordinary remedy of an injunction. 380 U. S., at 484. We found such "special circumstances" in *Dombrowski.* The prosecutions there begun and threatened were not, as here, for violation of a statute narrowly regulating conduct which is intertwined with expression, but for alleged violations of various sections of excessively broad Louisiana statutes regulating expression itself—the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. These statutes were challenged as overly broad and vague regulations of expression. Despite state court actions quashing arrest warrants and suppressing evidence purportedly seized in enforcing them, Louisiana officials continued to threaten prosecutions of Dombrowski and his co-appellants under them. In that context, we held that a case of "the threat of irreparable injury required by traditional doctrines of equity" was made

out. 380 U. S., at 490. We held further that the sections of the Subversive Activities and Communist Control Law (for alleged violations of which indictments had been obtained while the case was pending in the federal court) were patently unconstitutional on their face, and remanded with direction to frame an appropriate injunction restraining prosecution of the indictments.

In short, we viewed *Dombrowski* to be a case presenting a situation of the "impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities . . . ." 380 U. S., at 490. In contrast, the District Court expressly found in this case "that there was no harassment, intimidation, or oppression of these complainants in their efforts to exercise their constitutional rights, but they were arrested and they are being prosecuted in good faith for their deliberate violation of that part of the statute which denounces interference with the orderly use of courthouse facilities by all citizens alike." 262 F. Supp., at 876, see also 244 F. Supp., at 848–849. We cannot say from our independent examination of the record that the District Court erred in denying injunctive relief.

Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms. *Cox* v. *Louisiana, supra,* at 564. Appellants' case that there are "special circumstances" establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of ob-

taining convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not esablish the bad faith charged. This is therefore not a case in which ". . . a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [appellants] any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette, supra,* at 164. We have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See *Cox* v. *Louisiana, supra; Wright* v. *Georgia,* 373 U. S. 284; *Edwards* v. *South Carolina, supra.*

Appellants argue that the adoption of the statute in the context of the picketing at the courthouse, and its immediate enforcement by the arrests on April 10 and 11, provide compelling evidence that the statute was conceived and enforced solely to bring a halt to the picketing. Appellants buttress their argument by characterizing as "indefensible entrapment" the enforcement of the statute on April 10 against picketing conduct which county officials had permitted for almost three months along the "march route" marked out by the officials themselves. This argument necessarily implies the suggestion that had the statute been law when the picketing started in January it would not have been enforced. There is no support whatever in the record for that proposition. The more reasonable inference is that the authorities believed that until enactment of the statute on April 8 they had no choice but to allow the picketing. In any event, upon the adoption of the law, it became the duty of the authorities in good faith to enforce it, and to prosecute for picketing that violated that law. Similarly, insofar as appellants argue that selective enforcement was shown by the failure to arrest

those who were picketing from April 11 to May 18, the short answer is that it is at least as reasonable to infer from the record that the authorities did not regard their conduct in that period as violating the statute. Indeed, the fact that no arrests were made over that five-week period is itself some support for the District Court's rejection of appellants' primary contention that appellees used the statute in bad faith to discourage the pickets from picketing to foster increased voter registration of Negro citizens.

Nor are we persuaded by the argument that, because the evidence adduced at the hearing of the pickets' conduct throughout the period would not be sufficient, in the view of appellants, to sustain convictions on a criminal trial, it was demonstrated that the State had no expectation of securing valid convictions. *Dombrowski* v. *Pfister, supra,* at 490. This argument mistakenly supposes that "special circumstances" justifying injunctive relief appear if it is not shown that the statute was in fact violated. But the question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount "to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski* v. *Pfister, supra,* at 485. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions.[11] Appellants say that the picketing was non-

[11] See 244 F. Supp., at 849: "[T]his Court indicates nothing as to the guilt or innocence of the plaintiffs . . ."; 262 F. Supp., at 876: "We do not sit in this proceeding to determine the guilt or innocence of the plaintiffs . . . ."

obstructive, but the State claims quite the contrary, and the record is not totally devoid of support for the State's claim.

Appellants argue that selective enforcement was shown by the evidence that subsequent to the arrests of the pickets parades were held in Hattiesburg during which the streets of the downtown area, including the locale of the courthouse, were cordoned off during daytime business hours and the sidewalks were obstructed by crowds of spectators during the parades. But this statute is not aimed at obstructions resulting from parades on the city streets. All that it prohibits is the obstruction of or unreasonable interference with ingress and egress to and from public buildings, including courthouses, and with traffic on the streets or sidewalks adjacent to those buildings. There was no evidence of conduct of that nature at any other place which would have brought the statute into play, let alone evidence that the authorities allowed such conduct without enforcing the statute.

Affirmed.

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

In my opinion, *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), requires that the decision of the court below be reversed.

I agree that the statute in question is not "unconstitutional on its face." But that conclusion is not the end of the matter. *Dombrowski* stands for the proposition that "the abstention doctrine is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, *or as applied for the purpose of discouraging protected activities.*" 380 U. S., at 489–490. (Emphasis added.)

Dombrowski establishes that the federal courts will grant relief when "defense of the State's criminal prosecution will not assure adequate vindication" of First

Amendment rights. 380 U. S., at 485. According to *Dombrowski,* this condition exists when the State has invoked the criminal law in bad faith and for the purpose of harassing and disrupting the exercise of those rights. Federal courts are available to enjoin the invocation of state criminal process when that process is abusively invoked "without any hope of ultimate success, but only to discourage" the assertion of constitutionally protected rights. 380 U. S., at 490. See also *City of Greenwood* v. *Peacock,* 384 U. S. 808, 829 (1966).

Dombrowski is strong medicine. It involves interposition of federal power at the threshold stage of the administration of state criminal laws. *Dombrowski*'s remedy is justified only when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault. And those who seek federal intervention bear a heavy burden to show that the State, in prosecuting them, is not engaged in use of its police power for legitimate ends, but is deliberately invoking it to harass or suppress First Amendment rights. *Dombrowski* should never be invoked when the State is, in substance and truth, engaged in the enforcement of valid criminal laws. Ordinarily, the presumption that the State's motive was law enforcement and not interference with speech or assembly will carry the day.

I approach the problem of the present case with this modest view of *Dombrowski*'s scope. Even so, in my judgment, *Dombrowski* commands reversal of the judgment in this case. *Dombrowski* means precious little, I submit, if the presumption supporting state action is not overcome by facts such as those before us now.

On January 22, 1964, civil rights organizations whose members and adherents are represented in this class action by appellants began to picket the Forrest County voting registration office, which is located in the Hattiesburg, Mississippi, courthouse. The picketing was designed to protest racial discrimination in voter registra-

tion and to encourage Negro citizens of the county to register. On that day, there was a large crowd of several hundred persons gathered near the courthouse. The picketing continued from January 22 until May 18, every day except Sunday. After the initial period culminating in the first arrests on April 10, the number of pickets varied from seven to 10.

Shortly after the first day of picketing, the sheriff marked out a "march route." The pickets thereafter confined themselves to this route. They were allowed to continue picketing unmolested. The march route never took the pickets directly in front of any entrance to the courthouse. The picketing was, by all accounts, peaceful and without incident. The pickets at first sang, chanted, preached, and prayed, but within a few days and beginning well before the time of the arrests, they confined themselves to a slow, quiet walk. This continued throughout the relevant dates.

The evidence in this record that the picketing interfered with or even inconvenienced pedestrians is negligible.[1] There is no evidence that access to the courthouse was actually obstructed. If the pickets had been disorderly or had obstructed use of the sidewalks or access to the courthouse, the police, subject to constitutional limitations, could have arrested them under

[1] With respect to the arrests made on the morning of April 10, there are some unimpressive shreds of such evidence: the testimony of the home demonstration agent that, in proceeding outside from her office (located in the courthouse) to the office of the county agent (also located in the courthouse), she found that the pickets "were so close together that I had to wait for just a moment to get in line and I fell in line with them and started weaving back and forth until I reached the front steps and then dropped out of the line"; in addition, the president of the Forrest County Board of Supervisors, attracted to the scene by "curiosity as much as anything else," testified that in his "opinion" a side entrance to the courthouse was obstructed by the pickets.

various statutes.[2] But the record is clear: The pickets confined themselves to the line of march designated by the police themselves, and they were quiet and orderly. They remained at some considerable distance from at least three entrances to the courthouse, including the principal one at the top of the courthouse steps. There was no reason for their arrest. They were obeying, not disobeying, the police.

For about two and a half months, from January 22, 1964, to April 10, 1964, the police stood by. The pickets marched on the prescribed route. Nobody had any difficulty of passage or of access to the public building.

Then, on April 8, 1964, the Mississippi Legislature enacted a law which, I believe, may fairly be characterized as a directive to the police that the picketing in Hattiesburg should be stopped—forthwith. This law, as amended, forbade "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . courthouses . . . ."

The law was signed by the Governor on the same day it was passed by the State Legislature, and delivered by messenger to waiting law enforcement officials in Hattiesburg on the following day. As soon as the law was brought to those officials on April 9, they read it aloud to the pickets and asked them to disperse. There was then only a small group of pickets. The following morning, April 10, when pickets returned to the march route, the first arrests were made. A large number of persons were picketing on that day, 35 or 40 of them, because they anticipated arrests. In the same afternoon, only a woman and some school children were picketing.

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[2] Miss. Code Ann. §§ 2087.5, 2087.9 (1966 Supp.) (disorderly conduct); Miss. Code Ann. § 2089.5 (1966 Supp.) (disturbance of the peace); Miss. Code Ann. § 2090.5 (1957) (disturbance in public place). The record in fact shows that in the early period of picketing some arrests for breach of the peace were made.

All were arrested. On the next day, April 11, nine persons were demonstrating; seven were arrested. The picketing continued every day except Sunday. On May 18, again, there were nine pickets, and all were arrested. There was no further picketing.

Apart from the morning of April 10,[3] at none of the times when arrests were made is there a shred of evidence that the April 8 statute was violated. There is no suggestion that the few pickets present on the afternoon of April 10, on April 11, or on May 18, blocked access to or egress from the courthouse, or obstructed the walks.[4]

I submit that this record compels the following conclusions:

1. The pickets were arrested and prosecuted "without any hope of ultimate success." There is no evidence that their activities "obstruct[ed] . . . or unreasonably interfere[d] with ingress or egress to and from any . . . courthouses . . . ."

The meager, insubstantial evidence of inconvenience to pedestrians, which I have summarized in notes 1 and 4 above, could not be used to support a conviction under the language of this specific, narrowly phrased statute. See *Thompson* v. *Louisville,* 362 U. S. 199 (1960); cf.

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[3] See n. 1, *supra.*

[4] There were on each of these occasions fewer than 10 pickets walking around a grassy plot on the "march route," a path that measured well over 100 feet in length. There is some indication of a contention that on these occasions the pickets were walking closely bunched. But as Circuit Judge Rives, dissenting in the court below, pointed out, 10 pickets walking closely bunched could not possibly have obstructed any entrance to the courthouse for more than a small fraction of the time necessary to proceed around the plot. And in any event, there is no evidence of anyone having actually been impeded in attempting to gain access to the courthouse on these dates.

Brown v. *Louisiana,* 383 U. S. 131 (1966) (opinion of FORTAS, J.). Even if we assume that this record shows that some pedestrians were inconvenienced, that is not the same thing as blocking the doors of the courthouse. I agree that, in an injunctive proceeding like the present action, the State does not have to prove the violation of law beyond a reasonable doubt and establish that it is not constitutionally protected. But, if *Dombrowski* means anything, the State must certainly show more than there is in this record.

2. The arrests and their sequence demonstrate that the State was not here engaged in policing access to the courthouse or even freedom of the sidewalks, but in a deliberate plan to put an end to the voting-rights demonstration. This is shown by the facts (1) that the pickets marched in the line laid out by the police themselves; (2) that the police did not interfere for two and a half months; (3) that the legislature passed a rifle-shot law, neatly directed to this particular situation; (4) that thereupon the police set out to break up the picketing; (5) that the number, volume, and characteristics of the picketing certainly were not more obstructive on the days of the last three arrests than on any other days in which the picketing occurred and was tolerated.

In my opinion, these conclusions demonstrate that the pickets were not arrested as a result of good-faith administration of the criminal law. They were arrested for the purpose of putting a stop to a peaceful, orderly demonstration protected by the First Amendment in principle and in the manner of execution here. They were not arrested because they blocked access to the courthouse. There is powerful evidence in this record that the State cannot possibly anticipate a conviction of the pickets which will withstand the tests this Court has laid down in the First Amendment and Fourteenth

Amendment areas; and it requires more indulgence than this Court has permitted in cases involving First Amendment freedoms for us to say that the State has made a tolerable showing to the contrary.

I would reverse the judgment below and remand for the entry of an appropriate order.[5]

[5] In view of the fact that the majority does not reach the issue, I consider it inappropriate to discuss whether the anti-injunction statute, 28 U. S. C. § 2283, constitutes a bar to *Dombrowski* relief in this case. See, however, *City of Greenwood* v. *Peacock*, 384 U. S. 808, 829 (1966).

GINSBERG *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

No. 47. Argued January 16, 1968.—Decided April 22, 1968.

Appellant, who operates a stationery store and luncheonette, was convicted of selling "girlie" magazines to a 16-year-old boy in violation of § 484–h of the New York Penal Law. The statute makes it unlawful "knowingly to sell . . . to a minor" under 17 "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains [such pictures] and which, taken as a whole, is harmful to minors." Appellant's conviction was affirmed by the Appellate Term of the Supreme Court. He was denied leave to appeal to the New York Court of Appeals. *Held:*

1. The magazines here involved are not obscene for adults and appellant is not barred from selling them to persons 17 years of age or older. Pp. 634–635.

2. Obscenity is not within the area of protected speech or press, *Roth* v. *United States,* 354 U. S. 476, 485, and there is no issue here of the obscenity of the material involved as appellant does not argue that the magazines are not "harmful to minors." P. 635.

3. It is not constitutionally impermissible for New York, under this statute, to accord minors under 17 years of age a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read and see. Pp. 637–643.

(a) The State has power to adjust the definition of obscenity as applied to minors, for even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince* v. *Massachusetts,* 321 U. S. 158, 170. Pp. 638–639.

(b) Constitutional interpretation has consistently recognized that the parents' claim to authority in the rearing of their children is basic in our society, and the legislature could properly conclude that those primarily responsible for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. P. 639.

(c) The State has an independent interest in protecting the welfare of children and safeguarding them from abuses. Pp. 640–641.

(d) This Court cannot say that the statute, in defining obscenity on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm. Pp. 641–643.

4. Subsections (f) and (g) of § 484–h are not void for vagueness. Pp. 643–645.

(a) The New York Court of Appeals, in *Bookcase, Inc.* v. *Broderick,* 18 N. Y. 2d 71, 76, 218 N. E. 2d 668, 671, construed the definition of obscenity "harmful to minors" in subsection (f) "as virtually identical to" this Court's most recent statement of the elements of obscenity in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418, and accordingly the definition gives adequate notice of what is prohibited and does not offend due process requirements. P. 643.

(b) Since the New York Legislature's attention was drawn to *People* v. *Finkelstein,* 9 N. Y. 2d 342, 174 N. E. 2d 470, which defined the nature of *scienter* for New York's general obscenity statute, when it considered § 484–h, it may be inferred that the reference in provision (i) of subsection (g) to knowledge of the "character and content" of the material incorporates the gloss given the term "character" in *People* v. *Finkelstein.* P. 644.

(c) Provision (ii) of subsection (g) states expressly that a defendant must be acquitted on the ground of "honest mistake" if he proves that he made "a reasonable bona fide attempt to ascertain the true age of such minor." P. 645.

Affirmed.

Emanuel Redfield argued the cause for appellant. With him on the brief was *Benjamin E. Winston.*

William Cahn argued the cause for appellee. With him on the brief was *George Danzig Levine.*

Briefs of *amici curiae,* urging reversal, were filed by *Osmond K. Fraenkel, Edward J. Ennis, Melvin L. Wulf* and *Alan H. Levine* for the American Civil Liberties Union et al., by *Morris B. Abram* and *Jay Greenfield* for the Council for Periodical Distributors Associations, Inc.,

by *Horace S. Manges* and *Marshall C. Berger* for the American Book Publishers Council, Inc., and by *Irwin Karp* for the Authors League of America, Inc.

Brief of *amicus curiae,* urging affirmance, was filed by *Charles H. Keating, Jr.,* and *James J. Clancy* for the Citizens for Decent Literature, Inc.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

Appellant and his wife operate "Sam's Stationery and Luncheonette" in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including some so-called "girlie" magazines. Appellant was prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two "girlie" magazines on each of two dates in October 1965, in violation of § 484–h of the New York Penal Law. He was tried before a judge without a jury in Nassau County District Court and was found guilty on both counts.[1] The judge found (1) that the

[1] Appellant makes no attack upon § 484–h as applied. We therefore have no occasion to consider the sufficiency of the evidence, or such issues as burden of proof, whether expert evidence is either required or permissible, or any other questions which might be pertinent to the application of the statute. Appellant does argue that because the trial judge included a finding that two of the magazines "contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct," an offense not charged in the informations, the conviction must be set aside under *Cole* v. *Arkansas,* 333 U. S. 196. But this case was tried and the appellant

magazines contained pictures which depicted female "nudity" in a manner defined in subsection 1 (b), that is "the showing of . . . female . . . buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . . ," and (2) that the pictures were "harmful to minors" in that they had, within the meaning of subsection 1 (f)

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was found guilty only on the charges of selling magazines containing pictures depicting female nudity. It is therefore not a case where defendant was tried and convicted of a violation of one offense when he was charged with a distinctly and substantially different offense.

The full text of § 484–h is attached as Appendix A. It was enacted in L. 1965, c. 327, to replace an earlier version held invalid by the New York Court of Appeals in *People* v. *Kahan*, 15 N. Y. 2d 311, 206 N. E. 2d 333, and *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 201 N. E. 2d 14. Section 484–h in turn was replaced by L. 1967, c. 791, now §§ 235.20–235.22 of the Penal Law. The major changes under the 1967 law added a provision that the one charged with a violation "is presumed to [sell] with knowledge of the character and content of the material sold . . . ," and the provision that "it is an affirmative defense that: (a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and (b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more." Neither addition is involved in this case. We intimate no view whatever upon the constitutional validity of the presumption. See in general *Smith* v. *California*, 361 U. S. 147; *Speiser* v. *Randall*, 357 U. S. 513; 41 N. Y. U. L. Rev. 791 (1966); 30 Albany L. Rev. 133 (1966).

The 1967 law also repealed outright § 484–i which had been enacted one week after § 484–h. L. 1965, c. 327. It forbade sales to minors under the age of 18. The New York Court of Appeals sustained its validity against a challenge that it was void for vagueness. *People* v. *Tannenbaum*, 18 N. Y. 2d 268, 220 N. E. 2d 783. For an analysis of § 484–i and a comparison with § 484–h see 33 Brooklyn L. Rev. 329 (1967).

"that quality of . . . representation . . . of nudity . . . [which] . . . (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." He held that both sales to the 16-year-old boy therefore constituted the violation under § 484–h of "knowingly to sell . . . to a minor" under 17 of "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors." The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and then appealed to this Court. We noted probable jurisdiction. 388 U. S. 904. We affirm.[2]

[2] The case is not moot. The appellant might have been sentenced to one year's imprisonment, or a $500 fine or both. N. Y. Penal Law § 1937. The trial judge however exercised authority under N. Y. Penal Law § 2188 and on May 17, 1966, suspended sentence on all counts. Under § 470–a of the New York Code of Criminal Procedure, the judge could thereafter recall appellant and impose sentence only within one year, or before May 17, 1967. The judge did not do so. Although *St. Pierre* v. *United States,* 319 U. S. 41, held that a criminal case had become moot when the petitioner finished serving his sentence before direct review in this Court, *St. Pierre* also recognized that the case would not have been moot had "petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied." *Id.,* at 43. The State of New York concedes in its brief in this Court addressed to mootness "that certain disabilities do flow from the conviction." The brief states that among these is "the possibility of ineligibility for licensing under state and municipal license laws regulating various lawful occupations . . . ." Since the argument, the parties advised the Court that, although this is the first time appellant has been convicted of any

I.

The "girlie" picture magazines involved in the sales here are not obscene for adults, *Redrup* v. *New York*, 386 U. S. 767.[3] But § 484–h does not bar the appellant

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crime, this conviction might result in the revocation of the license required by municipal law as a prerequisite to engaging in the luncheonette business he carries on in Bellmore, New York. Bellmore is an "unincorporated village" within the Town of Hempstead, Long Island, 1967 N. Y. S. Leg. Man. 1154. The town has a licensing ordinance which provides that the "Commissioner of Buildings . . . may suspend or revoke any license issued, in his discretion, for . . . (e) conviction of any crime." LL 21, Town of Hempstead, eff. December 1, 1966, § 8.1 (e). In these circumstances the case is not moot since the conviction may entail collateral consequences sufficient to bring the case within the *St. Pierre* exception. See *Fiswick* v. *United States*, 329 U. S. 211, 220–222. We were not able to reach that conclusion in *Tannenbaum* v. *New York*, 388 U. S. 439, or *Jacobs* v. *New York*, 388 U. S. 431, in which the appeals were dismissed as moot. In *Tannenbaum* there was no contention that the convictions under the now repealed § 484–i entailed any collateral consequences. In *Jacobs* the appeal was dismissed on motion of the State which alleged, *inter alia*, that New York law did not impose "any further penalty upon conviction of the misdemeanor here in issue." Appellant did not there show, or contend, that his license might be revoked for "conviction of any crime"; he asserted only that the conviction might be the basis of a suspension under a provision of the Administrative Code of the City of New York requiring the Department of Licenses to assure that motion picture theatres are not conducted in a manner offensive to "public morals."

[3] One of the magazines was an issue of the magazine "Sir." We held in *Gent* v. *Arkansas*, decided with *Redrup* v. *New York*, 386 U. S. 767, 769, that an Arkansas statute which did not reflect a specific and limited state concern for juveniles was unconstitutional insofar as it was applied to suppress distribution of another issue of that magazine. Other cases which turned on findings of nonobscenity of this type of magazine include: *Central Magazine Sales, Ltd.* v. *United States*, 389 U. S. 50; *Conner* v. *City of Hammond*, 389 U. S. 48; *Potomac News Co.* v. *United States*, 389 U. S. 47; *Mazes* v. *Ohio*, 388 U. S. 453; *A Quantity of Books* v. *Kansas*, 388 U. S. 452; *Books, Inc.* v. *United States*, 388 U. S. 449; *Aday* v. *United States*,

from stocking the magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid under our decision in *Butler* v. *Michigan,* 352 U. S. 380.

Obscenity is not within the area of protected speech or press. *Roth* v. *United States,* 354 U. S. 476, 485. The three-pronged test of subsection 1 (f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth* stated in the plurality opinion in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418. Appellant's primary attack upon § 484–h is leveled at the power of the State to adapt this *Memoirs* formulation to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression. He makes no argument that the magazines are not "harmful to minors" within the definition in subsection 1 (f). Thus "[n]o issue is presented . . . concerning the obscenity of the material involved." *Roth, supra,* at 481, n. 8.

The New York Court of Appeals "upheld the Legislature's power to employ variable concepts of obscenity" [4]

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388 U. S. 447; *Avansino* v. *New York,* 388 U. S. 446; *Sheperd* v. *New York,* 388 U. S. 444; *Friedman* v. *New York,* 388 U. S. 441; *Keney* v. *New York,* 388 U. S. 440; see also *Rosenbloom* v. *Virginia,* 388 U. S. 450; *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372.

[4] *People* v. *Tannenbaum,* 18 N. Y. 2d 268, 270, 220 N. E. 2d 783, 785, dismissed as moot, 388 U. S. 439. The concept of variable obscenity is developed in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960). At 85 the authors state:

"Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance."

in a case in which the same challenge to state power to enact such a law was also addressed to § 484–h. *Bookcase, Inc.* v. *Broderick,* 18 N. Y. 2d 71, 218 N. E. 2d 668, appeal dismissed for want of a properly presented federal question, *sub nom. Bookcase, Inc.* v. *Leary,* 385 U. S. 12. In sustaining state power to enact the law, the Court of Appeals said, *Bookcase, Inc.* v. *Broderick,* at 75, 218 N. E. 2d, at 671:

> "[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults."

Appellant's attack is not that New York was without power to draw the line at age 17. Rather, his contention is the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly insists that the denial to minors under 17 of access to material condemned by § 484–h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty.

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. *In re Gault,* 387 U. S. 1, 13. It is enough for the purposes of this case that we inquire whether it was

constitutionally impermissible for New York, insofar as § 484–h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.[5]

Appellant argues that there is an invasion of protected rights under § 484–h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in *Meyer* v. *Nebraska,* 262 U. S. 390; the Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in *Pierce* v. *Society of Sisters,* 268 U. S. 510; and the statute compelling children against their religious scruples to give the flag salute, which was struck down in *West Virginia*

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[5] Suggestions that legislatures might give attention to laws dealing specifically with safeguarding children against pornographic material have been made by many judges and commentators. See, *e. g., Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (opinion of JUSTICES BRENNAN and Goldberg); *id.,* at 201 (dissenting opinion of THE CHIEF JUSTICE); *Ginzburg* v. *United States,* 383 U. S. 463, 498, n. 1 (dissenting opinion of MR. JUSTICE STEWART); *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, 593; *In re Louisiana News Co.,* 187 F. Supp. 241, 247; *United States* v. *Levine,* 83 F. 2d 156; *United States* v. *Dennett,* 39 F. 2d 564; R. Kuh, Foolish Figleaves? 258–260 (1967); Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 939 (1963); Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 848 (1964); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 413, n. 68 (1963); Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 7; Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7, 75.

The obscenity laws of 35 other States include provisions referring to minors. The laws are listed in Appendix B to this opinion. None is a precise counterpart of New York's § 484–h and we imply no view whatever on questions of their constitutionality.

State Board of Education v. *Barnette,* 319 U. S. 624. We reject that argument. We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484–h simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . ." of such minors. *Mishkin* v. *New York,* 383 U. S. 502, 509; *Bookcase, Inc.* v. *Broderick, supra,* at 75, 218 N. E. 2d, at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . ." *Prince* v. *Massachusetts,* 321 U. S. 158, 170.[6] In *Prince* we sustained the convic-

[6] Many commentators, including many committed to the proposition that "[n]o general restriction on expression in terms of 'obscenity' can . . . be reconciled with the first amendment," recognize that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," and accordingly acknowledge a supervening state interest in the regulation of literature sold to children, Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 938, 939 (1963):

"Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults."

See also Gerber, *supra,* at 848; Kalven, *supra,* at 7; Magrath, *supra,* at 75. *Prince* v. *Massachusetts* is urged to be constitutional authority for such regulation. See, *e. g.,* Kuh, *supra,* at 258–260;

tion of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484–h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts, supra,* at 166. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1 (f)(ii) of § 484–h expressly recognizes the parental role in assessing sex-related material harmful to minors according "to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.[7]

Comment, Exclusion of Children from Violent Movies, 67 Col. L. Rev. 1149, 1159–1160 (1967); Note, Constitutional Problems in Obscenity Legislation Protecting Children, 54 Geo. L. J. 1379 (1966).

[7] One commentator who argues that obscenity legislation might be constitutionally defective as an imposition of a single standard of public morality would give effect to the parental role and accept

The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in *Bookcase, Inc.* v. *Broderick, supra,* at 75, 218 N. E. 2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of *People* v. *Kahan,* 15 N. Y. 2d 311, 206 N. E. 2d 333, which had struck down the first version of § 484–h on grounds of vagueness. In his concurring opinion, *id.,* at 312, 206 N. E. 2d, at 334, he said:

> "While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults."

In *Prince* v. *Massachusetts, supra,* at 165, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men

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laws relating only to minors. Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 413, n. 68 (1963):

"One must consider also how much difference it makes if laws are designed to protect only the morals of a child. While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit."

See also Elias, Sex Publications and Moral Corruption: The Supreme Court Dilemma, 9 Wm. & Mary L. Rev. 302, 320–321 (1967).

and citizens." The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by § 484–h constitutes such an "abuse."

Section 484–e of the law states a legislative finding that the material condemned by § 484–h is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." It is very doubtful that this finding expresses an accepted scientific fact.[8] But obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase "clear and present danger" in its application to protected speech. *Roth* v. *United States, supra,* at 486–487.[9] To sustain state power to exclude material defined as obscenity by § 484–h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors. In *Meyer* v. *Nebraska, supra,* at 400, we were able to say that children's knowledge of the German language "cannot reasonably be regarded as harmful." That cannot be said by us of minors' reading and seeing sex material. To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present

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[8] Compare *Memoirs* v. *Massachusetts,* 383 U. S., at 424 (opinion of Douglas, J.) with *id.,* at 441 (opinion of Clark, J.). See Kuh, *supra,* cc. 18–19; Gaylin, Book Review, 77 Yale L. J. 579, 591–595 (1968); Magrath, *supra,* at 52.

[9] Our conclusion in *Roth,* at 486–487, that the clear and present danger test was irrelevant to the determination of obscenity made it unnecessary in that case to consider the debate among the authorities whether exposure to pornography caused antisocial consequences. See also *Mishkin* v. *New York, supra; Ginzburg* v. *United States, supra; Memoirs* v. *Massachusetts, supra.*

danger to the people of the state." But the growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." [10] We do not demand of legislatures

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[10] Magrath, *supra*, at 52. See, *e. g.*, *id.*, at 49–56; Dibble, Obscenity: A State Quarantine to Protect Children, 39 So. Cal. L. Rev. 345 (1966); Wall, Obscenity and Youth: The Problem and a Possible Solution, Crim. L. Bull., Vol. 1, No. 8, pp. 28, 30 (1965); Note, 55 Cal. L. Rev. 926, 934 (1967); Comment, 34 Ford. L. Rev. 692, 694 (1966). See also J. Paul & M. Schwartz, Federal Censorship: Obscenity in the Mail, 191–192; Blakey, Book Review, 41 Notre Dame Law. 1055, 1060, n. 46 (1966); Green, Obscenity, Censorship, and Juvenile Delinquency, 14 U. Toronto L. Rev. 229, 249 (1962); Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 373–385 (1954); Note, 52 Ky. L. J. 429, 447 (1964). But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of some psychiatrists in 77 Yale L. J., at 592–593, said:

"It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control—it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging."

Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

"[P]sychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, *i. e.*, disapproved. It is outside of parental standards and not a part of his identification

"scientifically certain criteria of legislation." *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110. We therefore cannot say that § 484–h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

II.

Appellant challenges subsections (f) and (g) of § 484–h as in any event void for vagueness. The attack on subsection (f) is that the definition of obscenity "harmful to minors" is so vague that an honest distributor of publications cannot know when he might be held to have violated § 484–h. But the New York Court of Appeals construed this definition to be "virtually identical to the Supreme Court's most recent statement of the elements of obscenity. [*Memoirs* v. *Massachusetts,* 383 U. S. 413, 418]," *Bookcase, Inc.* v. *Broderick, supra,* at 76, 218 N. E. 2d, at 672. The definition therefore gives "men in acting adequate notice of what is prohibited" and does not offend the requirements of due process. *Roth* v. *United States, supra, at* 492; see also *Winters* v. *New York,* 333 U. S. 507, 520.

As is required by *Smith* v. *California,* 361 U. S. 147, § 484–h prohibits only those sales made "knowingly." The challenge to the *scienter* requirement of subsection (g) centers on the definition of "knowingly" insofar as it includes "reason to know" or "a belief or ground for belief which warrants further inspection or inquiry of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the

processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego." *Id.,* at 594.

minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

As to (i), § 484–h was passed after the New York Court of Appeals decided *People* v. *Finkelstein*, 9 N. Y. 2d 342, 174 N. E. 2d 470, which read the requirement of *scienter* into New York's general obscenity statute, § 1141 of the Penal Law. The constitutional requirement of *scienter*, in the sense of knowledge of the contents of material, rests on the necessity "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity," *Mishkin* v. *New York*, *supra*, at 511. The Court of Appeals in *Finkelstein* interpreted § 1141 to require "the vital element of scienter" and defined that requirement in these terms: "A reading of the statute [§ 1141] as a whole clearly indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished. It is not innocent but *calculated* purveyance of filth which is exorcised . . . ." 9 N. Y. 2d, at 344–345, 174 N. E. 2d, at 471. (Emphasis supplied.) In *Mishkin* v. *New York*, *supra*, at 510–511, we held that a challenge to the validity of § 1141 founded on *Smith* v. *California*, *supra*, was foreclosed in light of this construction. When § 484–h was before the New York Legislature its attention was directed to *People* v. *Finkelstein*, as defining the nature of *scienter* required to sustain the statute. 1965 N. Y. S. Leg. Ann. 54–56. We may therefore infer that the reference in provision (i) to knowledge of "the *character* and content of any material described herein" incorporates the gloss given the term "character" in *People* v. *Finkelstein*. In that circumstance *Mishkin* requires rejection of appellant's challenge to provision (i) and makes it unnecessary for

us to define further today "what sort of mental element is requisite to a constitutionally permissible prosecution," *Smith* v. *California, supra,* at 154.

Appellant also attacks provision (ii) as impermissibly vague. This attack however is leveled only at the proviso according the defendant a defense of "honest mistake" as to the age of the minor. Appellant argues that "the statute does not tell the bookseller what effort he must make before he can be excused." The argument is wholly without merit. The proviso states expressly that the defendant must be acquitted on the ground of "honest mistake" if the defendant proves that he made "a reasonable bona fide attempt to ascertain the true age of such minor." Cf. 1967 Penal Law § 235.22 (2), n. 1, *supra.*

Affirmed.

[For concurring opinion of Mr. Justice Harlan see *post,* p. 704.]

APPENDIX A TO OPINION OF THE COURT.

New York Penal Law § 484–h as enacted by L. 1965, c. 327, provides:

§ 484–h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

APPENDIX B TO OPINION OF THE COURT.

State obscenity statutes having some provision referring to distribution to minors are:

Cal. Pen. Code §§ 311–312 (Supp. 1966); Colo. Rev. Stat. Ann. §§ 40–9–16 to 40–9–27 (1963); Conn. Gen. Stat. Rev. §§ 53–243 to 53–245 (Supp. 1965); Del. Code Ann., Tit. 11, §§ 435, 711–713 (1953); Fla. Stat. Ann. §§ 847.011–847.06 (1965 and Supp. 1968); Ga. Code Ann. §§ 26–6301 to 26–6309a (Supp. 1967); Hawaii Rev.

Laws § 267–8 (1955); Idaho Code Ann. §§ 18–1506 to 18–1510 (Supp. 1967); Ill. Ann. Stat., c. 38, §§ 11–20 to 11–21 (Supp. 1967); Iowa Code Ann. §§ 725.4–725.12 (1950); Ky. Rev. Stat. §§ 436.100–436.130, 436.540–436.580 (1963 and Supp. 1966); La. Rev. Stat. §§ 14:91.11, 14:92, 14:106 (Supp. 1967); Me. Rev. Stat. Ann., Tit. 17, §§ 2901–2905 (1964); Md. Ann. Code, Art. 27, §§ 417–425 (1957 and Supp. 1967); Mass. Gen. Laws Ann., c. 272, §§ 28–33 (1959 and Supp. 1968); Mich. Stat. Ann. §§ 28.575–28.579 (1954 and Supp. 1968); Mo. Ann. Stat. §§ 563.270–563.310 (1953 and Supp. 1967); Mont. Rev. Codes Ann. §§ 94–3601 to 94–3606 (1947 and Supp. 1967); Neb. Rev. Stat. §§ 28–926.09 to 28–926.10 (1965 Cum. Supp.); Nev. Rev. Stat. §§ 201.250, 207.180 (1965); N. H. Rev. Stat. Ann. §§ 571–A:1 to 571–A:5 (Supp. 1967); N. J. Stat. Ann. §§ 2A:115–1.1 to 2A:115–4 (Supp. 1967); N. C. Gen. Stat. § 14–189 (Supp. 1967); N. D. Cent. Code §§ 12–21–07 to 12–21–09 (1960); Ohio Rev. Code Ann. §§ 2903.10–2903.11, 2905.34–2905.39 (1954 and Supp. 1966); Okla. Stat. Ann., Tit. 21, §§ 1021–1024, 1032–1039 (1958 and Supp. 1967); Pa. Stat. Ann., Tit. 18, §§ 3831–3833, 4524 (1963 and Supp. 1967); R. I. Gen. Laws Ann. §§ 11–31–1 to 11–31–10 (1956 and Supp. 1967); S. C. Code Ann. §§ 16–414.1 to 16–421 (1962 and Supp. 1967); Tex. Pen. Code, Arts. 526, 527b (1952 and Supp. 1967); Utah Code Ann. §§ 76–39–5, 76–39–17 (Supp. 1967); Vt. Stat. Ann., Tit. 13, §§ 2801–2805 (1959); Va. Code Ann. §§ 18.1–227 to 18.1–236.3 (1960 and Supp. 1966); W. Va. Code Ann. § 61–8–11 (1966); Wyo. Stat. Ann. §§ 6–103, 7–148 (1957).

MR. JUSTICE STEWART, concurring in the result.

A doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of

this New York statute.[1] But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas." [2] To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others "by way of sound trucks with loud and raucous noises on city streets." [3] And so it was that my Brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.[4]

I think a State may permissibly determine that, at least in some precisely delineated areas, a child [5]—like someone in a captive audience—is not possessed of that

[1] The First Amendment is made applicable to the States through the Fourteenth Amendment. *Stromberg* v. *California,* 283 U. S. 359.

[2] *Abrams* v. *United States,* 250 U. S. 616, 630 (dissenting opinion).

[3] *Kovacs* v. *Cooper,* 336 U. S. 77, 86.

[4] *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 466 (dissenting opinion of MR. JUSTICE BLACK), 467 (dissenting opinion of MR. JUSTICE DOUGLAS).

[5] The appellant does not challenge New York's power to draw the line at age 17, and I intimate no view upon that question.

full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[6]

I cannot hold that this state law, on its face,[7] violates the First and Fourteenth Amendments.

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

While I would be willing to reverse the judgment on the basis of *Redrup* v. *New York,* 386 U. S. 767, for the reasons stated by my Brother FORTAS, my objections strike deeper.

If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called "obscene" book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of "sin."

That, however, was the view of our preceptor in this field, Anthony Comstock, who waged his war against "obscenity" from the year 1872 until his death in 1915. Some of his views are set forth in his book Traps for the Young, first published in 1883, excerpts from which I set out in Appendix I to this opinion.

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[6] Compare *Loving* v. *Virginia,* 388 U. S. 1, 12; *Carrington* v. *Rash,* 380 U. S. 89, 96.

[7] As the Court notes, the appellant makes no argument that the material in this case was not "harmful to minors" within the statutory definition, or that the statute was unconstitutionally applied.

The title of the book refers to "traps" created by Satan "for boys and girls especially." Comstock, of course, operated on the theory that every human has an "inborn tendency toward wrongdoing which is restrained mainly by fear of the final judgment." In his view any book which tended to remove that fear is a part of the "trap" which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do.[1]

It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873. 17 Stat. 598. It was he who was also responsible for the New York Act which soon followed. He was responsible for the organization of the New York Society for the Suppression of Vice, which by its act of incorporation was granted one-half of the fines levied on people successfully prosecuted by the Society or its agents.

I would conclude from Comstock and his Traps for the Young and from other authorities that a legislature could not be said to be wholly irrational[2] (*Ferguson*

[1] Two writers have explained Comstock as follows:

"He must have known that he could not wall out from his own mind all erotic fancies, and so he turned all the more fiercely upon the ribaldry of others." H. Broun & M. Leech, Anthony Comstock 27 (1927).

A notable forerunner of Comstock was an Englishman, Thomas Bowdler. Armed with a talent for discovering the "offensive," Bowdler expurgated Shakespeare's plays and Gibbon's History of the Decline and Fall of the Roman Empire. The result was "The Family Shakespeare," first published in 10 volumes in 1818, and a version of Gibbon's famous history "omitting everything of an immoral or irreligious nature, and incidentally rearranging the order of chapters to be in the strict chronology so dear to the obsessional heart." M. Wilson, The Obsessional Compromise, A Note on Thomas Bowdler (1965) (paper in Library of the American Psychiatric Association, Washington, D. C.).

[2] "The effectiveness of more subtle forms of censorship as an instrument of social control can be very great. They are effective over

v. *Skrupa,* 372 U. S. 726; and see *Williamson* v. *Lee Optical Co.,* 348 U. S. 483; *Daniel* v. *Family Ins. Co.,* 336 U. S. 220; *Olsen* v. *Nebraska,* 313 U. S. 236) if it decided that sale of "obscene" material to the young should be banned.[3]

The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate (originally applicable only to the Federal Government but now applicable to the States as well by reason of the Fourteenth Amendment) is directed to any law "abridging the freedom of speech, or of the press." I appreciate that there are those who think that

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a wider field of behavior than is propaganda in that they affect convivial and 'purely personal' behavior.

"The principle is that certain verbal formulae shall not be stated, in print or in conversation; from this the restriction extends to the discussion of certain topics. A perhaps quite rationally formulated taboo is imposed; it becomes a quasi-religious factor for the members of the group who subscribe to it. If they are a majority, and the taboo does not affect some master-symbol of an influential minority, it is apt to become quite universal in its effect. A great number of taboos—to expressive and to other acts—are embodied in the *mores* of any people. The sanction behind each taboo largely determines its durability—in the sense of resistance opposed to the development of contradictory *counter-mores,* or of simple disintegration from failure to give returns in personal security. If it is to succeed for a long time, there must be recurrent reaffirmations of the taboo in connection with the sanctioning power.

"The occasional circulation of stories about a breach of the taboo and the evil consequences that flowed from this to the offender *and* to the public cause (the sanctioning power) well serves this purpose. Censorship of this sort has the color of voluntary acceptance of a ritualistic avoidance, in behalf of oneself and the higher power. A violation, after the primitive patterns to which we have all been exposed, strikes at both the sinner and his god." The William Alanson White Psychiatric Foundation Memorandum: Propaganda & Censorship, 3 Psychiatry 628, 631 (1940).

[3] And see Gaylin, Book Review: The Prickly Problems of Pornography, 77 Yale L. J. 579, 594.

"obscenity" is impliedly excluded; but I have indicated on prior occasions why I have been unable to reach that conclusion.[4] See *Ginzburg* v. *United States,* 383 U. S.

[4] My Brother HARLAN says that no other Justice of this Court, past or present, has ever "stated his acceptance" of the view that "obscenity" is within the protection of the First and Fourteenth Amendments. *Post,* at 705. That observation, however, should not be understood as demonstrating that no other members of this Court, since its first Term in 1790, have adhered to the view of my Brother BLACK and myself. For the issue "whether obscenity is utterance within the area of protected speech and press" was only "squarely presented" to this Court for the first time in 1957. *Roth* v. *United States,* 354 U. S. 476, 481. This is indeed understandable, for the state legislatures have borne the main burden in enacting laws dealing with "obscenity"; and the strictures of the First Amendment were not applied to them through the Fourteenth until comparatively late in our history. In *Gitlow* v. *New York,* 268 U. S. 652, decided in 1925, the Court assumed that the right of free speech was among the freedoms protected against state infringement by the Due Process Clause of the Fourteenth Amendment. See also *Whitney* v. *California,* 274 U. S. 357, 371, 373; *Fiske* v. *Kansas,* 274 U. S. 380. In 1931, *Stromberg* v. *California,* 283 U. S. 359, held that the right of free speech was guaranteed in full measure by the Fourteenth Amendment. But even after these events "obscenity" cases were not inundating this Court; and even as late as 1948, the Court could say that many state obscenity statutes had "lain dormant for decades." *Winters* v. *New York,* 333 U. S. 507, 511. In several cases prior to *Roth,* the Court reviewed convictions under federal statutes forbidding the sending of "obscene" materials through the mails. But in none of these cases was the question squarely presented or decided whether "obscenity" was protected speech under the First Amendment; rather, the issues were limited to matters of statutory construction, or questions of procedure, such as the sufficiency of the indictment. See *United States* v. *Chase,* 135 U. S. 255; *Grimm* v. *United States,* 156 U. S. 604; *Rosen* v. *United States,* 161 U. S. 29; *Swearingen* v. *United States,* 161 U. S. 446; *Andrews* v. *United States,* 162 U. S. 420; *Price* v. *United States,* 165 U. S. 311; *Dunlop* v. *United States,* 165 U. S. 486; *Bartell* v. *United States,* 227 U. S. 427; *Dysart* v. *United States,* 272 U. S. 655; *United States* v. *Limehouse,* 285 U. S. 424. Thus, *Roth* v. *United States, supra,* which involved both a challenge to 18 U. S. C. §1461 (punishing the

463, 482 (dissenting opinion); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (concurring opinion of MR. JUSTICE BLACK); *Roth* v. *United States,* 354 U. S. 476, 508 (dissenting opinion). And the corollary of that view, as I expressed it in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467, 468 (dissenting opinion), is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of "obscenity" is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The "juvenile delinquents" I have known are mostly over

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mailing of "obscene" material) and, in a consolidated case (*Alberts* v. *California*), an attack upon Cal. Pen. Code § 311 (prohibiting, *inter alia,* the keeping for sale or advertising of "obscene" material), was the first case authoritatively to measure federal and state obscenity statutes against the prohibitions of the First and Fourteenth Amendments. I cannot speak for those who preceded us in time; but neither can I interpret occasional utterances suggesting that "obscenity" was not protected by the First Amendment as considered expressions of the views of any particular Justices of the Court. See, *e. g., Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572; *Beauharnais* v. *Illinois,* 343 U. S. 250, 266. The most that can be said, then, is that no other members of this Court since 1957 have adhered to the view of my Brother BLACK and myself.

50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for "protecting" many groups in our society, not merely children.

While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should be done to stop the flow. It is one thing for parents [5] and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor. As I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business.

I think it would require a constitutional amendment to achieve that result. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. Censors are, of course, propelled by their own neuroses.[6]

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[5] See Appendix II to this opinion.

[6] Reverend Fr. Juan de Castaniza of the 16th century explained those who denounced obscenity as expressing only their own feelings. In his view they had too much reason to suspect themselves of being "obscene," since "vicious men are always prone to think others like themselves." T. Schroeder, A Challenge to Sex Censors 44–45 (1938).

"Obscenity, like witchcraft . . . consists, broadly speaking, of a [delusional] projection of certain emotions (which, as the very word implies, emanate from within) to external things and an endowment of such things (or in the case of witchcraft, of such persons) with the moral qualities corresponding to these inward states. . . .

"Thus persons responsible for the persistent attempts to suppress the dissemination of popular knowledge concerning sex matters betray themselves unwittingly as the bearers of the very impulses they would so ostentatiously help others to avoid. Such persons should

That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective, turning on the neurosis of the censor. Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it.[7] That, of course, is the danger of letting any group of citizens be the judges of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.

I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell.

APPENDIX I TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING.

A. COMSTOCK, TRAPS FOR THE YOUNG 20–22 (1883).

And it came to pass that as Satan went to and fro upon the earth, watching his traps and rejoicing over

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know through their own experience that ignorance of a subject does not insure immunity against the evils of which it treats, nor does the propitiatory act of noisy public disapproval of certain evils signify innocence or personal purity." Van Teslaar, Book Review, 8 J. Abnormal Psychology 282, 286 (1913).

[7] See Appendix III to this opinion.

his numerous victims, he found room for improvement in some of his schemes. The daily press did not meet all his requirements. The *weekly* illustrated papers of crime would do for young men and sports, for brothels, gin-mills, and thieves' resorts, but were found to be so gross, so libidinous, so monstrous, that every decent person spurned them. They were excluded from the home on sight. They were too high-priced for children, and too cumbersome to be conveniently hid from the parent's eye or carried in the boy's pocket. So he resolved to make another trap for boys and girls especially.

He also resolved to make the most of these vile illustrated weekly papers, by lining the news-stands and shop-windows along the pathway of the children from home to school and church, so that they could not go to and from these places of instruction without giving him opportunity to defile their pure minds by flaunting these atrocities before their eyes.

And Satan rejoiced greatly that professing Christians were silent and apparently acquiesced in his plans. He found that our most refined men and women went freely to trade with persons who displayed these traps for sale; that few, if any, had moral courage to enter a protest against this public display of indecencies, and scarcely one in all the land had the boldness to say to the dealer in filth, "I will not give you one cent of my patronage so long as you sell these devil-traps to ruin the young." And he was proud of professing Christians and respectable citizens on this account, and caused honorable mention to be made of them in general order to his imps, because of the quiet and orderly assistance thus rendered him.

Satan stirred up certain of his willing tools on earth by the promise of a few paltry dollars to improve greatly on the death-dealing quality of the weekly death-traps, and forthwith came a series of new snares of fascinating

construction, small and tempting in price, and baited with high-sounding names. These sure-ruin traps comprise a large variety of half-dime novels, five and ten cent story papers, and low-priced pamphlets for boys and girls.

This class includes the silly, insipid tale, the coarse, slangy story in the dialect of the barroom, the blood-and-thunder romance of border life, and the exaggerated details of crimes, real and imaginary. Some have highly colored sensational reports of real crimes, while others, and by far the larger number, deal with most improbable creations of fiction. The unreal far outstrips the real. Crimes are gilded, and lawlessness is painted to resemble valor, making a bid for bandits, brigands, murderers, thieves, and criminals in general. Who would go to the State prison, the gambling saloon, or the brothel to find a suitable companion for the child? Yet a more insidious foe is selected when these stories are allowed to become associates for the child's mind and to shape and direct the thoughts.

The finest fruits of civilization are consumed by these vermin. Nay, these products of corrupt minds are the eggs from which all kinds of villainies are hatched. Put the entire batch of these stories together, and I challenge the publishers and vendors to show a single instance where any boy or girl has been elevated in morals, or where any noble or refined instinct has been developed by them.

The leading character in many, if not in the vast majority of these stories, is some boy or girl who possesses usually extraordinary beauty of countenance, the most superb clothing, abundant wealth, the strength of a giant, the agility of a squirrel, the cunning of a fox, the brazen effrontery of the most daring villain, and who is utterly destitute of any regard for the laws of God or man. Such a one is foremost among desperadoes, the companion and

beau-ideal of maidens, and the high favorite of some rich person, who by his patronage and indorsement lifts the young villain into lofty positions in society, and provides liberally of his wealth to secure him immunity for his crimes. These stories link the pure maiden with the most foul and loathsome criminals. Many of them favor violation of marriage laws and cheapen female virtue.

APPENDIX II TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING.

A SPECIAL TO THE WASHINGTON POST
[March 3, 1968]
by
AUSTIN C. WEHRWEIN

White Bear Lake, Minn., March 2.—Faced with the threat of a law suit, the school board in this community of 12,000 north of St. Paul is reviewing its mandatory sex education courses, but officials expressed fear that they couldn't please everybody.

Mothers threatened to picket and keep their children home when sex education films are scheduled. Mrs. Robert Murphy, the mother of five who led the protests, charged that the elementary school "took the privacy out of marriage."

"Now," she said, "our kids know what a shut bedroom door means. The program is taking their childhood away. The third graders went in to see a movie on birth and came out adults."

She said second-grade girls have taken to walking around with "apples and oranges under their blouses." Her seventh-grade son was given a study sheet on menstruation, she said, demanding "why should a seventh-grade boy have to know about menstruation?"

Mrs. Murphy, who fears the program will lead to ex-

perimentation, said that it was "pagan" and argued that even animals don't teach their young those things "before they're ready."

"One boy in our block told his mother, 'Guess what, next week our teacher's gonna tell us how daddy fertilized you,'" reported Mrs. Martin Capeder. "They don't need to know all that."

But Norman Jensen, principal of Lincoln School, said that the program, which runs from kindergarten through the 12th grade, was approved by the school district's PTA council, the White Bear Lake Ministerial Association and the district school board. It was based, he said, on polls that showed 80 per cent of the children got no home sex education, and the curriculum was designed to be "matter-of-fact."

The protesting parents insisted they had no objection to sex education as such, but some said girls should not get it until age 12, and boys only at age 15—"or when they start shaving."

(In nearby St. Paul Park, 71 parents have formed a group called "Concerned Parents Against Sex Education" and are planning legal action to prevent sex education from kindergarten through seventh grade. They have also asked equal time with the PTAs of eight schools in the district "to discuss topics such as masturbation, contraceptives, unqualified instructors, religious belief, morality and attitudes.")

The White Bear protesters have presented the school board with a list of terms and definitions deemed objectionable. Designed for the seventh grade, it included vagina, clitoris, erection, intercourse and copulation. A film, called "Fertilization and Birth" depicts a woman giving birth. It has been made optional after being shown to all classes.

Mrs. Ginny McKay, a president of one of the local PTAs defended the program, saying "Sex is a natural and

beautiful thing. We (the PTA) realized that the parents had to get around to where the kids have been for a long time."

But Mrs. Murphy predicted this result: "Instead of 15 [*sic*] and 15-year-old pregnant girls, they'll have 12 and 13-year-old pregnant girls."

APPENDIX III TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING.

(A). T. SCHROEDER, OBSCENE LITERATURE AND CONSTITUTIONAL LAW 277–278 (1911).

It thus appears that the only unifying element generalized in the word "obscene," (that is, the only thing common to every conception of obscenity and indecency), is subjective, is an affiliated emotion of disapproval. This emotion under varying circumstances of temperament and education in different persons, and in the same person in different stages of development, is aroused by entirely different stimuli, and by fear of the judgment of others, and so has become associated with an infinite variety of ever-changing objectives, with not even one common characteristic in objective nature; that is, in literature or art.

Since few men have identical experiences, and fewer still evolve to an agreement in their conceptional and emotional associations, it must follow that practically none have the same standards for judging the "obscene," even when their conclusions agree. The word "obscene," like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his fears, his hopes, his

prior experience, suggestions, education, and the degree of neuro-sexual or psycho-sexual health. Because it is a matter wholly of emotions, it has come to be that "men think they know because they feel, and are firmly convinced because strongly agitated."

This, then, is a demonstration that obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture. Since, then, the general conception "obscene" is devoid of every objective element of unification; and since the subjective element, the associated emotion, is indefinable from its very nature, and inconstant as to the character of the stimulus capable of arousing it, and variable and immeasurable as to its relative degrees of intensity, it follows that the "obscene" is incapable of accurate definition or a general test adequate to secure uniformity of result, in its application by every person, to each book of doubtful "purity."

Being so essentially and inextricably involved with human emotions that no man can frame such a definition of the word "obscene," either in terms of the qualities of a book, or such that, *by it alone,* any judgment whatever is possible, much less is it possible that by any such alleged "test" every other man must reach the same conclusion about the obscenity of every conceivable book. Therefore, the so-called judicial "tests" of obscenity are not standards of judgment, but, on the contrary, by every such "test" the rule of decision is itself uncertain, and in terms invokes the varying experiences of the test[e]rs within the foggy realm of problematical speculation about psychic tendencies, without the help of which the "test" itself is meaningless and useless. It follows that to each person the "test," of criminality, which should be a general standard of judgment, unavoidably becomes a personal and particular standard, differing in all per-

sons according to those varying experiences which they read into the judicial "test." It is this which makes uncertain, and, therefore, all the more objectionable, all the present laws against obscenity. Later it will be shown that this uncertainty in the criteria of guilt renders these laws unconstitutional.

(B). KALLEN, THE ETHICAL ASPECTS OF CENSORSHIP, IN 5 SOCIAL MEANING OF LEGAL CONCEPTS 34, 50–51 (N. Y. U. 1953).

To this authoritarian's will, difference is the same thing as inferiority, wickedness and corruption; he can apprehend it only as a devotion to error and a commitment to sin. He can acknowledge it only if he attributes to it moral turpitude and intellectual vice. Above all, difference must be for him, by its simple existence, an aggression against the good, the true, the beautiful and the right. His imperative is to destroy it; if he cannot destroy it, to contain it; if he cannot contain it, to hunt it down, cut it off and shut it out.

Certain schools of psychology suggest that this aggression is neither simple nor wholly aggression. They suggest that it expresses a compulsive need to bring to open contemplation the secret parts of the censor's psychosomatic personality, and a not less potent need to keep the secret and not suffer the shamefaced dishonor of their naked exposures. The censor's activities, in that they call for a constant public preoccupation with such secret parts, free his psyche from the penalties of such concern while transvaluing at the same time his pursuit and inspection of the obscene, the indecent, the pornographic, the blasphemous and the otherwise shameful into an honorable defense of the public morals. The censor, by purporting, quite unconscious of his actual dynamic, to protect the young from corruption, frees his conscious-

ness to dwell upon corruption without shame or dishonor. Thus, Anthony Comstock could say with overt sincerity: "When the genius of the arts produces obscene, lewd and lascivious ideas, the deadly effect upon the young is just as perceptible as when the same ideas are represented by gross experience in prose and poetry. . . . If through the eye and ear the sensuous book, picture or story is allowed to enter, the thoughts will be corrupted, the conscience seared, so such things reproduced by fancy in the thoughts awaken forces for evil which will explode with irresistible force carrying to destruction every human safeguard to virtue and honor." Did not evil Bernard Shaw, who gave the English language the word *comstockery,* declare himself, in his preface to *The Shewing-Up of Blanco Posnet,* "a specialist in immoral, heretical plays . . . to force the public to reconsider its morals"? So the brave Comstock passionately explored and fought the outer expressions of the inner forces of evil and thus saved virtue and honor from destruction.

But could this observation of his be made, save on the basis of introspection and not the scientific study of others? For such a study would reveal, for each single instance of which it was true, hundreds of thousands of others of which it was false. Like the correlation of misfortune with the sixth day of the week or the number 13, this basic comstockery signalizes a fear-projected superstition. It is an externalization of anxiety and fear, not a fact objectively studied and appraised. And the anxiety and fear are reaction-formations of the censor's inner self.

Of course, this is an incomplete description of the motivation and logic of censorship. In the great censorial establishments of the tradition, these more or less unconscious drives are usually items of a syndrome whose dominants are either greed for pelf, power, and prestige, reinforced by anxiety that they might be lost,

or anxiety that they might be lost reinforced by insatiable demands for more.

Authoritarian societies usually insure these goods by means of a prescriptive creed and code for which their rulers claim supernatural origins and supernatural sanctions. The enforcement of the prescriptions is not entrusted to a censor alone. The ultimate police-power is held by the central hierarchy, and the censorship of the arts is only one department of the thought-policing.

(C). CRAWFORD, LITERATURE AND THE PSYCHOPATHIC, 10 PSYCHOANALYTIC REVIEW 440, 445–446 (1923).

Objection, then, to modern works on the ground that they are, in the words of the objectors, "immoral," is made principally on the basis of an actual desire to keep sexual psychopathies intact, or to keep the general scheme of repression, which inevitably involves psychopathic conditions, intact. The activities of persons professionally or otherwise definitely concerned with censorship furnish proof evident enough to the student of such matters that they themselves are highly abnormal. It is safe to say that every censorship has a psychopath back of it.

Carried to a logical end, censorship would inevitably destroy all literary art. Every sexual act is an instinctive feeling out for an understanding of life. Literary art, like every other type of creative effort, is a form of sublimation. It is a more conscious seeking for the same understanding that the common man instinctively seeks. The literary artist, having attained understanding, communicates that understanding to his readers. That understanding, whether of sexual or other matters, is certain to come into conflict with popular beliefs, fears, and taboos because these are, for the most part, based on error. . . . [T]he presence of an opinion concerning which one thinks it would be unprofitable, immoral, or

unwise to inquire is, of itself, strong evidence that that opinion is nonrational. Most of the more deep-seated convictions of the human race belong to this category. Anyone who is seeking for understanding is certain to encounter this nonrational attitude.

The act of sublimation on the part of the writer necessarily involves an act of sublimation on the part of the reader. The typical psychopathic patient and the typical public have alike a deep-rooted unconscious aversion to sublimation. Inferiority and other complexes enter in to make the individual feel that acts of sublimation would destroy his comfortable, though illusory, sense of superiority. Again, there is the realization on the part of the mass of people that they are unable to sublimate as the artist does, and to admit his power and right to do so involves destruction of the specious sense of superiority to him. It is these two forms of aversion to sublimation which account for a considerable part of public objection to the arts. The common man and his leader, the psychopathic reformer, are aiming unconsciously at leveling humanity to a plane of pathological mediocrity.

To the student of abnormal psychology the legend, popular literature, and literature revelatory of actual life, are all significant. In the legend he finds race taboos, in the popular literature of the day he discovers this reinforced by the mass of contemporary and local taboos, in literature that aims to be realistically revelatory of life he finds material for study such as he can hardly obtain from any group of patients. The frankness which he seeks in vain from the persons with whom he comes into personal contact, he can find in literature. It is a field in which advances may be made comparable to the advances of actual scientific research.

Moreover, the student of abnormal psychology will commend realistic, revelatory literature not only to his

patients, who are suffering from specific psychopathic difficulties, but to the public generally. He will realize that it is one of the most important factors in the development of human freedom. No one is less free than primitive man. The farther we can get from the attitude of the legend and its slightly more civilized successor, popular literature, the nearer we shall be to a significant way of life.

(D). J. RINALDO, PSYCHOANALYSIS OF THE "REFORMER" 56–60 (1921).

The other aspect of the humanist movement is a very sour and disgruntled puritanism, which seems at first glance to protest and contradict every step in the libidinous development. As a matter of fact it is just as much an hysterical outburst as the most sensuous flesh masses of Rubens, or the sinuous squirming lines of Louis XV decoration. Both are reactions to the same morbid past experience.

The Puritan like the sensualist rebels at the very beginning against the restraint of celibacy. Unfortunately, however, he finds himself unable to satisfy the libido in either normal gratification or healthy converted activities. His condition is as much one of super-excitement as that of the libertine. Unable to find satisfaction in other ways, from which for one reason or another he is inhibited, he develops a morbid irritation, contradicting, breaking, prohibiting and thwarting the manifestations of the very exciting causes.

Not being able to produce beautiful things he mars them, smashing stained glass windows, destroying sculptures, cutting down May-poles, forbidding dances, clipping the hair, covering the body with hideous misshapen garments and silencing laughter and song. He cannot build so he must destroy. He cannot create so he hinders creation. He is a sort of social abortionist and like an

abortionist only comes into his own when there is an illegitimate brat to be torn from the womb. He cries against sin, but it is the pleasure of sin rather than the sin he fights. It is the enjoyment he is denied that he hates.

From no age or clime or condition is he absent; but never is he a dominant and deciding factor in society till that society has passed the bounds of sanity. Those who wait the midwife never call in the abortionist, nor does he ever cure the real sickness of his age. That he does survive abnormal periods to put his impress on the repressions of later days is due to the peculiar economy of his behavior. The libertine destroys himself, devouring his substance in self-satisfaction. The reformer devours others, being somewhat in the nature of a tax on vice, living by the very hysteria that destroys his homologous opposite.

In our own day we have reached another of those critical periods strikingly similar in its psychological symptoms and reactions, at least, to decadent Rome. We have the same development of extravagant religious cults, Spiritism, Dowieism, "The Purple Mother," all eagerly seized upon, filling the world with clamor and frenzy; the same mad seeking for pleasure, the same breaking and scattering of forms, the same orgy of gluttony and extravagance, the same crude emotionalism in art, letter and the theater, the same deformed and inverted sexual life.

Homo-sexualism may not be openly admitted, but the "sissy" and his red necktie are a familiar and easily understood property of popular jest and pantomime. It is all a mad jazz jumble of hysterical incongruities, dog dinners, monkey marriages, cubism, birth control, feminism, free-love, verse libre, and moving pictures. Through it all runs the strident note of puritanism. As one grows so does the other. Neither seems to precede or follow.

It would be a rash man indeed who would attempt to give later beginnings to the reform movements than to the license they seem so strongly to contradict. Significant indeed is the fact that their very license is the strongest appeal of the reformer. Every movie must preach a sermon and have a proper ending, but the attempted rape is as seldom missing as the telephone; and it is this that thrills and is expected to thrill.

The same sexual paradox we saw in the eunuch priests and harlot priestesses of Isis we see in the vice-crusading, vice-pandering reformers. Back of it all lies a morbid sexual condition, which is as much behind the anti-alcoholism of the prohibitionist, as behind the cropped head of his puritan father, and as much behind the birth-control, vice-crusading virgins as behind their more amiable sisters of Aphrodite.

Interpreted then in the light of their history, libertinism and reformism cannot be differentiated as cause and effect, action and reaction, but must be associated as a two-fold manifestation of the same thing, an hysterical condition. They differ in externals, only insofar as one operates in license and the other in repression, but both have the same genesis and their development is simultaneous.

(E). H. LASSWELL, PSYCHOPATHOLOGY AND POLITICS 94–96 (1930).

Another significant private motive, whose organization dates from early family days, but whose influence was prominent in adult behavior, was A's struggle to maintain his sexual repressions. ["A" is an unidentified, nonfictional person whose life history was studied by the author.] He erected his very elaborate personal prohibitions into generalized prohibitions for all society, and just as he laid down the law against brother-hatred, he condemned "irregular" sexuality and gambling and drink-

ing, its associated indulgences. He was driven to protect himself from himself by so modifying the environment that his sexual impulses were least often aroused, but it is significant that he granted partial indulgence to his repressed sexuality by engaging in various activities closely associated with sexual operations. Thus his sermons against vice enabled him to let his mind dwell upon rich fantasies of seduction. His crusading ventures brought him to houses of ill fame, where partly clad women were discoverable in the back rooms. These activities were rationalized by arguing that it was up to him as a leader of the moral forces of the community to remove temptation from the path of youth. At no time did he make an objective inquiry into the many factors in society which increase or diminish prostitution. His motives were of such an order that he was prevented from self-discipline by prolonged inspection of social experience.

That A was never able to abolish his sexuality is sufficiently evident in his night dreams and day dreams. In spite of his efforts to "fight" these manifestations of his "antisocial impulses," they continued to appear. Among the direct and important consequences which they produced was a sense of sin, not only a sense of sexual sin, but a growing conviction of hypocrisy. His "battle" against "evil" impulses was only partially successful, and this produced a profound feeling of insecurity.

This self-punishing strain of insecurity might be alleviated, he found, by publicly reaffirming the creed of repression, and by distracting attention to other matters. A's rapid movements, dogmatic assertions, and diversified activities were means of escape from this gnawing sense of incapacity to cope with his own desires and to master himself. Uncertain of his power to control himself, he was very busy about controlling others, and engaged in endless committee sessions, personal conferences, and public meetings for the purpose. He always managed

to submerge himself in a buzzing life of ceaseless activity; he could never stand privacy and solitude, since it drove him to a sense of futility; and he couldn't undertake prolonged and laborious study, since his feeling of insecurity demanded daily evidence of his importance in the world.

A's sexual drives continued to manifest themselves, and to challenge his resistances. He was continually alarmed by the luring fear that he might be impotent. Although he proposed marriage to two girls when he was a theology student, it is significant that he chose girls from his immediate entourage, and effected an almost instantaneous recovery from his disappointments. This warrants the inference that he was considerably relieved to postpone the test of his potency, and this inference is strengthened by the long years during which he cheerfully acquiesced in the postponement of his marriage to the woman who finally became his wife. He lived with people who valued sexual potency, particularly in its conventional and biological demonstration in marriage and children, and his unmarried state was the object of good-natured comment. His pastoral duties required him to "make calls" on the sisters of the church, and in spite of the cheer which he was sometimes able to bring to the bedridden, there was the faint whisper of a doubt that this was really a man's job. And though preaching was a socially respectable occupation, there was something of the ridiculous in the fact that one who had experienced very little of life should pass for a privileged censor of all mankind.

MR. JUSTICE FORTAS, dissenting.

This is a criminal prosecution. Sam Ginsberg and his wife operate a luncheonette at which magazines are offered for sale. A 16-year-old boy was enlisted by his mother to go to the luncheonette and buy some

"girlie" magazines so that Ginsberg could be prosecuted. He went there, picked two magazines from a display case, paid for them, and walked out. Ginsberg's offense was duly reported to the authorities. The power of the State of New York was invoked. Ginsberg was prosecuted and convicted. The court imposed only a suspended sentence. But as the majority here points out, under New York law this conviction may mean that Ginsberg will lose the license necessary to operate his luncheonette.

The two magazines that the 16-year-old boy selected are vulgar "girlie" periodicals. However tasteless and tawdry they may be, we have ruled (as the Court acknowledges) that magazines indistinguishable from them in content and offensiveness are not "obscene" within the constitutional standards heretofore applied. See, *e. g., Gent* v. *Arkansas,* 386 U. S. 767 (1967). These rulings have been in cases involving adults.

The Court avoids facing the problem whether the magazines in the present case are "obscene" when viewed by a 16-year-old boy, although not "obscene" when viewed by someone 17 years of age or older. It says that Ginsberg's lawyer did not choose to challenge the conviction on the ground that the magazines are not "obscene." He chose only to attack the statute on its face. Therefore, the Court reasons, we need not look at the magazines and determine whether they may be excluded from the ambit of the First Amendment as "obscene" for purposes of this case. But this Court has made strong and comprehensive statements about its duty in First Amendment cases—statements with which I agree. See, *e. g., Jacobellis* v. *Ohio,* 378 U. S. 184, 187–190 (1964) (opinion of BRENNAN, J.).*

* "[W]e reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guar-

In my judgment, the Court cannot properly avoid its fundamental duty to define "obscenity" for purposes of censorship of material sold to youths, merely because of counsel's position. By so doing the Court avoids the essence of the problem; for if the State's power to censor freed from the prohibitions of the First Amendment depends upon obscenity, and if obscenity turns on the specific content of the publication, how can we sustain the conviction here without deciding whether the particular magazines in question are obscene?

The Court certainly cannot mean that the States and cities and counties and villages have unlimited power to withhold anything and everything that is written or pictorial from younger people. But it here justifies the conviction of Sam Ginsberg because the impact of the Constitution, it says, is variable, and what is not obscene for an adult may be obscene for a child. This it calls "variable obscenity." I do not disagree with this, but I insist that to assess the principle—certainly to apply it—the Court must define it. We must know the extent to which literature or pictures may be less offensive than *Roth* requires in order to be "obscene" for purposes of a statute confined to youth. See *Roth* v. *United States,* 354 U. S. 476 (1957).

I agree that the State in the exercise of its police power—even in the First Amendment domain—may make proper and careful differentiation between adults and children. But I do not agree that this power may be used on an arbitrary, free-wheeling basis. This is not a case where, on any standard enunciated by the Court,

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antees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." 378 U. S., at 190. See *Cox* v. *Louisiana,* 379 U. S. 536, 545, n. 8 (1965).

the magazines are obscene, nor one where the seller is at fault. Petitioner is being prosecuted for the sale of magazines which he had a right under the decisions of this Court to offer for sale, and he is being prosecuted without proof of "fault"—without even a claim that he deliberately, calculatedly sought to induce children to buy "obscene" material. Bookselling should not be a hazardous profession.

The conviction of Ginsberg on the present facts is a serious invasion of freedom. To sustain the conviction without inquiry as to whether the material is "obscene" and without any evidence of pushing or pandering, in face of this Court's asserted solicitude for First Amendment values, is to give the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility. Cf. *In re Gault*, 387 U. S. 1 (1967). It begs the question to present this undefined, unlimited censorship as an aid to parents in the rearing of their children. This decision does not merely protect children from activities which all sensible parents would condemn. Rather, its undefined and unlimited approval of state censorship in this area denies to children free access to books and works of art to which many parents may wish their children to have uninhibited access. For denial of access to these magazines, without any standard or definition of their allegedly distinguishing characteristics, is also denial of access to great works of art and literature.

If this statute were confined to the punishment of pushers or panderers of vulgar literature I would not be so concerned by the Court's failure to circumscribe state power by defining its limits in terms of the meaning of "obscenity" in this field. The State's police power may, within very broad limits, protect the parents and their children from public aggression of panderers and pushers. This is defensible on the theory that they can-

not protect themselves from such assaults. But it does not follow that the State may convict a passive luncheonette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazines which are presumably *not* obscene.

I would therefore reverse the conviction on the basis of *Redrup* v. *New York,* 386 U. S. 767 (1967) and *Ginzburg* v. *United States,* 383 U. S. 463 (1966).

INTERSTATE CIRCUIT, INC. *v.* CITY OF DALLAS.

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

No. 56. Argued January 15–16, 1968.—Decided April 22, 1968.*

Appellee, the City of Dallas, enacted an ordinance establishing a Motion Picture Classification Board to classify films as suitable or not suitable for young persons, who are defined as those under 16 years old. In classifying a picture as "not suitable for young persons" the Board must follow standards set forth in the ordinance and find that, in its judgment, the film describes or portrays (1) brutality, criminal violence, or depravity in such a manner as likely to incite young persons to crime or delinquency or (2) "sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as . . . likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest." A film shall be considered likely to produce such results if in the Board's judgment "there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." If the exhibitor does not accept the Board's "not suitable" classification, the Board must file suit to enjoin the showing of the picture and the Board's determination is subject to *de novo* review. The ordinance is enforceable by a misdemeanor penalty, injunction, and license revocation. Acting pursuant to the ordinance the Board, without giving reasons for its determination, classified as "not suitable for young persons" the film "Viva Maria," for which appellants are respectively the exhibitor and distributor. Following the exhibitor's notice of nonacceptance of the Board's classification, appellee petitioned for an injunction alleging in terms of the ordinance that the classification was warranted because of the film's portrayal of sexual promiscuity. Two Board members testified at the hearing that several scenes portraying male-female relationships contravened "acceptable and approved behavior." The trial judge, concluding that there were "two or three features in the picture that look

*Together with No. 64, *United Artists Corp.* v. *City of Dallas*, on appeal from the same court.

to me would be unsuitable to young people," issued an injunction. The appellate court, without limiting the standards of the ordinance, affirmed. *Held:* The ordinance is violative of the First and Fourteenth Amendments as being unconstitutionally vague since it lacks "narrowly drawn, reasonable and definite standards for the officials to follow," *Niemotko* v. *Maryland,* 340 U. S. 268, 271 (1951). Pp. 682–691.

(a) Motion pictures are protected by the First Amendment and cannot be regulated except by precise and definite standards. Pp. 682–683.

(b) The vice of vagueness is particularly pronounced where expression is subjected to licensing. P. 683.

(c) Vague censorship standards are not cured merely by *de novo* judicial review and unless narrowed by interpretation only encourage erratic administration. P. 685.

(d) The term "sexual promiscuity" is not defined in the ordinance and was not interpreted in the state courts. The failure to limit that term or related terms used in the ordinance and the breadth of the standard "profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted" give the censor a roving commission. Pp. 687–688.

(e) The evil of vagueness is not cured because the regulation of expression is one of classification rather than direct suppression or was adopted for the salutary purpose of protecting children. Pp. 688–689.

402 S. W. 2d 770, reversed and remanded.

Grover Hartt, Jr., argued the cause for appellant in No. 56. With him on the briefs was *Edwin Tobolowsky.* *Louis Nizer* argued the cause for appellant in No. 64. With him on the briefs were *Paul Carrington* and *Dan McElroy.*

N. Alex Bickley argued the cause for appellee in both cases. With him on the briefs was *Ted P. MacMaster.*

Briefs of *amici curiae,* urging reversal in No. 64, were filed by *Irwin Karp* for the Authors League of America, Inc., and by *Osmond K. Fraenkel, Edward J. Ennis, Melvin L. Wulf* and *Alan H. Levine* for the American Civil Liberties Union et al.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellants are an exhibitor and the distributor of a motion picture named "Viva Maria," which, pursuant to a city ordinance, the Motion Picture Classification Board of the appellee City of Dallas classified as "not suitable for young persons." A county court upheld the Board's determination and enjoined exhibition of the film without acceptance by appellants of the requirements imposed by the restricted classification. The Texas Court of Civil Appeals affirmed,[1] and we noted probable jurisdiction, 387 U. S. 903, to consider the First and Fourteenth Amendment issues raised by appellants with respect to appellee's classification ordinance.

That ordinance, adopted in 1965, may be summarized as follows.[2] It establishes a Motion Picture Classification Board, composed of nine appointed members, all of whom serve without pay. The Board classifies films as "suitable for young persons" or as "not suitable for young persons," young persons being defined as children who have not reached their 16th birthday. An exhibitor must be specially licensed to show "not suitable" films.

The ordinance requires the exhibitor, before any initial showing of a film, to file with the Board a proposed classification of the film together with a summary of its

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[1] 402 S. W. 2d 770 (1966). The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals. 28 U. S. C. § 1257 (2).

[2] The ordinance is set forth in an Appendix to this opinion. The parties disagree as to the meaning of certain of its provisions that have not been authoritatively interpreted by courts of the State. The differences are not material to our decision, however, and the summary of the ordinance in the text above should not be taken as acceptance by us of any of the parties' conflicting interpretations, nor as expressing any view on the validity of provisions of the ordinance not challenged here.

plot and similar information. The proposed classification is approved if the Board affirmatively agrees with it, or takes no action upon it within five days of its filing.

If a majority of the Board is dissatisfied with the proposed classification, the exhibitor is required to project the film before at least five members of the Board at the earliest practicable time. At the showing, the exhibitor may also present testimony or other support for his proposed classification. Within two days the Board must issue its classification order. Should the exhibitor disagree, he must file within two days [3] a notice of nonacceptance. The Board is then required to go to court within three days to seek a temporary injunction, and a hearing is required to be set on that application within five days thereafter; if the exhibitor agrees to waive notice and requests a hearing on the merits of a permanent injunction, the Board is required to waive its application for a temporary injunction and join in the exhibitor's request. If an injunction does not issue within 10 days of the exhibitor's notice of nonacceptance, the Board's classification order is suspended.[4] The ordinance does not define the scope of judicial review of the Board's determination, but the Court of Civil Appeals held that *de novo* review in the trial court was required.[5] If an injunction issues and the exhibitor seeks appellate review, or if an injunction is refused and the Board appeals, the

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[3] The two-day period is apparently part of an attempt to assure prompt final determination. The ordinance also provides that "any initial or subsequent exhibitor" may seek reclassification of a film previously classified.

[4] Appellants assert that, despite the seemingly clear words of the suspension provision, exhibitors in practice have not been free to show films without a not suitable notification while a court challenge is pending, even though an injunction has not issued within the 10-day period. See n. 2, *supra*.

[5] 402 S. W. 2d 770, 774–775.

Board must waive all statutory notices and times, and join a request of the exhibitor, to advance the case on the appellate court's docket, *i. e.*, do everything it can to assure a speedy determination.

The ordinance is enforced primarily by a misdemeanor penalty: an exhibitor is subject to a fine of up to $200 if he exhibits a film that is classified "not suitable for young persons" without advertisements clearly stating its classification or without the classification being clearly posted, exhibits on the same program a suitable and a not suitable film, knowingly admits a youth under age 16 to view the film without his guardian or spouse accompanying him,[6] makes any false or willfully misleading statement in submitting a film for classification, or exhibits a not suitable film without having a valid license therefor.

The same penalty is applicable to a youth who obtains admission to a not suitable film by falsely giving his age as 16 years or over, and to any person who sells or gives to a youth under 16 a ticket to a not suitable film, or makes any false statements to enable such a youth to gain admission.[7]

Other means of enforcement, as against the exhibitor, are provided. Repeated violations of the ordinance, or persistent failure "to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen," may be the basis for revoca-

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[6] Appellee says that youths under 16 years of age accompanied throughout the showing of the picture by a guardian (parent) or spouse, may attend not suitable films. Appellants read the ordinance as making the existence of such accompaniment solely a matter of defense should a criminal prosecution ensue. See n. 2, *supra*.

[7] See n. 6, *supra*. It appears that a parent who purchases a ticket to a not suitable film and gives it to his child is subject to the

tion of a license to show not suitable films.[8] Such a persistent failure, or exhibition of a not suitable film by an exhibitor with three convictions under the ordinance, *inter alia,* are defined as "public nuisances," which the Board may seek to restrain by a suit for injunctive relief.

The substantive standards governing classification are as follows:

> " 'Not suitable for young persons' means:
> "(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
> "(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
> "A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted.

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misdemeanor penalty of the ordinance. To be sure, appellee indicated at oral argument that criminal sanctions have not been sought against anyone under the ordinance.

[8] In related litigation, the provision for revocation of the special license was held unconstitutional as violative of *Butler* v. *Michigan,* 352 U. S. 380 (1957), by District Judge Hughes, 249 F. Supp. 19, 25 (D. C. N. D. Tex., 1965), and that ruling was not challenged on appeal. See *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, 593, n. 5 (C. A. 5th Cir. 1966).

> A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons,' the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

Appellants attack those standards as unconstitutionally vague. We agree. Motion pictures are, of course, protected by the First Amendment, *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952), and thus we start with the premise that "[p]recision of regulation must be the touchstone," *NAACP* v. *Button,* 371 U. S. 415, 438 (1963). And while it is true that this Court refused to strike down, against a broad and generalized attack, a prior restraint requirement that motion pictures be submitted to censors in advance of exhibition, *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43 (1961), there has been no retreat in this area from rigorous insistence upon procedural safeguards and judicial superintendence of the censor's action. See *Freedman* v. *Maryland,* 380 U. S. 51 (1965).[9]

In *Winters* v. *New York,* 333 U. S. 507 (1948), this Court struck down as vague and indefinite a statutory standard interpreted by the state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes . . . ." *Id.,* at 518. In *Joseph Burstyn, Inc.* v. *Wilson, supra,* the Court dealt with a film licensing standard of "sacrilegious," which was found to have such an all-inclusive definition as to result in "substantially unbridled censorship." 343 U. S., at 502. Following

[9] See also *Teitel Film Corp.* v. *Cusack, ante,* p. 139.

Burstyn, the Court held the following film licensing standards to be unconstitutionally vague: "of such character as to be prejudicial to the best interests of the people of said City," *Gelling* v. *Texas,* 343 U. S. 960 (1952); "moral, educational or amusing and harmless," *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954); "immoral," and "tend to corrupt morals," *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954); "approve such films . . . [as] are moral and proper; . . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals," *Holmby Productions, Inc.* v. *Vaughn,* 350 U. S. 870 (1955).[10] See also *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, 699–702 (Clark, J., concurring in result).

The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect

[10] There are numerous state cases to the same effect. See, *e. g., Police Commissioner* v. *Siegel Enterprises, Inc.,* 223 Md. 110, 162 A. 2d 727, cert. denied, 364 U. S. 909 (1960) ("violent bloodshed, lust or immorality or which, for a child below the age of eighteen, are obscene, lewd, lascivious, filthy, indecent or disgusting and so presented as reasonably to tend to incite such a child to violence or depraved or immoral acts"); *People* v. *Kahan,* 15 N. Y. 2d 311, 206 N. E. 2d 333 (1965); *People* v. *Bookcase, Inc.,* 14 N. Y. 2d 409, 201 N. E. 2d 14 (1964) ("descriptions of illicit sex or sexual immorality"); *Hallmark Productions, Inc.* v. *Carroll,* 384 Pa. 348, 121 A. 2d 584 (1956) ("sacrilegious, obscene, indecent, or immoral, or such as tend . . . to debase or corrupt morals"). In *Paramount Film Distributing Corp.* v. *City of Chicago,* 172 F. Supp. 69 (D. C. N. D. Ill. 1959), it was alternatively held that the standard "tends toward creating a harmful impression on the minds of children" was indefinite; that provision had no further legislative or judicial definition and is therefore unlike the statute in *Ginsberg* v. *New York, ante,* at 643, where the phrase "harmful to minors" is specifically and narrowly defined in accordance with tests this Court has set forth for judging obscenity.

upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

Of course, as the Court said in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S., at 502, "[i]t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." What does follow at the least, as the cases above illustrate, is that the restrictions imposed cannot be so vague as to set "the censor . . . adrift upon a boundless sea . . . ," *id.,* at 504. In short, as Justice Frankfurter said, "legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion . . . ," *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S., at 694 (concurring in result), one reason being

that "where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative [by vagueness]," *Joseph Burstyn, Inc.* v. *Wilson, supra,* at 532 (concurring opinion). Thus, to the extent that vague standards do not sufficiently guide the censor, the problem is not cured merely by affording *de novo* judicial review. Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial; "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law," *Kingsley Int'l Pictures Corp.* v. *Regents, supra,* at 701 (Clark, J., concurring in result).[11]

The dangers inherent in vagueness are strikingly illustrated in these cases. Five members of the Board viewed "Viva Maria." Eight members voted to classify it as "not suitable for young persons," the ninth member not voting. The Board gave no reasons for its determination.[12] Appellee alleged in its petition for an injunc-

[11] See also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 90 (1960); Klein, Film Censorship: The American and British Experience, 12 Vill. L. Rev. 419, 428 (1967).

[12] The ordinance does not require the Board to give reasons for its action. Compare *ACLU* v. *City of Chicago,* 13 Ill. App. 2d 278, 286, 141 N. E. 2d 56, 60 (1957):

"[T]he censoring authority, in refusing to issue a permit for showing the film, should be obliged to specify reasons for so doing . . . . The trial court, as well as the reviewing court, would then have a record, in addition to the film itself, on which to decide whether the ban should be approved. . . . Without such procedure, the courts become, not only the final tribunal to pass upon films, but the only tribunal to assume the responsibilities of the censoring authority."

Accord, *Zenith Int'l Film Corp.* v. *City of Chicago,* 291 F. 2d 785 (C. A. 7th Cir. 1961). See also Note, 71 Harv. L. Rev. 326, 338 (1957).

tion that the classification was warranted because the film portrayed "sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." Two Board members, a clergyman and a lawyer, testified at the hearing. Each adverted to several scenes in the film which, in their opinion, portrayed male-female relationships in a way contrary to "acceptable and approved behavior." Each acknowledged, in reference to scenes in which clergymen were involved in violence, most of which was farcical, that "sacrilege" might have entered into the Board's determination. And both conceded that the asserted portrayal of "sexual promiscuity" was implicit rather than explicit, *i. e.*, that it was a product of inference by, and imagination of, the viewer.

So far as "judicial superintendence" [13] and *de novo* review are concerned, the trial judge, after viewing the film and hearing argument, stated merely: "Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. . . . So I enjoin the exhibitor . . . from exhibiting it." [14] Nor did the Court of Civil Appeals provide much enlightenment or a narrowing definition of the ordinance. United Artists argued that the obscenity standards similar to those set forth in *Roth* v. *United States,* 354 U. S. 476 (1957), and other decisions of this Court ought to be controlling.[15] The majority of

[13] *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). See *Freedman* v. *Maryland, supra.*

[14] In response to a request that he make findings, the trial judge stated: "I decline. I have so many irons for a little fellow. I have taken on more than I can do, trying to decide a big case here, and I have got others at home and here and in Hill County where I have been helping out, and I do not have time to do it. I decline."

[15] Appellants also contend here that, in addition to its vagueness, the ordinance is invalid because it authorizes the restraint of films

the Court of Civil Appeals held, alternatively, (1) that such cases were not applicable because the legislation involved in them resulted in suppression of the offending expression rather than its classification; (2) that if obscenity standards were applicable then "Viva Maria" was obscene as to adults (a patently untenable conclusion) and therefore entitled to no constitutional protection; and (3) that if obscenity standards were modified as to children, the film was obscene as to them, a conclusion which was not in terms given as a narrowing interpretation of any specific provision of the ordinance. 402 S. W. 2d 770, 775–776. In regard to the last alternative holding, we must conclude that the court in effect ruled that the "portrayal . . . of sexual promiscuity as acceptable," *id.*, at 775, is in itself obscene as to children.[16] The court also held that the standards of the ordinance were "sufficiently definite." *Ibid.*

Thus, we are left merely with the film and directed to the words of the ordinance. The term "sexual promiscuity" is not there defined[17] and was not interpreted in the state courts. It could extend, depending upon one's moral judgment, from the obvious to any sexual contacts outside a marital relationship. The determina-

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on constitutionally impermissible grounds, arguing that the limits on regulation of expression are those of obscenity, or at least obscenity as judged for children. In light of our disposition on vagueness grounds, we do not reach that issue.

[16] A concurring justice of that court, with whom the author of the majority opinion agreed, specifically rejected the view that obscenity standards were relevant at all in determining the limits of the ordinance. But nothing in that opinion clarifies the standards adopted. 402 S. W. 2d, at 777–779.

[17] Appellee adopted an amendment to the ordinance in March 1966, which is not involved here. It defines "sexual promiscuity" as "indiscriminate sexual intimacies beyond the customary limits of candor in the community, and said term as defined herein shall include, but not be limited to sexual intercourse as that term is defined."

tive manner of the "describing or portraying" of the subjects covered by the ordinance (see *supra,* at 681), including "sexual promiscuity," is defined as "such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons." A film is so " 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." It might be excessive literalism to insist, as do appellants, that because those last six adjectives are stated in the disjunctive, they represent separate and alternative subtle determinations the Board is to make, any of which results in a not suitable classification. Nonetheless, "[w]hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission . . . ." *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S., at 701 (Clark, J., concurring in result).[18]

Vagueness and the attendant evils we have earlier described, see *supra,* at 683–685, are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. Cf. *Bantam*

[18] An alternative to "likely to incite" because the portrayal might "create the impression . . . [the] conduct is profitable, desirable," etc., is set forth in the ordinance. That is if the manner of presentation is "likely . . . to appeal to their [young persons'] prurient interest." That alternative, however, was not relied upon by the Board members who testified, nor by the appellate court.

Books, Inc. v. *Sullivan,* 372 U. S. 58 (1963).[19] Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. As Chief Judge Fuld has said:

> "It is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *People* v. *Kahan,* 15 N. Y. 2d 311, 313, 206 N. E. 2d 333, 335 (1965) (concurring opinion).[20]

The vices—the lack of guidance to those who seek to adjust their conduct and to those who seek to administer

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[19] In *Bantam Books,* the Commission there charged with reviewing material "manifestly tending to the corruption of the youth" (372 U. S., at 59) had no direct regulatory or suppressing functions, although its informal sanctions were found to achieve the same result. The Court held that "system of informal censorship" (*id.,* at 71) to violate the Fourteenth Amendment. One important factor in that decision was the Commission's "vague and uninformative" mandate, which the Commission in practice had "done nothing to make . . . more precise." *Ibid.* See also I. Carmen, Movies, Censorship, and the Law, *passim* (1966); Klein, Film Censorship: The American and British Experience, 12 Vill. L. Rev. 419, 455 (1967); Note, 71 Harv. L. Rev. 326, 342 (1957).

[20] See also, *e. g., Katzev* v. *County of Los Angeles,* 52 Cal. 2d 360, 341 P. 2d 310 (1959) (magazine sales to minors under age 18); *People* v. *Bookcase, Inc., supra,* n. 10 (book sales to minors under age 18); *Police Commissioner* v. *Siegel Enterprises, Inc., supra,* n. 10 (sale of certain publications to those under 18); *Paramount Film Distributing Corp.* v. *City of Chicago, supra,* n. 10 (special license for films deemed objectionable for those under age 21).

the law, as well as the possible practical curtailing of the effectiveness of judicial review—are the same.

It is not our province to draft legislation. Suffice it to say that we have recognized that some believe "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression," *Joseph Burstyn, Inc.* v. *Wilson, supra,* at 502, and we have indicated more generally that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg* v. *New York, ante,* p. 629.[21] Here we conclude only that "the absence of narrowly drawn, reasonable and definite standards for the officials to follow," *Niemotko* v. *Maryland,* 340 U. S. 268, 271 (1951), is fatal.[22]

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[21] On age classification with regard to viewing motion pictures, see generally I. Carmen, Movies, Censorship, and the Law 247–260 (1966); Note, 69 Yale L. J. 141 (1959).

[22] Appellants also assert that the city ordinance violates the teachings of *Freedman* v. *Maryland, supra,* because it does not secure prompt state appellate review. The assurance of a "prompt final judicial decision" (380 U. S., at 59) is made here, we think, by the guaranty of a speedy determination in the trial court (in this case nine days after the Board's classification). See *Teitel Film Corp.* v *Cusack, ante,* p. 139. Nor is *Freedman* violated by the requirement that the exhibitor file a notice of nonacceptance of the Board's classification. To be sure, it is emphasized in *Freedman* that "only a procedure requiring a judicial determination suffices to impose a valid final restraint" (380 U. S., at 58), and here if the exhibitor chooses not to file the notice of nonacceptance, the Board's determination is final without judicial approval. But we are not constrained to view that procedure as invalid in the absence of a showing that it has any significantly greater effect than would the exhibitor's decision not to contest in court the Board's suit for a temporary injunction. The ordinance provides that the Board has the burden of going to court to seek a temporary injunction, once

The judgment of the Texas Court of Civil Appeals is reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

Chapter 46A of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, as amended, provides:

Section 46A–1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A–2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judg-

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the exhibitor has indicated his nonacceptance, and there it has the burden of sustaining its classification.

Finally, appellant United Artists contends the ordinance unconstitutionally infringes upon its rights by not providing for participation by a distributor, who might wish to contest where an exhibitor would not. Of course the distributor must be permitted to challenge the classification, cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 64, n. 6 (1963), but the appellee assures us he may (see n. 2, *supra*), and United Artists was permitted to intervene in the trial court.

ment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered "likely to incite or encourage" crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to "prurient interest" of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is "not suitable for young persons," the Board shall consider the films as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) "Classify" means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) "Advertisement" means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) "Initial exhibition" means the first exhibition of any film within the City of Dallas.

(j) "Subsequent exhibition" means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) "File" means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) "Classification order" means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term "Board" as used and applied in subsection (a) of Section 46A–7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A–2. *Establishment of Board:*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and ex-

perienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A–3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it "approved" and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the appli-

cation is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification "not suitable for young persons," the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A–4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified "not suitable for young persons" if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified "not suitable for young persons" without keeping such classification posted

prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified "not suitable for young persons."

(5) Knowingly to permit any young person to view the exhibition of any film classified "not suitable for young persons."

(6) To exhibit any film classified "not suitable for young persons" or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified "suitable for young persons"; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified "not suitable for young persons" may be shown at any time if same has been separately classified as "suitable for young persons" under the provisions of Section 46A–3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified "not suitable for young persons" without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified "not suitable for young persons."

(2) To enter or remain in the viewing room of any theatre where a film classified "not suitable for young persons" is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as "not suitable for young persons."

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified "not suitable for young persons."

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as "not suitable for young persons."

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified "not suitable for young persons," it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A–5. *License:*

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified "not suitable for young persons."

Section 46A–6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any

exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified "not suitable for young persons" are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file an order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A–7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such

defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps neces-

sary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A–7, shall constitute acceptance

of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subsection (c) of Section 46A–3 above.

Section 46A–8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A–4 of this ordinance.

(b) Any exhibition of a film classified as "not suitable for young persons" at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as "not suitable for young persons" by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibitions are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as "not suitable for young persons" by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A–4 of this ordinance in connection with the exhibition of the same film.

Section 46A–9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A–8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A–10. *Exemption to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A–11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose.

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

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

As I indicated in my dissenting opinion in *Ginsberg* v. *New York*, *ante*, p. 650, if we assume *arguendo* that the censorship of obscene publications, whether for children or for adults, is in the area of substantive due proc-

ess, the States have a very wide range indeed for determining what kind of movie, novel, poem, or article is harmful. If that were the test, I would agree with my Brother HARLAN that the standard of "sexual promiscuity" in this Dallas ordinance is sufficiently precise and discriminating for modern man to apply intelligently.

My approach to these problems is, of course, quite different. I reach the result the Court reaches for the reasons stated in my dissenting opinions in *Ginsberg* and other cases and therefore concur in reversing the present judgment.

MR. JUSTICE HARLAN, concurring in No. 47, *ante*, p. 629, and dissenting in Nos. 56 and 64.

These cases usher the Court into a new phase of the intractable obscenity problem: may a State prevent the dissemination of obscene or other obnoxious material to juveniles upon standards less stringent than those which would govern its distribution to adults?

In No. 47, the *Ginsberg* case, the Court upholds a New York statute applicable only to juveniles which, as construed by the state courts, in effect embodies in diluted form the "adult" obscenity standards established by *Roth* v. *United States*, 354 U. S. 476, and the prevailing opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413. In Nos. 56 and 64, the *Interstate Circuit* and *United Artists* cases, the Court strikes down on the ground of vagueness a similar Dallas ordinance, not couched, however, entirely in obscenity terms. In none of these cases does the Court pass judgment on the particular material condemned by the state courts.

As the Court enters this new area of obscenity law it is well to take stock of where we are at present in this constitutional field. The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional

adjudication.[1] Two members of the Court steadfastly maintain that the First and Fourteenth Amendments render society powerless to protect itelf against the dissemination of even the filthiest materials.[2] No other member of the Court, past or present, has ever stated his acceptance of that point of view. But there is among present members of the Court a sharp divergence as to the proper application of the standards in *Roth, supra,*[3] *Memoirs, supra,*[4] and *Ginzburg* v. *United States,* 383 U. S. 463,[5] for judging whether given material is con-

[1] In the following 13 obscenity cases from the date *Roth* was decided, in which signed opinions were written for a decision or judgment of the Court, there has been a total of 55 separate opinions among the Justices. *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (four opinions); *Roth* v. *United States, supra* (four opinions); *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684 (six opinions); *Smith* v. *California,* 361 U. S. 147 (five opinions); *Times Film Corp.* v. *Chicago,* 365 U. S. 43 (three opinions); *Marcus* v. *Search Warrant,* 367 U. S. 717 (two opinions); *Manual Enterprises* v. *Day,* 370 U. S. 478 (three opinions); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (four opinions); *Jacobellis* v. *Ohio,* 378 U. S. 184 (six opinions); *A Quantity of Books* v. *Kansas,* 378 U. S. 205 (four opinions); *Memoirs* v. *Massachusetts, supra* (five opinions); *Ginzburg* v. *United States,* 383 U. S. 463 (five opinions); *Mishkin* v. *New York,* 383 U. S. 502 (four opinions).

[2] See *Roth* v. *United States, supra,* at 508 (dissenting opinion); *Jacobellis* v. *Ohio, supra,* at 196 (separate opinion); *Ginzburg* v. *United States, supra,* at 476, 482 (dissenting opinions).

[3] *Roth* stated the test to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489 (note omitted).

[4] *Memoirs* elaborated the *Roth* test as follows: "it must be established that (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." 383 U. S., at 418.

[5] The *Ginzburg* "test" is difficult to state with any precision. The Court held that "in close cases evidence of pandering may be

stitutionally protected or unprotected. Most of the present Justices who believe that "obscenity" is not beyond the pale of governmental control seemingly consider that the *Roth-Memoirs-Ginzburg* tests permit suppression of material that falls short of so-called "hard core pornography," on equal terms as between federal and state authority.[6] Another view is that only "hard core pornography" may be suppressed, whether by federal or state authority.[7] And still another view, that of this writer, is that only "hard core pornography" may be suppressed by the Federal Government, whereas under the Fourteenth Amendment States are permitted wider authority to deal with obnoxious matter than might be justifiable under a strict application of the *Roth-Memoirs-Ginzburg* rules.[8]

There are also differences among us as to how our appellate process should work in reviewing obscenity determinations. One view is that we should simply examine the proceedings below to ascertain whether the lower federal or state courts have made a genuine effort to apply the *Roth-Memoirs-Ginzburg* tests, and that if such is the case, their determinations that the questioned

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probative with respect to the nature of the material in question and thus satisfy the *Roth* test." 383 U. S., at 474. But this "simply elaborates the test by which the obscenity vel non of the material must be judged." *Id.*, at 475. Yet evidence of pandering may "support the determination that the material is obscene even though in other contexts the material would escape such condemnation." *Id.*, at 476. Pandering itself evidently encompasses every form of the " 'business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' " *Id.*, at 467 (note omitted).

[6] See, *e. g.*, *Jacobellis* v. *Ohio*, *supra*, at 193–195 (opinion of BRENNAN, J.).

[7] See *id.*, at 197 (concurring opinion of STEWART, J.).

[8] See *Roth* v. *United States*, *supra*, at 496 (concurring and dissenting opinion); *Memoirs* v. *Massachusetts*, *supra*, at 455 (dissenting opinion).

material is obscene should be accepted, much as would any findings of fact.[9] Another view is that the question of whether particular material is obscene inherently entails a constitutional judgment for which the Court has ultimate responsibility, and hence that it is incumbent upon us to judge for ourselves, *de novo* as it were, the obscenity *vel non* of the challenged matter.[10]

The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.[11] From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges. In all except rare instances, I venture to say, no substantial free-speech interest is at stake, given the right of the States to control obscenity.

I believe that no improvement in this chaotic state of affairs is likely to come until it is recognized that this whole problem is primarily one of state concern, and

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[9] See *Jacobellis* v. *Ohio, supra,* at 202 (dissenting opinion).

[10] See *Jacobellis,* at 190 (opinion of BRENNAN, J.); *Roth* v. *United States, supra,* at 497–498 (concurring and dissenting opinion); *Kingsley Int'l Pictures Corp.* v. *Regents, supra,* at 708 (concurring in result).

[11] See, *e. g., Keney* v. *New York,* 388 U. S. 440; *Friedman* v. *New York,* 388 U. S. 441; *Ratner* v. *California,* 388 U. S. 442; *Cobert* v. *New York,* 388 U. S. 443; *Sheperd* v. *New York,* 388 U. S. 444; *Avansino* v. *New York,* 388 U. S. 446; *Aday* v. *United States,* 388 U. S. 447; *Corinth Publications, Inc.* v. *Wesberry,* 388 U. S. 448; *Books, Inc.* v. *United States,* 388 U. S. 449; *Rosenbloom* v. *Virginia,* 388 U. S. 450; *A Quantity of Copies of Books* v. *Kansas,* 388 U. S. 452; *Mazes* v. *Ohio,* 388 U. S. 453; *Schackman* v. *California,* 388 U. S. 454; *Landau* v. *Fording,* 388 U. S. 456; *Potomac News Co.* v. *United States,* 389 U. S. 47; *Conner* v. *City of Hammond,* 389 U. S. 48; *Central Magazine Sales, Ltd.* v. *United States,* 389 U. S. 50; *Chance* v. *California,* 389 U. S. 89.

that the Constitution tolerates much wider authority and discretion in the States to control the dissemination of obscene materials than it does in the Federal Government. Reiterating the viewpoint that I have expressed in earlier opinions, I would limit federal control of obscene materials to those which all would recognize as what has been called "hard core pornography," and would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish overzealousness. See *Roth* v. *United States, supra,* at 496; *Manual Enterprises* v. *Day,* 370 U. S. 478; *Jacobellis* v. *Ohio,* 378 U. S. 184, 203; *Memoirs* v. *Massachusetts, supra,* at 455. And in the juvenile field I think that the Constitution is still more tolerant of state policy and its applications. If current doctrinaire views as to the reach of the First Amendment into state affairs are thought to stand in the way of such a functional approach, I would revert to basic constitutional concepts that until recent times have been recognized and respected as the fundamental genius of our federal system, namely the acceptance of wide state autonomy in local affairs.

I come now to the cases at hand. In No. 47, *Ginsberg,* I concur in the judgment and join the opinion of the Court, fully preserving, however, the views repeatedly expressed in my earlier opinions in this field.

In Nos. 56 and 64, the *Interstate Circuit* and *United Artists* cases, I respectfully dissent. I do not agree that the Dallas ordinance can be struck down, as the Court now holds, on the score of vagueness. The ambiguities about which the Court expresses concern are essentially two.[12] First, the ordinance does not include a definition

[12] The Court emphasizes at greater length the failure of the Board and the Texas courts to proffer any clarification of the ordinance. This compels examination of the ordinance's terms, but it does

of "sexual promiscuity." [13] Second, the ordinance provides that a film "shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity . . . if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." The Court is concerned that many may disagree as to whether any specific materials create such impressions on young persons.

These seem to me entirely inadequate grounds on which to strike down the ordinance. It must be granted, of course, that people may differ as to the application of these standards; but the central lesson of this Court's efforts in this area is that under all verbal formulae, including even this Court's own definition of obscenity, reasonable men can, and ordinarily do, differ as to the proper assessment of challenged materials. The truth is that the Court has demanded greater precision of language from the City of Dallas than the Court can itself give, or even than can sensibly be expected in this area of the law.

The Court has not always asked so much.[14] In *Roth,* the federal statute under which the petitioner had been

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not, of course, offer any independent basis for a conclusion that the ordinance is ambiguous.

[13] The Court acknowledges that the city has since adopted a definition of sexual promiscuity, but it expresses no views as to the definition's adequacy.

[14] It is pertinent to note that a majority of the Court did not hold that the New York statute at issue in *Kingsley Int'l Pictures Corp.* v. *Regents, supra,* was impermissibly vague. The statute forbade the exhibition of a film "which portrays acts of sexual immorality . . . or . . . presents such acts as desirable, acceptable or proper patterns of behavior." *Id.,* at 685. It appears that only the opinion of Mr. Justice Clark, concurring in the result, upon which the Court now relies so heavily, described this standard as vague. Indeed, Mr. Justice Frankfurter said in his separate opinion that the "Court does not strike the law down because of vagueness . . . ." *Id.,* at

sentenced to five years' imprisonment forbade the mailing of material that was "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." [15] 354 U. S., at 491. In *Alberts* v. *California*, the companion case to *Roth*, the California statute provided that the materials must have a "tendency to deprave or corrupt its readers." *Id.*, at 498. No definitions were included in either statute, yet the Court there explicitly rejected the argument that they did not "provide reasonably ascertainable standards of guilt . . . ." *Id.*, at 491. The Court recognized that the terms of obscenity statutes are necessarily imprecise, but emphasized, quoting *United States* v. *Petrillo*, 332 U. S. 1, 7–8, that the " 'Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common

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695. See also *id.*, at 704. Mr. Justice Frankfurter went on to say that " '[s]exual immorality' is not a new phrase in this branch of law and its implications dominate the context. I hardly conceive it possible that the Court would strike down as unconstitutional the federal statute against mailing lewd, obscene and lascivious matter, which has been the law of the land for nearly a hundred years, see the Act of March 3, 1865, 13 Stat. 507, and March 3, 1873, 17 Stat. 599, whatever specific instances may be found not within its allowable prohibition. In sustaining this legislation this Court gave the words 'lewd, obscene and lascivious' concreteness by saying that they concern 'sexual immorality.' " *Id.*, at 695–696.

[15] The statute involved in *Roth* now provides in part that it is a criminal offense to import or transport in interstate commerce any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . . ." 18 U. S. C. § 1462. Similarly, § 1461 provides that it is a criminal offense to mail any "obscene, lewd, lascivious, indecent, filthy or vile" article. See also §§ 1463, 1464, 1465. Although each of these sections makes profuse use of the disjunctive, no definitions of any of these descriptive terms are provided.

understanding and practices. . . .'" [16] *Ibid.* Yet it should be repeated that the *Interstate Circuit* cases, unlike *Roth* and *Alberts,* involve merely the classification, not the proscription by criminal prosecution, of objectionable materials. In my opinion, the ordinance does not fail either to give adequate notice of the films that are to be restricted, or to provide sufficiently definite standards for its administration.[17]

Although the Court finds it unnecessary to pass judgment upon the materials involved in these cases, I consider it preferable to face that question. Upon the premises set forth in my *Roth* and *Memoirs* opinions, and reiterated here, I would hold that in condemning these materials New York and the City of Dallas have acted within constitutional limits.

I would affirm the judgments in all three cases.

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[16] The Court went on to say that it "is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." 354 U. S., at 492, n. 30. Precisely similar reasoning should be applicable to boards like that created by the Dallas ordinance, although the cost of differences in result is here measured (at least initially) by film classifications, and not by lengthy terms of imprisonment.

[17] It is difficult to see how the Court could suppose that its *Memoirs* formula offers more precise warnings to film makers than does the Dallas ordinance. Surely the Court cannot now believe that "redeeming social value," "patent offensiveness," and "prurient interest" are, particularly as modified so as to apply to children, terms of common understanding and clarity. Moreover, one wonders whether the pandering rationale adopted in *Ginzburg* v. *United States, supra,* is thought to give more "guidance to those who seek to adjust their conduct" than does the Dallas ordinance. It is difficult to imagine any standard more vague, or more overbroad, than the "new subjectivity" created by the Court's search for the "leer of the sensualist." See Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7, 61.

HASWELL *v.* POWELL, SECRETARY OF STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1055. Decided April 22, 1968.

38 Ill. 2d 161, 230 N. E. 2d 178, appeal dismissed.

John C. Tucker for appellant.

William G. Clark, Attorney General of Illinois, and *John J. O'Toole* and *Robert F. Nix,* 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.

TIMES MIRROR CO. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1162. Decided April 22, 1968.

274 F. Supp. 606, affirmed.

Julian O. von Kalinowski for appellant.

Solicitor General Griswold, Assistant Attorney General Turner and *Bernard M. Hollander* for the United States.

PER CURIAM.

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

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

SCAFATI, CORRECTIONAL SUPERINTENDENT *v.* GREENFIELD.

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

No. 1104. Decided April 22, 1968.

277 F. Supp. 644, affirmed.

Elliot L. Richardson, Attorney General of Massachusetts, *Willie J. Davis* and *Howard M. Miller,* Assistant Attorneys General, and *Richard L. Levine,* Deputy Assistant Attorney General, for appellant.

PER CURIAM.

The motion of appellee for leave to proceed *in forma pauperis* is granted. 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.

TILL *v.* NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 1189, Misc. Decided April 22, 1968.

78 N. M. 255, 430 P. 2d 752, appeal dismissed and certiorari denied.

Gladys Towles Root 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.

NATIONWIDE MUTUAL INSURANCE CO. *v.* VAAGE ET AL.

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

No. 1177. Decided April 22, 1968.

265 F. Supp. 556, appeal dismissed.

Charles G. Pillon and *Thomas A. Ziebarth* for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General, for appellees Rockefeller et al.

PER CURIAM.

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

ANDERSON ET AL. *v.* TIEMANN ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 1218. Decided April 22, 1968.

182 Neb. 393, 155 N. W. 2d 322, appeal dismissed.

Ray C. Simmons for appellants.

Clarence A. H. Meyer, Attorney General of Nebraska, *Gerald S. Vitamvas,* Deputy Attorney General, and *Richard H. Williams,* Special Assistant Attorney General, for appellees.

PER CURIAM.

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

CITY OF NEW YORK ET AL. *v.* UNITED STATES ET AL.

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

No. 1141. Decided April 22, 1968.*

Affirmed.

Lee A. Freeman, William G. Clark, Attorney General of Illinois, *Joseph L. Alioto, John J. Dillon,* Attorney General of Indiana, *Elliot L. Richardson,* Attorney General of Massachusetts, *Robert L. Meade,* Assistant Attorney General of Massachusetts, *William B. Saxbe,* Attorney General of Ohio, *David G. Budd,* Assistant Attorney General of Ohio, *Crawford C. Martin,* Attorney General of Texas, *Thomas W. Mack,* Assistant Attorney General of Texas, *C. Donald Robertson,* Attorney General of West Virginia, *Benjamin F. Yancey, Jr.,* Deputy Attorney General of West Virginia, *Bronson C. La Follette,* Attorney General of Wisconsin, *George F. Sieker* and *Theodore L. Priebe,* Assistant Attorneys General of Wisconsin, *J. Lee Rankin, Raymond F. Simon, Thomas M. O'Connor* and *Robert M. Desky* for appellants in No. 1141. *David Berger* and *Herbert B. Newberg* for appellants in No. 1146.

Solicitor General Griswold and *Assistant Attorney General Turner* for the United States in both cases. *Horace S. Manges, Donald J. Williamson, Don H. Reuben, Lawrence Gunnels, Bernard G. Segal, Edward W. Mullinix, Albert E. Jenner, Jr., Philip W. Tone, W. Donald McSweeney, Harry I. Rand, Samuel Weisbard, Harry Buchman, Robert H. Davison, George B. Christensen,*

*Together with No. 1146, *School District of Philadelphia et al.* v. *United States et al.*, also on appeal from the same court.

H. Templeton Brown, Lee N. Abrams, James F. Dwyer, Leo Rosen, Roger Bryant Hunting and *Robert C. Keck* for appellees Harper & Row, Publishers, Inc., et al., in both cases.

PER CURIAM.

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

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

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

SAFEGUARD MUTUAL INSURANCE CO. *v.* HOUSING AUTHORITY OF THE CITY OF CAMDEN ET AL.

APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY.

No. 1208. Decided April 22, 1968.

Appeal dismissed.

Malcolm W. Berkowitz and *Sidney W. Bookbinder* for appellant.

Bryan B. McKernan for appellee Housing Authority of the City of Camden.

PER CURIAM.

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

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. Order and judgment of January 15, 1968, 389 U. S. 577, vacated. Decided April 22, 1968.

Certiorari granted to District Court of Appeal of Florida, Third District; 188 So. 2d 380, reversed.

Morris P. Glushien for petitioners.

Joseph A. Perkins for respondent.

PER CURIAM.

The mandate of this Court in this case issued on the 9th day of February 1968, is hereby recalled and the judgment heretofore entered on the 15th day of January 1968, is hereby vacated. The order of the Court dated the 15th day of January 1968, granting the writ of certiorari to the Supreme Court of Florida, is vacated.

Treating the papers submitted as a petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, the petition for a writ of certiorari is granted and the judgment 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.

HORLOCK *v.* OGLESBY ET UX.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 1217. Decided April 22, 1968.

— Ind. —, 231 N. E. 2d 810, appeal dismissed.

John D. Clouse for appellant.

Theodore Lockyear for appellees.

PER CURIAM.

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

Syllabus.

BARBER *v.* PAGE, WARDEN.

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

No. 703. Argued March 28, 1968.—
Decided April 23, 1968.

Petitioner and one Woods were jointly charged with armed robbery. During the preliminary hearing Woods waived his privilege against self-incrimination and testified, incriminating petitioner. Petitioner's counsel did not cross-examine Woods. When petitioner was tried in Oklahoma seven months later, Woods was in a federal prison in Texas. The State of Oklahoma made no effort to obtain Woods' presence at trial but introduced, over petitioner's objection on the ground of deprivation of his right to be confronted with the witnesses against him, the transcript of Woods' testimony at the preliminary hearing on the basis that he was out of the State and thus unavailable to testify. Petitioner was convicted. He sought federal habeas corpus claiming deprivation of his right of confrontation, but his contention was rejected by the District Court, and the Court of Appeals affirmed. *Held:*

1. While there is a traditional exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant, the witness is not "unavailable" for the purposes of that exception unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. Pp. 722–725.

2. Petitioner's failure to cross-examine at the preliminary hearing did not constitute a waiver of the right of confrontation at the subsequent trial; and even if petitioner had cross-examined the witness at the hearing he would not have waived his right of confrontation, since it is basically a trial right, and includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. P. 725.

381 F. 2d 479, reversed and remanded.

Ira C. Rothgerber, Jr., by appointment of the Court, 389 U. S. 910, argued the cause and filed briefs for petitioner.

Charles L. Owens, Assistant Attorney General of Oklahoma, argued the cause for respondent. With him on the brief was *G. T. Blankenship,* Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether petitioner was deprived of his Sixth and Fourteenth Amendment right to be confronted with the witnesses against him at his trial in Oklahoma for armed robbery, at which the principal evidence against him consisted of the reading of a transcript of the preliminary hearing testimony of a witness who at the time of trial was incarcerated in a federal prison in Texas.

Petitioner and one Woods were jointly charged with the robbery, and at the preliminary hearing were represented by the same retained counsel, a Mr. Parks. During the course of the hearing, Woods agreed to waive his privilege against self-incrimination. Parks then withdrew as Woods' attorney but continued to represent petitioner. Thereupon Woods proceeded to give testimony that incriminated petitioner. Parks did not cross-examine Woods, although an attorney for another codefendant did.

By the time petitioner was brought to trial some seven months later, Woods was incarcerated in a federal penitentiary in Texarkana, Texas, about 225 miles from the trial court in Oklahoma. The State proposed to introduce against petitioner the transcript of Woods' testimony at the preliminary hearing on the ground that Woods was unavailable to testify because he was outside the jurisdiction. Petitioner objected to that course on the ground that it would deprive him of his right to be confronted with the witnesses against him. His objection was overruled and the transcript was admitted and read to the jury, which found him guilty. On appeal

the Oklahoma Court of Criminal Appeals affirmed his conviction. *Barber* v. *State,* 388 P. 2d 320 (Okla. Crim. App. 1963).

Petitioner then sought federal habeas corpus, claiming that the use of the transcript of Woods' testimony in his state trial deprived him of his federal constitutional right to confrontation in violation of the Sixth and Fourteenth Amendments. His contention was rejected by the District Court and on appeal the Court of Appeals for the Tenth Circuit, one judge dissenting, affirmed. 381 F. 2d 479 (1966). We granted certiorari, 389 U. S. 819 (1967), to consider petitioner's denial of confrontation claim, and we reverse.

Many years ago this Court stated that "[t]he primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States,* 156 U. S. 237, 242–243 (1895). More recently, in holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas,* 380 U. S. 400, 405 (1965). See also *Douglas* v. *Alabama,* 380 U. S. 415 (1965).

It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. *E. g., Mattox* v. *United States, supra* (witnesses who testified in original trial died prior to the second trial). This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement. See 5 Wigmore, Evidence §§ 1395–1396, 1402 (3d ed. 1940); C. McCormick, Evidence §§ 231, 234 (1954).

Here the State argues that the introduction of the transcript is within that exception on the grounds that Woods was outside the jurisdiction and therefore "unavailable" at the time of trial, and that the right of cross-examination was afforded petitioner at the preliminary hearing, although not utilized then by him. For the purpose of this decision we shall assume that petitioner made a valid waiver of his right to cross-examine Woods at the preliminary hearing, although such an assumption seems open to considerable question under the circumstances.[1]

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[1] Since Woods and his attorney Parks presumably discussed Woods' connection with the crime before the preliminary hearing, it would seem highly probable that effective cross-examination by Parks of Woods would have necessitated covering material about which Woods had made confidential communications to Parks. While the State may be correct in asserting that Woods had waived, under Oklahoma law, his right to assert the attorney-client privilege as to those matters by testifying, at the very least serious ethical questions would seem to be presented to Parks under those circumstances. And in fact, the cases cited by the State in support of its contention that the attorney-client privilege would not have

We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma. It must be acknowledged that various courts [2] and commentators [3] have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that "it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless." 5 Wigmore, Evidence § 1404 (3d ed. 1940).

Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government has largely deprived it of any continuing validity in the criminal law.[4]

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barred cross-examination by Parks involved situations where the client had testified about the existence and nature of the communications between himself and his attorney prior to the introduction of the attorney's testimony by way of rebuttal. *E. g., Brown* v. *State,* 9 Okla. Crim. 382, 132 P. 359 (1913); *Boring* v. *Harber,* 130 Okla. 251, 267 P. 252 (1927). As far as the record reveals, Woods did not testify about any communications between himself and Parks and hence the applicability of the foregoing cases is questionable.

[2] See cases collected in 5 Wigmore, Evidence § 1404, n. 5 (3d ed., 1964 Supp.).

[3] *E. g.,* C. McCormick, Evidence § 234 (1954).

[4] For witnesses not in prison, the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the witness is found directing the witness to appear in court in the first State to testify. The State seeking his appearance must pay the witness a specified sum as a travel allowance and compensation for his time. As of 1967 the Uniform Act was in force in 45 States, the District of Columbia, the Canal Zone, Puerto Rico, and the

For example, in the case of a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c)(5) gives federal courts the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities. See *Gilmore* v. *United States,* 129 F. 2d 199, 202 (C. A. 10th Cir. 1942); *United States* v. *McGaha,* 205 F. Supp. 949 (D. C. E. D. Tenn. 1962). In addition, it is the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of state courts.[5] Cf. *Lawrence* v. *Willingham,* 373 F. 2d 731 (C. A. 10th Cir. 1967) (habeas corpus *ad prosequendum*).

In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." 381 F. 2d, at 481. In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation

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Virgin Islands. See 9 Uniform Laws Ann. 50 (1967 Supp.). For witnesses in prison, quite probably many state courts would utilize the common-law writ of habeas corpus *ad testificandum* at the request of prosecutorial authorities of a sister State upon a showing that adequate safeguards to keep the prisoner in custody would be maintained.

[5] Department of Justice, United States Marshals Manual §§ 720.04–720.06. Cf. Brief for the United States as Amicus Curiae, *Smith* v. *Hooey,* No. 495, Misc., October Term, 1967 (habeas corpus *ad prosequendum* from state court normally honored by Bureau of Prisons).

requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

The State argues that petitioner waived his right to confront Woods at trial by not cross-examining him at the preliminary hearing. That contention is untenable. Not only was petitioner unaware that Woods would be in a federal prison at the time of his trial, but he was also unaware that, even assuming Woods' incarceration, the State would make no effort to produce Woods at trial. To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938); *Brookhart* v. *Janis,* 384 U. S. 1, 4 (1966).

Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See *Motes* v. *United States,* 178 U. S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown

to be actually unavailable, this is not, as we have pointed out, such a case.[6]

The judgment of the Court of Appeals for the Tenth Circuit is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I agree that the State's failure to attempt to obtain the presence of the witness denied petitioner due process, and I therefore concur in the opinion of the Court on the premises of my opinion in *Pointer* v. *Texas,* 380 U. S. 400, 408.

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[6] Cf. *Holman* v. *Washington,* 364 F. 2d 618 (C. A. 5th Cir. 1966); *Government of the Virgin Islands* v. *Aquino,* 378 F. 2d 540 (C. A. 3d Cir. 1967).

Syllabus.

ST. AMANT *v.* THOMPSON.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 517. Argued April 4, 1968.—Decided April 29, 1968.

Petitioner made a televised political speech in the course of which he read questions which he had put to a union member, Albin, and Albin's answers; the answers falsely charged respondent, a public official, with criminal conduct. Respondent sued petitioner for defamation and was awarded damages by the trial judge. The trial judge, having considered *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), decided after the trial, denied a motion for a new trial. An intermediate appellate court reversed the trial court's judgment, having found that petitioner had not acted with actual malice within the meaning of the *New York Times* rule, *i. e.*, with knowledge that petitioner's statements were false or with reckless disregard of whether they were false or not. The State Supreme Court reversed, finding that there had been sufficient evidence that petitioner had acted in "reckless disregard" in that petitioner had no personal knowledge of respondent's activities; relied solely on Albin's affidavit though there was no evidence as to Albin's veracity; failed to verify the information with others who might know the facts; did not consider whether the statements were defamatory; and mistakenly believed that he had no responsibility for the broadcast because he was merely quoting Albin. *Held:* In order that it can be found that a defendant, within the meaning of *New York Times*, acted in "reckless disregard" of whether a defamatory statement which he made about a public official is false or not, there must be sufficient evidence to permit the conclusion that the defendant had serious doubts as to the truth of his publication. Pp. 730–733.

(a) In a defamation action by a public official reckless conduct is not measured by whether a reasonably prudent man would have published the statement or would have investigated before publishing. P. 731.

(b) The people's stake in the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would adequately implement First Amendment policies. Pp. 731–732.

(c) A defendant's testimony that he acted in good faith is not conclusive as to that issue, since the fact finder in the light of all

the surrounding circumstances must determine whether the publication was indeed made in good faith. P. 732.

(d) The evidence in this case is not sufficient to permit the conclusion that petitioner acted in reckless disregard of whether the statements about respondent were false or not. Pp. 732–733.

250 La. 405, 196 So. 2d 255, reversed and remanded.

Russell J. Schonekas argued the cause and filed a brief for petitioner.

Robert L. Kleinpeter argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question presented by this case is whether the Louisiana Supreme Court, in sustaining a judgment for damages in a public official's defamation action, correctly interpreted and applied the rule of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), that the plaintiff in such an action must prove that the defamatory publication "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.

On June 27, 1962, petitioner St. Amant, a candidate for public office, made a televised speech in Baton Rouge, Louisiana. In the course of this speech, St. Amant read a series of questions which he had put to J. D. Albin, a member of a Teamsters Union local, and Albin's answers to those questions. The exchange concerned the allegedly nefarious activities of E. G. Partin, the president of the local, and the alleged relationship between Partin and St. Amant's political opponent. One of Albin's answers concerned his efforts to prevent Partin from secreting union records; in this answer Albin referred to Herman A. Thompson, an East Baton Rouge Parish deputy sheriff and respondent here:

> "Now, we knew that this safe was gonna be moved that night, but imagine our predicament, knowing

> of Ed's connections with the Sheriff's office through Herman Thompson, who made recent visits to the Hall to see Ed. We also knew of money that had passed hands between Ed and Herman Thompson . . . from Ed to Herman. We also knew of his connections with State Trooper Lieutenant Joe Green. We knew we couldn't get any help from there and we didn't know how far that he was involved in the Sheriff's office or the State Police office through that, and it was out of the jurisdiction of the City Police." [1]

Thompson promptly brought suit for defamation, claiming that the publication had "impute[d] . . . gross misconduct" and "infer[red] conduct of the most nefarious nature." The case was tried prior to the decision in *New York Times Co.* v. *Sullivan, supra.* The trial judge ruled in Thompson's favor and awarded $5,000 in damages. Thereafter, in the course of entertaining and denying a motion for a new trial, the Court considered the ruling in *New York Times,* finding that rule no barrier to the judgment already entered. The Louisiana Court of Appeal reversed because the record failed to show that St. Amant had acted with actual malice, as required by *New York Times.* 184 So. 2d 314 (1966). The Supreme Court of Louisiana reversed the intermediate appellate court. 250 La. 405, 196 So. 2d 255 (1967). In its view, there was sufficient evidence that St. Amant recklessly disregarded whether the statements about Thompson were true or false. We granted a writ of certiorari. 389 U. S. 1033 (1968).

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[1] St. Amant had preceded this question and answer with other answers by Albin asserting that Partin, on learning that a union member had written to the Secretary of Labor charging that Partin had been stealing union funds, had become "pretty riled up" and had decided to "get rid of the safe" containing the union records.

For purposes of this case we accept the determinations of the Louisiana courts that the material published by St. Amant charged Thompson with criminal conduct, that the charge was false, and that Thompson was a public official [2] and so had the burden of proving that the false statements about Thompson were made with actual malice as defined in *New York Times Co.* v. *Sullivan* and later cases. We cannot, however, agree with either the Supreme Court of Louisiana or the trial court that Thompson sustained this burden.

Purporting to apply the *New York Times* malice standard, the Louisiana Supreme Court ruled that St. Amant had broadcast false information about Thompson recklessly, though not knowingly. Several reasons were given for this conclusion. St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.

These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal stand-

[2] The Louisiana Supreme Court concluded, after considering state law, that a deputy sheriff has "substantial responsibility for or control over the conduct of governmental affairs," the test established by *Rosenblatt* v. *Baer*, 383 U. S. 75, 85 (1966), "at least where law enforcement and police functions are concerned." 250 La., at 422, 196 So. 2d, at 261.

ards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana,* 379 U. S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U. S., at 74. MR. JUSTICE HARLAN'S opinion in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the

people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[3]

By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a public officer. Nothing referred to by the Louisiana courts indicates an awareness by St. Amant of the probable falsity of Albin's

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[3] See, *e. g., Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 169–170 (WARREN, C. J., concurring in the result), and 172 (BRENNAN, J., dissenting) (1967).

statement about Thompson. Failure to investigate does not in itself establish bad faith. *New York Times Co.* v. *Sullivan, supra,* at 287–288. St. Amant's mistake about his probable legal liability does not evidence a doubtful mind on his part. That he failed to realize the import of what he broadcast—and was thus "heedless" of the consequences for Thompson—is similarly colorless. Closer to the mark are considerations of Albin's reliability. However, the most the state court could say was that there was no evidence in the record of Albin's reputation for veracity, and this fact merely underlines the failure of Thompson's evidence to demonstrate a low community assessment of Albin's trustworthiness or unsatisfactory experience with him by St. Amant.

Other facts in this record support our view. St. Amant made his broadcast in June 1962. He had known Albin since October 1961, when he first met with members of the dissident Teamsters faction. St. Amant testified that he had verified other aspects of Albin's information and that he had affidavits from others. Moreover Albin swore to his answers, first in writing and later in the presence of newsmen. According to Albin, he was prepared to substantiate his charges. St. Amant knew that Albin was engaged in an internal struggle in the union; Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute.

Because the state court misunderstood and misapplied the actual malice standard which must be observed in a public official's defamation action, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Black and Mr. Justice Douglas concur in the judgment of the Court for the reasons set out in

their concurring opinions in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (1964), and *Garrison* v. *Louisiana,* 379 U. S. 64, 79, 80 (1964).

MR. JUSTICE FORTAS, dissenting.

I do not believe that petitioner satisfied the minimal standards of care specified by *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). The affidavit that petitioner broadcast contained a seriously libelous statement directed against respondent. Respondent was a public official. He was not petitioner's adversary in the political contest. Petitioner's casual, careless, callous use of the libel cannot be rationalized as resulting from the heat of a campaign. Under *New York Times,* this libel was broadcast by petitioner with "actual malice"—with reckless disregard of whether it was false or not. The principle of *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), in my opinion, should lead us to affirmance here.

The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living.

Petitioner had a duty here to check the reliability of the libelous statement about respondent. If he had made a good-faith check, I would agree that he should be pro-

tected even if the statement were false, because the interest of public officials in their reputation must endure this degree of assault. But since he made no check, I agree with the Supreme Court of Louisiana that *New York Times* does not prohibit recovery.

I would affirm.

HANNER *v.* DeMARCUS ET UX.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 497. Argued March 28, 1968.—Decided April 29, 1968.

102 Ariz. 105, 425 P. 2d 837, certiorari dismissed.

Philip M. Haggerty argued the cause for petitioner. With him on the briefs was *Raymond R. Wein.*

N. Pike Johnson, Jr., argued the cause for respondents. On the brief was *Robert John Walton.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

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

Respondent was appointed Special Master in an Arizona divorce proceeding where petitioner, Josephine Hanner, was defendant. The divorce court ordered petitioner to pay respondent's $5,072.10 Special Master's fee. Respondent obtained a writ of execution and levied on certain real property of petitioner, which respondent purchased at the execution sale for the amount of judgment, later acquiring a sheriff's deed. The only notice of the execution and judicial sale was by newspaper publication and public posting. Three years after the execution, respondent commenced a quiet-title action in Arizona court. Petitioner pleaded as an affirmative defense that the execution and deed were "null and void and of no effect" because neither respondent nor the sheriff gave her actual notice of the execution and judicial sale, although respondent knew her address and that of her attorney in the divorce action. Respondent was granted summary judgment, and, on appeal to the Arizona Supreme Court, petitioner urged that because no

actual notice was given her, the procedure for execution violated the Due Process Clause of the Fourteenth Amendment. Petitioner urged the State Supreme Court to construe Rule 53 (a) of the Arizona Rules of Civil Procedure, concerning Master's fees, to require actual notice to the debtor of execution, in order to avoid the constitutional problem. That court, however, held that Rule 53 (a) did not require notice of execution, but merely of the underlying debt, and concluded that the procedure did not deny due process.

In her petition for writ of certiorari, Mrs. Hanner urged that the failure to give her actual notice of the execution prejudiced her in three respects: (1) she was unable to invoke her privilege under state law, Ariz. Rev. Stat. Ann. § 12–1562, to specify which property the sheriff should seize to satisfy the debt; (2) she was unable to demand that the sheriff comply with Ariz. Rev. Stat. Ann. § 12–1553, providing that execution be levied on personal property rather than realty, where the personalty is sufficient to satisfy the judgment; and (3) respondent was enabled to acquire for less than $5,100 land which he in the divorce case had valued at $20,000 and which petitioner values at $40,000, because petitioner, not knowing of the judicial sale, was unable to protect her interests.

In his brief opposing certiorari, respondent argued that the only federal question presented, whether actual notice to the judgment debtor of execution and judicial sale was required by procedural due process, had been decided in *Endicott Johnson Corp.* v. *Encyclopedia Press,* 266 U. S. 285, which held that notice of the underlying debt sufficed. We granted certiorari to determine whether *Endicott* should be overruled. 389 U. S. 926.

In his brief on the merits, respondent changed position and argued that the *Endicott* question was not properly before this Court. Sections 12–1562 and 12–1553 of the

Arizona Statutes, he claims, do in fact require that the debtor be given actual notice. It is urged that by failing to invoke these sections but instead arguing that Rule 53 (a) was unconstitutional unless construed to require actual notice petitioner bypassed state grounds which might have entitled her to relief.

Section 12–1553 provides that the writ of execution shall require the officer to satisfy a judgment against the property of the debtor "out of the personal property of the debtor, and if sufficient personal property cannot be found, then out of his real property. . . ." Section 12–1562B provides: "A judgment debtor may point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make levy on no other property."

In *Blasingame* v. *Wallace,* 32 Ariz. 580, 261 P. 42, the Arizona Supreme Court held these provisions were "not mandatory" but that the judicial sale "may be set aside where it is shown that the judgment debtor had sufficient personal property which could have been applied upon the judgment, and that the officer knew it, or by the exercise of reasonable diligence could have discovered it, and failed to levy upon it, but instead levied upon and sold for the amount of the judgment real property worth many times that sum." *Id.*, at 586, 261 P., at 44.

We do not know precisely what petitioner argued in the Supreme Court of Arizona because the briefs of the parties in that court have not been made part of the record here. It appears, however, from the sketchy record that is before us that she did make timely objection that the sheriff did not consult with her respecting the property upon which he would levy. In her affidavit opposing summary judgment petitioner made two separate and distinct arguments regarding notice. The first states: "Affiants allege that at no time did . . . these

affiants receive any *notice* from the said Cecil DeMarcus or his agents or his attorney as required by Rule 53 (A) Rules of Civil Procedure for the Superior Courts of the State of Arizona, which is a material issue of fact as to whether the *notice* required by said Rule 53 (A) was given to these defendants by the plaintiff." (Emphasis in original.)

In the next paragraph of the affidavit petitioner made a different allegation respecting notice: "Affiants further allege that at no time did they receive any Notice from the Sheriff of Maricopa County, State of Arizona as to any execution issued out of the above entitled Court and did not receive any notice as to any Sheriff's sale of said Lots . . . ." Since petitioner's position was that Rule 53 (a), relating to special masters, required the *Master* to give notice, the allegations respecting failure of the sheriff to give notice could only be relevant under the State's *Blasingame* doctrine. The fact that this affidavit was before the State Supreme Court, coupled with respondent's concession that petitioner argued there that if actual notice were not provided for due process would be violated, compels the conclusion that for purposes of this Court's review of federal questions petitioner adequately presented to the Arizona courts the issue of the applicability of *Blasingame,* even though she may not have cited that case or §§ 12–1553 and 12–1562 until her petition for rehearing. Moreover, this Court will not decline to decide a constitutional question simply because of a State's technicalities respecting briefing and pleading. See *NAACP* v. *Alabama,* 377 U. S. 288; *Wright* v. *Georgia,* 373 U. S. 284; *Staub* v. *City of Baxley,* 355 U. S. 313, 318.

When the judgment below is viewed as holding by necessity that *Blasingame* does not entitle petitioner to relief, it is unquestionable that the Arizona Supreme Court has held constitutional a procedure for execution

of judgment and judicial sale in which the debtor receives no actual notice of these proceedings.[1] With all due respect, only a Baron Parke[2] would say that the federal question respecting notice had not been raised and therefore that the writ should be dismissed as improvidently granted.

The propriety of overruling *Endicott Johnson Corp.* v. *Encyclopedia Press, supra,* is therefore squarely presented.

Endicott was decided in 1924, and its holding that due process does not require notifying a judgment debtor of execution on his property has never been reaffirmed by this Court. Significantly, the Court in *Endicott* did not hold that absence of any notice at all was permissible, but rather that the judgment debtor, having had his day in court and being aware of the judgment against him, is expected to know that execution may follow.

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[1] Rule 53 (a) provides in relevant part: "[W]hen the party ordered to pay the compensation allowed by the court [to a Master] does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party." The Arizona Supreme Court held: "A cursory reading of the rule makes it evident that the word 'notice' refers to a notice to the debtor of his obligation and that the rule does not then further require a notice of an intent to execute, once notification of the judgment is properly given. Therefore whether or not [petitioner] had actual notice of the intended execution is immaterial . . . . Rule 53 (a) . . . is clear in its terms. If the compensation is not paid, the rule provides a means by which payment may be secured. We disagree with defendant's contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or Federal Constitutions." *Knight* v. *DeMarcus,* 102 Ariz. 105, 107–108, 425 P. 2d 837, 839–840.

[2] Sir James Parke served on England's bench from 1828–1855. "His fault was an almost superstitious reverence for the dark technicalities of special pleading." 15 Dictionary of National Biography 226.

Since the *Endicott* decision, there has been not only an expansion of the scope of the notice requirement itself (*e. g., Armstrong* v. *Manzo,* 380 U. S. 545 (adoption); *Lambert* v. *California,* 355 U. S. 225 (felon's duty to register); *Covey* v. *Town of Somers,* 351 U. S. 141 (property tax foreclosure)),[3] but a new approach to the constitutional sufficiency of the *means* of giving notice in particular types of cases. *Mullane* v. *Central Hanover Tr. Co.,* 339 U. S. 306; *Walker* v. *Hutchinson City,* 352 U. S. 112; *Schroeder* v. *City of New York,* 371 U. S. 208. "The means employed must be such as one desirous of actually informing the [opposing party] might reasonably adopt to accomplish it." *Mullane* v. *Central Hanover Tr. Co.,* 339 U. S., at 315.

The *Endicott* rationale that a party who has litigated a case and had a judgment taken against him is deemed, for purposes of due process, to be on notice of further proceedings in the same action was rejected in *Griffin* v. *Griffin,* 327 U. S. 220. There the wife won a divorce from her husband in 1926 and an award of $3,000 per year alimony. In 1938, without notifying her ex-husband, the debtor, she obtained a judgment for alimony arrears and a writ of execution. Under the applicable New York law, the husband could have defeated liability for the accrued arrearage by proof, for example, that the wife had remarried or of change of circumstances, such as comparative financial status, warranting retroactive modification of the alimony award.

We held failure to give actual notice to the husband of the 1938 proceedings violated due process, saying: "While

[3] "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert* v. *California,* 355 U. S. 225, 228.

it is undoubtedly true that the 1926 decree, taken with the New York practice on the subject, gave petitioner notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree, we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not." *Id.*, at 229.

Does not *Griffin* point the way to the demands of due process in the instant case? The further proceedings in Mrs. Hanner's case—execution and judicial sale—certainly "undertook substantially to affect [her] rights." In *Griffin* substantial property rights were at stake at further proceedings because state law entitled the debtor to reduce his debt on proof of changed circumstances; in the instant case substantial property rights were at stake because state law gave the debtor the right to select the property to be levied on and to effectively prevent respondent from seizing property worth $20,000 or $40,000 for a $5,072.10 judgment. Is there any more reason to accept in this case the *Endicott* fiction of constructive notice because of knowledge of the underlying judgment than there was in *Griffin?*

We should face the question whether in light of our recent decisions *Endicott* should be overruled.

MR. JUSTICE BRENNAN, dissenting.

I agree with my Brother DOUGLAS, for the reasons stated in his dissenting opinion, that the federal question respecting notice was raised and therefore that we have the duty to decide whether *Endicott Johnson Corp.* v. *Encyclopedia Press,* 266 U. S. 285, should be overruled. In my view the situation in this case is indistinguishable from that in *Endicott*—both involve money

judgments and present the identical question whether actual notice to the judgment debtor of execution and judicial sale was required by procedural due process. In that circumstance the judgment before us cannot be reversed without overruling *Endicott*. Since the Court refuses to consider whether *Endicott* should be overruled, I see no alternative but to vote to affirm on its authority.

SOUTHERN PACIFIC CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 1159. Decided April 29, 1968.

277 F. Supp. 671, affirmed.

Alan C. Furth, Robert L. Pierce, William P. Higgins and *G. Clark Cummings* for appellants.

Solicitor General Griswold, Assistant Attorney General Turner, Robert W. Ginnane and *Betty Jo Christian* for the United States et al.; *Ernest Porter, Dennis McCarthy, E. L. Van Dellen, Walter G. Treanor* and *E. Barrett Prettyman, Jr.,* for Denver & Rio Grande Western Railroad Co. et al., appellees.

PER CURIAM.

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

HOSACK ET AL. *v.* SMILEY ET AL.

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

No. 1196. Decided April 29, 1968.

276 F. Supp. 876, affirmed.

Melvin L. Wulf for appellants.

Duke W. Dunbar, Attorney General of Colorado, and *John P. Holloway,* Assistant Attorney General, for appellees.

PER CURIAM.

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

DELLA ROCCA *v.* UNITED STATES.

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

No. 1105. Decided April 29, 1968.

Certiorari granted; 388 F. 2d 525, vacated and remanded.

Jerome Lewis and *Thomas R. Newman* for petitioner.

Solicitor General Griswold for the United States.

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 *Haynes* v. *United States, ante,* p. 85, and *Simmons* v. *United States, ante,* p. 377.

ROADWAY EXPRESS, INC. *v.* DIRECTOR, DIVISION OF TAXATION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1225. Decided April 29, 1968.

50 N. J. 471, 236 A. 2d 577, appeal dismissed.

Nicholas Conover English for appellant.

Arthur J. Sills, Attorney General of New Jersey, and *Elias Abelson* and *Jeffrey R. Lowe,* 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.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

SIMS *v.* COHEN, ACTING SECRETARY OF HEALTH, EDUCATION, AND WELFARE.

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

No. 386, Misc. Decided April 29, 1968.

Certiorari granted; 378 F. 2d 70, reversed.

H. H. Gearinger for petitioner.

Solicitor General Marshall for respondent.

Israel Steingold for the American Trial Lawyers Association, as *amicus curiae,* in support of the petition.

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. *Hopkins* v. *Cohen, ante,* p. 530.

THE CHIEF JUSTICE and MR. JUSTICE WHITE dissent for the reasons stated in the dissenting opinion of MR. JUSTICE WHITE in *Hopkins* v. *Cohen, ante,* p. 535.

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

Syllabus.

PERMIAN BASIN AREA RATE CASES.

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

Argued December 5–7, 1967.—Decided May 1, 1968.*

Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, holding that independent producers are "natural gas compan[ies]" within the meaning of § 2 (6) of the Natural Gas Act, the Federal Power Commission (FPC) struggled under a heavy administrative burden in attempting to determine whether producers' rates were just and reasonable under §§ 4 (a) and 5 (a) by examining each producer's cost of service. In 1960 the FPC announced that it would begin a series of proceedings under § 5 (a) in which it would determine maximum producers' rates for each major producing area. A Statement of General Policy was issued by the FPC, asserting its authority to determine and require application throughout a producing area of maximum rates for producers' interstate sales, tentatively designating certain areas as producing units for rate regulation (three of which areas were consolidated for this proceeding), and providing two series of area guideline prices, for initial filings and for increased rates. This first area proceeding was initiated in 1960, and in 1965 the FPC issued its decision, devising for the Permian Basin area a rate structure with two area maximum prices, one for natural gas produced from gas wells and dedicated to interstate commerce after January 1, 1961, and the other, and lower, price for all other natural gas produced in the area. The FPC found that price

*No. 90, *Continental Oil Co. et al.* v. *Federal Power Commission;* No. 95, *Superior Oil Co.* v. *Federal Power Commission;* No. 98, *New Mexico et al.* v. *Federal Power Commission;* No. 99, *Sun Oil Co.* v. *Federal Power Commission et al.;* No. 100, *California et al.* v. *Skelly Oil Co. et al.;* No. 101, *Hunt Oil Co. et al.* v. *Federal Power Commission;* No. 102, *Pacific Gas & Electric Co. et al.* v. *Skelly Oil Co. et al.;* No. 105, *Bass et al.* v. *Federal Power Commission;* No. 117, *Federal Power Commission* v. *Skelly Oil Co. et al.;* No. 181, *City of Los Angeles* v. *Skelly Oil Co. et al.;* 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.*

could be an incentive for exploration and production of new gas-well gas, while supplies of associated and dissolved gas and previously committed reserves of gas-well gas were relatively unresponsive to price variations. The FPC did not use prevailing field prices in calculating rates, but utilized composite cost data from published sources and from producers' cost questionnaires, establishing the national costs in 1960 of finding and producing gas-well gas, and, for all other gas, deriving the just and reasonable rate from historical costs of gas-well gas produced in the Permian Basin in 1960, with a local and historical emphasis. The uncertainties of joint cost allocation made it difficult to compute the cost of gas produced in association with oil, but the FPC found that the costs of such gas were less than those incurred in producing flowing gas-well gas. Each maximum rate includes a return to the producer of 12% on average production investment based on the FPC's two series of cost computations. A system of quality and Btu adjustments was provided for. The following rates were determined: 16.5¢ per Mcf (including state production taxes) in Texas, and 15.5¢ (excluding state production taxes) in New Mexico, for gas-well gas dedicated to interstate commerce after January 1, 1961; 14.5¢ per Mcf (including taxes) in Texas, and 13.5¢ per Mcf (excluding taxes) in New Mexico, for flowing gas, including oil-well gas and gas-well gas dedicated to interstate commerce before 1961; 9¢ per Mcf minimum for all gas of pipeline quality. The FPC declared that it would provide special relief in hardship cases; that small producers (annual national sales not above 10,000,000 Mcf) need not adjust prices for quality and Btu deficiencies; that it would require a moratorium until January 1, 1968, for filing under § 4 (d) for prices above the applicable area maximum; that the use of indefinite escalation clauses to increase prevailing contract prices above the area maximum was thereafter prohibited; and that refunds were required of the difference between amounts collected by producers in periods subject to refund and the amounts permitted under the area rate. The Court of Appeals held that the FPC had authority to impose maximum area rates, sustained (but stayed enforcement of) the moratorium on § 4 (d) filings, approved the two-price system and the exemption for small producers, but concluded that the requirements of *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, were not satisfied. It held that the FPC had not properly calculated the financial consequences of the quality and Btu adjustments, had not made essential findings as to aggregate revenue, and had not precisely indicated the circumstances in which individual producers could

obtain relief from area rates. On rehearing, the court also held that refunds were permissible only if aggregate actual area revenues exceeded aggregate permissible area revenues, and only to the amount of the excess, apportioned on "some equitable contract-by-contract basis." *Held:*

1. A presumption of validity attaches to each exercise of the FPC's expertise, and those who would overturn its judgment undertake "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *FPC* v. *Hope Natural Gas Co., supra,* at 602. Pp. 766–767.

2. The FPC has constitutional and statutory authority to adopt a system of area regulation and to impose supplementary requirements. Pp. 768–790.

(a) Area maximum rates, determined in conformity with the Natural Gas Act, and intended to balance investor and consumer interests, are constitutionally permissible. Pp. 769–770.

(b) In these circumstances the FPC's broad guarantees of special relief were not inadequate or excessively imprecise. Pp. 771–772.

(c) The FPC did not abuse its discretion by its refusal to stay, *pro tanto,* enforcement of the area rates pending dispositions of producers' petitions for special relief. Pp. 773–774.

(d) Area regulation is consistent with the terms of the Act and is within the statutory authority granted the FPC to carry out its broad responsibilities. Pp. 774–777.

(e) The FPC may under §§ 5 and 16 of the Act impose a moratorium on the filing under § 4 (d) of proposed rates higher than those determined to be just and reasonable, and the relatively brief moratorium declared here did not exceed or abuse the FPC's authority. Pp. 777–781.

(f) Under the authority of § 5 (a) the FPC permissibly restricted the application of indefinite escalation clauses. Pp. 781–784.

(g) The problems and public functions of small producers differ sufficiently to permit their separate classification, and the exemptions created for them by the FPC comport with the terms and purposes of its statutory responsibilities. Pp. 784–787.

(h) The regulatory area designated in this first area proceeding was both convenient and familiar, and the FPC was not obliged under these circumstances to include among the disputed

issues questions of the proper size and composition of the regulatory area. Pp. 787–789.

3. The rate structure devised for natural gas produced in the Permian Basin did not exceed the FPC's authority; and the "heavy burden" of attacking the validity of that rate structure has not been satisfied. Pp. 790–813.

(a) The responsibilities of a reviewing court are to determine whether the FPC abused or exceeded its authority, whether each of the order's essential elements is supported by substantial evidence, and whether the order may reasonably be expected to maintain financial integrity, attract needed capital, and fairly compensate investors for risks they have assumed, while appropriately protecting relevant public interests, both existing and foreseeable. Pp. 791–792.

(b) While field prices may have some relevance to the calculation of just and reasonable rates, the FPC was not compelled, on this record, to adopt field prices as the basis of its computations of area rates. Pp. 792–795.

(c) The two-price rate structure, which is permissible under the Act, will provide a useful incentive to exploration and prevent excessive producer profits, and thus protect both present and future consumer interests. Pp. 795–799.

(d) The FPC may employ "any formula or combination of formulas" it wishes and is free "to make the pragmatic adjustments which may be called for by particular circumstances," as long as the consequences are not arbitrary or unreasonable. *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586. P. 800.

(e) In calculating cost data for the two maximum rates by selections of differing geographical bases and time periods the FPC did not abuse its authority, as its selections comported with the logic of its system of incentive pricing. Pp. 800–803.

(f) The FPC's use of flowing gas-well gas cost data to calculate the rate for old gas, disregarding the costs of gas produced in association with oil, was essentially pragmatic, and its judgment was warranted under the circumstances. Pp. 803–805.

(g) The computation of the rate base by determining an average net production investment to which the FPC applied a constant rate of return, was within the FPC's discretion, and was not arbitrary or unreasonable. Pp. 805–806.

(h) The selection of 12% as the proper rate of return for gas of pipeline quality was supported by substantial evidence that

the rate will be likely to "maintain financial integrity, to attract capital, and to compensate investors for the risks assumed." Pp. 806–808.

(i) It was not impermissible for the FPC to treat quality adjustments as a risk of production, and its promulgation of quality standards was accompanied by adequate findings as to their revenue consequences. Pp. 808–812.

4. The FPC's rate structure has not here been shown to deny producers revenues consonant with just and reasonable rates. Pp. 813–822.

(a) The FPC need not provide formal findings in absolute dollar amounts as to revenue and revenue requirements; it is enough if it proffers findings and conclusions sufficiently detailed to permit reasoned evaluation of the purposes and implications of its order. P. 814.

(b) The FPC permissibly discounted the producers' reliance upon the relationship between gas reserves and production to establish the inadequacy of the rate structure. Pp. 816–818.

(c) The contention that since the area maximum rates were derived from average costs they cannot, without further adjustment, provide aggregate revenue equal to the producers' aggregate requirements has not been sustained. Pp. 818–821.

(d) The FPC's authority to abrogate existing contract prices depends upon its conclusion that they "adversely affect the public interest," and it properly applied that authority in setting a minimum area price of 9¢ per Mcf and in declining to apply it to prices less than the two area maximum rates. Pp. 820–821.

5. Since it has been almost eight years since these proceedings were commenced, and the remaining issues, which were not decided by the Court of Appeals, were briefed and argued at length in this Court, no useful purpose would be served by further proceedings in the Court of Appeals. Pp. 823–824.

6. The FPC's orders requiring refunds of (1) amounts charged in excess of the applicable area rates for periods following the effective date of its order and (2) amounts collected in excess of area rates during previous periods in which producers' prices were subject to refund under § 4 (e), were within its authority. It reasonably concluded that the adoption of a system of refunds conditioned on findings as to aggregate area revenues would prove inequitable to consumers and difficult to administer effectively. Pp. 825–828.

375 F. 2d 6 and 35, affirmed in part, reversed in part, and remanded.

Richard A. Solomon argued the cause for the Federal Power Commission. With him on the brief were *Solicitor General Marshall, Ralph S. Spritzer, Richard A. Posner, Peter H. Schiff, Leo E. Forquer, David J. Bardin* and *Alan J. Roth.*

J. Calvin Simpson argued the cause for the Public Utilities Commission of California; *Malcolm H. Furbush* argued the cause for the Pacific Gas & Electric Co.; *John Ormasa* argued the cause for the Pacific Lighting Gas Supply Co. et al., and *C. Hayden Ames* argued the cause for the San Diego Gas & Electric Co., all in support of the order of the Federal Power Commission. With *Mr. Simpson* on the brief for the Public Utilities Commission of California was *Mary Moran Pajalich.* With *Messrs. Furbush, Ormasa* and *Ames* on the brief for Pacific Gas & Electric Co. et al. was *Frederick T. Searls. Roger Arnebergh* filed a brief for the City of Los Angeles, and *Edward T. Butler* and *Thomas M. O'Connor* filed a brief for the City of San Diego and the City and County of San Francisco, in support of the order of the Federal Power Commission.

Bruce R. Merrill argued the cause for the Continental Oil Co.; *Crawford C. Martin,* Attorney General, argued the cause for the State of Texas; *Boston E. Witt,* Attorney General, argued the cause for the State of New Mexico; *Herbert W. Varner* argued the cause for the Superior Oil Co.; *Robert W. Henderson* argued the cause for the Hunt Oil Co. et al.; *J. Evans Attwell* argued the cause for Bass et al.; *Justin R. Wolf* argued the cause for the Standard Oil Co. of Texas; *James L. Armour* argued the cause for the Mobil Oil Corp.; *Louis Flax* argued the cause for the Sun Oil Co., and *Carroll L. Gilliam* and *Oliver L. Stone* argued the cause for the Amerada Petroleum Corp. et al., all in opposition to the order of the Federal Power Commission.

With *Mr. Merrill* on the brief for the Continental Oil Co. et al. were *Thomas H. Burton, Cecil N. Cook, Neal Powers, Jr.*, and *Lloyd F. Thanhouser.* With *Messrs. Martin* and *Witt* on the brief for the State of Texas et al. were *George M. Cowden,* First Assistant Attorney General of Texas, *Houghton Brownlee, Jr., Linward Shivers* and *C. Daniel Jones, Jr.*, Assistant Attorneys General of Texas, *A. J. Carubbi, Jr.*, and *William J. Cooley,* Special Assistant Attorney General of New Mexico. With *Mr. Varner* on the brief for the Superior Oil Co. were *Homer J. Penn* and *Murray Christian.* With *Mr. Henderson* on the brief for the Hunt Oil Co. et al. were *Paul W. Hicks* and *Donald K. Young.* With *Mr. Attwell* on the brief for Bass et al. was *W. H. Drushel, Jr.* With *Mr. Wolf* on the brief for the Standard Oil Co. of Texas was *Francis R. Kirkham.* With *Mr. Armour* on the brief for Mobil Oil Corp. et al. were *Thomas P. Hamill, Robert D. Haworth* and *William H. Tabb.* With *Mr. Flax* on the brief for the Sun Oil Co. were *Phillip D. Endom* and *Robert E. May.* With *Messrs. Gilliam* and *Stone* on the brief for the Amerada Petroleum Corp. et al. were *Joseph W. Morris, Edwin S. Nail, Edward J. Kremer, Jr., Robert E. Wade, Bernard A. Foster, Jr., Graydon D. Luthey, Warren M. Sparks, Martin E. Erck, Clayton L. Orn, Joseph F. Diver, H. Y. Rowe, W. W. Heard, J. P. Hammond, T. C. McCorkle, William H. Emerson, Kenneth Heady, John R. Rebman, Jerome M. Alper, Thomas G. Johnson, Charles E. McGee, Sherman S. Poland, Richard F. Remmers, Homer E. McEwen, Jr., William K. Tell, Jr., William R. Slye* and *John C. Snodgrass. John Davenport* filed a brief for Texas Independent Producers & Royalty Owners Association et al., in opposition to the order of the Federal Power Commission.

Briefs of *amici curiae* were filed by *Louis J. Lefkowitz,* Attorney General of New York, *Kent H. Brown* and

Morton L. Simons for the Public Service Commission of the State of New York; by *J. David Mann, Jr., John E. Holtzinger, Jr., Bertram D. Moll, William T. Coleman, Jr., Robert W. Maris, C. William Cooper, Edward S. Kirby, James R. Lacey, Edwin F. Russell, Jr., Barbara M. Suchow, John W. Glendening, Jr., John S. Schmid* and *Dale A. Wright* for the Associated Gas Distributors Group, and by *Vincent P. McDevitt* and *Samuel Graff Miller* for the Philadelphia Electric Co.

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases stem from proceedings commenced in 1960 by the Federal Power Commission under § 5 (a) of the Natural Gas Act,[1] 52 Stat. 823, 15 U. S. C. § 717d (a), to determine maximum just and reasonable rates for sales in interstate commerce[2] of natural gas produced in the

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[1] Section 5 (a) provides in pertinent part that "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . ."

[2] Section 1 (b), 15 U. S. C. § 717 (b), provides in part that the "provisions of this Chapter shall apply . . . to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use . . . ." We shall, for convenience, hereafter describe sales within the Commission's regulatory authority as "jurisdictional" or "interstate" sales.

Permian Basin.[3] 24 F. P. C. 1121. The Commission conducted extended hearings,[4] and in 1965 issued a decision that both prescribed such rates and provided various ancillary requirements. 34 F. P. C. 159 and 1068. On petitions for review, the Court of Appeals for the Tenth Circuit sustained in part and set aside in part the Commission's orders. 375 F. 2d 6 and 35. Because these proceedings began a new era in the regulation of natural gas producers, we granted certiorari and consolidated the cases for briefing and extended oral argument. 387 U. S. 902, 388 U. S. 906, 389 U. S. 817. For reasons that follow, we reverse in part and affirm in part the judgments of the Court of Appeals, and sustain in their entirety the Commission's orders.

I.

The circumstances that led ultimately to these proceedings should first be recalled. The Commission's authority to regulate interstate sales of natural gas is derived entirely from the Natural Gas Act of 1938. 52 Stat. 821. The Act's provisions do not specifically extend to producers or to wellhead sales of natural gas,[5] and the Commission declined until 1954 to regulate sales by

[3] The Permian Basin was defined by the Commission's order commencing these proceedings so as to include Texas Railroad Commission Districts Nos. 7–C and 8, and the New Mexico counties of Lea, Eddy, and Chaves. *Area Rate Proceeding No. AR61–1,* 24 F. P. C. 1121, 1125.

[4] There were some 384 parties before the Commission, including 336 gas producers. Hearings began on October 11, 1961, and closed on September 10, 1963. The final transcript included more than 30,000 pages. The examiner's decision was issued on September 17, 1964. The Commission heard three days of oral argument, and issued its decision on August 5, 1965. A supplementary opinion denying applications for rehearing was issued on October 4, 1965.

[5] Indeed, § 1 (b), 15 U. S. C. § 717 (b), provides in part that the "provisions of this Chapter . . . shall not apply to . . . the production or gathering of natural gas."

independent producers[6] to interstate pipelines.[7] Its efforts to regulate such sales began only after this Court held in 1954 that independent producers are "natural-gas compan[ies]" within the meaning of § 2 (6) of the Act. 15 U. S. C. § 717a (6); *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. The Commission has since labored with obvious difficulty to regulate a diverse and growing industry under the terms of an ill-suited statute.

The Commission initially sought to determine whether producers' rates were just and reasonable within the meaning of §§ 4 (a)[8] and 5 (a) by examination of each producer's costs of service.[9] Although this method has been widely employed in various rate-making situations,[10] it ultimately proved inappropriate for the regulation of independent producers. Producers of natural gas cannot usefully be classed as public utilities.[11] They en-

[6] Independent producers are those that do "not engage in the interstate transmission of gas from the producing fields to consumer markets and [are] not affiliated with any interstate natural-gas pipeline company." *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, 675.

[7] This position was first adopted by the Commission in *Columbian Fuel Corp.,* 2 F. P. C. 200. See also *Billings Gas Co.,* 2 F. P. C. 288; *Fin-Ker Oil & Gas Production Co.,* 6 F. P. C. 92; *Tennessee Gas & Transmission Co.,* 6 F. P. C. 98.

[8] Section 4 (a), 15 U. S. C. § 717c (a), provides that "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

[9] See generally *Phillips Petroleum Co.,* 24 F. P. C. 537, 542.

[10] It has been observed that costs-of-service standards are "most generally accepted in the regulation of the levels of rates" charged by both publicly and privately owned utilities. J. Bonbright, Principles of Public Utility Rates 67 (1961).

[11] It has been said that "the primary, even though not the sole, distinguishing feature of a public utility enterprise is to be found

joy no franchises or guaranteed areas of service. They are intensely competitive vendors of a wasting commodity they have acquired only by costly and often unrewarded search. Their unit costs may rise or decline with the vagaries of fortune. The value to the public of the services they perform is measured by the quantity and character of the natural gas they produce, and not by the resources they have expended in its search; the Commission and the consumer alike are concerned principally with "what [the producer] gets out of the ground, not . . . what he puts into it . . . ." *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 649 (separate opinion). The exploration for and the production of natural gas are thus "more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business." *Id.*, at 647. Moreover, the number both of independent producers and of jurisdictional sales is large,[12] and the administrative burdens placed upon the Commission by an individual company costs-of-service standard were therefore extremely heavy.[13]

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in a technology of production and transmission which almost inevitably leads to a complete or partial monopoly of the market for the service." Bonbright, *supra*, at 10. See also *Sunray Oil Co.* v. *FPC*, 364 U. S. 137, 160 (dissenting opinion).

[12] The Commission in its second *Phillips* opinion stated that there were then 3,372 independent producers with rates on file; these producers had on file 11,091 rate schedules and 33,231 supplements to those schedules. There were, at the moment of the Commission's opinion, 570 producers involved in 3,278 rate increase filings awaiting hearings and decisions. 24 F. P. C., at 545. See for listings by sales of natural gas producers, Federal Power Commission, Sales by Producers of Natural Gas to Natural Gas Pipeline Companies 1963, 1 (1965).

[13] The Commission stated in its second *Phillips* opinion that "if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A. D.—

In consequence, the Commission's regulation of producers' sales became increasingly laborious, until, in 1960, it was described as the "outstanding example in the federal government of the breakdown of the administrative process." [14] The Commission in 1960 acknowledged the gravity of its difficulties,[15] and announced that it would commence a series of proceedings under § 5 (a) in which it would determine maximum producers' rates for each of the major producing areas.[16] One member of the Commission has subsequently described these efforts as "admittedly . . . experimental . . . ." [17] These cases place in question the validity of the first such proceeding.[18]

The perimeter of this proceeding was drawn by the Commission in its second *Phillips* decision and in its Statement of General Policy No. 61–1. The Commission in *Phillips* asserted that it possesses statutory authority both to determine and to require the application through-

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eighty-two and one half years from now." 24 F. P. C., at 546. It added that if "the plan of rate regulation we here announce is not lawful," it would follow that "as a practical matter, adequate regulation of producers appears to be impossible under existing law." *Id.*, at 547.

[14] Landis, Report on Regulatory Agencies to the President-Elect, printed for use of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 54. Contrast Landis, Theoretical and Practical Considerations with Reference to Price Regulation in Production and Transmission of Natural Gas, 13th Oil & Gas Inst. 401, 406 (1962).

[15] *Phillips Petroleum Co., supra,* at 542–548.

[16] *Id.*, at 547; Statement of General Policy No. 61–1, 24 F. P. C. 818.

[17] *Area Rate Proceeding (Hugoton-Anadarko Area) No. AR64–1,* 30 F. P. C. 1354, 1359 (dissenting opinion of Commissioner Ross).

[18] We are informed that four other area proceedings are pending in various stages before the Commission. These, in combination with the present proceeding, reach some 90% of the sales of natural gas subject to the Commission's jurisdiction. Brief for the Federal Power Commission 14–15.

out a producing area of maximum rates for producers' interstate sales.[19] It averred that the adoption of area maximum rates would appreciably reduce its administrative difficulties, facilitate effective regulation, and ultimately prove better suited to the characteristics of the natural gas industry. Each of these conclusions was reaffirmed in the Commission's opinion in these proceedings.[20] Its Statement of General Policy tentatively designated various geographical areas as producing units for purposes of rate regulation; in addition, the Commission there provided two series of area guideline prices,[21] which were expected to help to determine "whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended." [22] The Commission consolidated three of the producing areas listed in the Statement of General Policy for purposes of this proceeding.

The rate structure devised by the Commission for the Permian Basin includes two area maximum prices. The Commission provided one area maximum price for natural gas produced from gas wells and dedicated to inter-

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[19] *Phillips Petroleum Co., supra,* at 548.

[20] It is proper to note that certain of the Commission's statements in *Phillips* concerning the difficulties of unit cost computations do not appear to have been entirely reaffirmed in its opinion in these proceedings. The two opinions are, however, broadly consistent, and the Commission is not, in any event, forbidden "to adapt [its] rules and practices to the Nation's needs in a volatile, changing economy." *American Trucking* v. *A., T. & S. F. R. Co.,* 387 U. S. 397, 416.

[21] The Statement provided separate guideline prices for initial filings and for increased rates. The Commission said merely that "prices in new contracts are, and in many cases by virtue of economic factors, must be higher than the prices contained in old contracts." 24 F. P. C., at 819. The guideline prices applicable to the producing areas subsequently included in these proceedings were in each case 16¢ and 11¢ per Mcf, with the higher price for initial filings.

[22] Statement of General Policy No. 61–1, *supra,* at 818.

state commerce after January 1, 1961.[23] It created a second, and lower, area maximum price for all other natural gas produced in the Permian Basin. The Commission reasoned that it may employ price functionally, as a tool to encourage discovery and production of appropriate supplies of natural gas. It found that price could serve as a meaningful incentive to exploration and production only for gas-well gas committed to interstate commerce since 1960; the supplies of associated and dissolved gas,[24] and of previously committed reserves of gas-well gas, were, in contrast, found to be relatively unresponsive to variations in price. The Commission expected that its adoption of separate maximum prices would both provide a suitable incentive to exploration and prevent excessive producer profits.

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[23] The Commission defined gas-well gas as "gas from dry gas reservoirs and gas condensate reservoirs, and gas from gas-cap wells." It added that gas-cap gas is "a special category of gas from an oil reservoir that can be produced free from the influence of oil production." 34 F. P. C. 159, 189 and n. 23. Residue gas derived from new gas-well gas is also to be subject to higher maximum rate. See *id.*, at 211.

[24] Natural gas is variously classified, and certain of the descriptive names that will be employed in this opinion should be briefly explained. Casinghead gas is "the common name for gas produced from oil wells in conjunction with the production of oil." 34 F. P. C., at 208. Residue gas is "the gas remaining after casinghead gas or gas-well gas has been processed to remove liquids present in the raw gas stream in the form of vapor or droplets." *Id.*, at 210. Associated gas is "[f]ree natural gas in immediate contact, but not in solution, with crude oil in the field or reservoir." American Gas Association, 1966 Gas Facts 246 (1966). Dissolved gas is that "in solution with crude oil in the reservoir." *Ibid.* Oil-well gas encompasses associated, dissolved, and casinghead gas, together with residue derived from casinghead gas. In addition, we shall adopt the Commission's usage, and on occasion describe gas subject to the lower maximum rate as "old" or "flowing" gas. 34 F. P. C., at 212, n. 31.

The Commission declined to calculate area rates from prevailing field prices. Instead, it derived the maximum just and reasonable rate for new gas-well gas from composite cost data, obtained from published sources and from producers through a series of cost questionnaires. This information was intended in combination to establish the national costs in 1960 of finding and producing gas-well gas; it was understood not to reflect any variations in cost peculiar either to the Permian Basin or to periods prior to 1960. The maximum just and reasonable rate for all other gas was derived chiefly from the historical costs of gas-well gas produced in the Permian Basin in 1960; the emphasis was here entirely local and historical. The Commission believed that the uncertainties of joint cost allocation made it difficult to compute accurately the cost of gas produced in association with oil.[25] It held, however, that the costs of such gas could not be greater, and must surely be smaller, than those incurred in the production of flowing gas-well gas. In addition, the Commission stated that the exigencies of administration demanded the smallest possible number of separate area rates.

Each of the area maximum rates adopted for the Permian Basin includes a return to the producer of 12% on average production investment, calculated from the

[25] Joint costs "are incurred when products cannot be separately produced . . . ." M. Adelman, The Supply and Price of Natural Gas 25 (1962). Compare the following: "Products are 'truly joint' if they must be produced together and in constant proportions. Truly joint costs are variable costs. They vary (as a total) with the output of the entire set (fixed combination) of joint products." F. Machlup, The Economics of Sellers' Competition 21 (1952). And see Bonbright, *supra*, at 354–357. It appears to be conceded that even gas-well gas has costs jointly, as well as in common, with petroleum, but the Commission evidently, and permissibly, believed that the difficulties of allocation connected with gas-well gas were relatively uncomplicated. See 34 F. P. C., at 214–215, 339.

Commission's two series of cost computations. The Commission assumed for this purpose that production commences one year after investment, that gas wells deplete uniformly, and that they are totally depleted in 20 years. The rate of return was selected after study of the returns recently permitted to interstate pipelines, but, in addition, was intended to take fully into account the greater financial risks of exploration and production. The Commission recognized that producers are hostages to good fortune; they must expect that their programs of exploration will frequently prove unsuccessful, or that only gas of substandard quality will be found.

The allowances included in the return for the uncertainties of exploration were, however, paralleled by a system of quality and Btu adjustments.[26] The Commission held that gas of less than pipeline quality must be sold at reduced prices, and it provided for this purpose a system of quality standards. The price reduction appropriate in each sale is to be measured by the cost of the processing necessary to raise the gas to pipeline quality; these costs are to be determined by agreement between the parties to the sale, subject to review and approval by the Commission. The Commission ultimately indicated that it would accept any agreement which reflects "a good faith effort to approximate the processing costs involved . . . ." 34 F. P. C. 1068, 1071. In addition, the Commission prescribed that gas with a Btu content of less than 1,000 per cubic foot must be sold at a price proportionately lower than the applicable area maximum, and that gas with a Btu content greater than 1,050 per cubic foot may be sold at a price proportionately higher than the area maximum. The Commission acknowledged that the aggregate revenue consequences

[26] A Btu, or British thermal unit, is the amount of heat required to raise the temperature of one pound of water one degree Fahrenheit under stated conditions of pressure and temperature.

of these adjustments could not be precisely calculated, although its opinion denying applications for rehearing provided estimates of the average price reductions that would be necessary. *Id.*, at 1073.

The Commission derived from these calculations the following rates for the Permian Basin.[27] Gas-well gas, including its residue, and gas-cap gas, dedicated to interstate commerce after January 1, 1961, may be sold at 16.5¢ per Mcf (including state production taxes) in Texas, and 15.5¢ (excluding state production taxes) in New Mexico.[28] Flowing gas, including oil-well gas and gas-well gas dedicated to interstate commerce before January 1, 1961, may be sold at 14.5¢ per Mcf (including taxes) in Texas, and 13.5¢ per Mcf (excluding taxes) in New Mexico. Further, the Commission created a *minimum* just and reasonable rate of 9¢ per Mcf for all gas of pipeline quality sold under its jurisdiction within the Permian Basin. It found that existing contracts that included lower rates would "adversely affect the public interest." *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355. The Commission permitted producers to file under § 4 (d), 15 U. S. C. § 717c (d),[29] for the area min-

[27] Tabular summaries of the cost components from which the distributors and the producers derived recommended rates for new gas-well gas may be found in the examiner's opinion. 34 F. P. C., at 343. Based on allowances for production investment costs, return, exploratory costs, royalty and production taxes, and other factors, the producers recommended a rate of 23.24¢ per Mcf; the distributors derived from the same factors a rate of 15.39¢ per Mcf. See also *id.*, at 357. Similar tables summarizing the Commission's findings were included in its opinion. *Id.*, at 192, 220.

[28] The Commission excluded New Mexico state production taxes because they are not uniform throughout the three counties. See the Commission's opinion denying applications for rehearing, 34 F. P. C., at 1074.

[29] Section 4 (d), 15 U. S. C. § 717c (d), provides in part that "[u]nless the Commission otherwise orders, no change shall be made

imum rate despite existing contractual limitations, and without the consent of the purchaser.

The Commission acknowledged that area maximum rates derived from composite cost data might in individual cases produce hardship, and declared that it would, in such cases, provide special relief. It emphasized that exceptions to the area rates would not be readily or frequently permitted, but declined to indicate in detail in what circumstances relief would be given.

This rate structure is supplemented by a series of ancillary requirements. First, the Commission provided various special exemptions for producers whose annual jurisdictional sales throughout the United States do not exceed 10,000,000 Mcf. The prices in sales by these relatively small producers need not be adjusted for quality and Btu deficiencies. Moreover, the Commission by separate order commenced a rule-making proceeding to reduce the small producers' reporting and filing obligations under §§ 4 and 7, 15 U. S. C. §§ 717c, f. 34 F. P. C. 434.

Second, the Commission imposed a moratorium until January 1, 1968, upon filings under § 4 (d) for prices in excess of the applicable area maximum rate. The Commission concluded that such a moratorium was imperative if the administrative benefits of an area proceeding were to be preserved. Further, it permanently prohibited the use of indefinite escalation clauses to increase prevailing contract prices above the applicable area maximum rate.[30]

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by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public."

[30] The restricted contract provisions include most-favored-nation, spiral escalation and redetermination clauses. See *Pure Oil Co.*, 25 F. P. C. 383, 388, n. 3. They were said by the examiner to "cause price increases . . . to occur without reference to the circumstances or economics . . . ." 34 F. P. C., at 373 (initial decision of the presiding examiner).

Finally, the Commission announced that, by further order, it would require refunds of the difference between amounts that individual producers had actually collected in periods subject to refund, and the amounts that would have been permissible under the applicable area rate, including any necessary quality adjustments.[31] Small producers, although obliged to make refunds, are not required to take into account price reductions for quality deficiencies, unless they wish to take advantage of upward adjustments in price because of high Btu content. The Commission rejected the examiner's conclusion that refunds were appropriate only if the aggregate area revenue actually collected exceeds the aggregate area revenue permissible under the applicable area rates. It held that such a formula would prove both inequitable to purchasers and difficult for the Commission to administer effectively.

On petitions for review, the Court of Appeals for the Tenth Circuit held that the Commission had authority under the Natural Gas Act to impose maximum area rates upon producers' jurisdictional sales. It sustained, but stayed enforcement of, the Commission's moratorium upon filings under § 4 (d) in excess of the applicable area maximum rate. It approved both the Commission's two-price system and its exemptions for small producers. Nonetheless, the court concluded that the Commission failed to satisfy the requirements devised by this Court in *FPC* v. *Hope Natural Gas Co., supra.* It held that the Commission had not properly calculated the financial consequences of the quality and Btu adjustments, had not made essential findings as to aggregate revenue, and

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[31] Many of the refund obligations in question here stem from the consolidation of proceedings conducted in connection with filings for rate increases under § 4 (d). For purposes of these filings and of the attendant refund obligations, these proceedings were conducted under § 4 (e). *Area Rate Proceeding No. AR61–1,* 24 F. P. C. 1121.

had not indicated with appropriate precision the circumstances in which relief from the area rates may be obtained by individual producers. 375 F. 2d 6. On rehearing, the court also held that the Commission's treatment of refunds was erroneous; it concluded that refunds were permissible only if aggregate actual area revenues have exceeded aggregate permissible area revenues, and only to the amount of the excess, apportioned on "some equitable contract-by-contract basis." The Court of Appeals ordered the cases remanded to the Commission for further proceedings consistent with its opinions. 375 F. 2d 35.

II.

The parties before this Court have together elected to place in question virtually every detail of the Commission's lengthy proceedings.[32] It must be said at the outset that, in assessing these disparate contentions, this Court's authority is essentially narrow and circumscribed.

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[32] The various parties before the Court have taken quite disparate positions. The distributing companies, with the exception of *amici*, and the public authorities, with the exceptions of the States of Texas and New Mexico, have all supported the Commission's orders in their entirety. They urge that "consumers . . . have waited long enough," and assert that "no good purpose can be served by further proceedings." See Joint Brief for the City of San Diego and the City and County of San Francisco 24. Certain of the producers support the judgment below; others challenge the validity of portions of the Commission's orders that were sustained below. We have, nonetheless, frequently not indicated which of the parties join, and which oppose, various contentions. This does not suggest that we do not recognize differences in position; we want merely to simplify, so far as possible, an already lengthy opinion.

One further comment is pertinent. The organization and presentation of issues is, of course, a matter for the judgment of counsel. Nonetheless, it is proper to remark that the effectiveness and clarity with which issues are presented in cases of this complexity might be significantly increased if even greater efforts were made to focus and consolidate argumentation on behalf of parties with essentially similar views.

Section 19 (b) of the Natural Gas Act provides without qualification that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." More important, we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *FPC* v. *Hope Natural Gas Co., supra,* at 602. We are not obliged to examine each detail of the Commission's decision; if the "total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Ibid.*

Moreover, this Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a "zone of reasonableness." *FPC* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 585. No other rule would be consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests. It is on these premises that we proceed to assess the Commission's orders.

III.

The issues in controversy may conveniently be divided into four categories. In the first are questions of the Commission's statutory and constitutional authority to

employ area regulation and to impose various ancillary requirements. In the second are questions of the validity of the rate structure adopted by the Commission for natural gas produced in the Permian Basin. The third includes questions of the accuracy of the cost and other data from which the Commission derived the two area maximum prices. In the fourth are questions of the validity of the refund obligations imposed by the Commission.

We turn first to questions of the Commission's constitutional and statutory authority to adopt a system of area regulation and to impose various supplementary requirements. The most fundamental of these is whether the Commission may, consistently with the Constitution and the Natural Gas Act, regulate producers' interstate sales by the prescription of maximum area rates, rather than by proceedings conducted on an individual producer basis. This question was left unanswered in *Wisconsin* v. *FPC*, 373 U. S. 294.[33] Its solution requires consideration of a series of interrelated problems.

It is plain that the Constitution does not forbid the imposition, in appropriate circumstances, of maximum prices upon commercial and other activities. A legislative power to create price ceilings has, in "countries where the common law prevails," been "customary from time immemorial . . . ." *Munn* v. *Illinois*, 94 U. S. 113, 133. Its exercise has regularly been approved by this Court. See, *e. g.*, *Tagg Bros.* v. *United States*, 280

[33] The opinion of the Court stated simply that "[w]e recognize the unusual difficulties inherent in regulating the price of a commodity such as natural gas. We respect the Commission's considered judgment, backed by sound and persuasive reasoning, that the individual company cost-of-service method is not a feasible or suitable one for regulating the rates of independent producers. We share the Commission's hopes that the area approach may prove to be the ultimate solution." 373 U. S., at 310 (note omitted).

U. S. 420; *Bowles* v. *Willingham,* 321 U. S. 503. No more does the Constitution prohibit the determination of rates through group or class proceedings. This Court has repeatedly recognized that legislatures and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties. See *Tagg Bros.* v. *United States, supra; Acker* v. *United States,* 298 U. S. 426; *United States* v. *Corrick,* 298 U. S. 435. Compare *New England Divisions Case,* 261 U. S. 184, 196–199; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 290–291; *New York* v. *United States,* 331 U. S. 284; *Chicago & N. W. R. Co.* v. *A., T. & S. F. R. Co.,* 387 U. S. 326, 341.

No constitutional objection arises from the imposition of maximum prices merely because "high cost operators may be more seriously affected . . . than others," *Bowles* v. *Willingham, supra,* at 518, or because the value of regulated property is reduced as a consequence of regulation. *FPC* v. *Hope Natural Gas Co., supra,* at 601. Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness. *Covington & Lexington Turnpike Co.* v. *Sandford,* 164 U. S. 578, 596.

It is, however, plain that the "power to regulate is not a power to destroy," *Stone* v. *Farmers' Loan & Trust Co.,* 116 U. S. 307, 331; *Covington & Lexington Turnpike Co.* v. *Sandford, supra,* at 593; and that maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations. Price control is "unconstitutional . . . if arbitrary, discrim-

inatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . ." *Nebbia* v. *New York*, 291 U. S. 502, 539. Nonetheless, the just and reasonable standard of the Natural Gas Act "coincides" with the applicable constitutional standards, *FPC* v. *Natural Gas Pipeline Co., supra,* at 586, and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory. Accordingly, there can be no constitutional objection if the Commission, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile. We do not suggest that maximum rates computed for a group or geographical area can never be confiscatory; we hold only that any such rates, determined in conformity with the Natural Gas Act, and intended to "balanc[e] . . . the investor and the consumer interests," are constitutionally permissible. *FPC* v. *Hope Natural Gas Co., supra,* at 603.

One additional constitutional consideration remains. The producers have urged, and certain of this Court's decisions might be understood to have suggested, that if maximum rates are jointly determined for a group or area, the members of the regulated class must, under the Constitution, be proffered opportunities either to withdraw from the regulated activity or to seek special relief from the group rates.[34] We need not determine whether this is in every situation constitutionally imperative, for such arrangements have here been provided by the Commission, and we cannot now hold them inadequate.

The Commission declared that a producer should be permitted "appropriate relief" if it establishes that its "out-of-pocket expenses in connection with the operation of a particular well" exceed its revenue from the

[34] Compare *Bowles* v. *Willingham, supra,* at 517.

well under the applicable area price. 34 F. P. C., at 226. It did not indicate which operating expenses would be pertinent for these calculations.[35] The Commission acknowledged that there might be other circumstances in which relief should be given, but declined to enumerate them. It emphasized, however, that a producer's inability to recover either its unsuccessful exploration costs or the full 12% return on its production investment would not, without more, warrant relief. It announced that in many situations it would authorize abandonment under § 7 (b), 15 U. S. C. § 717f (b),[36] rather than an exception to the area maximum price. Finally, the Commission held that the burden would be upon the producer to establish the propriety of an exception, and that it therefore would not stay enforcement of the area rates pending disposition of individual petitions for special relief.

The Court of Appeals held that these arrangements were inadequate. It found the Commission's description of its intentions vague. The court would require the Commission to provide "guidelines which if followed by an aggrieved producer will permit it to be heard promptly and to have a stay of the general rate order until its claim for exemption is decided." 375 F. 2d, at 30. We cannot agree. It would doubtless be desirable if the Commission

[35] The Court of Appeals remarked that "[o]ut-of-pocket expenses are not defined and we do not know what they include." 375 F. 2d, at 30. It is certainly true that the Commission proffered no definition, but we cannot regard this as a fatal omission.

[36] Section 7(b), 15 U. S. C. § 717f (b), provides that "[n]o natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

provided, as quickly as may be prudent, a more precise summary of its conditions for special relief, but it was not obliged to delay area regulation until such guidelines could be properly drawn. The Commission quite reasonably believed that the terms of any exceptional relief should be developed as its experience with area regulation lengthens. Moreover, area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences; it is entirely possible that the Commission may later find that its area rate structure for the Permian Basin requires significant modification.[37] We cannot now hold that, in these circumstances, the Commission's broad guarantees of special relief were inadequate or excessively imprecise.

Nor is there reason now to suppose that petitions for relief will not be expeditiously evaluated; for the Commission has given assurance that they will be "disposed of as promptly as possible." [38] If it subsequently appears that the Commission's provisions for special relief are for any reason impermissibly dilatory, this question may then be reconsidered.

Furthermore, it is pertinent that the Commission may supplement its provisions for special relief by permitting abandonment of unprofitable activities. The producers

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[37] Indeed, Commissioner Ross has already urged that the Commission modify its area proceedings so as to reflect the essentially national character of the relevant issues. *Area Rate Proceeding (Hugoton-Anadarko Area) No. AR64–1,* 30 F. P. C. 1354, 1359–1362 (dissenting opinion). Moreover, we note the "essential amalgamation" of the Hugoton-Anadarko and Texas Gulf Coast area proceedings before the Commission, where "identical issues were heard on a joint record." 1 Joint Initial Staff Brief in Area Rate Proceedings Nos. AR64–1 and AR64–2, 1. Finally, we must emphasize that we understand the present proceeding to be merely the first of many steps toward a more expeditious and effective system of regulation.

[38] 34 F. P. C., at 227.

urge that this source of relief must be disregarded, since it is entirely conditional upon the Commission's assent. It is enough for present purposes that the Commission has in other circumstances allowed abandonment,[39] and that it has indicated that it will, in appropriate cases, authorize it here. Indeed, the Commission has already acknowledged that only in "exceptional situations" would the abandonment of unprofitable facilities prove detrimental to consumers, and thus impermissible under § 7 (b). 34 F. P. C., at 226.

Finally, we cannot agree that the Commission abused its discretion by its refusal to stay, *pro tanto,* enforcement of the area rates pending disposition of producers' petitions for special relief. The Court of Appeals would evidently require the Commission automatically to issue such a stay each time a producer seeks relief. This is plainly inconsistent with the established rule that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury. See, *e. g., Virginia Petroleum Jobbers Assn.* v. *FPC,* 259 F. 2d 921, 925. Moreover, the issuance of a stay of an administrative order pending disposition by the Commission of a motion to "modify or set aside, in whole or in part" the order is a matter committed by the Natural Gas Act to the Commission's discretion. §§ 19 (a), (c), 15 U. S. C. §§ 717r (a), (c). We have no reason now to believe that it would in all cases prove an abuse of discretion for the Commission to deny a stay of the area rate order. There might be many situations in which a stay would be inappropriate; at a minimum, the Commission is entitled to give careful consideration to the substantiality of the claim for relief, and to the consequences of any delay in the full administration of the area rate structure. We therefore decline to bind the Commission to any inflexible obligation; we shall assume

[39] See, *e. g., Transcontinental Gas Pipe Line Corp.,* 34 F. P. C. 584.

that it will, in situations in which stays prove appropriate, properly exercise its statutory authority.

For the reasons indicated, we find no constitutional infirmity in the Commission's adoption of an area maximum rate system for the Permian Basin.

We consider next the claims that the Commission has exceeded the authority given it by the Natural Gas Act. The first and most important of these questions is whether, despite the absence of any constitutional deficiency, area regulation is inconsistent with the terms of the Act. The producers that seek reversal of the judgments below offer three principal contentions on this question. First, they emphasize that the Act uniformly employs the singular to describe those subject to its requirements; § 4 (a), for example, provides that rates received by "any natural-gas company" must be just and reasonable. It is urged that the draftsman's choice of number indicates that each producer's rates must be individually computed from evidence of its own financial position. We cannot infer so much from so little; we see no more in the draftsman's choice of phrase than that the Act's obligations are imposed severally upon each producer.

Reliance is next placed upon one sentence in the Report of the House Committee on Interstate and Foreign Commerce, which in 1937 recommended passage of the Natural Gas Act. The Committee remarked that the "bill provides for regulation along recognized and more or less standardized lines." H. R. Rep. No. 709, 75th Cong., 1st Sess., 3. It added that the bill's provisions included nothing "novel." *Ibid.* We find these statements entirely inconclusive, particularly since, as the Committee doubtless was aware, regulation by group or class was a recognized administrative method even in 1937. Compare *Tagg Bros.* v. *United States, supra; New*

England Divisions Case, supra. See also H. R. Rep. No. 77, 67th Cong., 1st Sess., 10–11; H. R. Rep. No. 456, 66th Cong., 1st Sess., 29–30.

Finally, the producers urge that two opinions of this Court establish the inconsistency of area regulation with the Natural Gas Act. It is asserted that the failure of a majority of the Court to adopt the reasoning of Mr. Justice Jackson's separate opinion in *FPC* v. *Hope Natural Gas Co., supra,* impliedly rejected the system of regulation now selected by the Commission. We find this without force. The Court in *Hope* emphasized that we may not impose methods of regulation upon the discretion of the Commission; for purposes of judicial review, the validity of a rate order is determined by "the result reached not the method employed." 320 U. S., at 602; see also *FPC* v. *Natural Gas Pipeline Co., supra,* at 586. The Court there did not reject area regulation; it repudiated instead the suggestion that courts may properly require the Commission to employ any particular regulatory formula or combination of formulae.

The producers next rely upon a dictum in the opinion of the Court in *Bowles* v. *Willingham, supra.* The Court remarked that "under other price-fixing statutes such as the Natural Gas Act of 1938 . . . Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons or companies." 321 U. S., at 517. The dictum is imprecise, but even if it were not, we could not agree that it can now be controlling. The construction of the Natural Gas Act was not even obliquely at issue in *Bowles,* and this Court does not decide important questions of law by cursory dicta inserted in unrelated cases. Whatever the dictum's meaning, we do not regard it as decisive here. Compare *Wisconsin* v. *FPC,* 373 U. S. 294, 310.

There are, moreover, other factors that indicate persuasively that the Natural Gas Act should be understood to permit area regulation. The Act was intended to create, through the exercise of the national power over interstate commerce, "an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate"; *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 506; it was for this purpose expected to "balanc[e] . . . the investor and the consumer interests." *FPC* v. *Hope Natural Gas Co., supra,* at 603. This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; see, *e. g., Piedmont & Northern R. Co.* v. *Comm'n,* 286 U. S. 299; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 193–194; *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *American Trucking Assns.* v. *United States,* 344 U. S. 298, 311. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.[40]

Such a construction is consistent with the view of administrative rate making uniformly taken by this Court. The Court has said that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 304. And see *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446. It follows that rate-making agencies are not bound

[40] We obtain additional assistance from § 16; it provides that the Commission "shall have power to perform any and all acts, and to prescribe . . . such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this" Act. 15 U. S. C. § 717*o*.

to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, "to make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co., supra,* at 586.

We are unwilling, in the circumstances now presented, to depart from these principles. The Commission has asserted, and the history of producer regulation has confirmed, that the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods. The Commission believes that the elements of such methods may be found in area proceedings. "[C]onsiderations of feasibility and practicality are certainly germane" to the issues before us. *Bowles* v. *Willingham, supra,* at 517. We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted.

We must now consider whether the Commission exceeded its statutory authority by the promulgation of various supplementary requirements. The first of these is its imposition of a moratorium until January 1, 1968, upon filings under § 4 (d) for prices in excess of the applicable area maximum rate. Although the period for which the moratorium was to be effective has expired, the order is not without continuing effect. The Court of Appeals stayed enforcement of the moratorium until final disposition of the petitions for review, and a number of rate increases have therefore become effective subject to invalidation and refund if the moratorium order is now upheld. See Brief for the Federal Power Commission 69, n. 44.

The validity of the moratorium order turns principally upon construction of §§ 4 and 5 of the Act. Section

4 (d)[41] provides that no modification in existing rate schedules may be made by a natural gas company except after 30 days' notice to the Commission. When the Commission receives such notice, it is permitted by § 4 (e),[42] upon complaint or on its own motion, to suspend the proposed rate schedule for a period not to exceed five months. The Commission is to employ the period of suspension to conduct hearings upon the lawfulness of the proposed rates. If at the end of the suspension period appropriate orders have not been issued, the proposed rate schedule becomes effective, subject only to a refund obligation. In contrast, § 5 (a)[43] permits the Commission, upon complaint from a public agency or a gas distributing company, or on its own motion, to conduct proceedings to determine whether existing rates are just and reasonable, and to prescribe rates "to be thereafter observed and in

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[41] Section 4 (d) is set out at n. 29, *supra*.

[42] Section 4 (e), 15 U. S. C. § 717c (e), provides in part that "[w]henever any such new schedule is filed the Commission shall have authority, either upon complaint . . . or upon its own initiative . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule and defer the use of such rate . . . but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period . . . the proposed change of rate . . . shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond . . . and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

[43] See n. 1, *supra*.

force . . . ." These investigatory powers are not conditional upon the filing by a natural gas company of any proposed change in existing rates.

Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4 (d). They assert that the period of effectiveness of a rate determination under § 5 (a) is limited by § 4 (e); they reason that § 4 (d) creates an unrestricted right to file rate changes, and that such changes may, under § 4 (e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that "the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away." 34 F. P. C., at 228.

We cannot construe the Commission's statutory authority so restrictively. Nothing in § 5 (a) imposes limitations of time upon the effectiveness of rate determinations issued under it; rather, the section provides that rates held to be just and reasonable are "to be thereafter observed . . . ." Moreover, this Court has already declined to find in § 4 (d) or § 4 (e) an "invincible right to raise prices subject only to a six-month delay and refund liability." *United Gas* v. *Callery Properties,* 382 U. S. 223, 232 (opinion concurring in part and dissenting in part). Section 4 (d) merely requires notice to the Commission as a condition of any modification of existing rates; it provides that a "change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made." *United Gas Co.* v. *Mobile Gas Corp.,* 350 U. S. 332, 339. (Emphasis in original.) Nor does § 4 (e) restrict the

Commission's authority under § 5 (a); it permits the Commission to preserve an existing situation pending consideration of a proposed change in rates, and thereafter to issue an order retroactively forbidding the change; but the "scope and purpose of the Commission's review [under § 5 (a)] remain the same . . . ." *Id.*, at 341.

The deficiencies of the producers' construction of §§ 4 and 5 are illustrated by *United Gas* v. *Callery Properties, supra.* The Court held in *Callery* that permanent certifications issued under § 7 may be conditioned, even upon remand, by a moratorium upon filings under § 4 (d) for rates in excess of a specified ceiling. At issue were conditions imposed under § 7 (e) prior to the determination of just and reasonable rates; but nothing in the pertinent statutory provisions suggests that the Commission's authority under § 5 (a) is more narrow. Indeed, if the producers' construction of §§ 4 and 5 were adopted, we should be forced to the uncomfortable result that filings under § 4 (d) may be precluded by the Commission's relatively summary determination of a provisional in-line price, but not by its formal adjudication, after full deliberation, of a just and reasonable price. The consequences of such a construction would, as the Commission observed, be the enervation of § 5 and the effective destruction of area regulation. We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes. We have found no such evidence here, and therefore hold that the Commission may under §§ 5 and 16 restrict filings under § 4 (d) of proposed rates higher than those determined by the Commission to be just and reasonable.

The question remains whether the imposition by the Commission of a moratorium until January 1, 1968, was

a permissible exercise of this authority. The Commission found that in 1960 the costs of gas production had recently been, and would foreseeably remain, "remarkably steady"; [44] it reasoned that in these circumstances a moratorium of 2½ years, subject to "modification of its original decision after appropriate proceedings held in that docket," [45] would both facilitate orderly administration and satisfactorily assure the protection of producers' rights. Individual producers would not have been prevented by the moratorium from seeking relief from the maximum area rates; relief would have been possible both through the Commission's provisions for special exemptions and through motions for modification or termination of the moratorium. This is not a case in which the Commission has sought to bind producers, without recourse and in the face of changing circumstances, to an unchanging rate structure.

We cannot, given the apparent stability of production costs, the Commission's relative inexperience with area regulation, and the administrative burdens of concurrent area proceedings, hold that this arrangement was impermissible. We need not attempt to prescribe the limitations of the Commission's authority under §§ 5 and 16 to impose moratoria upon § 4 (d) filings; in particular, we intimate no views on the propriety of moratoria created in circumstances of changing costs. These and other difficult issues may more properly await both clarification of the Commission's intentions and the necessities of the particular circumstances. We hold only that this relatively brief moratorium did not, in the circumstances here presented, exceed or abuse the Commission's authority.

A collateral issue of statutory authority must be considered. The Commission supplemented its mora-

[44] 34 F. P. C., at 228.

[45] *Id.*, at 230.

torium by prohibiting price increases that exceed the area maximum rates, if the increases are the products of certain varieties of contractual price escalation clauses. Unlike the more general moratorium upon filings under § 4 (d), this proscription is without limit of time. The Commission's order is applicable to the most-favored-nation, spiral escalation, and redetermination clauses [46] that in 1961 it entirely forbade in contracts executed on or after April 3, 1961; [47] the additional limitation provided here by the Commission was intended to restrict the use of clauses included in contracts executed before the date of effectiveness of the Commission's earlier orders. The Commission reasoned, as had the examiner, that to permit producers to breach the area maximum rates by implementation of such clauses would not be "in accordance with the principles upon which a rate structure should be based." 34 F. P. C., at 236.

Indefinite escalation clauses "cause price increases . . . to occur without reference to the circumstances or economics of the particular operation, but solely because

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[46] The Commission has elsewhere provided brief definitions of the pertinent types of clauses. See generally *Pure Oil Co.*, 25 F. P. C. 383. Two-party most-favored-nation clauses are those "activated by higher prices paid to any other supplier by the same purchaser." Three-party most-favored-nation clauses are "activated by higher prices paid to any other supplier by any purchaser." Spiral escalation clauses provide "that in the event the price which the buyer receives for the gas is increased, the price concurrently paid by the buyer to the supplier under the contract shall be increased in proportion to the buyer's increase." Redetermination clauses provide "that the price currently paid under the contract shall be subject to upward adjustment at certain specified times to reflect the average of the highest prices then paid by buyers to other suppliers for gas delivered under substantially similar terms and conditions." *Id.*, at 388, n. 3.

[47] Order No. 232, 25 F. P. C. 379. This was subsequently modified by Order No. 242, 27 F. P. C. 339. See 18 CFR § 154.93.

of what happens under another contract." 34 F. P. C., at 373. There is substantial evidence [48] that in design and function they are "incompatible with the public interest . . . ." Order No. 232, 25 F. P. C. 379, 380. Indeed, this Court has already entirely sustained the Commission's 1962 order. *FPC* v. *Texaco,* 377 U. S. 33.

The producers do not suggest that the Commission and Court were there mistaken; they urge instead that the Commission has acted inconsistently with its decision in *Pure Oil Co.,* 25 F. P. C. 383, and that it has wrongly invalidated existing contracts. The Commission declined in *Pure Oil* to declare unenforceable escalation clauses included in previously executed contracts. It reasoned that since the contracts lacked severability provisions, to strike the escalation clauses would, under "familiar principles of law," destroy the contracts; it feared that this would prove "many times" more prejudicial to the public interest than would the escalation clauses. *Id.,* at 388–389. The producers assert that the Commission has now committed the error that it avoided in *Pure Oil.* The Commission rejoins that it has not stricken the escalation clauses; it has merely limited their application to prices no higher than the area maximum rates. Alternatively, the Commission avers that even if the contracts have been frustrated, neither the public nor the producers can suffer, since producers' prices may be as high as, but not higher than, the area maximum.

We think that the Commission did not exceed or abuse its authority. Section 5 (a) provides without qualifica-

[48] The Commission stated in its Order No. 242 that indefinite escalation clauses "have created a significant portion of the administrative burdens under which this Commission is laboring," and that they produce a "flood of almost simultaneous filings" that "bear no apparent relationship to the economic requirements of the producers who file them." 27 F. P. C. 339, 340. See also 5 Joint Appendix 1858–1859.

tion or exception that the Commission may determine whether "any rule, regulation, practice, or contract affecting . . . [any] rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ," and prescribe the "rule, regulation, practice, or contract to be thereafter observed . . . ." Although the Natural Gas Act is premised upon a continuing system of private contracting, *United Gas Co.* v. *Mobile Gas Corp., supra,* the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests. Compare *FPC* v. *Sierra Pacific Power Co.,* 350 U. S. 348. Nor may its order properly be set aside merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances. Compare *American Trucking* v. *A., T. & S. F. R. Co.,* 387 U. S. 397, 416. See 2 K. Davis, Administrative Law Treatise § 18.09, at 610 (1958). We need not, for present purposes, calculate what collateral consequences, if any, the Commission's order may have for the terms or validity of the contracts it reaches; we hold only that the Commission has here permissibly restricted the application of indefinite escalation clauses.

The next supplementary order to be considered is the Commission's creation of various exemptions for the smaller producers. The difficulties of the smaller producers differ only in emphasis from those of the larger independent producers and the integrated producer-distributors; but these differences are not without relevant importance.[49] Although the resources of the small pro-

[49] The Commission defined a small producer as one "selling jurisdictionally less than 10,000,000 Mcf annually on a nationwide basis." 34 F. P. C., at 235. See further the testimony of producer witness Abel, 1 Joint Appendix 339–342. This would include some

ducers are ordinarily more limited, their activities are characteristically financially more hazardous.[50] It appears that they drill a disproportionately large number of exploratory wells, and that these are frequently in areas in which relatively little exploration has previously occurred.[51] Their contribution to the search for new gas reserves is therefore significant, but it is made at correspondingly greater financial risks and at higher unit costs. The record before the Commission included evidence that, for this and other reasons, small producers have regularly suffered higher percentages of dry wells, and higher average costs per Mcf of production.[52] At the same time, the Commission found that small producers are the source of only a minor share of the total national gas production, and that the prices they have

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250 of the filing producers in the Permian Basin, leaving some 40 large producers. Under this definition, there are some 2,000 small producers in the United States, and 75 large producers. 34 F. P. C., at 235. See also Federal Power Commission, Sales by Producers of Natural Gas to Natural Gas Pipeline Companies 1963, 1–6 (1965).

[50] The examiner observed that the "basic difference between the small and the large producer is that the risks of the business are materially different for each." 34 F. P. C., at 360. Compare 1 Joint Appendix 318–319, 328–332.

[51] These questions were discussed at length in testimony before the examiner on behalf of the Texas Independent Producers and Royalty Owners Association, and others. See generally 5 Joint Appendix 1655–1714, 1773–1787; 1 *id.*, at 224–232, 255. And see Supplement to Joint Appendix 3s–6s.

[52] The examiner stated that small producers had "relatively larger dry hole expenses, a smaller proportion of geological and geophysical expenses, and a smaller proportion of lease acquisition expenditures"; he added that they had relatively larger depletion, depreciation, and amortization expenses. 34 F. P. C., at 361. The examiner also found that the "ratios of income available for income taxes, cash dividends, and working capital to net investment were 7.8, 2.5, and 7.4 for the large producers, small producers and for the weighted average." *Ibid.* See also testimony at 3 Joint Appendix 1114–1116.

received have followed closely those obtained by the larger producers.[53]

The Commission reasoned that, in these circumstances, carefully selected special arrangements for small producers would not improperly increase consumer prices. Moreover, it concluded that such exemptions might usefully both streamline the administrative process and strengthen the small producers' financial position.[54] The Commission provided two forms of special relief: first, it released small producers from the requirement that quality adjustments be made in price; [55] and second, it commenced a rule-making proceeding intended to relieve them from various filing and reporting obligations. See 34 F. P. C. 434. The Commission asserted that the consequences for consumer prices of the first would be *de minimis;* it expected that the second would measurably reduce the small producers' regulatory expenses.[56]

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[53] The Commission found that they provide only about 15% of the total supply of natural gas moving in interstate commerce, and that "they usually cannot obtain more for their gas than the regulated price we fix for the major producers." 34 F. P. C., at 234. And see *id.*, at 363. On the other hand, the Commission noted that in specific situations the small producers might have a very important portion of the relevant market. *Id.*, at 235. The examiner indicated that "[f]ewer than 50" large producers sell 87% of the gas sold from the Permian Basin under the Commission's jurisdiction. *Id.*, at 361.

[54] It should be noted that the small producers did not at first wish any special exemptions; they evidently feared that any such exemptions might cause the Commission to ignore their difficulties, and ultimately perhaps to permit them to be priced out of the industry. These discussions may be traced at 5 Joint Appendix 1692–1714.

[55] Correspondingly, the small producers need not take quality adjustments into account for purposes of refunds, unless they wish to take advantage of upward price adjustments because of high Btu content. 34 F. P. C., at 233.

[56] It is pertinent that the Commission estimated regulatory expenses, for purposes of the calculation of area maximum rates, at 0.14¢ per Mcf. The Commission stated that "no participant dis-

We conclude that these arrangements did not exceed the Commission's statutory authority. We recognize that the language of §§ 5 and 7 is without exception or qualification, but it must also be noted that the Commission is empowered, for purposes of its rules and regulations, to "classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters." § 16, 15 U. S. C. § 717*o*. The problems and public functions of the small producers differ sufficiently to permit their separate classification, and the exemptions created by the Commission for them are fully consistent with the terms and purposes of its statutory responsibilities. It is not without relevance that this Court has previously expressed the belief that similar arrangements would ameliorate the Commission's administrative difficulties. See *FPC* v. *Hunt*, 376 U. S. 515, 527.

Finally, we consider one additional question. Certain of the producers have urged that, having adopted a system of area regulation, the Commission improperly designated the Permian Basin as a regulatory area. It is contended that the Commission failed to provide appropriate opportunities for briefing and argument on questions of the size and composition of the area. We must, before considering the rate structure devised for the Permian Basin by the Commission, examine this contention.

The Commission's designation of the Permian Basin as a regulatory area stemmed from its Statement of General Policy, issued September 28, 1960. 24 F. P. C.

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putes its inclusion . . . ." 34 F. P. C., at 197. In contrast, it has been estimated that the total costs to producers of the Commission's regulation are some 1.164¢ per Mcf. Of this total, 0.039¢ are said to arise from administration, 0.809¢ from delay, and 0.316¢ from contingencies. See Gerwig, Natural Gas Production: A Study of Costs of Regulation, 5 J. Law & Econ. 69, 85, 86, 88.

818. The Commission there announced its intention to regulate producers' interstate sales through the imposition of maximum area prices; it provided, for this purpose, a provisional system of guideline prices for the principal producing areas. The Commission averred that these areas, although "not necessarily in complete accord with geographical and economic factors," are "convenient and well known." *Id.*, at 819. It declared that, as "experience and changing factors" require, it was prepared to alter the areas to eliminate any inequities. *Ibid.*

On December 23, 1960, the Commission ordered the institution of this proceeding, for which it merged three of the producing areas separately listed by the Statement of General Policy. 24 F. P. C. 1121. It unequivocally announced that "no useful purpose would be served at this time by delaying the discharge of our primary responsibility . . . by entertaining issues . . . that the areas we have delineated . . . might be inappropriate for ratemaking purposes." *Id.*, at 1122. It appears that no hearings were conducted, and no evidence taken, on the propriety of the areas thus designated by the Commission for inclusion in this proceeding.

We do not doubt that significant economic consequences may, in certain situations, result from the definition of boundaries among regulatory areas. The calculation of average costs might, for example, be influenced by the inclusion or omission of a given group of producers; and the loss or retention of a price differential between regulatory areas might prove decisive to the success of marginal producers. Nonetheless, we hold that the Commission did not abuse its statutory authority by its refusal to complicate still further its first area proceeding by inclusion of issues relating to the proper size and composition of the regulatory area.

It must first be emphasized that the regulatory area designated by the Commission was evidently both convenient and familiar. There is no evidence before us, and the producers have not alleged, that the Permian Basin, as it was defined by the Commission, does not fit either with prevailing industry practice or with other programs of state or federal regulation.[57] Moreover, the Commission was already confronted by an extraordinary variety of difficult issues of first impression; it quite reasonably preferred to simplify, so far as possible, its proceedings. Finally, it is not amiss to note that the Commission evidently has more recently permitted consideration of similar questions in area proceedings. Compare *Area Rate Proceeding (Hugoton-Anadarko Area)*, 31 F. P. C. 888, 891. We assume that, consistent with this practice and with the terms of its Statement of General Policy, the Commission now would, upon an adequate request, permit interested parties to offer evidence and argument on the propriety of modification of the Permian Basin regulatory area. We hold only that the Commission was not obliged, in the circumstances of this case, to include among the disputed issues questions of the proper size and composition of the regulatory area.

We therefore conclude that the Commission did not, in these proceedings, violate pertinent constitutional limitations, and that its adoption of a system of area

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[57] It is pertinent that much of the cost and other data upon which the Commission relied reflected national, and not area or local, circumstances. Further, the Commission found that production costs in the Permian Basin did not "vary sufficiently from the national average to warrant a different treatment . . . ." 34 F. P. C., at 191. Moreover, no party offered a comprehensive cost study premised on a larger Permian Basin, although certain information relevant to adjacent areas was presented. See 1 Joint Appendix 37–41; 6 *id.*, at 15e. But see 1 *id.*, at 242–244.

price regulation, supplemented by provisions for a moratorium upon certain price increases and for exceptions for smaller producers, did not abuse or exceed its authority. We accordingly turn to various questions that have been raised respecting the propriety of the rate structure devised by the Commission for the Permian Basin.

IV.

It is important first to delineate the criteria by which we shall assess the Commission's rate structure.[58] We must reiterate that the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties. This Court has therefore repeatedly stated that the Commission's orders may not be overturned if they produce "no arbitrary result." *FPC* v. *Natural Gas Pipeline Co., supra,* at 586; *FPC* v. *Hope Natural Gas Co., supra,* at 602. Although neither law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders,[59] it must, nonetheless, be obvious that reviewing courts will require criteria more discriminating than justice and arbitrariness if they are sensibly to appraise the Commission's orders. The Court in *Hope* found appropriate criteria by inquiring whether "the return to the equity owner [is]

[58] The rate structure is summarized above, at 759–764.

[59] Economists have frequently proved more candid about these difficulties. Social welfare and public interest standards have been described as "almost unique in the extreme vagueness of [their] ultimate verbal norm." Bonbright, *supra,* at 27. Similarly, it is said that no writer "whose views on public utility rates command respect purports to find a single yardstick by sole reference to which rates that are reasonable or socially desirable can be distinguished from rates that are unreasonable or adverse to the public interest." *Id.,* at 67. But compare *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216.

commensurate with returns on investments in other enterprises having corresponding risks," and whether the return was "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.*, at 603. And compare *S. W. Tel. Co.* v. *Public Serv. Comm.*, 262 U. S. 276, 290–292 (dissenting opinion). But see Edgerton, Value of the Service as a Factor in Rate Making, 32 Harv. L. Rev. 516. These criteria, suitably modified to reflect the special circumstances of area regulation, remain pertinent, but they scarcely exhaust the relevant considerations.

The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the "end result" [60] of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they "maintain . . . credit and . . . attract capital."

It follows that the responsibilities of a reviewing court are essentially three. First, it must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court

[60] This phrase was taken by the Court of Appeals as the substance of the opinion of the Court in *FPC* v. *Hope Natural Gas Co., supra.* The court contrasted unfavorably the Commission's assertion that it had found a "fair relationship" between the consumer interests and the producers' costs. See 34 F. P. C., at 1074; 375 F. 2d, at 34. We are unable to find in the verbal differences between these two phrases any objection to the Commission's orders. The Commission's exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by references to isolated phrases from previous cases.

must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry. We are, in addition, obliged at this juncture to give weight to the unusual difficulties of this first area proceeding; we must, however, emphasize that this weight must significantly lessen as the Commission's experience with area regulation lengthens. We shall examine the various issues presented by the rate structure in light of these interrelated criteria.

The first issue is whether the Commission properly rejected the producers' contention that area rates should be derived from field, or contract, prices. The producers have urged that prevailing contract prices provide an accurate index of aggregate revenue requirements, and that they are an appropriate mechanism for the protection of consumer interests. The record before the Commission, however, supports its conclusion that competition cannot be expected to reduce field prices in the

Permian Basin to the "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." *Atlantic Rfg. Co.* v. *Public Service Comm'n*, 360 U. S. 378, 388.

The field price of natural gas produced in the Permian Basin has in recent years steadily and significantly increased.[61] These increases are in part the products of a relatively inelastic supply and steeply rising demand; but they are also symptomatic of the deficiencies of the market mechanism in the Permian Basin. Producers' contracts have in the past characteristically included indefinite escalation clauses. These clauses, in combination with the price leadership of a few large producers,[62] and with the inability or unwillingness of interstate pipelines to bargain vigorously for reduced prices,[63] have

[61] The Commission found that the 2.8¢ per Mcf paid as an average price in 1947 had risen to 9.0¢ in 1954, and to 13.8¢ in 1960. In 1960, El Paso, the dominant pipeline company in the Basin, renegotiated its contracts and offered prices ranging from 13.5¢ to 17¢ per Mcf. 34 F. P. C., at 182. The examiner pointed out that between 1947 and 1960, the average price paid nationally by pipelines trebled, from 4.95¢ to 15.61¢ per Mfc. *Id.*, at 312. And see 2 Joint Appendix 423–432.

[62] It appears that five producers were responsible in 1960 for more than one-half of all the natural gas sold from the Basin under the Commission's regulation. Fifteen producers accounted for almost three-fourths of the sales. See Memorandum of the Texas Independent Producers and Royalty Owners Association, 5 Joint Appendix 1775, 1780. See also Analysis of Independent Producer Rate Schedules, 6 Joint Appendix 275e–293e. These questions are very usefully discussed by distributor witness Kahn at 2 Joint Appendix 410–432. He notes the significance of "a sharply rising demand operating on a sluggishly responding supply," *id.*, at 423, but also emphasizes the importance of the escalation clauses and of various market imperfections.

[63] The Commission stated that "the entire history of pipeline purchasing activity, since the end of the El Paso monopoly in the Permian Basin, has been characterized by the overriding needs of the pipelines to contract for the large blocks of uncommitted re-

created circumstances in which price increases unconnected with changes in cost may readily be obtained. These market imperfections, operative despite an "essentially monopsonistic environment," [64] have accentuated the consequences of inelastic supply and sharply rising demand. Once an increase has been obtained by the larger producers, the escalation clauses have guaranteed similar increases to others.[65] In contrast, consumers have been left without effective protection against steadily rising prices. Their alternative sources of energy are in practice few, and the demand for natural gas, particularly in California, is therefore relatively unresponsive to price increases.[66] The consumer is thus obliged to rely

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serves essential to maintain their competitive position in developing markets . . . and their inability to accomplish this objective except at ever increasing prices." 34 F. P. C., at 182. It is noteworthy that, despite the obvious importance of these proceedings, the pipeline companies did not take an active part here, in the Court of Appeals or before the Commission. See also 2 Joint Appendix 423–432. But see 4 *id.*, at 1384–1388.

[64] The phrase is Commissioner O'Connor's. 34 F. P. C., at 252 (opinion concurring and dissenting on limited issue). It is proper to note that he would have made much wider use of field prices for the calculation of the area rates. Monopsony is the term used to describe a situation in which the relevant market for a factor of production is dominated by a single purchaser. See J. Robinson, The Economics of Imperfect Competition 215 (1933). The relevant market here is that for uncommitted reserves. See 2 Joint Appendix 410. Finally, for a general examination of the usefulness of the competitive model for regulation, see Bonbright, *supra*, at 106–108.

[65] It should be observed that the significance of the escalation clauses will presumably be diminished by the Commission's series of orders restricting their use.

[66] Some 85% of the gas sold in interstate commerce from the Permian Basin is ultimately consumed in California. 34 F. P. C., at 174, 312. The demand for natural gas among residential and commercial consumers, once they have purchased the necessary equipment, is relatively inelastic. *Id.*, at 313. The demand among

upon the Commission to provide "a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Rfg. Co.* v. *Public Service Comm'n, supra,* at 388.

We do not now hold, and the Commission has not suggested,[67] that field prices are without relevance to the Commission's calculation of just and reasonable rates under § 5 (a). The records in subsequent area proceedings may more clearly establish that the market mechanism will adequately protect consumer interests.[68] We hold only that, on this record, the Commission was not compelled to adopt field prices as the basis of its computations of area rates.

We next examine the Commission's decision to create two maximum area rates for the Permian Basin. Under the Commission's rate structure, the applicable maximum price for a producer's sale is determined both by the moment at which the gas was first dedicated to the interstate market, and by the method by which the gas was produced. It follows that two producers, simultaneously

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industrial consumers is more responsive to price, but restrictions in California on the use of various industrial fuels have left industrial demand less responsive to price there than in other parts of the country. *Id.,* at 313–314.

[67] Indeed, the Commission explicitly stated that "[w]e recognize that the history of negotiated prices in the area is an important element to be considered in reaching our decision." 34 F. P. C., at 181.

[68] We note that economists have sometimes concluded that the market mechanism works satisfactorily in the natural gas industry. "There is . . . no question but that the field price of gas in the United States is competitively determined." Adelman, *supra,* at 39. See also E. Neuner, The Natural Gas Industry 125–134, 238–290 (1960). In contrast, Professor Kahn said of oil and gas that "few other industries in our entire economy . . . are so insulated . . . from the normal forces of the market." 2 Joint Appendix 607. But see 1 *id.,* at 217–218, 280–281. And see R. Hooley, Financing the Natural Gas Industry 5–25 (1961).

offering gas of identical quality and Btu content, may be confronted by different maximum prices.

The premises of this arrangement are two. First, the Commission evidently believed that price should be employed functionally, as a tool to encourage the production of appropriate supplies of natural gas. A price is thus just and reasonable within the meaning of §§ 4 (a) and 5 (a) not merely because it is "somebody's idea of return on a 'rate base,' " [69] but because it results in satisfactory programs of exploration, development and production.

Second, the Commission concluded that price could usefully serve as an incentive to exploration and production only if it were computed according to the method by which gas is produced. Natural gas produced jointly with oil is necessarily a relatively unimportant by-product. The value of oil-well gas is on average only one-seventeenth that of the oil with which it is produced. See 34 F. P. C., at 322. It cannot be separately sought or independently produced; its production is effectively restricted by state regulations intended to encourage the conservation of oil. Accordingly, the supply of oil-well gas is, as the examiner observed, "almost perfectly inelastic." *Id.*, at 323.

On the other hand, gas-well gas is produced independently of oil, and of state restrictions on oil production. More important, the Commission found that a separate search can now be conducted for gas reservoirs; cumulative drilling experience permits at least the larger producers to direct their programs of exploration and development to the search for gas.[70] The supply of gas-

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[69] *Colorado Interstate Co.* v. *FPC*, 324 U. S. 581, 612 (concurring opinion).

[70] The examiner found that the larger producers could now predict with high accuracy whether drilling in a particular area would be likely to produce associated or unassociated gas. 34 F. P. C., at 325–329. This appears primarily to be the consequence of

well gas is therefore relatively elastic, and its price can meaningfully be employed by the Commission to encourage exploration and production. The Commission reasoned that a higher maximum rate for gas-well gas dedicated to interstate commerce after the approximate moment at which a separate search became widely possible would provide an effective incentive.[71] Correspondingly, the Commission adopted a relatively low price for all other natural gas produced in the Permian Basin, since price could not serve as an incentive, and since any price above average historical costs, plus an appropriate return, would merely confer windfalls.

We find no objection under the Natural Gas Act to this dual arrangement. We have emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a "zone of reasonableness." *FPC* v. *Natural Gas Pipeline Co., supra,* at 585. The Commission may, within this zone, employ price functionally in order to achieve relevant regulatory purposes; it may, in particular, take fully into account the probable consequences of a given price level for future programs of exploration and production. Nothing in the purposes or history of the Act forbids the Commission to require different prices for different sales, even if the distinctions are unrelated to quality, if these arrangements are "necessary or appropriate to carry out the provisions of this Act." § 16, 15 U. S. C. § 717*o*. We hold that the stat-

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accumulated experience, and not of any improvement in technology. See also 2 Joint Appendix 558, 581; 1 *id.*, at 56, 307–308. Useful statistical evidence of predictability may be found in producer testimony. See 3 *id.*, at 952–955, 963, 965–967, 1079–1080. And see 7 *id.*, at 572e–575e. It should be noted that the Commission's staff denied that gas could be separately sought. 3 *id.*, at 933–934.

[71] Estimates of the moment at which directional search became possible varied; one witness testified that Phillips regarded January 1, 1959, as an appropriate date of calculation. 1 Joint Appendix 56.

utory "just and reasonable" standard permits the Commission to require differences in price for simultaneous sales of gas of identical quality, if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress.

The Commission's responsibilities include the protection of future, as well as present, consumer interests. It has here found, on the basis of substantial evidence, that a two-price rate structure will both provide a useful incentive to exploration and prevent excessive producer profits. In these circumstances, there is no objection under the Natural Gas Act to the price differentials required by the Commission.

The symmetry of the Commission's incentive program is, however, marred. The Commission held in 1965 that the higher maximum rate should be applicable to gas-well gas committed to interstate commerce since January 1, 1961. It is difficult to see how the higher rate could reasonably have been expected to encourage, retrospectively, exploration and production that had already occurred. There is thus force in Commissioner Ross' contention that this arrangement is not fully consistent with the logic of the two-price system.[72]

Nonetheless, we are constrained to hold that this was a permissible exercise of the Commission's discretion. The Commission believed that its Statement of General Policy, issued September 28, 1960, had created reasonable expectations among producers that higher rates would thereafter be permitted for initial filings under § 7.[73] The Commission evidently concluded that fairness

[72] See 34 F. P. C., at 273. But contrast the testimony of distributor witness Kahn, who recognized that it would be "in some measure arbitrary" to give the lower price to gas wells that began production after 1960 but before the Commission's final decision in these proceedings. 2 Joint Appendix 635.

[73] The Statement provided a guideline price of 16¢ per Mcf for initial filings, and 11¢ per Mcf for previously committed gas. 24

obliged it to satisfy, at least in part, those expectations. We must also recognize that an unexpected downward revision of the guideline price for initial filings, with accompanying refunds, might have seriously diminished the producers' confidence in interstate prices, and perhaps threatened the future interstate supply of natural gas.[74] We can assume that the Commission gave attention to this possibility. Compare 34 F. P. C., at 188. These factors provide a permissible basis for this exercise of the Commission's authority.[75]

We must next examine the methods by which the Commission reached the two maximum rates it created for gas produced in the Permian Basin. The Commission justified its adoption of a two-price rate structure by reliance upon functional pricing; it suggested that two prices, with an appropriate differential, may be used so as both to provide an incentive to exploration and to restrict to reasonable levels producers' profits. In turn, it computed the two area maximum prices directly from costs of service, without allowances for noncost factors. The price differential which the Commission expects to serve as an incentive is the product of differences in the time periods and geographical areas for which costs were

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F. P. C., at 820. The Commission indicated that this was in recognition of "economic factors." *Id.*, at 819.

[74] It is pertinent that Gerwig found that a premium of 1.16¢ per Mcf is necessary before producers rationally enter the interstate market. Gerwig, *supra*, at 85. See also Kitch, The *Permian Basin Area Rate Cases* and the Regulatory Determination of Price, 116 U. Pa. L. Rev. 191, 207. Compare Johnson, Producer Rate Regulation in Natural Gas Certification Proceedings: *CATCO* in Context, 62 Col. L. Rev. 773, 784, n. 61. Finally, see the testimony of producer witness Foster, 1 Joint Appendix 142–144.

[75] We see no objection to the Commission's preference for January 1, 1961, instead of December 23, 1960, the date on which it issued the order commencing these proceedings. This choice was adequately justified by administrative convenience.

computed, and not of noncost additives to cost components. Finally, the Commission, by its adoption of a moratorium until January 1, 1968, created a temporary price freeze in the Permian Basin.[76]

Although we would expect that the Commission will hereafter indicate more precisely the formulae by which it intends to proceed, we see no objection to its use of a variety of regulatory methods. Provided only that they do not together produce arbitrary or unreasonable consequences, the Commission may employ any "formula or combination of formulas" it wishes, and is free "to make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co., supra,* at 586. We have already considered the Commission's adoption of a two-price system and of a moratorium, and have concluded that they are each reasonably calculated to achieve appropriate regulatory purposes. It remains now to examine its computation of the area maximum prices from the producers' costs of service.

The Commission derived the maximum rate for new gas-well gas from composite cost data intended to evidence the national costs in 1960 of finding and producing gas-well gas. It reasoned that these costs should be computed from national, and not area, data because, first, the larger producers conduct national programs of exploration, and, second, "much, if not most, of the relevant information" [77] was available only on a national

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[76] It should be observed that the witness chiefly responsible for the contrivance of the two-price system ultimately adopted by the Commission, see 2 Joint Appendix 510–513, 576–585, 601–611, has elsewhere described the need for close restraints on increases in the price for natural gas. Kahn, Economic Issues in Regulating the Field Price of Natural Gas, 50 Am. Econ. Rev. 506, 510–514. See also Kitch, *supra,* at 211–212.

[77] 34 F. P. C., at 191. And see *id.,* at 339–340.

basis. It held, in addition, that costs in the Permian Basin did not "vary sufficiently from the national average to warrant a different treatment . . . ." 34 F. P. C., at 191. The Commission found that 1960 cost data should be used, and historical data disregarded, because only relatively current cost data would adequately guarantee an effective incentive for future exploration and production. The Commission was obliged to obtain the relevant cost data from a variety of sources. Natural gas producers have not yet been required to adopt any uniform system of accounts, and no private or public agency had in 1965 collected all the pertinent information. Many of the data were taken from nationally published statistics; [78] the balance was derived from questionnaires completed by the producers. The Commission concluded that these sources "in combination provide an adequate basis for the costs we have found." *Ibid.*

The maximum just and reasonable rate for all other Permian Basin gas was calculated from cost data intended to reflect the historical costs of gas-well gas produced in 1960 in the Permian Basin. The examiner had computed this rate by essentially the same method he had used for new gas-well gas, with certain cost components adjusted by back-trending. The Commission's staff, on the other hand, offered a comprehensive study of historical costs of service. The Commission adopted both methods, using the examiner's back-trended cost

[78] It should be noted that the parties proffered a list of sources of information, to which the examiner gave his approval. See 1 Joint Appendix 291–305, 309–310. These were said by the parties to be "recognized, published statistical data sources." *Id.*, at 292. The Commission described them as "well-recognized and authoritative." 34 F. P. C., at 191. Nonetheless, careful efforts were made to determine whether these and other sources of evidence, including the producers' questionnaires, were, as to the various cost components, accurately representative of the relevant groups of producers. See, *e. g.*, *id.*, at 377, 378, 380, 381, 384, 387, 392, 393.

computations as a check upon the accuracy of the staff's presentation.

The Commission reasoned that excessive producer profits could be minimized only if the rate for flowing gas were derived from the most precise available evidence of actual historical costs. It therefore held that these costs should be taken from area, and not national, data.

The Commission's staff obtained the data necessary for its computation of historical costs from questionnaires completed by producers. The information used by the staff, and ultimately adopted by the Commission, was taken from questionnaires submitted by 42 major producers, which together account for 75% of all the gas produced in the Basin, and 85% of all the gas-well gas. Nonetheless, some two-thirds of all the gas produced in the Permian Basin is oil-well gas, and Sun Oil estimates that the staff's gas-well gas data were thus applicable only to some 15.3% of the total production of natural gas in the Basin in 1960.[79]

[79] Three sets of questionnaires were used. Appendix A was applicable to all producers, and concerned chiefly drilling costs. Appendix B was required of large producers, and concerned costs, revenues and production. Appendix C was a simplified version of Appendix B, which small producers were permitted to use. The producers have argued vigorously that these questionnaires did not provide a sufficient basis for the Commission's findings. We cannot agree. The Commission reasonably concluded, as had the examiner, that the Appendix C questionnaires received from small producers were not necessarily representative. 34 F. P. C., at 214. And see 3 Joint Appendix 1117–1118. Moreover, the addition of the Appendix C data from the small producers would evidently not have produced a significant change in the ultimate cost components. See 34 F. P. C., at 214, 392–393, 400. Further, the Commission found that the responses to the Appendix B questionnaires received from 25 small producers would not have "change[d] the results." *Id.*, at 214, n. 34. Of the 43 large producers that filed Appendix B questionnaires, the staff and Commission disregarded only one, which had not been properly completed. See generally 2 Joint Appendix 731–

We hold that the Commission, in calculating cost data for the two maximum rates by differing geographical bases and time periods, did not abuse its authority. The Commission's use of separate sources of data for the two rates permitted the creation of a price differential between them without the inclusion of noncost components. Its selections of time periods and geographical bases were entirely consistent with the logic of its system of incentive pricing. In these circumstances, we can find no tenable objection to this aspect of the Commission's rate structure.

It is further contended that the Commission impermissibly used flowing gas-well gas cost data to calculate the maximum rate for old gas, thereby disregarding entirely the costs of gas produced in association with oil. The Commission's explanation was essentially pragmatic. It reasoned that the uncertainties of joint cost allocation preclude accurate computations of the cost of casinghead and residue gas. Further, the Commission averred that it is administratively imperative to simplify, so far as possible, the area rate structure. The Commission regarded its adoption of a single area maximum price for all gas, except new gas-well gas, its residue and gas-cap gas, as "an important step toward simplified and realistic area price regulation." 34 F. P. C., at 211.

748; 3 *id.*, at 753–761. In these circumstances, the Commission concluded, we think reasonably, that "the data provided by the major producers with respect to their Permian production was fully representative of area costs . . . ." 34 F. P. C., at 214. This Court has repeatedly held that administrative agencies may "proceed on a group basis . . . on 'evidence which the Commission assumed was typical in character, and ample in quantity' to justify its findings . . . ." *Chicago & N. W. R. Co.* v. *A., T. & S. F. R. Co.*, 387 U. S. 326, 341, quoting *New England Divisions Case*, 261 U. S. 184, 196–197. The Commission has here reasonably found that the evidence before it satisfied these requirements; we therefore find no objection.

We cannot say that these arrangements are impermissible. There is ample support for the Commission's judgment that the apportionment of actual costs between two jointly produced commodities, only one of which is regulated by the Commission, is intrinsically unreliable.[80] It is true that certain of the costs of gas-well gas must also be apportioned, but the Commission reasonably concluded that these difficulties are relatively less severe.[81] The Commission was, in addition, entitled to give great weight to the administrative importance of a simplified rate structure. Finally, it is relevant that the Commission found that the cost of casinghead and residue gas could not be higher, and, if exploration and development costs are realistically discounted, must surely be lower than the costs of flowing gas-well gas.[82] These considerations in combination

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[80] See generally the examiner's discussion, 34 F. P. C., at 393–400. Economists have described these difficulties with repetitive pungency. "To make laborious computations purporting to divide [such] costs is 'nonsense on stilts,' and has no more meaning than the famous example of predicting the banana crop by its correlation with expenditures on the Royal Navy." Adelman, *supra*, at 25. See also Machlup, *supra*, n. 25, at 21; Bonbright, *supra*, at 339–342. Compare Eckstein, Natural Gas and Patterns of Regulation, 36 Harv. Bus. Rev. 126, 129–133; and Kahn, *supra*, at 510–514.

[81] By one estimate, the costs of nonassociated gas are 45% separate, 31% joint, and 24% common. See 34 F. P. C., at 339. All of the costs of associated gas are joint. *Ibid.* But see Kitch, *supra*, at 202.

[82] 34 F. P. C., at 1072. None of the distributors or public agencies before the Court, except *amici*, have argued that this permits excessively generous returns to producers. Indeed, representatives of the consumers who ultimately purchase most of the gas produced in the Permian Basin have urged us to avoid "long extensive delays" and to affirm the Commission's orders in their entirety. See, *e. g.*, Brief for the City of Los Angeles 6; Joint Brief for the City of San Diego and the City and County of San Francisco 24; Brief for People of the State of California 63. These parties did not petition the Court of Appeals to review the Commission's orders,

warranted the Commission's judgment that a single area maximum price for all gas other than new gas-well gas should be imposed, and that this maximum rate should be derived entirely from the historic costs of flowing gas-well gas.

We turn now to the Commission's computation of the proper rate base. The Commission's method here differed significantly from that frequently preferred by regulatory authorities. It did not use a declining rate base and return, but instead computed an average net production investment, to which it applied a constant rate of return. The Commission assumed for this purpose that a gas well depletes at a uniform rate, and that it is, on average, totally depleted in 20 years. It found that the annual capital-recovery cost, including depletion, depreciation, and amortization, was 3.95¢ per Mcf. Allowing one year for a lag between investment and first production, the Commission obtained an average production investment of 43.45¢ per Mcf. The proper return per Mcf was then calculated by multiplying this figure by the rate of return.

The producers argue that this has the effect of postponing revenue, and thus discounting its present value; they suggest that the Commission should properly have

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and participated below only as intervenors in full support of the Commission's position. Even assuming *arguendo* that these questions are not now foreclosed by § 19 (b), we can find no basis on which to set aside the area rates as excessive. As we shall show below, the rate of return permitted the producers does not substantially exceed that ordinarily allowed to pipelines. Further, it must be recalled that the area *maximum* rates were, even before adjustment for quality and Btu deficiencies, intended to approximate *average* unit costs. Finally, we note that the Commission's area rate for new gas-well gas, after adjustment for average quality deficiencies, very nearly equals that originally proposed by distributor and consumer representatives. Compare 34 F. P. C., at 343, and at 1073. We cannot say that the Commission's rates are above the "zone of reasonableness" permitted by the Natural Gas Act.

employed a declining investment base and return. This is a question peculiarly within the Commission's discretion, and, while the method adopted by the Commission was evidently less favorable to the producers than various other possible formulae, we cannot hold that it was arbitrary or unreasonable.

We next consider whether the rate of return adopted by the Commission was a permissible exercise of its regulatory authority. The Commission first asserted that rates of return must be assessed by a comparable-earnings standard. Under such a standard, earnings should be permitted that are "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Co.* v. *Public Service Comm.*, 262 U. S. 679, 692; *FPC* v. *Hope Natural Gas Co., supra,* at 603. Although other standards might properly have been employed,[83] the Commission's decision to examine comparable earnings was fully consistent with prevailing administrative practice, and manifestly was not an abuse of its authority.

The Commission relied for purposes of comparison chiefly upon the rates of return that have recently been permitted to the interstate pipelines. It found that pipelines had been given returns of 6.0 to 6.5% on net investment, with a yield on equity of 10 to 12%.[84] The

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[83] These questions are usefully discussed in Bonbright, *supra,* at 240–283. See also the Commission's discussion of the true yield method. 34 F. P. C., at 202. Compare 4 Joint Appendix 1267, 1406–1416. And see the Initial Decision of the Presiding Examiner in *Area Rate Proceeding* (*Southern Louisiana Area*), *No. AR61–2,* issued December 30, 1966, at 75–85.

[84] 34 F. P. C., at 201. Compare *id.*, at 343–352. And see for estimates of more recent equity allowances, Brief for the Federal Power Commission 144, n. 16.

Commission noted that producers characteristically have less long-term debt than pipelines,[85] and that the financial risks of production are somewhat greater than those of transmission.[86] It reasoned that these differences warranted a more generous rate of return for producers. In addition, the Commission stated that the risk of finding gas of less than pipeline quality, created by the Commission's promulgation of quality and Btu standards, should be reflected in the rate of return. Finally, the Commission sought to determine the rate of return recently earned by producers of natural gas. It found that accurate rates of return could not be calculated with assurance, although the Commission's staff offered evidence of an average return for nine companies over five years of 12.4% on net investment.[87] The Commission concluded that, despite its statistical deficiencies,

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[85] The examiner found that nonintegrated producers had an average debt of approximately 12%. The pipelines were found to have debts "sometimes as large as 70 percent of total capitalization . . . ." 34 F. P. C., at 345. See also contrasting testimony at 1 Joint Appendix 173–177; and 2 *id.*, at 614–626. It is proper to observe that it has sometimes been argued that the leverage of high borrowings itself creates certain financial risks. But see G. Stigler, Capital and Rates of Return in Manufacturing Industries 64, n. 15 (1963). Finally, it should be noted that risk has on occasion been regarded as cause for a reduction of the rate of return. See C. Hardy, Risk and Risk-bearing 37–38 (1931).

[86] As will appear below, we find the Commission's discussion of relative financial risks imprecise. There is, however, a plain statement in the Commission's opinion to the effect that exploration and production are financially more hazardous than transmission. See 34 F. P. C., at 201. The Commission did not indicate clearly whether it considered production taken in the aggregate as more hazardous than the affairs of an individual pipeline company, or indeed even whether it considered such aggregate calculations relevant.

[87] See the discussion at 34 F. P. C., at 203–204. And see *id.*, at 349–352. Finally, see 3 Joint Appendix 850–936.

this and similar evidence must be given "heavy consideration in the decisional process." 34 F. P. C., at 203.

On balance, the Commission selected 12% as the proper rate of return for gas of pipeline quality. We think that this judgment was supported by substantial evidence, and that it did not exceed or abuse the Commission's authority. The evidence before the Commission fairly suggests that this rate will be likely to "maintain [the producers'] financial integrity, to attract capital, and to compensate [their] investors for the risks assumed . . . ." *FPC* v. *Hope Natural Gas Co., supra,* at 605. Further, the distributors and public agencies before the Court have not suggested, and we find no reason to believe, that this return will exceed the proper requirements of the industry.[88] Certainly, as we shall show below, this return is no more than comparable to that characteristically allowed interstate pipelines.

Nonetheless, there remains one further issue essential to an accurate appraisal of the return permitted by the Commission. The Commission's computation of the rate of return was specifically premised in part on the additional financial risks created for producers by the Commission's promulgation of quality and Btu standards.[89] Its opinion in these proceedings included a series of

[88] But see Kitch, *supra,* at 201. See also Stigler, *supra,* at 62–64.

[89] It has been argued with force that the producers were not given fair notice that the Commission might promulgate such standards. It appears that the Commission did not announce in terms that it might create quality standards, and that it tacitly denied a motion to consolidate this proceeding with a rule-making proceeding intended to devise national quality standards. We cannot say that the Commission impermissibly refused to complicate still further this proceeding by the addition of issues centering on national quality standards. Moreover, the general terms of the Commission's order commencing this proceeding reasonably encompassed questions of quality standards, 24 F. P. C. 1121, 1124, and we do not regard the Commission's denial of the consolidation motion as

specific quality standards.[90] The Commission ruled that gas that fails to satisfy these standards must be sold at prices lower than the applicable area maximum; the amount of the reduction necessary in each sale is to be initially determined by the parties, subject to review by the Commission. Further, natural gas with a Btu content of less than 1,000 per cubic foot must be sold at a price proportionately lower than the applicable area maximum, and gas with a Btu content of more than 1,050 per cubic foot may be sold at a price proportionately higher than the area maximum.[91] The

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foreclosing the ultimate adoption of such standards. The producers' motion was premised on the desirability of national standards, and explicitly recognized that prices and differences in quality "are so inextricably tied together that they cannot be meaningfully separated one from the other." 9 Joint Appendix 69d, 71d. We cannot hold that the Commission denied the producers fair notice that it might as a consequence of these hearings impose quality standards.

[90] It is argued vigorously that the standards adopted by the Commission lack substantial basis in the record. Emphasis is placed chiefly on the examiner's statement that it would be "probably impossible on this record . . . to establish a complete set of differentials for the various value and quality characteristics of gas." 34 F. P. C., at 368. See also 1 Joint Appendix 123–136. We believe this statement to be inapposite to the issues before us. The Commission did not create such a set of differentials; it merely posited a series of pipeline standards, and placed the responsibility for reaching specific price differentials upon the parties to each sale. It indicated that it would accept any agreement that appeared to be a good-faith effort to determine the pertinent processing costs. It should be noted that at least one witness testified that negotiation among the relevant parties is the proper method for measurement of processing costs. See 3 Joint Appendix 983. Further, various estimates of quality adjustments were provided by witnesses before the examiner. See 5 *id.*, at 1769–1771, 1867–1899, 1907–1908. We conclude that the Commission's findings on these questions are adequately supported by the record.

[91] Commissioner O'Connor argued forcefully in a concurring and dissenting opinion that the Commission's adoption of high and low

Commission conceded that it could not precisely determine the revenue consequences of these adjustments, although its opinion denying applications for rehearing provided various estimates. It appears to be conceded that the quality of gas produced in the Basin is characteristically lower than the Commission's standards, and that the standards are therefore likely to be more significant than they might be in other producing areas.

The producers urge, and the Court of Appeals held, that this arrangement is doubly erroneous. First, it treats as a risk what properly is a cost, and thus evades the necessity of appropriate findings on the revenue consequences of the quality adjustments. Second, it reduces the rate of return actually permitted individual producers to an unascertainable figure of less than 12%, and thus prevents an accurate appraisal of its sufficiency. We find both suggestions unpersuasive.

We cannot now hold that it was impermissible for the Commission to treat the quality adjustments as a risk of production. It must be recalled that the Commission

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Btu standards was unfair to producers. 34 F. P. C., at 267–268. The Court of Appeals indicated that it was unable to understand the reasons for the dual standard. 375 F. 2d, at 31. We agree that the Commission might have dealt more clearly with these questions, but we have found no basis on which we can set aside its judgment. The Commission found that, by prevailing practice, the minimum Btu standard in the Permian Basin was 1,000 per cubic foot; the average Btu content is, however, in a range of 1,034 to 1,042 per cubic foot. 34 F. P. C., at 223, 267–268. It concluded that it would require downward price adjustments only where Btu content is less than 1,000, and permit upward adjustment only where it exceeds 1,050 per cubic foot. Although this is evidently less favorable to producers than other possible formulae, we have found no evidence that suggests that it is arbitrary, or an abuse of the Commission's authority. Compare Initial Decision, *Area Rate Proceeding (Southern Louisiana Area), No. AR61–2,* issued December 30, 1966, at 180–183.

was in this first area rate case unable to determine with precision the average amount of the necessary price reductions, and that it thus would have been difficult to have included them as costs, as the Court of Appeals suggested. Further, we recognize that the Commission's method, premised on agreement between the parties to each sale, has at least the advantage of requiring discrete and accurate adjustments for each transaction. Finally, as we shall show below, treatment of these adjustments as risks of production did not in this case result in inadequate findings, and does not prevent proper appraisal of the rate of return permitted by the Commission. In any event, the Commission's discretion in such matters is necessarily broad, and its choice cannot be said to have abused its discretion.

The Commission estimated in its opinion denying applications for rehearing that the quality adjustments would result in average price reductions of from 0.7¢ to 1.5¢ per Mcf. In turn, the amount of these adjustments will be reduced by price increases for high Btu content, and by revenue from plant liquids.[92] We believe that, in the circumstances presented, these estimates were adequate. The Commission's information about existing contracts was evidently not sufficiently complete to permit precise calculations from previous experience. Moreover, since the adjustments are to be, in the first instance, the product of agreement between the parties,

[92] The Commission pointed out that sellers of gas-well gas receive payments for "liquid hydrocarbons extracted from the gas by the pipelines." 34 F. P. C., at 1073. These payments may amount to 0.6¢ to 0.8¢ per Mcf in the Permian Basin. *Ibid.* An allowance of only 0.2¢ per Mcf was incorporated by stipulation in the new gas-well gas rate. *Id.*, at 388. Moreover, producers receive "substantial payments" for liquids extracted from oil-well gas sold under Spraberry contracts. *Id.*, at 1073. And see n. 111, *infra*. Compare 34 F. P. C., at 208–209.

a dimension of uncertainty is necessarily created. Depite these difficulties, the Commission provided reasonably specific estimates of the range of adjustments that it believed would result. We are entitled now to take notice that these are confirmed by subsequent events.[93] We hold that the Commission's promulgation of quality standards was accompanied by adequate findings as to their revenue consequences.

The Commission did not provide specific findings as to the effect of these revenue adjustments upon the producers' rate of return. This was an unfortunate omission, but it does not preclude evaluation of the Commission's conclusions. It would appear, and counsel for the Commission have estimated, that the rate of return "on average quality" natural gas sold in the Permian Basin might, after quality adjustments, yield "as little" as 10 to 12% on equity.[94] These figures presumably must be adjusted upward for sales of pipeline quality gas, sales of gas with a high Btu content, and revenue from plant liquids. Even as adjusted, however, the aggregate return permitted to producers will apparently exceed only slightly that customarily allowed pipelines, for the quantities of pipeline quality and high Btu content gas produced in the Permian Basin are evidently quite small. Nevertheless, the record before the Commission contained evidence sufficient to establish that these rates, as adjusted, will maintain the industry's credit and continue to attract capital. Although the Commission's position might at several places usefully

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[93] The Commission's order accepting quality statements filed by producers in the Permian Basin indicates that the adjustments average 0.78¢ per Mcf for old gas-well gas, and 0.86¢ per Mcf for old residue gas. 37 F. P. C. 52, 53.

[94] Brief for the Federal Power Commission 141.

be clarified,[95] the producers have not satisfied the "heavy burden" placed upon those who would set aside its decisions.[96]

V.

We have concluded that the various segments of the Commission's rate structure do not separately exceed or abuse its authority. Nonetheless, certain of the producers have argued vigorously that the aggregate revenue permitted by the rate structure is, or might be, inadequate. They urge that the imposition of maximum prices computed from composite costs reduces contract prices to a maximum premised on a cost average; and they conclude that the Commission has therefore denied them the revenue necessary for appropriate programs of exploration and development. Related questions troubled the Court of Appeals. It held that the Commission must, under *Hope,* place in balance revenue and requirements, and that findings must be provided that will permit reviewing courts to assess the skill with which the Commission has employed its scales. Although we

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[95] The Commission emphasized that because exploration "is fraught with uncertainties foreign to its transmission," a "greater return" should be allowed. 34 F. P. C., at 201. Nonetheless, as we have found, the rate of return actually permitted by the Commission, after allowance for quality and other adjustments, does not substantially exceed that permitted to pipelines. We note, however, that the risks incidental to exploration have not always been thought to be greatly in excess of those incidental to transmission. See Kitch, *supra,* at 201. And see on the insurance principle, Nelson, Percentage Depletion and National Security, reprinted in Federal Tax Policy for Economic Growth and Stability, papers submitted to the Joint Committee on the Economic Report, 84th Cong., 1st Sess., 463, 470 (Comm. Print 1955). See also Dirlam, Natural Gas: Cost, Conservation, and Pricing, 48 Am. Econ. Rev. 491, 498. And compare 3 Joint Appendix 907.

[96] *FPC* v. *Hope Natural Gas Co., supra,* at 602.

sustain, for reasons stated above, the Commission's rate structure, we believe it proper to examine these additional contentions.

Three interrelated questions are pertinent. First, the adequacy of the Commission's aggregate revenue findings must be assessed. Second, we must consider the producers' contentions that the Commission has significantly underestimated the deficiencies of present programs of exploration. Finally, we must determine whether the Commission's use of averaged costs has created a rate structure that is unjust and unreasonable in its consequences.

We turn initially to the adequacy of the Commission's revenue findings. It must be emphasized that we perceive no imperative obligation upon the Commission, under either the Natural Gas Act or the decisions of this Court, to provide an apparatus of formal findings, in terms of absolute dollar amounts, as to aggregate revenue and aggregate revenue requirements. It is enough if the Commission proffers findings and conclusions sufficiently detailed to permit reasoned evaluation of the purposes and implications of its order. Compare *Chicago & N. W. R. Co.* v. *A., T. & S. F. R. Co.*, 387 U. S. 326, 345–347. As we shall show, the Commission's revenue findings were not, in the circumstances of these proceedings, unduly imprecise. The ambiguities about which the Court of Appeals expressed concern were two. First, the court faulted the Commission for the imprecision of its findings as to the revenue consequences of the quality and Btu adjustments. We have already found adequate the Commission's estimates of the necessary price reductions. Second, the court stated that the rate structure could not be accurately assessed, since the Commission has incorporated in its calculations both cost and noncost factors; it believed that "the Commission

decision rides two horses and we have no way of knowing the outcome of the race." 375 F. 2d, at 34.

We find this unpersuasive. Although the Commission's exposition of these questions might have been more carefully drawn, it has quite appropriately incorporated in its calculations factors other than producers' costs.[97] Cost and noncost factors do not, as the Court of Appeals supposed, race one against the other; they must be, as they are here, harnessed side by side. The Commission's responsibilities necessarily oblige it to give continuing attention to values that may be reflected only imperfectly by producers' costs; a regulatory method that excluded as immaterial all but current or projected costs could not properly serve the consumer interests placed under the Commission's protection. We have already considered each of the points at which the Commission has given weight to noncost factors, and have found its judgments consistent with the terms and purposes of its statutory authority.[98] There is no reason now to

[97] The Commission first emphasized that "we make clear that we do not confine ourselves to a cost calculation in determining just and reasonable rates." 34 F. P. C., at 190. It later said that "there is no justification in this area for any adjustment of a cost-determined ceiling price." It added that "no such [noncost] adjustments are required in the Permian Basin." *Id.*, at 207. Yet it is quite plain that the Commission's rate structure is, and was intended to be, significantly influenced by "non-cost considerations." Unfortunately, the Commission never paused to reconcile these general observations with the specific terms of its rate structure.

[98] We understand the principal points at which the Commission employed noncost factors to be four. It used the logic of functional pricing to justify both its two-price rate structure and its selections of sources of cost data. Second, it explained its imposition of a single maximum rate upon all old gas by, among other reasons, the importance of a relatively uncomplicated rate structure. Third, the Commission justified its adoption of a temporary period of price restriction by the exigencies of area regulation. Fourth, the Commission based its calculation of the rate of return upon risk factors that it did not directly reduce to cost components.

return these cases to the Commission for clarification of these issues.[99]

Nor can we hold that the Commission has underestimated the deficiencies of current programs of exploration. The producers' argument has been uniformly premised upon the assertion that the ratio of proved recoverable reserves to current production is an accurate index of the industry's financial requirements. The producers urge that this ratio has dangerously declined,[100] and conclude that any reduction of prevailing field prices will jeopardize essential programs of exploration. There is, however, substantial evidence that additions to reserves have not been unsatisfactorily low,[101] and that

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[99] We are cognizant, as presumably is the Commission, of the forceful argument that the computation of rates from costs is ultimately circular. See Kitch, *supra,* at 195–196; compare Kahn, *supra,* at 510–514. See also Eckstein, *supra,* at 129–131. The Commission has not, however, relied simply upon cost computations, and we have found no basis on which we could now properly set aside the Commission's orders. We assume that the Commission will continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate-making orders. Nothing under the Act or the cases of this Court compels the Commission to reduce its regulatory functions to self-fulfilling prophecies. Compare *City of Detroit* v. *FPC,* 230 F. 2d 810, 818.

[100] The ratio "has been as high as 32.5 to 1 in 1946 and it has steadily declined to about 18.7 to 1 in 1963 . . . ." 34 F. P. C., at 183. At year end of 1965, proved recoverable reserves totaled 286.5 trillion cubic feet; withdrawals in 1965 were 16.25 trillion cubic feet. American Gas Association, 1966 Gas Facts 1 (1966). These questions may be traced in testimony at 1 Joint Appendix 20–34, 76–95, 97–111, 352–360; 2 *id.,* at 459–471. See also Hooley, *supra,* 5–25.

[101] In 1965, "[g]ross additions to reserves aggregated 21.3 trillion cubic feet, the third highest since the Natural Gas Reserves Committee initiated its reports in 1946." American Gas Association, *supra,* at 5. Further, "[o]ver the past twenty years, gross addi-

recent variations in the ratio of reserves to production are of quite limited significance.[102] Nothing in the record establishes as proper or even minimal any particular ratio.[103] We do not suggest, nor did the Commission,[104] that the Commission should not continuously assess the level and success of exploration, or that the relationship between reserves and production is not a useful benchmark of the industry's future. We hold only that the Commission here permissibly discounted the producers'

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tions have resulted in more than 343 trillion cubic feet being added to the nation's proved reserves of natural gas. During this same period, net production of natural gas totaled 207 trillion cubic feet." *Ibid.* See for similar evidence, American Gas Association, 1967 Gas Facts 5 (1967). It is, however, proper to recognize that the ratio of new discoveries to annual net production has generally declined since 1946, although the decline is neither steep nor consistent. See 34 F. P. C., at 319; 1 Joint Appendix 76–95, 97–111. And see generally Cram, Introduction to the Problem of Developing Adequate Supplies of Natural Gas, Southwestern Legal Foundation, Economics of the Gas Industry 1 (1962).

[102] It is pertinent that the American Gas Association in 1957 observed of the reserves-to-production ratio that so "long as new additions exceed production there need be little cause for concern about such an hypothetical ratio." 1957 Gas Facts 6 (1957). See for similar evidence 34 F. P. C., at 309–317.

[103] The producers have argued vigorously that 20 to 1 is the minimum reserves-to-production ratio. There is, however, ample evidence to support the Commission's judgment that lower ratios are permissible. One intervenor witness forcefully described the concern for that ratio as a "neurotic preoccupation." 1 Joint Appendix 357. See also *id.*, at 352–360; and 2 *id.*, at 459–471. These questions are usefully discussed in Terry, Future Life of the Natural Gas Industry, Southwestern Legal Foundation, *supra*, at 275, 284–285; and in Netschert, Economic Aspects of Natural Gas Supply, *id.*, at 27, 56–68.

[104] Indeed, the Commission described the adequacy of reserves as "an important factor in our determination here," and said that it will "continue to be an important factor in reviewing area rates in the future . . . ." 34 F. P. C., at 185.

reliance upon this relationship to establish the inadequacy of its rate structure.

Finally, we turn to the contention that these area maximum rates were derived from averaged costs, and therefore cannot, without further adjustment, provide aggregate revenue equal to the producers' aggregate requirements. The producers that support the judgments below emphasize that revenue in 1960 from all jurisdictional sales in the Permian Basin averaged 12.72¢ per Mcf.[105] They contend that this revenue will, under the Commission's order, be reduced by the amount of any necessary quality deductions, by refunds, and by loss of revenue from abrogation of contract prices above the area maximum rates. The producers conclude that the Commission's rate structure will necessarily cause revenue deficiencies, measured by the difference between actual average revenue (12.72¢ less these adjustments) and 14.5¢ per Mcf, the rate assertedly found by the Commission to be just and reasonable for flowing gas. They urge that the Commission was properly obliged to balance revenue and costs either by increasing the area minimum rate, or by placing the area maximum rates above average costs.

The inadequacies of this reasoning are several. First, it neglects important characteristics of the rate structure. We understand the Commission, despite certain infelicities of its opinion,[106] to hold that the just and reasonable rate for old gas not of pipeline quality is 14.5¢ per Mcf,

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[105] There appears to be some uncertainty about the appropriate figures. Compare Brief for the Federal Power Commission 96. The producers' use of 12.72¢ per Mcf is supported by 7 Joint Appendix 538e.

[106] Certain of the producers urge that the Commission described 14.5¢ and 16.5¢, unadjusted for quality deficiencies, as the just and reasonable rates for the Permian Basin. This ellipsis may sometimes have entered the Commission's opinion, but on fair reading its intentions seem entirely clear. See 34 F. P. C., at 239.

less the cost of processing necessary to raise it to pipeline quality. The Commission's net just and reasonable rate for such gas is therefore 13.0¢ to 13.8¢, and not 14.5¢ per Mcf.[107] Further, average unit revenue will not be simultaneously reduced, as the producers have suggested, by refunds and by abrogation of above-ceiling field prices. As to the past, the two are in large part synonymous; as to the future, only the latter will be applicable.

Moreover, the Commission's computation of its area rates was not intended to reflect with complete fidelity either the producers' average costs or their sources of revenue. First, the actual average unit costs of casinghead and residue gas are substantially lower than the average unit costs of flowing gas-well gas;[108] yet the maximum rate for all associated and flowing gas was derived entirely from the latter. It follows that the producers' net revenues from sales of casinghead and residue gas will prove higher than the return formally permitted by the Commission. Second, producers receive significant payments for liquid hydrocarbons extracted by the pipelines during their processing of gas-well gas.[109] The maximum rate for new gas-well gas

[107] It is pertinent to reiterate that the Commission has recently calculated the actual adjustments required by the quality statements filed by producers in the Permian Basin through August 31, 1966, as 0.78¢ per Mcf for old gas-well gas and 0.86¢ per Mcf for old residue gas. *Area Rate Proceeding (Permian Basin Area)*, 37 F. P. C. 52, 53.

[108] The Commission stated that "the evidence in the record makes clear that with respect to casinghead gas and residue gas derived therefrom (which together make up by far the largest share of the Permian gas subject to quality adjustments) the costs are substantially below the 14.5 cents per Mcf ceiling price." 34 F. P. C., at 1072. And see *id.*, at 356–360.

[109] The Commission pointed out that there was evidence that suggested that these payments average 0.6¢ to 0.8¢ per Mcf for gas-well gas in the Permian Basin. 34 F. P. C., at 1073.

evidently takes into account only part of these receipts, and that for old gas-well gas disregards altogether this source of additional revenue.[110] Third, some 20% of all the gas sold under the Commission's jurisdiction in the Permian Basin is controlled by Spraberry contracts, by which producers are paid for liquids processed by the pipelines from oil-well gas.[111] Much of the gas sold at prices below the applicable area maximum rate is governed by such contracts.[112] This source of revenue was not incorporated in the Commission's calculation of the maximum rate for oil-well gas. The Commission was unable to compute with precision the revenue obtained by producers from these disparate sources, but it estimated it to be "substantial." 34 F. P. C., at 1073.

Finally, the producers have ignored the limits of the Commission's statutory authority. This Court has held, under the Federal Power Act, that the Commission may not abrogate existing contractual arrangements unless the contract price is so "low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its

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[110] The new gas-well gas rate includes a credit of 0.2¢ per Mcf for plant liquids. 34 F. P. C., at 197, 1073. This figure was determined by stipulation. *Id.*, at 388. No such credit was included in the flowing gas rate.

[111] The Spraberry, or El Paso, contract is one which provides "for the purchase of casinghead gas by a pipeline which processes the gas, pays the producer a percentage of the proceeds from the sale of the extracted liquids, plus a fixed price for the residue gas delivered to the pipeline." 34 F. P. C., at 208. The presiding examiner would have essentially prohibited such contracts in the Permian Basin, but the Commission declined to do so. Nonetheless, it asserted jurisdiction, we think properly, over the sale of casinghead gas under the contract. The Commission indicated that the producers' revenue from the contracts for the extracted liquids is "substantial." 34 F. P. C., at 1073.

[112] Compare 34 F. P. C., at 209 and 1072.

service, cast upon other consumers an excessive burden, or be unduly discriminatory." *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355. It is not enough, the Court there held, that the contract price permits less than a fair return; the Commission may not, absent evidence of injury to the public interest, relieve a regulated company of "its improvident bargain." *Ibid.* The pertinent provisions of the Federal Power Act "are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act." *Id.*, at 353. It follows that the Commission was here without authority to abrogate existing contract prices unless it first concluded that they "adversely affect the public interest." And see *FPC* v. *Tennessee Gas Co.*, 371 U. S. 145, 153. The Commission found that field prices of less than 9¢ per Mcf had such consequences, but it declined so to hold for all prices less than the two area maximum rates.[113] There was no evidence before the Commission that required a different result, or that would now permit this Court to set aside the Commission's judgment.

It does not, however, necessarily follow that the Commission was forbidden to consider, as it selected maxi-

[113] The Commission's calculation of the minimum rate was, however, left largely unexplained. The Commission clearly found that "the establishment of minimum rates in this case is in the public interest and that the price impact on the consumer will be *de minimis*." 34 F. P. C., at 231. It failed to offer any explanation of its selection of 9¢ as the minimum rate, relying entirely on the examiner's preference for that figure. The examiner adopted two minimum rates: 9¢ per Mcf for residue and gas-well gas, and 7¢ per Mcf for casinghead gas. His calculations were evidently premised on his computation of the revenue standard for the various classes of natural gas. See *id.*, at 369. The composite explanation for the choice of 9¢ as the area minimum rate is thus imprecise. Nonetheless, the Commission reasonably concluded that a minimum rate was imperative, and there is no evidence before us that permits the conclusion that its selection was unjust or unreasonable.

mum rates from within the zone of reasonableness, the aggregate revenue deficiencies that might result from improvident contractual limitations. Within this zone, the Commission is permitted to give weight to the consequences upon producers, and thereby upon supply, of such limitations. Nonetheless, the Commission permissibly declined to make adjustments in the area rates because of prevailing contract prices. It recognized that such adjustments would increase the cost of natural gas to some groups of consumers, in order simply to offset bargains previously obtained by others.

The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity. See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U. S. 332. There was here no evidence of financial or other difficulties that required the Commission to relieve the producers, even obliquely, from the burdens of their contractual obligations. We do not suggest that the Commission need not continuously evaluate the revenue and other consequences of its area rate structures. A principal advantage of area regulation is that it centers attention upon the industry's aggregate problems, and we may expect that, as the Commission's experience with area regulation lengthens, it will treat these important questions more precisely and efficaciously. We hold only that, in the circumstances here presented, the Commission's rate structure has not been shown to deny producers revenues consonant with just and reasonable rates.[114]

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[114] Two additional issues should properly be separately considered. First, the States of Texas and New Mexico have urged that we reconsider *Hope*, and require the Commission to give special weight to the probable effects of its orders on the economies of producing States. We have examined these contentions, but decline to modify the treatment of the similar questions in *Hope*. See 320 U. S., at

VI.

There remain for consideration various additional objections by the producers to the Commission's cost determinations, and to the sources of information from which those determinations were derived. These questions were not decided by the Court of Appeals. Although this Court ordinarily does not review an administrative record in the first instance, *United States* v. *Great North-*

607–614. As we said there, we do not "suggest that Congress was unmindful of the interests of the producing states . . . when it drafted the Natural Gas Act." *Id.*, at 612. But to go as far as Texas and New Mexico now ask "raises questions of policy which go beyond our province." *Id.*, at 614.

Second, the Commission indicated that it would apply these area rates to sales initiated during the pendency of these proceedings. 34 F. P. C., at 237. See order issuing certificates, *id.*, at 418. The effect of this order is to impose these rates as the in-line rate for the Permian Basin for periods prior to the Commission's decision in these proceedings. See generally *United Gas* v. *Callery Properties*, 382 U. S. 223, 226–228. The Court of Appeals found it unnecessary to decide the propriety of this arrangement. 375 F. 2d, at 35–36. Nonetheless, we believe that in the circumstances here presented it is appropriate to resolve this issue without awaiting consideration by that court. Compare *Chicago & N. W. R. Co.* v. *A., T. & S. F. R. Co.*, 387 U. S. 326, 355–356. We hold that the Commission was not forbidden to employ the area rates as the in-line rate for purposes of sales initiated after commencement of its proceedings, but before its final decision. The area rates were properly calculated as the just and reasonable rates for the Permian Basin for periods subsequent to the periods at issue, on the basis of cost factors believed to be stable throughout these periods. As the Commission observed, to prevent their use as the in-line rate "would require an unending succession of Section 5 area rate proceedings, each covering only the sales instituted prior to the institution of the proceeding." 34 F. P. C., at 237. We need not, however, determine for what further periods or in what other circumstances the Commission may use unadjusted area rates as in-line rates. Orders involving § 7 proceedings commenced after the Commission's decision in these proceedings were not before the Commission, and are not now before the Court.

ern R. Co., 343 U. S. 562, 578; *Seaboard Air Line R. Co.* v. *United States*, 382 U. S. 154, 157; there are persuasive reasons now to reach and decide these remaining issues. Almost eight years have elapsed since the Commission commenced these proceedings; we are convinced that producers' rates may be fairly and effectively regulated only after this and the other area proceedings now before the Commission have been successfully terminated. These issues were briefed and argued at length before this Court; very extended additional proceedings would doubtless be necessary in order to review them yet again.

Moreover, the circumstances here parallel closely those in *Chicago & N. W. R. Co.* v. *A., T. & S. F. R. Co.*, 387 U. S. 326. It was there said that the "presentation and discussion of evidence on cost issues constituted a dominant part of the lengthy administrative hearings, and the issues were thoroughly explored and contested before the Commission. Its factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry. Our previous description of the Commission's disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment." *Id.*, at 356. This reasoning is entirely applicable to the circumstances presented here; we hold, as did the Court there, that no useful purpose would be served by further proceedings in the Court of Appeals, and that there is no legal infirmity in the Commission's findings.[115]

[115] It is, however, proper to take special notice of various arguments that have been vigorously pressed by certain of the producers. First, it is urged that the Commission should have included an allowance for federal income taxes in the rate for new gas-well gas. It appears that the producers originally presented no evidence supporting such an allowance, and that producer witnesses did not include such costs in their computations. Further, there was evi-

VII.

Lastly, we reach questions of the validity of the refund obligations imposed by the Commission's orders. Two categories of refunds were created. First, producers must return amounts charged in excess of the applicable area rates, including quality and Btu adjustments, for periods following September 1, 1965, the date of effectiveness of the Commission's order. 34 F. P. C., at 243. The Commission imposed interest of 7% upon these refunds.[116] Second, producers must refund amounts collected in excess of the applicable area rates, including quality and Btu adjustments, during previous periods in which their prices were subject

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dence that the computation of such an allowance would be difficult, see 3 Joint Appendix 992, and that, in any event, the producers will incur "no Federal income tax liability at any return up to 15 percent." 34 F. P. C., at 206. In these circumstances, we think that the Commission did not err in excluding such an allowance.

Second, it is urged that the Commission failed to include an adequate allowance for exploration costs. We must emphasize that we perceive no obligation upon the Commission, under the Constitution or the Natural Gas Act, to permit recovery of all exploration costs, regardless of their amount and prudence. Although other methods of computing these costs might have been used by the Commission, see *id.*, at 192–193, we have found nothing that would properly permit reversal of the Commission's judgment.

Finally, Sun Oil asserts that it was at various points denied due process. It is enough to say that we have examined these contentions, and find them without substance.

[116] We note that the terms of the stay entered by the Court of Appeals on January 20, 1966, would reduce this rate of interest to 4½%. See 12 Transcript of Record 12, 13–14. The court offered no explanation of this modification of the Commission's orders. We perceive no basis for the court's order, particularly since the question was evidently not raised in the producers' applications to the Commission for rehearing. See § 19 (b), 15 U. S. C. § 717r (b). And see *Wisconsin* v. *FPC*, 373 U. S. 294, 307. We hold that the Commission's order imposing interest of 7% must be restored.

to refund under § 4 (e). Such obligations ultimately arise from filings by the producers under § 4 (d) for increases in existing price schedules. The appropriate interest on these refunds was held to be that specified in each § 4 (e) proceeding.[117] Refunds in both categories were, under the Commission's order, to be measured by comparison of individual company price schedules with the applicable area rates.

The Court of Appeals initially sustained the Commission's refund orders. 375 F. 2d, at 33. On petitions for rehearing, however, the court held that "no refund obligation may be imposed for a period in which there is a group revenue deficiency." *Id.*, at 36. The court believed this to be an essential corollary of the Commission's asserted obligation to bring into balance group costs and group revenues; it would have permitted the Commission to order refunds only in periods in which aggregate revenue is found to exceed aggregate revenue requirements, and only as to the amount of the excess. The Commission was expected to apportion any refunds "on some equitable contract-by-contract basis." *Ibid.*

We find the court's reasoning unpersuasive. The Commission may, in the course of its examination of the producers' financial positions, consider the possible refund consequences of its rate-making orders; but its power to order refunds is not limited to situations in which group revenues exceed group revenue requirements. Area regulation offers a more expeditious method for the calculation of just and reasonable rates, and it will necessarily more rigorously focus the Commission's attention upon the producers' common problems. It does not, however, lessen the significance, or modify the

[117] We understand these interest rates to be in some cases 6% and in others 7%. Brief for the Federal Power Commission 169.

incidents, of findings that specific rate levels are or are not just and reasonable within the meaning of §§ 4 (a) and 5 (a). A rate found to be unjust and unreasonable is declared by § 4 (a) to be unlawful; if the rate has been the subject of a rate schedule modification under § 4 (d), the Commission is empowered by § 4 (e) to order its refund. We can see no warrant, either in the Act or in the terms of the Commission's orders, now to impose any additional limitations upon the Commission's authority; we hold that the Commission's discretion is not constricted in the fashion described by the Court of Appeals.

Wisconsin v. *FPC*, *supra*, does not require a different result. It did not, as the Court of Appeals evidently supposed, create any imperative procedure for the disposition of refunds from locked-in rates.[118] The Commission there held that, given its decision to begin a system of area regulation, it was not in the public interest "to reopen these proceedings, to determine a cost of service on the basis of completely new evidence and to attempt to determine rates on the basis of Phillips' individual cost of service." 24 F. P. C., at 1009. No just and reasonable rates had been, or could then have been, calculated for Phillips' sales in the relevant periods. The Commission did not urge,[119] and this Court did not hold, that Phillips' revenue deficiencies imposed a limitation upon the Commission's authority to require refunds; the Court merely sustained the Commission's refusal, in the

[118] A locked-in rate is one in which an "increased rate is later superseded by a further increase . . . ." It is thus "effective only for the limited intervening period, called the 'locked-in' period, and retains significance in § 4 (e) proceedings only in respect of its refundability if found unlawful." *Wisconsin* v. *FPC*, *supra*, at 298, n. 5.

[119] See Brief for the Federal Power Commission in Nos. 72, 73, 74, October Term, 1962, 48–53.

circumstances there presented, to pursue further a lengthy and burdensome series of § 4 (e) proceedings. See also *Hunt Oil Co.*, 28 F. P. C. 623; and *Wisconsin* v. *FPC*, *supra*, at 306, n. 15.

The Commission reasonably concluded that the adoption of a system of refunds conditioned on findings as to aggregate area revenues would prove both inequitable to consumers and difficult to administer effectively. Such arrangements would require consumers to accede to unjust and unreasonable prices merely because other prices, perhaps ultimately benefiting other consumers, had proved improvident. Nor would these arrangements necessarily serve the interests of the improvident producers; they might merely permit more prudent competitors to escape refunds on concededly unlawful prices.[120] We hold that the Commission's refund orders do not exceed or abuse its statutory authority.[121]

The motions for leave to adduce additional evidence are denied, the judgments of the Court of Appeals are affirmed in part and reversed in part, as herein indicated, and the cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

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[120] Compare *FPC* v. *Tennessee Gas Co.*, 371 U. S. 145, 152–153.

[121] We note that Mobil and others have argued vigorously that the Commission's refund formulae would impose obligations to refund amounts below the "last clean rate." The latter is a rate established by a final permanent certificate unconditioned by a refund obligation under either § 7 or § 4 (e). The Commission concluded that it need not reach this question since "no such situation has been presented as resulting from our order herein." 34 F. P. C., at 1074–1075. And see *Gulf Oil Corp.*, 35 F. P. C. 375. Given the Commission's postponement of the question, we intimate no views on the proper limitations of the Commission's authority in this regard.

MR. JUSTICE DOUGLAS, dissenting.

I.

What the Court does today cannot be reconciled with the construction given the Natural Gas Act by *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602. In that case we said, in determining whether a rate had been properly found to be "just and reasonable" under the Act, that

(1) "it is the result reached not the method employed which is controlling";

(2) it is "not theory but the impact of the rate order which counts";

(3) "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end."

The area rate orders challenged here are based on averages.[1] No single producer's actual costs, actual risks, actual returns, are known.

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[1] In its effort to determine costs of production, the Commission sent out questionnaires (Appendices A, B, and C), to 458 producers in the Permian Basin area, 361 of which were named respondents in these proceedings. Appendices B and C inquired as to production costs; Appendix A covered drilling costs. Appendix B was a comprehensive questionnaire designed for major producers, while Appendix C was a simplified form for small producers (those with under 10,000,000 Mcf in nationwide jurisdictional sales in 1960). Small producers, however, could answer either Appendix B or C.

The Commission received complete responses on Appendix B from 67 producers, of which 25 were small producers. Responses to Appendix C were filed by 105 small producers. (Some of the responses represented composite data for more than one company.) The Commission excluded the Appendix C replies from consideration. 34 F. P. C. 159, 213–214.

The Commission's staff used these responses to develop a composite cost of service study. The staff arranged the Appendix B replies on various charts, arraying the data from high to low in respect to various categories (*e. g.*, total unit costs and allow-

The "result reached" as to any producer is not known.

The "impact of the rate order" on any producer is not known.

The "total effect" of the rate order on a single producer is not known.

It is said, however, that if any producer is aggrieved, it may apply for relief and if it fails to obtain relief it can resort to the courts. But unless we know the standards which will govern in case it applies for relief, we are, with all respect, mouthing mere words when we say the

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ances, cash expense unit costs). Then, weighted cost averages were computed—*i. e.*, the replies on Appendix B were given a weight proportional to the volume Mcf covered by the responses.

In establishing the rate for new gas-well gas, the Commission elected to proceed by determining costs on a national, rather than an area, basis. 34 F. P. C., at 191. It used the Permian questionnaire responses, however, as "a vital source of information," *ibid.*, employing them in determining various components of the final national average cost. See *id.*, at 191–200. The Commission also turned to various "well-recognized and authoritative industry data sources [which] were utilized by various witnesses in the proceeding." *Id.*, at 191. These included such sources as the United States Census Bureau's Census of Mineral Industries for 1958 (wherever this source was used, the figures were trended to 1960 on the basis of the Permian questionnaire data), the 1961 Chase Manhattan Bank's Annual Analysis of the Petroleum Industry, and the 1958 Joint Association Survey (a survey made by three industry trade groups based on questionnaires mailed to all member companies).

Various adjustments were made because of factors such as atypical years or the Permian questionnaire data being disproportionate to the national figures. See 34 F. P. C., at 194–196.

The Commission's rate for flowing gas was based primarily on the questionnaire data which had been compiled by the staff into a composite cost of service study. The Commission in this instance based the ceiling price on Permian Basin area costs, although it used nationwide data in determining exploration and development costs. See 34 F. P. C., at 212–218. And, although the term "flowing gas" was defined to include casinghead gas, residue gas derived therefrom, and old gas-well gas, the Commission used only the costs of the old gas-well gas in determining the area rate. *Id.*, at 208–212.

rate is "just and reasonable." In absence of knowledge, we cannot possibly perform our function of judicial review, limited though it be.

It was urged in the separate opinion of Mr. Justice Jackson in *Hope* that a system of regulation be authorized which would center not on the producer but on the product "which would be regulated with an eye to average or typical producing conditions in the field." 320 U. S., at 652. But the Court rejected that approach, saying that §§ 4 (a) and 5 (a) of the Natural Gas Act contained "only the conventional standards of rate-making for natural gas companies." *Id.*, at 616.

Group regulation of rates is not, of course, novel. It has at times been authorized. The Federal Aviation Act of 1958, § 1002 (e), 72 Stat. 789, 49 U. S. C. § 1482 (e), permits it. And see *General Passenger-Fare Investigation,* 32 C. A. B. 291. Under the War Power, extensive price regulation on a group basis was sustained. *Bowles* v. *Willingham,* 321 U. S. 503, 517–519. The Interstate Commerce Commission has undertaken it, as revealed by the Divisions of Revenue cases. *New England Divisions Case,* 261 U. S. 184; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274; *Chicago & N. W. R. Co.* v. *A., T. & S. F. R. Co.,* 387 U. S. 326. See also § 15 of the Interstate Commerce Act, as amended, 24 Stat. 384, 49 U. S. C. § 15 (3). The requirement in the Divisions of Revenue cases is that the group evidence be "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." 261 U. S., at 196–197. In other words, where the rates fixed will recover the *typical* group cost of service, the individual producer's right to a minimum of its operating expenses and capital charges is protected. Cost of service includes operating expenses and capital charges. *FPC* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 607 (concurring opinion). With

that protection I can see no reason why group rates may not be sanctioned here. But more is required than the Commission undertook to do in these cases.

In the present cases the Commission found averages; but there are no findings as to the typicality and representative nature of those averages.[2] We certainly cannot

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[2] Nor did the Commission discuss the distribution of the data within the grouping being considered—that is, matters of the concentration, symmetry, and uniformity of the data.

The Commission asserts in this Court that "while producer costs vary widely from year to year on an individual-company basis, in the long run the costs of most producers tend to approximate the industry average." In support of this assertion, it cites record testimony and refers to the existence of fairly stable industry averages for drilling costs of successful wells as compared with erratic figures for individual companies. Apart from the fact that not all of the testimony cited stands for the proposition stated by the Commission, but indicates at most only that there is less instability in individual producers' costs over time rather than that they tend to average out, there was conflicting testimony on the point of representativeness offered by a witness for the Sun Oil Company, who showed that certain averages were not representative of the basic data because the distribution of the data was so widely spread and skewed from the *mean*. The fact that there were no comprehensive cost data suitable for supplying all the necessary elements of a cost study (see 34 F. P. C., at 191) does not excuse the Commission from finding whether the data it chose to use were *typical and representative*. In fact, the necessity of making such a finding is accentuated, because of the number of different sources entering into the computation of virtually all of the individual cost components. See 34 F. P. C., at 191–207, 212–218.

The Commission stated that it would use national rather than area data in arriving at a cost for new gas-well gas, noting: "It may be that in some areas production costs may vary sufficiently from the national average to warrant a different treatment but on the record in this case we agree that cost of new gas-well gas should be determined on the basis of nationwide data." 34 F. P. C., at 191. Since the Commission was discussing the use of *area* versus *national* costs, that statement at most suggests only that the Permian

take judicial notice that the averages are typical. Mr. Justice Brandeis in the leading Divisions of Revenue case said that "averages are apt to be misleading" and they cannot be accepted "as a substitute for typical evidence." 265 U. S., at 291. Cf. *American Motors Corp.* v. *FTC*, 384 F. 2d 247, 251–259, 260–262 (C. A. 6th Cir. 1967).

The Commission found no *median*. Moreover, as we observed in another context, it did not find what was "the average cost" of groups made up of individual members who have "a close resemblance" when it comes to the "essential point or points which determine the

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Basin composite costs did not vary sufficiently from the national average costs to warrant not using the latter, rather than that the Commission was comparing the national average with *individual* producer costs in the Permian Basin.

Perhaps for a group as large and diversified as that involved in this case, typical and representative averages cannot be computed. Hunt Oil Company presses this point strongly, contending that wide variations in unit costs are an inherent characteristic of gas and that a uniform ceiling rate fixed at the average composite cost level is unlawful *per se* because of the wide disparity in costs among different categories of gas as well as among different producers. The Commission itself noted this fact of wide variation in individual costs as part of its justification for basing costs on overall producer experience (see 34 F. P. C., at 179); but, as pointed out, it failed to go forward and determine whether the averages used to construct this overall producer experience were typical and representative. If they were not, then perhaps the Commission could have subdivided the group until it arrived at groupings whose members possessed essentially similar characteristics. Cf. *United States* v. *Borden Co.*, 370 U. S. 460, 469. This would not mean that the Commission would in effect be returning to an individual producer regulatory method; rather, the Commission could stop the subdivision at that point where group averages became typical and representative. But, as this case now stands, the Commission has not made the necessary findings; and, of course, this Court, lacking the required expertise, cannot undertake to supply those findings for the Commission, nor is it our function to do so. See, *e. g.*, *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274.

costs considered." *United States* v. *Borden Co.*, 370 U. S. 460, 469.

With respect to the cost of new gas-well gas, the Commission did not determine whether the average costs compiled from the questionnaires or derived from industry-wide data were typical or representative.

In finding the cost of flowing gas, the Commission noted that the 1960 level of costs compiled by the staff in large part from the questionnaire responses was "fairly representative of the costs during the three year period ending in 1960" (34 F. P. C. 159, 213) and that "[t]he 1960 test year is . . . typical of current and future costs of the flowing gas . . . ." *Ibid.* This reference to "representative" and "typical" costs, however, dealt only with *the question of time—i. e.,* the staff's use of 1960 data in developing its composite cost presentation was deemed permissible since 1960 was found to be *a typical and representative year.*

The Court professes to find that the Commission adequately determined that the averages it employed were "typical" and "representative." *Ante,* at 802–803, n. 79. But the statements plucked from the Commission's opinion do not support that interpretation.

The Commission also observed, with respect to the questionnaire data, that 42 of the major producers (representing all but one of the major producers in the Permian area) responded on the Appendix B questionnaires. The Commission agreed with the Examiner that "the data provided by the major producers with respect to their Permian production was fully representative of area costs," and that exclusion of the Appendix C returns from small producers would have only a *de minimis* effect. 34 F. P. C., at 214. But although the *data* submitted by the major producers were found to be typical *data for the area,* and I assume also for the major producers in the area, there are no findings whether the *averages*

compiled from the data were *typical or representative of the costs* of those major producers or of other producers in the area.

The Commission's statement that the sources used "in combination provide an adequate basis for the costs we have found" certainly cannot be read as a finding that those sources were "typical and representative." Nor does the fact that the sources were "recognized, published statistical data sources," or "well-recognized and authoritative," mean they also contained typical and representative averages.

An average cost is not only apt to be "misleading"; it may indeed not be representative of any producer.

The Commission allowed a 12% rate of return, the return being "on capital invested in finding new gas well gas." 34 F. P. C., at 306, 343. "Production investment costs" constituted this "capital invested" and were the bases to which the Commission applied the 12% rate to arrive at a return of 5.21¢ per Mcf to be included in the rate base for new gas-well gas. 34 F. P. C., at 197, 204. These "production investment costs" included successful well costs, lease acquisition costs, and the cost of other production facilities. But they were likewise determined on the basis of *averages*. See 34 F. P. C., at 197–198, 295, 377–382.

The average per capita income of a Middle East kingdom is said to be $1,800 a year. But since one man—or family—gets most of the money, $1,800 a year describes only a mythical resident of that country.

The 12% return allowed by the Commission and computed on an average-cost basis may likewise have no relation whatever to the reality of the actual costs of any producer.

One producer's cost, though varying from year to year, may average out at $1 per Mcf. Another's may average out at 5¢ per Mcf. Does that make 52.5¢ per Mcf repre-

sentative of either producer or typical of all producers, or, indeed, typical of any producer, even if the 52.5¢ per Mcf is stable over the entire period of years?

The Commission could follow the lead of the Interstate Commerce Commission and produce rates on a group basis. But it simply has not done so in any rational way.

Averages are apt to take us with Alice into Wonderland. That is one reason why the case should be remanded to the Commission for further findings.

The Commission will allow individual application for relief from these new rates. But it has not prescribed the terms and conditions on which relief will be granted. It has said, however, that an individual producer must show more than that its cost of service is greater than the averages on which the rate is based. 34 F. P. C., at 180.

In a regulated industry there is no constitutional guarantee that the most inefficient will survive. *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170–171.

That assumes, however, an ability to withdraw from the business. But a producer of natural gas may not abandon its existing facilities that supply the interstate market without Commission approval. *United Gas Pipe Line Co.* v. *FPC*, 385 U. S. 83.

The Commission says that a producer will be able to obtain relief to cover its out-of-pocket expenses. 34 F. P. C., at 226. Do they include return, depreciation, depletion, exploration, development, and overhead? The Court of Appeals did not know (375 F. 2d, at 30); and we certainly do not. The remand by the Court of Appeals for further definition was therefore clearly necessary. For even if we need not know the precise impact of the new group rate on each producer at the time of the group rate order, we certainly must know the conditions on which a producer can get relief before we can say that a rate as to it is "just and reasonable."

Although we assume that the Act authorizes group rate-making, we cannot disregard the basic structure of the Act, patterned on the "conventional standards of rate-making" (*FPC* v. *Hope Natural Gas Co., supra,* at 616) and providing in §§ 4 (a) and 5 (a) that all rates of *"any"* natural gas company be "just and reasonable." Beyond the group is the single producer; beyond the community of producers is the individual. The ultimate thrust of the Act reaches the individual producer; and unless we know what the group rate in final analysis does to it or disables it from doing we cannot perform our duty of judicial review.

II.

If we move to the regulation of the group as such and consider the impact of these rate orders on it, we are likewise not able on the present record to perform our function of judicial review.

It is impossible to say whether the proper revenue requirements of the group can be satisfied under this rate order. For the costs represent averages; and there is no way for us to find from the record whether these averages are typical and what the impact of the rates on the group will be.

The error is compounded when the costs used are the purported costs of gas-well gas and do not include the costs of casinghead gas, residue gas derived therefrom, and gas-well gas from combination leases. The Commission concluded that the costs of casinghead gas and residue gas produced therefrom did not exceed the costs for gas-well gas. Yet at the same time it rejected proffered evidence of higher costs of processing gas to remove liquid hydrocarbons. Commission expertise should not be allowed to make its own "facts" to justify the desired result.

Beyond that are the quality adjustments. Upward price adjustments are permitted for Btu content above 1,050 per cubic foot and downward adjustment for Btu content below 1,000. The Commission was concerned with the value of the "energy content of the gas, which in reality is what the consumer is purchasing." 34 F. P. C., at 223.

With that standard in mind it allowed price reductions

(1) where the gas contains more than 10 grains of hydrogen sulphide or 200 grains of total sulphur per Mcf;

(2) where it contains more than .009 pound per Mcf of water;

(3) where it contains more than 3% by volume of carbon dioxide;

(4) where the gas pressure is less than 500 pounds per square inch.

When any of these standards are not met, the applicable ceiling price is adjusted downward by the net cost of processing the gas to bring it up to standard.

Under the Commission's standards about 90% of the flowing gas moving interstate from the Permian Basin is not of the pipeline quality that the Commission has prescribed. 375 F. 2d, at 30. What the costs will be to convert the gas to these new standards is not found in this record. Perhaps this deficiency is due to the fact that the Commission, almost as an afterthought and not with clear, advance notice, decided to deal with detailed quality standards. But without knowing these costs through competent evidence, neither we nor the Commission has any way even to guess at whether the new rates will satisfy the criteria of *Hope*.

III.

The Court approves the Commission's treatment of the quality adjustments as a risk of production. But

whether they be labeled a risk of production or a cost would seem to be irrelevant. That is a matter of semantics as far as the standards of *Hope* are concerned. For the question is whether we can reasonably determine the end result from the computations of the Commission, including both risk and cost factors.

Any unknown cost is a risk. But the Commission should not be permitted to excuse its failure to solicit or proffer appropriate evidence concerning the cost of converting gas into pipeline quality by labeling that cost a "risk." The Court of Appeals recognized this point. See 375 F. 2d, at 31–32, 35. Commissioner O'Connor noted in his opinion concurring in the denial of rehearing that: "To bury the quality impact in our rate of return determination is to overlook the basis for the 12 per cent allowance: comparable return on equity of 10–12 per cent by the far less risky operations of transmission companies." 34 F. P. C., at 1081. And, as one commentator recently observed:

> "The Commission stated that the rate of return also reflected the risk of finding gas of less than pipeline quality—a clever way of avoiding the quality discount problem. Since there was no evidence in the record as to what those discounts would be, one can only say that 'risks' were involved. It is a novel doctrine, indeed, that the rate of return should be adjusted to reflect the risk that the regulatory cost computations are incorrect." [3]

The Court concedes that the lack of specific findings concerning the effect of the quality adjustments upon the rate of return was "an unfortunate omission." *Ante,* at 812. But it proceeds to scratch about for evidence

[3] Kitch, The *Permian Basin Area Rate Cases* and the Regulatory Determination of Price, 116 U. Pa. L. Rev. 191, 201 (1967) (footnote omitted).

to support the Commission. With all respect, there is no competent evidence in the record to permit a meaningful determination of the impact of the quality deductions.[4] The Court of Appeals was clearly correct in

[4] Counsel for the Commission observe in their brief to this Court that "[n]o more precise determination was possible in the state of the record" than the 0.7¢ to 1.5¢ range for the average adjustment for quality predicted by the Commission in its opinion denying rehearing. See 34 F. P. C., at 1073. Counsel also cite to certain record testimony and exhibits to support the Commission's determination of this 0.7¢ to 1.5¢ range.

It should be noted first that the 0.7¢ to 1.5¢ prediction is an *average*. I have already discussed the misleading nature of averages not found to be typical and representative, and those observations are equally pertinent here. Moreover, we have no idea whether the Commission relied in making its prediction on any of the sources cited by Commission counsel to this Court.

In computing the 0.7¢ to 1.5¢ range in its opinion denying rehearing, the Commission apparently relied on Commissioner O'Connor's statement in his concurring opinion to the initial decision that the average adjustment would be between 1.0¢ and 1.7¢, and then adjusted those figures to allow for certain changes made with respect to quality standards in the decision denying rehearing. But at the time of the Commission's initial decision, Commissioner O'Connor did not and could not know the costs incurred by the pipelines in bringing gas up to pipeline quality, for the pipelines' processing costs were not in the record. Commissioner O'Connor based his estimate in large part on contract exhibits, as is evident from his opinion; and he noted that a precise adjustment for quality could not be ascertained from those exhibits. See 34 F. P. C., at 266. His view of the evidence on this point was clearly stated in his opinion concurring in the denial of rehearing, in which he observed that the record "does not permit a meaningful determination of the impact." 34 F. P. C., at 1081.

Commission counsel also note the Examiner's finding that 1¢ represented a reasonable estimate for bringing new gas-well gas up to pipeline quality and 1¢ to 1.5¢ for old gas-well gas. But, as counsel admit, this finding was not made in conjunction with defining pipeline quality standards on which the costs of conforming the quality of the gas would be based. In fact, the Examiner con-

remanding to the Commission for proper findings on this point.

Behind the veneer of the Court's opinion may be an unstated premise that the complexity of the task of regulating the wellhead price of gas sold by producers is both so great and so novel that the Commission must be given great leeway. But the permissible bounds, so far as judicial review is concerned, are passed when guesswork is substituted for reasoned findings, when the Commission can avoid finding "costs" by the convenience of calling them "risks," when rates of return are computed for those mythical producers who happen to meet the "average" specifications.

If the task of regulating producer sales within the framework of the Natural Gas Act is as difficult as the present cases illustrate, perhaps the problem should be returned to Congress. But certainly we do little today to advance the cause of responsible administrative action. With all respect, we promote administrative irresponsibility by making an agency's *fiat* an adequate substitute for supported findings.

IV.

New Mexico and Texas, in which the Permian Basin is located, have comprehensive oil and gas conservation codes.[5] A substantial portion of their taxes on the pro-

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cluded that: "This record does not permit the determination of a complete set of quality and value differentials." 34 F. P. C., at 370.

The percentage calculations translating the 0.7¢ to 1.5¢ range into terms of rate of return, which are relied upon by the Court, were presented by Commission counsel to this Court and do not appear in the Commission's opinion or in the record.

[5] See N. M. Stat. Ann., c. 65 (1953); Tex. Stat. Ann., Art. 6004–6066d (1962). In 1935, Texas, New Mexico, Kansas, Oklahoma, Illinois, and Colorado agreed upon an interstate compact for the conservation of oil and gas. Congress subsequently gave its consent

duction of natural gas within their boundaries goes into school funds. They say that the "public interest" entrusted to the Commission by 15 U. S. C. § 717 (a) includes the interest of the States where the gas is found. They claim that pricing can be disastrous to the producing States and urge the need for threefold findings by the Commission to ensure an adequate supply of natural gas for future use:

> "First, the Commission must determine the quantity of gas needed to constitute an adequate future supply. Secondly, it must make a conclusion as to the level of exploration and development which will produce the needed gas supply. Finally, it must prescribe a rate which will elicit that level of exploration and development."

They argue that where Commission rates are lower than existing contract rates, continued operation is uneconomical in many so-called "stripper fields":

> "Although daily per well production from these fields is relatively low, their combined remaining recoverable reserves nevertheless constitute a considerable percentage of the total reserves for the area which will be forever lost if it becomes necessary to plug and abandon these fields for economic reasons."

The Court of Appeals did not entertain these objections (375 F. 2d, at 18) because it read the *Hope* case as foreclosing them.

Hope, however, did not involve regulation of producers of natural gas, only interstate pipelines. At that

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to the compact on August 27, 1935, for a period of two years. Pub. Res. No. 64, 49 Stat. 939. The compact has been extended by the compacting States, with the consent of Congress, for successive periods without interruption, the latest extension being from September 1, 1967, to September 1, 1969. Pub. L. No. 90–185, 81 Stat. 560.

time, *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, giving the Commission authority over these producers, had not been decided. In *Hope* we assumed that the Act meant what it said in § 1 (b) when it did not extend federal control to the "production or gathering of natural gas." We were not then reviewing a federal order fixing wellhead gas prices for producers. Wellhead gas was not even involved in the *Hope* case. We were concerned there with abuses and overreaching by pipeline companies. We said:

> "If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province." 320 U. S., at 614.

Now that *Phillips* has put the prices of producers under federal control, the interests of the producing States must be considered, appraised, and weighed as an important ingredient of the "public interest." Regulation of wellhead prices by the Commission directly influences the level and feasibility of production, and can significantly affect the producing States' regulation of production. See *Phillips Petroleum Co.* v. *Wisconsin, supra,* at 689–690 (dissenting opinion).[6]

As the Court today says in another context, price in functional terms can be "a tool to encourage" the production of gas. *Ante,* at 760. The effect of price on the regulatory responsibilities of the several States must therefore be weighed, unless contrary to the mandate of the Act regulation of production is to pass into federal hands.

What the merits may be on this issue we do not know. The matter is complicated. For example, it seems

[6] See also H. R. Doc. No. 342, 84th Cong., 2d Sess., 2 (1956).

that the revenues of the processing plants are derived primarily (about 80%) from the liquids which they extract from the casinghead gas, rather than from the sale of the residue gas. We do not know how to appraise the chances that this gas would be flared rather than processed if the price were too low. For example, it might be that the processing plants would continue to purchase and process casinghead gas as long as the revenues from the liquids extracted plus those from the residue gas processed exceeded the cost of gathering, processing, and marketing the gas. As long as there is a market for the residue gas remaining after extraction of the liquids, it might be that the processor would sell it at almost any price rather than flare it, in order to recover at least part of his costs. This assumes, of course, that the processor has already made the investment in equipment necessary to purify the residue gas to make it salable, and that the operating costs of this process are not prohibitive. Conceivably, the price of the residue gas could influence the processing plants in deciding whether to maintain or install the equipment and procedures necessary to make salable quality residue gas as the liquids are being extracted. We do not know how many processors do not now have that necessary equipment or the cost of operating and maintaining that equipment.

If the processor is willing to gather and process the gas because of the value of the liquids extracted, it might be that a producer would be willing to sell its casinghead gas rather than flare it, in order to obtain some payment for the gas. On the other hand, the price of the casinghead gas might well be critical for marginal producers, whose revenues from the sale of casinghead gas justify keeping their oil wells in production. But we have no

evidence concerning how many oil producers in the Permian Basin area could be termed "marginal."

It may be that the posture of *Hope* was the reason why this phase of the case was not developed. Whatever the reason, it must be developed if the interest of the producing States is not by judicial *fiat* to be subjected entirely to complete federal supremacy, contrary to the promise in the Natural Gas Act.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 845 and 901 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 JANUARY 18 THROUGH APRIL 29, 1968.

JANUARY 18, 1968.

Dismissal Under Rule 60.

No. 864. JAMES BLACK DRY GOODS CO. *v.* BOARD OF REVIEW FOR THE CITY OF WATERLOO. Sup. Ct. Iowa. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *George R. Johnson* for petitioner. Reported below: —— Iowa ——, 151 N. W. 2d 534.

JANUARY 22, 1968.

Miscellaneous Orders.

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. Motion to vacate stay of mandate of the United States Court of Appeals for the Ninth Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Arthur Scheiner* and *Harold F. Reis* on the motion for Southwestern Cable Co. *Solicitor General Griswold* for the United States et al., and *Ernest W. Jennes* and *Charles A. Miller* for Midwest Television, Inc., et al. in opposition. [For previous orders herein, see *e. g.*, 389 U. S. 1029.]

No. 897, Misc. BOWENS *v.* REAGAN, GOVERNOR OF CALIFORNIA, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 906, Misc. TURNER *v.* NELSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

No. 180, Misc. In re Disbarment of McCullough. It having been reported to the Court that James M. McCullough of Chevy Chase, State of Maryland, 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 11th day of May, 1967, and this Court by order of June 5, 1967, having suspended the said James M. McCullough from the practice of law in this Court and directed 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 James M. McCullough 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. 866, Misc. McClary *v.* Rodgers, Jail Superintendent. Motion for leave to file petition for writ of habeas corpus denied. *Solicitor General Griswold* for respondent.

No. 546, Misc. Patterson, Warden, et al. *v.* Arraj, Chief Judge, U. S. District Court. Motion for leave to proceed on mimeographed papers granted. Motion for leave to file petition for writ of mandamus denied. *Duke W. Dunbar,* Attorney General of Colorado, and *John E. Bush* and *John P. Moore,* Assistant Attorneys General, for petitioners. *Michael A. Williams* for respondent.

No. 744, Misc. Jupiter *v.* United States District Court for the Northern District of California. Motion for leave to file petition for writ of mandamus denied.

No. 1078, Misc. GONZALES *v.* WARDEN, BROOKLYN HOUSE OF DETENTION. Ct. App. N. Y. Motion for bail denied. MR. JUSTICE DOUGLAS is of the opinion that bail should be granted. *Jack Greenberg, Michael Meltsner, Anthony Amsterdam, James M. Nabrit III, Charles Stephen Ralston* and *Melvyn Zarr* on the motion.

Probable Jurisdiction Noted.

No. 949. KING, COMMISSIONER, DEPARTMENT OF PENSIONS AND SECURITY, ET AL. *v.* SMITH ET AL. Appeal from D. C. M. D. Ala. Probable jurisdiction noted. *MacDonald Gallion,* Attorney General of Alabama, and *Mary Lee Stapp* and *Carol F. Miller,* Assistant Attorneys General, for appellants. Reported below: 277 F. Supp. 31.

Certiorari Granted.

No. 844. MANCUSI, WARDEN *v.* DEFORTE. C. A. 2d Cir. Certiorari granted. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Michael H. Rauch,* Assistant Attorney General, for petitioner. Reported below: 379 F. 2d 897.

No. 889. HOGUE *v.* SOUTHERN RAILWAY CO. Ct. App. Ga. Certiorari granted. *Samuel D. Hewlett, Jr.,* for petitioner. *Charles A. Horsky* for respondent. Reported below: 116 Ga. App. 194, 156 S. E. 2d 412.

Certiorari Denied. (See also No. 815, *ante,* p. 36; No. 895, *ante,* p. 37; No. 502, Misc., *ante,* p. 29; No. 778, Misc., *ante,* p. 38; No. 806, Misc., *ante,* p. 37; and No. 906, Misc., *supra.*)

No. 917. O'CONNOR *v.* O'CONNOR. Super. Ct. N. J. Certiorari denied.

No. 816. SUESS *v.* UNITED STATES; and

No. 845. SCHWENOHA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Teitelbaum* for petitioner in No. 816, and *Samuel Rowe* for petitioner in No. 845. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States in both cases. Reported below: 383 F. 2d 395.

No. 841. MONSANTO CO. ET AL. *v.* CHEROKEE LABORATORIES, INC.; and

No. 842. ROTARY DRILLING SERVICES, INC., ET AL. *v.* CHEROKEE LABORATORIES, INC. C. A. 5th Cir. Certiorari denied. *R. Gordon Gooch* for petitioner Monsanto Co., and *Vernon O. Teofan* and *Jack N. Price* for respondent in No. 841. *James R. Ryan* for petitioners in No. 842. Reported below: 383 F. 2d 97.

No. 856. KENNEY *v.* CALIFORNIA TANKER CO. C. A. 3d Cir. Certiorari denied. *Henry A. Wise, Jr.*, for petitioner. *David T. Dana III* for respondent. Reported below: 381 F. 2d 775.

No. 869. ERLING *v.* PARK DISTRICT OF THE CITY OF BISMARCK. Sup. Ct. N. D. Certiorari denied. *William R. Mills* for petitioner. Reported below: 152 N. W. 2d 401.

No. 878. SCOTT'S, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *John W. Cummiskey* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *George B. Driesen* for the National Labor Relations Board, and *Irving Abramson* and *Ruth Weyand* for International Union of Electrical, Radio & Machine Workers, AFL–CIO, respondents. Reported below: 127 U. S. App. D. C. 303, 383 F. 2d 230.

No. 875. WALKER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *John J. Spriggs, Jr.,* for petitioner. *Robert C. Londerholm,* Attorney General of Kansas, and *J. Richard Foth* and *John K. Sargent,* Assistant Attorneys General, for respondent. Reported below: 199 Kan. 508, 430 P. 2d 246.

No. 884. NORTH CAROLINA *v.* PATTON. C. A. 4th Cir. Certiorari denied. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Andrew A. Vanore, Jr.,* for petitioner. *William W. Van Alstyne* for respondent. Reported below: 381 F. 2d 636.

No. 887. ROYAL TOPS MANUFACTURING CO., INC., ET AL. *v.* DONALD F. DUNCAN, INC. C. A. 7th Cir. Certiorari denied. *Maxwell E. Sparrow* for petitioners. *Owen J. Ooms* for respondent. Reported below: 381 F. 2d 879.

No. 888. LOCALS 107 ET AL., AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* A. DUIE PYLE, INC., ET AL. C. A. 3d Cir. Certiorari denied. *David Previant, Edward Davis* and *Florian Bartosic* for petitioners. *Robert H. Kleeb* for A. Duie Pyle, Inc., et al., and *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, respondents. Reported below: 383 F. 2d 772.

No. 915. GLENS FALLS INSURANCE CO. ET AL. *v.* UNITED STATES FOR THE USE OF NEWTON LUMBER & MFG. CO. ET AL. C. A. 10th Cir. Certiorari denied. *Martin J. Andrew* for Glens Falls Insurance Co., and *Roger T. Tammen* for DMH Enterprises, Inc., petitioners. *Louis Johnson* for respondents. Reported below: 388 F. 2d 66.

No. 892. HASHA ET AL. *v.* FOSTER CATHEAD CO. C. A. 5th Cir. Certiorari denied. *Jack W. Hayden* for petitioners. *James F. Weiler* and *Royal H. Brin, Jr.*, for respondent. Reported below: 382 F. 2d 761.

No. 894. FRIEND ET AL. *v.* TROPIS CO., LTD. C. A. 4th Cir. Certiorari denied. *Sidney H. Kelsey* for petitioners. *John W. Winston* for respondent. Reported below: 382 F. 2d 633.

No. 902. SCIORTINO *v.* ZAMPANO, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *David Goldstein, Jacob D. Zeldes* and *Elaine S. Amendola* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 385 F. 2d 132.

No. 904. UNITED STATES *v.* TRINITY UNIVERSAL INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein, Crombie J. D. Garrett* and *Bennet N. Hollander* for the United States. *Lloyd E. Elliott* for respondents. Reported below: 382 F. 2d 317.

No. 757. DEKALB COUNTY COMMUNITY SCHOOL DISTRICT 428 ET AL. *v.* DESPAIN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Peter Fitzpatrick* and *George Kaye* for petitioners. Reported below: 384 F. 2d 836.

No. 234, Misc. PARKER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Norman H. Anderson,* Attorney General of Missouri, and *John H. Denman,* Assistant Attorney General, for respondent. Reported below: 413 S. W. 2d 489.

No. 896. MASHAK *v.* PASTERNAK. Sup. Ct. Mo. Certiorari denied. *Frank Mashak,* petitioner, *pro se. Jerome F. Duggan* for respondent. Reported below: 428 S. W. 2d 565.

No. 867. BATTAGLIA *v.* UNITED STATES. 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. *Albert J. Krieger* and *Robert Kasanof* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 383 F. 2d 303.

No. 349, Misc. ARGO *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: 378 F. 2d 301.

No. 464, Misc. DIXSON *v.* MONTANA ET AL. Sup. Ct. Mont. Certiorari denied. *Forrest H. Anderson,* Attorney General of Montana, and *James R. Beck,* Assistant Attorney General, for respondents. Reported below: 149 Mont. 412, 430 P. 2d 642.

No. 517, Misc. WOODS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, and *Robert A. Derengoski,* Solicitor General, for respondent. Reported below: 379 Mich. 757.

No. 576, Misc. BERRIEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Sheldon Otis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 371 F. 2d 587.

No. 463, Misc. PRICE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Aaron E. Koota* and *Frank DiLalla* for respondent.

No. 520, Misc. PERRY ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioners. *John T. Corrigan* and *Harvey R. Monck* for respondent.

No. 593, Misc. LISCIANDRELLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 340 F. 2d 243 and 254.

No. 642, Misc. SCHMIDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 380 F. 2d 22.

No. 646, Misc. DOMDOM *v.* ADMINISTRATOR OF VETERANS ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 697, Misc. PINKNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 380 F. 2d 882.

No. 765, Misc. CUNNINGHAM *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Elsbeth Levy Bothe* for petitioner. *Francis B. Burch,* Attorney General of Maryland, and *Lewis A. Noonberg,* Assistant Attorney General, for respondent. Reported below: 247 Md. 404, 231 A. 2d 501.

No. 749, Misc. MATLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 757, Misc. BERTSCH *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Crawford C. Martin,* Attorney General of Texas, and *R. L. Lattimore, Howard M. Fender* and *Gilbert J. Pena,* Assistant Attorneys General, for respondent. Reported below: 376 F. 2d 855.

No. 766, Misc. TANNAHILL *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 102 Ariz. 356, 429 P. 2d 953.

No. 770, Misc. FINNEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 776, Misc. GOLDBERG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frank S. Hogan, H. Richard Uviller* and *Michael R. Stack* for respondent. Reported below: 19 N. Y. 2d 460, 227 N. E. 2d 575.

No. 780, Misc. TRAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner. Reported below: 416 S. W. 2d 417.

No. 781, Misc. PRINCIPE *v.* NELSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 783, Misc. RIVERA *v.* SARD ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondents.

No. 782, Misc. SIMS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 784, Misc. WALLS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 785, Misc. CAULFIELD *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 790, Misc. CRAWFORD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 797, Misc. BAKER *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 799, Misc. ANDERSON *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 800, Misc. STEBBINS *v.* NATIONWIDE MUTUAL INSURANCE CO. C. A. 4th Cir. Certiorari denied. *Roger D. Redden* for respondent. Reported below: 382 F. 2d 267.

No. 801, Misc. CLARK *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 803, Misc. OSWALD *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 804, Misc. ALLEN *v.* WARDEN, BALTIMORE COUNTY JAIL. Cir. Ct. Baltimore County, Md. Certiorari denied.

No. 64, Misc. COLEMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Victor Rabinowitz* for petitioner. *Aaron E. Koota* and *William I. Siegel* for respondent.

MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in the following cases (beginning with No. 754, Misc., and extending through No. 850, Misc., on this page):

No. 754, Misc. SHAW *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 758, Misc. GALLMON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 19 N. Y. 2d 389, 227 N. E. 2d 284.

No. 816, Misc. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *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. 826, Misc. HOWARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *H. David Rothman* for petitioner. *Robert W. Duggan* and *Edwin J. Martin* for respondent. Reported below: 426 Pa. 305, 231 A. 2d 860.

No. 850, Misc. WILSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Howard Moore, Jr.,* for petitioner. *Lewis R. Slaton, J. Walter LeCraw* and *J. Robert Sparks* for respondent. Reported below: 223 Ga. 531, 156 S. E. 2d 446.

No. 805, Misc. LAMENCA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 381 F. 2d 993.

No. 810, Misc. FUNICELLO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 49 N. J. 553, 231 A. 2d 579.

No. 814, Misc. DABNEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 250 Cal. App. 2d 933, 59 Cal. Rptr. 243.

No. 812, Misc. PICHE, AKA PEPPINOS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Francis Conklin* for petitioner. Reported below: 71 Wash. 2d 583, 430 P. 2d 522.

No. 815, Misc. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 856, Misc. RAINSBERGER *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. *Samuel S. Lionel* for petitioner. *Harvey Dickerson,* Attorney General of Nevada, for respondent. Reported below: 380 F. 2d 783.

No. 960, Misc. HAWKINS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *John Caughlan* for petitioner. Reported below: 70 Wash. 2d 697, 425 P. 2d 390.

No. 723, Misc. BANDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Acting Solicitor General Spritzer* for the United States.

Rehearing Denied.

No. 197. KAPLAN ET AL. *v.* LEHMAN BROTHERS ET AL., 389 U. S. 954. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 337. EASTON, DBA GEORGE EASTON FURNITURE CO. *v.* WEIR ET AL., 389 U. S. 905. Motion to dispense with printing petition granted. Petition for rehearing denied.

No. 572. MOORMAN ET UX. *v.* THOMAS ET AL., 389 U. S. 959; and

No. 370, Misc. NELSON *v.* DARLING SHOP OF BIRMINGHAM, INC., ET AL., 389 U. S. 876. Motions for leave to file petitions for rehearing denied.

No. 515. W. E. B. DuBois Clubs of America et al. *v.* Clark, Attorney General, et al., 389 U. S. 309;

No. 675. Township of Springfield *v.* Green et al., 389 U. S. 331;

No. 696. Alpha Enterprises, Inc. *v.* City of Houston et al., 389 U. S. 1005;

No. 698. Farmers Co-operative Elevator Association Non-Stock of Big Springs, Nebraska *v.* Strand, 389 U. S. 1014; and

No. 197, Misc. Hillery *v.* California, 389 U. S. 986. Petitions for rehearing denied.

January 24, 1968.

Miscellaneous Order.

Nos. 778, 779, 830–836. Penn-Central Merger and N & W Inclusion Cases, 389 U. S. 486. Motion of the United States and Interstate Commerce Commission for immediate issuance of judgment granted. Mr. Justice Marshall took no part in the consideration or decision of this motion. *Solicitor General Griswold, Robert W. Ginnane* and *Fritz R. Kahn* for the United States et al. on the motion. *Hugh B. Cox* and *Henry P. Sailer* for Pennsylvania Railroad Co. et al., and *Joseph Auerbach* and *Morris Raker* for Smith et al., trustees of the property of New York, New Haven & Hartford Railroad Co., in support of the motion. *Harvey Gelb, Gordon P. MacDougall, Leon H. Keyserling* and *Israel Packel* for the City of Scranton et al., in opposition.

January 25, 1968.

Dismissal Under Rule 60.

No. 768, Misc. Shipp *v.* California. Ct. App. Cal., 2d App. Dist. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

JANUARY 29, 1968.

Miscellaneous Orders.

No. ——. MCSURELY ET AL. *v.* RATLIFF ET AL. Motion for relief presented to MR. JUSTICE STEWART, and by him referred to the Court, granted, and the order of the United States District Court for the Eastern District of Kentucky of December 13, 1967, stayed to the extent that the seized documents shall remain in custody of the Commonwealth's Attorney of Pike County, Kentucky, pending perfection and disposition of the appeal by this Court.

This stay is conditioned upon filing of the record, the jurisdictional statement and the docketing of the case within fourteen days from this date and should such appeal be docketed within that time, the Solicitor General is requested to respond to such jurisdictional statement within fourteen days thereafter. In the event the appeal is so docketed, this stay is to remain in effect pending this Court's ruling on the jurisdictional aspect of the case. Should the Court summarily affirm the judgment or dismiss the appeal, this stay shall automatically expire. In the event the Court notes probable jurisdiction or postpones consideration of the jurisdiction until the hearing on the merits, this stay is to remain in effect pending issuance of the judgment of this Court.

Issuance of this stay in no way represents an adjudication that this Court has jurisdiction of an appeal from the order of the United States District Court hereby stayed. *Dan Jack Combs, William M. Kunstler, Arthur Kinoy* and *Morton Stavis* for applicants. *Solicitor General Griswold* for the United States in opposition. [For earlier order herein, see 389 U. S. 949.]

No. 807, Misc. PEREZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion for leave to file petition for writ of certiorari denied.

No. 574, October Term, 1963. WILLIAMSON ET AL., EXECUTORS *v.* PEURIFOY, JUDGE. C. A. 5th Cir. Second motion to recall and amend order of this Court of January 6, 1964, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier orders herein, see, *e. g.*, 386 U. S. 901.]

No. 1105, October Term, 1966. MCBRIDE *v.* SMITH, COMMANDANT, UNITED STATES COAST GUARD, 387 U. S. 932. 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.

No. —. IAQUINTA *v.* NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM ET AL. Further consideration of the motions to docket and dismiss this appeal is postponed pending consideration of any jurisdictional statement that may be filed.

No. —. AMERICAN RADIATOR & STANDARD SANITARY CORP. ET AL. *v.* PHILADELPHIA HOUSING AUTHORITY ET AL. C. A. 3d Cir. Application for writ of injunction presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. *John B. H. Carter, Lewis H. Van Dusen, Jr., Seymour Kurland, Edward W. Mullinix, David B. Buerger* and *Richardson Blair* for applicants. *Aaron M. Fine, Harold E. Kohn* and *David Berger* for respondents in opposition.

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 of Karen Horney Clinic, Inc., for leave to file a brief, as *amicus curiae,* denied. *Morris P. Glushien* on the motion.

No. 70. ALITALIA-LINEE AEREE ITALIANE, S. P. A. *v.* LISI ET AL. C. A. 2d Cir. (Certiorari granted, 389 U. S. 926; see also, *e. g.,* 389 U. S. 1027.) Motion of Bates Block for leave to file a brief, as *amicus curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Lee S. Kreindler* on the motion.

No. 187. MENOMINEE TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. (Certiorari granted, 389 U. S. 811.) Case restored to calendar for rebriefing and reargument during session of the Court beginning April 22, 1968. The State of Wisconsin invited to submit a brief and to participate in oral argument. Forty-five minutes each allotted to petitioner, the United States and the State of Wisconsin for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 600. RED LION BROADCASTING CO., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. (Certiorari granted, 389 U. S. 968.) Oral argument in this case postponed pending decision of the United States Court of Appeals for the Seventh Circuit in the case of *Radio Television News Directors Association et al.* v. *United States et al.* and pending this Court's action on any petition for certiorari which may be filed to review that decision. (See No. 993, *infra,* p. 922.) Action on motion of Radio Television News Directors Association et al., for leave to present oral argument, as *amici curiae,* is meanwhile deferred.

No. 155, Misc. IN RE DISBARMENT OF QUIMBY. Charles H. Quimby III, Esquire, of Washington, D. C., 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. [For earlier orders herein, see 387 U. S. 927, 389 U. S. 1012.]

No. 483. DETENBER ET AL., ADMINISTRATRICES *v.* AMERICAN UNIVERSAL INSURANCE CO., 389 U. S. 987. Respondent requested to file response to petition for rehearing within thirty days.

No. 482. UNITED STATES *v.* JOHNSON ET AL. Appeal from D. C. N. D. Ga. (Probable jurisdiction noted, 389 U. S. 910.) Motion of appellee Willie Hester for appointment of counsel granted. It is ordered that *Robert B. Thompson, Esquire,* of Gainesville, Georgia, be, and he is hereby, appointed to serve as counsel for appellee Willie Hester in this case. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 742. MARYLAND ET AL. *v.* WIRTZ, SECRETARY OF LABOR, ET AL. Appeal from D. C. Md. (Probable jurisdiction noted, 389 U. S. 1031.) Motion of Alabama et al. to remove case from summary calendar granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Francis B. Burch,* Attorney General of Maryland, and *Alan M. Wilner,* Assistant Attorney General, on the motion.

No. 760. COMMISSIONER OF INTERNAL REVENUE *v.* GORDON ET UX. C. A. 2d Cir.; and

No. 781. BAAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. (Certiorari granted, 389 U. S. 1033, 1034.) Motion to consolidate these cases granted and schedule of briefing approved. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Solicitor General Griswold* for petitioner in No. 760 and for respondent in No. 781, and *Harry R. Horrow,* for respondents in No. 760 and for petitioners in No. 781, on the motion.

No. 867, Misc. SOVIERO *v.* LUMBARD, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 747, Misc. DANIEL *v.* PORT, JUDGE; and

No. 864, Misc. TAYLOR *v.* BURKE, WARDEN, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 635. GARDNER *v.* BRODERICK, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. *Richard Gugliotta* and *Ronald Podolsky* for appellant. *J. Lee Rankin* and *Stanley Buchsbaum* for appellees. Reported below: 20 N. Y. 2d 227, 229 N. E. 2d 184.

No. 673. GEORGE CAMPBELL PAINTING CORP. *v.* REID ET AL., MEMBERS OF NEW YORK CITY HOUSING AUTHORITY, ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted and case set for oral argument immediately following No. 635, *supra*. *Theodore M. Ruzow, Albert A. Blinder* and *Stephen Hochhauser* for appellant. *Harry Levy* and *I. Stanley Stein* for appellees. *Louis J. Lefkowitz,* Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for the Attorney General of New York, in opposition. Reported below: 20 N. Y. 2d 370, 229 N. E. 2d 602.

Certiorari Granted. (See also No. 133, *ante,* p. 136; No. 648, *ante,* p. 143; and No. 866, *ante,* p. 144.)

No. 638. CHENG FAN KWOK *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. 800. World Airways, Inc., et al. *v.* Pan American World Airways, Inc., et al.;

No. 946. Civil Aeronautics Board *v.* Pan American World Airways, Inc., et al.; and

No. 969. American Society of Travel Agents, Inc. *v.* Pan American World Airways, Inc., et al. C. A. 2d Cir. Certiorari granted. Cases consolidated and two hours allotted for oral argument. Mr. Justice Marshall took no part in the consideration or decision of these petitions. *Raymond J. Rasenberger, Clayton L. Burwell, Leonard N. Bebchick, George Berkowitz* and *Stephen D. Potts* for petitioners in No. 800. *Solicitor General Griswold, Assistant Attorney General Turner, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Robert L. Toomey* for petitioner in No. 946. *Charles A. Hobbs* and *Glen A. Wilkinson* for petitioner in No. 969. *Edward R. Neaher, Carl S. Rowe* and *Gertrude S. Rosenthal* for respondents in all three cases. Reported below: 380 F. 2d 770.

No. 823. Uniformed Sanitation Men Assn., Inc., et al. *v.* Commissioner of Sanitation of the City of New York et al. C. A. 2d Cir. Certiorari granted and case set for oral argument immediately following No. 673, *supra*, p. 918. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioners. *J. Lee Rankin, Norman Redlich* and *John J. Loflin* for respondents. Reported below: 383 F. 2d 364.

No. 891. Wirtz, Secretary of Labor *v.* Hotel, Motel & Club Employees Union, Local 6. C. A. 2d Cir. Certiorari granted. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Weisl, Louis F. Claiborne, Alan S. Rosenthal, Robert V. Zener, Charles Donahue* and *George T. Avery* for petitioner. *Sidney E. Cohn* for respondent. Reported below: 381 F. 2d 500.

Certiorari Denied.

No. 818. TRANSCONTINENTAL BUS SYSTEM, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. 5th Cir. Certiorari denied. *Howard S. Boros* and *Robert C. Lester* for petitioners. *Solicitor General Griswold, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Robert L. Toomey* for respondent. *Frederick S. Hill* for National Association of Motor Bus Owners, as *amicus curiae,* in support of the petition. Reported below: 383 F. 2d 466.

No. 855. WILLIAMS *v.* SEABOARD AIR LINE RAILROAD CO. ET AL. Sup. Ct. Fla. Certiorari denied. *Peyton Ford* and *Joseph D. Farish, Jr.,* for petitioner. *Frank G. Kurka* and *Manley P. Caldwell* for respondents. Reported below: 199 So. 2d 469.

No. 899. INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION OF AMERICA, LOCAL NO. 1082, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Herbert M. Ansell* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 384 F. 2d 55.

No. 901. STRONG, DBA STRONG ROOFING & INSULATING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Charles G. Bakaly, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 386 F. 2d 929.

No. 923. AVINS *v.* RUTGERS, STATE UNIVERSITY OF NEW JERSEY. C. A. 3d Cir. Certiorari denied. *Alfred Avins,* petitioner, *pro se. Clyde A. Szuch* for respondent. Reported below: 385 F. 2d 151.

No. 903. UNIWELD PRODUCTS, INC., ET AL. *v.* UNION CARBIDE CORP. C. A. 5th Cir. Certiorari denied. *Philip J. Hirschkop* for petitioners. *Darrey A. Davis, Walter J. Halliday* and *Donald E. Van Koughnet* for respondent. Reported below: 385 F. 2d 992.

No. 907. YOUNG-PETERSON CONSTRUCTION, INC. *v.* POTOMAC INSURANCE CO. OF THE DISTRICT OF COLUMBIA. C. A. 7th Cir. Certiorari denied. *John P. Madigan* for petitioner. *John C. Bartler* for respondent. Reported below: 382 F. 2d 400.

No. 908. DAUPHIN DEPOSIT TRUST CO. ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Thomas A. Beckley* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States et al. Reported below: 385 F. 2d 129.

No. 918. SPINNEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Edward O. Proctor* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 385 F. 2d 908.

No. 919. FOGLE ET AL. *v.* FOGLE ET AL. C. A. 7th Cir. Certiorari denied. *Conrad J. Lynn* for petitioners.

No. 995. NASHVILLE I–40 STEERING COMMITTEE ET AL. *v.* ELLINGTON, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. *Jack Greenberg, James M. Nabrit III, Charles H. Jones, Jr., Avon N. Williams, Jr.,* and *Z. Alexander Looby* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Milton P. Rice* and *Thomas E. Fox,* Deputy Attorneys General, for Ellington et al., and *Robert E. Kendrick* for Briley, respondents. Reported below: 387 F. 2d 179.

No. 993. RADIO TELEVISION NEWS DIRECTORS ASSN. ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari before judgment denied. *Archibald Cox, W. Theodore Pierson, Robert M. Lichtman, Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Lawrence J. McKay, Raymond L. Falls, Jr., Maurice Rosenfield, Herbert Wechsler, Thomas E. Ervin* and *Howard Monderer* for petitioners. *Solicitor General Griswold* for the United States et al.

No. 920. GERNER *v.* MOOG INDUSTRIES, INC. C. A. 8th Cir. Certiorari denied. *Harvey B. Jacobson, David C. Johnston* and *Robert F. Davis* for petitioner. *Joseph J. Gravely, Malcolm I. Frank* and *Bernard Mellitz* for respondent. Reported below: 383 F. 2d 56.

No. 922. BARKER *v.* CALIFORNIA-WESTERN STATES LIFE INSURANCE CO. ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. *Ewart Lytton Merica* for petitioner. Reported below: 252 Cal. App. 2d 768, 61 Cal. Rptr. 595.

No. 1028. DECKER ET AL. *v.* UNITED STATES ET AL.;
No. 1029. AMERICAN RADIATOR & STANDARD SANITARY CORP. ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Frank L. Seamans* for petitioners Decker et al., *J. Robert Maxwell* for petitioner Backner, and *Alexander Unkovic* for petitioner Held in No. 1028. *William E. Willis, Hubert I. Teitelbaum, Thomas F. Daly, Harold R. Schmidt, Frank C. McAleer, David B. Buerger, Paul J. Winschel, Gilbert J. Helwig, Milton Handler, Ralph L. McAfee, David J. Armstrong, George A. Raftery, T. W. Pomeroy, Jr., W. Walter Braham, Jr., Abraham J. Harris, Elliott W. Finkel, J. King Rosendale, Eugene B. Strassburger, Jr., Foster T. Bean, William J. Kenney* and *J. Vincent Burke, Jr.*, for petitioners in No. 1029. Reported below: 388 F. 2d 201.

No. 859. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL.;

No. 861. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* AKRON & BARBERTON BELT RAILROAD CO. ET AL.;

No. 862. ORDER OF RAILWAY CONDUCTORS & BRAKEMEN *v.* AKRON & BARBERTON BELT RAILROAD CO. ET AL.;

No. 863. AKRON & BARBERTON BELT RAILROAD CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL.; and

No. 933. BANGOR & AROOSTOOK RAILROAD CO. ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

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 petitioner, and *Francis M. Shea, Richard T. Conway* and *James R. Wolfe* for respondents in No. 859.

Milton Kramer, Lester P. Schoene and *Martin W. Fingerhut* for petitioners, and *Messrs. Shea, Conway* and *Wolfe* for respondents in No. 861.

James D. Hill and *Harry E. Wilmarth* for petitioner, and *Messrs. Shea, Conway* and *Wolfe* for respondents in No. 862.

Messrs. Shea, Conway and *Wolfe* for petitioners, and *Messrs. Kramer, Schoene* and *Fingerhut* for Brotherhood of Railroad Trainmen et al., and *Messrs. Hill* and *Wilmarth* for Order of Railway Conductors & Brakemen, respondents, in No. 863.

Messrs. Shea, Conway and *Wolfe* for petitioners, and *Messrs. Rauh, Silard, Groner, Heiss, Bennett, Elson, Lassers* and *Wolff, David Epstein,* and *Mrs. Taylor* for respondent in No. 933. Reported below: 128 U. S. App. D. C. 59, 385 F. 2d 581.

No. 729. RATNER *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Redrup* v. *New York,* 386 U. S. 767. *Richard A. Lavine* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Gordon Ringer,* Assistant Attorney General, and *Evelle J. Younger* for respondent.

No. 738. HART ET AL. *v.* FEDERAL RESERVE BANK OF ATLANTA. C. A. 6th Cir. Motion to supplement record granted. Certiorari denied. *Fyke Farmer* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge* and *Robert C. McDiarmid* for respondent. Reported below: 379 F. 2d 961.

No. 912. 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, Jacques M. Schiffer, Cecil D. Branstetter, Harold E. Brown* and *Daniel B. Maher* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 856.

No. 890. GILBERT ET AL. *v.* CASE ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Robert L. Bobrick* for petitioners. *George A. Raftery* and *Edmund C. Grainger, Jr.,* for respondents.

No. 900. REBENSTORF *v.* ILLINOIS. Sup. Ct. Ill. Motion to dispense with printing petition granted. Certiorari denied. *Walter R. Stewart* for petitioner. Reported below: 37 Ill. 2d 572, 229 N. E. 2d 483.

No. 931. VROOMAN, TRUSTEE IN BANKRUPTCY *v.* LEONARD. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Edgar C. Keller* for petitioner. Reported below: 383 F. 2d 556.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted in the following cases (beginning with No. 927 and extending through No. 959 on this page):

No. 927. ZUCKERMAN ET AL. *v.* GREASON. Ct. App. N. Y. Certiorari denied. *Emanuel Redfield* for petitioners. *Harold M. Spitzer* for respondent. Reported below: 20 N. Y. 2d 430, 231 N. E. 2d 718.

No. 928. ALLINSON *v.* GREASON. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Emanuel Redfield* for petitioner. *Harold M. Spitzer* for respondent. Reported below: 27 App. Div. 2d 553, 277 N. Y. S. 2d 370.

No. 959. RESNICOFF *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. *Samuel Resnicoff,* petitioner, *pro se. John G. Bonomi, Michael Franck* and *Arthur J. Cooperman* for respondent. Reported below: See 27 App. Div. 2d 509, 280 N. Y. S. 2d 820.

No. 438, Misc. MITCHELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Daniel J. Kremer,* Deputy Attorney General, for respondent.

No. 584, Misc. RAGLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Peter B. Sullivan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 375 F. 2d 471.

No. 15, Misc. HALE *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

No. 518, Misc. SPRINGER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Darrell F. Smith,* Attorney General of Arizona, and *Norval C. Jesperson,* Assistant Attorney General, for respondent. Reported below: 102 Ariz. 238, 428 P. 2d 95.

No. 527, Misc. DUVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 383 F. 2d 378.

No. 557, Misc. LONGKNIFE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for the United States. Reported below: 381 F. 2d 17.

No. 565, Misc. BLACK *v.* STANLEY, U. S. DISTRICT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 641, Misc. KURKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *David Loeffler* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 384 F. 2d 905.

No. 655, Misc. STORLIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 677, Misc. BANNISTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 379 F. 2d 750.

No. 700, Misc. DIAMOND *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for respondent.

No. 742, Misc. GAMBLE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. *William H. Seals* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, and *Everett N. Brandon* and *Emmet H. Clair,* Assistant Attorneys General, for respondent. Reported below: 249 S. C. 605, 155 S. E. 2d 916.

No. 775, Misc. CEDILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 777, Misc. NAEGLE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Pugh* and *Gilbert E. Andrews* for respondent. Reported below: 378 F. 2d 397.

No. 795, Misc. COOK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 808, Misc. GAINES *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 787, Misc. THOMPSON *v.* MACHROWICZ, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *B. J. Tennery* for petitioner. *Solicitor General Griswold* for respondent.

No. 793, Misc. BROWN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Peter J. O'Connor* for respondent. Reported below: 20 N. Y. 2d 238, 229 N. E. 2d 192.

No. 817, Misc. SARTAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 819, Misc. WALL *v.* PATE, WARDEN. Cir. Ct. Will County, Ill. Certiorari denied.

No. 820, Misc. GOODMAN *v.* PATE, WARDEN. Crim. Ct. Cook County, Ill. Certiorari denied.

No. 822, Misc. LEWIS *v.* PATE, WARDEN, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 827, Misc. CHASE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 828, Misc. PIERCE *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 832, Misc. CARTER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 836, Misc. CLARK *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 825, Misc. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Morris Lavine* for petitioner.

No. 838, Misc. SLIVA *v.* VOGEL, JUDGE. C. A. 3d Cir. Certiorari denied.

No. 847, Misc. BOGART *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Peter D. Bogart*, petitioner, *pro se*.

No. 848, Misc. WHITE *v.* MURPHY ET AL. C. A. 9th Cir. Certiorari denied.

No. 849, Misc. LOMBARDI *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 851, Misc. LISULA *v.* PATE, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 861, Misc. HENDERSON *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied.

No. 876, Misc. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 383 F. 2d 154.

No. 554, Misc. MYERS 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. *Jim Hudson* for petitioners. *Acting Solicitor General Spritzer* and *Assistant Attorney General Doar* for the United States. Reported below: 377 F. 2d 412.

Rehearing Granted. (See No. 133, *ante*, p. 136.)

Rehearing Denied.

No. 636, Misc. RUCKER *v.* PARKER ET AL., 389 U. S. 995. Motion for leave to file petition for rehearing denied.

No. 66. CASE-SWAYNE CO., INC. *v.* SUNKIST GROWERS, INC., 389 U. S. 384;

No. 548. SNOHOMISH COUNTY *v.* SEATTLE DISPOSAL CO. ET AL., 389 U. S. 1016;

No. 670. ILLINOIS EX REL. MAERAS, TREASURER & EX-OFFICIO COLLECTOR OF TAXES OF MADISON COUNTY *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL., 389 U. S. 427;

No. 712. MALINOU, PUBLIC ADMINISTRATOR *v.* CAIRNS ET AL., 389 U. S. 1015; and

No. 637, Misc. BASKIN *v.* BASKIN ET AL., 389 U. S. 1009. Petitions for rehearing denied.

No. 246. MOSES ET AL. *v.* WASHINGTON ET AL., 389 U. S. 428. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

FEBRUARY 6, 1968.

Dismissals Under Rule 60.

No. 764. GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* FIELDS. C. A. 4th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Weisl* and *John C. Eldridge* for petitioner. *James H. Coleman* for respondent. Reported below: 378 F. 2d 4.

No. 985, Misc. MINOR *v.* HASTINGS, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

FEBRUARY 15, 1968.

Dismissal Under Rule 60.

No. 1266, Misc. STONE *v.* PITCHESS, SHERIFF, ET AL. Motion for leave to file petition for writ of habeas corpus dismissed pursuant to Rule 60 of the Rules of this Court.

FEBRUARY 28, 1968.

Dismissals Under Rule 60.

No. 1069. AMERICAN RADIATOR & STANDARD SANITARY CORP. ET AL. *v.* PHILADELPHIA HOUSING AUTHORITY ET AL. C. A. 3d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *William E. Willis* for petitioners. *Harold E. Kohn* for respondents Philadelphia Housing Authority et al., and *David Berger* for certain other respondents.

No. 860, Misc. DILLARD *v.* ILLINOIS. Sup. Ct. Ill. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Sam Adam* for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent.

FEBRUARY 29, 1968.

Dismissal Under Rule 60.

No. 393, Misc. RANSOM *v.* UNITED STATES ET AL. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

MARCH 4, 1968.

Miscellaneous Orders.

No. 925, Misc. FOX *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied. *Solicitor General Griswold* for the United States in opposition.

No. —. BRANIGIN ET AL. *v.* GRILLS ET AL. D. C. S. D. Ind.; and

No. —. SUMMERS *v.* GRILLS ET AL. D. C. S. D. Ind. Applications for a stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

Memorandum of MR. JUSTICE HARLAN.

We are asked by the State Election Board of Indiana, and others, to stay enforcement of the order of a three-judge District Court creating districts for the election of Indiana's 11 members of the United States House of Representatives. The court had, after this Court's remand, 385 U. S. 455, previously declared unconstitutional the districting arrangement adopted in 1965 by the Indiana General Assembly. *Grills* v. *Branigin,* 284 F. Supp. 176. A majority of the District Court believed it necessary to abandon many of the districting boundaries chosen by the General Assembly, and to substitute districts of their own devising. In contrast, Judge Dillin's dissenting opinion sought to modify the districts drawn by the General Assembly only where necessary to reduce to an acceptable minimum the population variances from average. This Court now denies the application.

I have heretofore expressed the view, but to no avail, that this Court should not approve the imposition by district courts of their own apportionment plans upon States until the Court has first given plenary consideration to the matter, involving as it does delicate questions of federalism and the most unusual exercise of federal judicial power. See my Memorandum in *Parsons* v. *Buckley,* 379 U. S. 359, 364. See also *Fortson* v. *Toombs,* 379 U. S. 621, 623 (opinion concurring in part and dissenting in part). Here, as for the most part, the Court has chosen to leave the district courts to implement the basic apportionment decisions in *Reynolds* v. *Sims,* 377 U. S. 533, and *Wesberry* v. *Sanders,* 376 U. S. 1, without explicated guidelines. I think that this is all

wrong. See *Rockefeller* v. *Wells,* 389 U. S., at 421 (dissenting opinion of this writer).

I would in normal circumstances conclude that these applications for a stay should be granted in order to enable this Court to give full-dress consideration to the serious questions which the actions of the District Court raise. However, I feel myself obliged by the unusual situation confronting us here to acquiesce in the denial of a stay. The Indiana General Assembly has apparently now adjourned without adopting any revised system of apportionment. The period in which prospective candidates for the House of Representatives may file their candidacies expires on March 27, 1968, and a primary election is now scheduled for May 7, 1968. If the applications for a stay were granted, and even if review of the District Court's decision were expedited to the utmost, Indiana would in all likelihood be left without any permissible system for the election of members of the House of Representatives. In these circumstances, I see no practical alternative to the denial of the stay requested. Only for that reason do I go along with the Court's disposition.

No. 29, Orig. TEXAS ET AL. *v.* COLORADO. Request of Texas and New Mexico for leave to reply to counterclaim and to otherwise plead granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this request. *Crawford C. Martin,* Attorney General, for the State of Texas, and *Boston E. Witt,* Attorney General, for the State of New Mexico, plaintiffs. [For earlier orders herein, see, *e. g.,* 389 U. S. 1000.]

No. —. MARINO ET AL. *v.* GREASON. Ct. App. N. Y. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Julio John Marino* and *Alfred L. Plesser,* applicants, *pro se.* *Harold M. Spritzer* for respondent in opposition.

No. 618. FORTNIGHTLY CORP. *v.* UNITED ARTISTS TELEVISION, INC. C. A. 2d Cir. (Certiorari granted, 389 U. S. 969.) Motions of National Cable Television Association, Inc., Screen Composers Association of the United States of America, All-Channel Television Society, Broadcast Music, Inc., National Association of Broadcasters, American Society of Composers, Authors & Publishers, Authors League of America, Inc., and Writers Guild of America et al., for leave to file briefs, as *amici curiae,* granted. Motion of National Association of Broadcasters for leave to participate in oral argument, as *amicus curiae,* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. On the motions were: *Bruce E. Lovell* for National Cable Television Association, Inc.; *Leonard Zissu* and *Abraham Marcus* for Screen Composers Association of the United States of America; *Michael Finkelstein* for All-Channel Television Society; *Ambrose Diskow* for Broadcast Music, Inc.; *Warner W. Gardner, William H. Dempsey, Jr.,* and *Douglas A. Anello* for National Association of Broadcasters; *Herman Finkelstein, Simon H. Rifkind, Jay H. Topkis* and *Paul S. Adler* for American Society of Composers, Authors & Publishers; *Irwin Karp* for Authors League of America, Inc.; and *Paul P. Selvin* and *William Berger* for Writers Guild of America et al.

No. 416. FLAST ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. S. D. N. Y. (Probable jurisdiction noted, 389 U. S. 895.) Motions of Rose Spira et al. and National Jewish Commission on Law & Public Affairs for leave to file briefs, as *amici curiae,* granted. *Herbert Brownell* and *Thomas F. Daly* for Spira et al., and *Reuben E. Gross* for National Jewish Commission on Law & Public Affairs on the motions.

No. 645. JONES ET UX. *v.* ALFRED H. MAYER CO. ET AL. C. A. 8th Cir. (Certiorari granted, 389 U. S. 968.) Request of the Solicitor General to participate in oral argument, as *amicus curiae,* granted and 30 minutes allotted for that purpose. Counsel for respondents allotted an additional 30 minutes for argument. Motions of American Civil Liberties Union et al. and Maryland Petition Committee, Inc., et al. for leave to file briefs, as *amici curiae,* granted. Motion of National Committee Against Discrimination in Housing et al., as *amici curiae,* to remove case from summary calendar denied. Motion of Missouri Commission on Human Rights for leave to present oral argument, as *amicus curiae,* denied. On the motions were *Leo Pfeffer* and *Melvin L. Wulf* for American Civil Liberties Union et al., *Geo. Washington Williams* and *Thomas F. Cadwalader* for Maryland Petition Committee, Inc., et al., *Sol Rabkin* and *Robert L. Carter* for National Committee Against Discrimination in Housing et al., and *Norman H. Anderson,* Attorney General of Missouri, *C. B. Burns, Jr.,* Special Assistant Attorney General, and *Louis C. Defeo, Jr.,* Assistant Attorney General, for Missouri Commission on Human Rights.

No. 898. SABBATH *v.* UNITED STATES. C. A. 9th Cir. (Certiorari granted, 389 U. S. 1003.) Motion of petitioner for appointment of counsel granted. It is ordered that *Murray H. Bring, 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. 1038. PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY *v.* CITY OF SEATTLE; and

No. 1039. CITY OF SEATTLE *v.* PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 695. GREEN ET AL. *v.* COUNTY SCHOOL BOARD OF NEW KENT COUNTY ET AL. C. A. 4th Cir. (Certiorari granted, 389 U. S. 1003);

No. 740. MONROE ET AL. *v.* BOARD OF COMMISSIONERS OF THE CITY OF JACKSON ET AL. C. A. 6th Cir. (Certiorari granted, 389 U. S. 1033); and

No. 805. RANEY ET AL. *v.* BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT ET AL. C. A. 8th Cir. (Certiorari granted, 389 U. S. 1034.) Request of the Solicitor General to participate in oral argument in these cases, as *amicus curiae,* granted and a total of 30 minutes allotted for that purpose. Counsel for respondents allotted a total of 30 additional minutes to argue on behalf of all respondents. Motion of American Jewish Congress for leave to file a brief, as *amicus curiae,* in No. 695 granted. *Joseph B. Robison* on the motion.

No. 995, Misc. IN RE DISBARMENT OF ELLIS. It having been reported to the Court that John Flather Ellis, of Washington, District of Columbia, has been disbarred from the practice of law by order of the United States Court of Appeals for the District of Columbia Circuit, duly entered on the first day of November 1967, and this Court by order of December 4, 1967, having suspended the said John Flather Ellis from the practice of law in this Court and directed 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 John Flather Ellis 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. 1038, Misc. IN RE DISBARMENT OF O'MALLEY. It having been reported to the Court that William R. O'Malley, of Wickliffe, Ohio, has been indefinitely suspended from the practice of law by order of the Supreme Court of Ohio, duly entered on the twenty-second day of November 1967, and this Court by order of December 18, 1967, having suspended the said William R. O'Malley from the practice of law in this Court and directed 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 William R. O'Malley 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. 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. (Certiorari granted, 389 U. S. 1013.) Request of the Solicitor General to participate in oral argument, as *amicus curiae,* granted and 30 minutes allotted for that purpose. The Attorney General of Washington allotted an additional 30 minutes to argue on behalf of respondents. MR. JUSTICE MARSHALL took no part in the consideration or decision of this request.

No. 495, Misc. SMITH *v.* HOOEY, JUDGE. Sup. Ct. Tex. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 991, Misc. BLEVINS *v.* NELSON, WARDEN. Motion to dispense with printing petition granted. Motion for leave to file petition for writ of habeas corpus denied.

No. 939, Misc. TEMPLE *v.* UNITED STATES;

No. 946, Misc. FURTAK *v.* McMANN, WARDEN;

No. 954, Misc. ALEXANDER *v.* PERINI, CORRECTIONAL SUPERINTENDENT, ET AL.;

No. 968, Misc. RYLAND *v.* GREEN, CORRECTIONAL SUPERINTENDENT;

No. 970, Misc. METCALF *v.* PATE, WARDEN;

No. 988, Misc. FOSSUM *v.* PORTER, SHERIFF;

No. 1002, Misc. ROBERTS *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.;

No. 1006, Misc. JOHNSON *v.* MAXWELL, WARDEN;

No. 1013, Misc. HURST ET AL. *v.* HARRIS, JUDGE, ET AL.;

No. 1024, Misc. TOMPA *v.* PEYTON, PENITENTIARY SUPERINTENDENT;

No. 1109, Misc. BLANCHEY *v.* PORTER, SHERIFF, ET AL.;

No. 1120, Misc. ALBERTSON *v.* KROPP;

No. 1125, Misc. TURNER *v.* NELSON, WARDEN; and

No. 1136, Misc. DEWITT *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 904, Misc. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* for respondent in opposition.

No. 905, Misc. WION *v.* CLARK, ATTORNEY GENERAL, ET AL. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* for respondents in opposition.

No. 1023, Misc. CARONDELET SAVINGS & LOAN ASSN. *v.* JAMES, JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *J. L. London* and *Carroll C. Gilpin* on the motion.

No. 841, Misc. TILDEN *v.* ILLINOIS PAROLE AND PARDON BOARD. Motion for leave to file petition for writ of mandamus denied.

No. 764, Misc. LOUISIANA EDUCATION COMMISSION FOR NEEDY CHILDREN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA ET AL. Motion for leave to file petition for writ of prohibition denied. *L. H. Perez* on the motion. *Acting Solicitor General Spritzer* and *Assistant Attorney General Doar* for the United States in opposition.

Probable Jurisdiction Noted.

No. 1116. KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. *v.* PREISLER ET AL.; and

No. 1117. HEINKEL ET AL. *v.* PREISLER ET AL. Appeals from D. C. W. D. Mo. Probable jurisdiction noted. Cases consolidated and one hour allotted for oral argument. Judgment of the District Court, dated December 29, 1967, stayed pending final decisions on the appeals. Motion to advance denied; State of Missouri authorized to conduct 1968 congressional elections under and pursuant to 1967 Missouri Congressional Reapportionment Act, Mo. Rev. Stat., §§ 128.203–128.305 (Cum. Supp. 1967). See *Martin* v. *Bush,* 376 U. S. 222, 223; cf. *Lucas* v. *Colorado Gen. Assembly,* 377 U. S. 713, 739; *Roman* v. *Sincock,* 377 U. S. 695, 711–712; *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, 655; *Burns* v. *Richardson,* 384 U. S. 73, 97–98. *Norman H. Anderson,* Attorney General of Missouri, *pro se, Thomas J. Downey,* First Assistant Attorney General, and *Louren R. Wood,* Assistant Attorney General, for appellants in No. 1116. *John David Collins* for appellants Heinkel et al. in No. 1117. *Paul W. Preisler, pro se,* and for other appellees in No. 1116. Reported below: 279 F. Supp. 952.

No. 1138. REYNOLDS ET AL. *v.* SMITH ET AL. Appeal from D. C. E. D. Pa. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument immediately following No. 1134, *infra*. Joint motion to advance granted. *William C. Sennett,* Attorney General of Pennsylvania, *Edward Friedman,* Counsel General, and *Edgar R. Casper,* Deputy Attorney General, for appellants. *Harvey N. Schmidt* for appellees. Reported below: 277 F. Supp. 65.

No. 925. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL.; and

No. 938. INTERSTATE COMMERCE COMMISSION *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL. Appeals from D. C. E. D. La. Probable jurisdiction noted. Cases consolidated and a total of two hours allotted for oral argument. *Edward A. Kaier, Joseph F. Eshelman, Richard B. Montgomery, Jr., Eugene E. Hunt, Kenneth H. Lundmark* and *Kemper A. Dobbins* for appellants in No. 925, and *Robert W. Ginnane* and *Arthur J. Cerra* for appellant in No. 938. *Ashton Phelps, Howard J. Trienens, George L. Saunders, Jr., John W. Adams, Philip C. Beverly, James A. Bistline, R. Wray Henriott* and *Donal L. Turkal* for Aberdeen & Rockfish Railroad Co. et al., and *Carl E. Sanders* and *Walter R. McDonald* for Southern Governors' Conference et al., appellees in both cases. Reported below: 270 F. Supp. 695.

No. 1134. WASHINGTON ET AL. *v.* HARRELL ET AL. Appeal from D. C. D. C. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument immediately following No. 813 (389 U. S. 1032). Joint motion to advance granted. *Charles T. Duncan* and *Hubert B. Pair* for appellants. *Peter S. Smith* for appellees. Reported below: 279 F. Supp. 22.

No. 749. EPPERSON ET AL. *v.* ARKANSAS. Appeal from Sup. Ct. Ark. Probable jurisdiction noted. *Eugene R. Warren* and *Bruce T. Bullion* for appellants. *Joe Purcell,* Attorney General of Arkansas, for appellee.

No. 950. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL.; and

No. 973. HARDIN, PROSECUTING ATTORNEY, ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. Appeals from D. C. W. D. Ark. Probable jurisdiction noted. Cases consolidated and a total of one and one-half hours allotted for oral argument. MR. JUSTICE FORTAS took no part in the consideration or decision of these cases. *James E. Youngdahl, Robert D. Ross* and *John P. Sizemore* for appellants in No. 950. *Joe Purcell,* Attorney General of Arkansas, and *Leslie Evitts,* Chief Assistant Attorney General, for appellants in No. 973. *Martin M. Lucente, Robert V. Light, W. J. Smith, H. H. Friday* and *R. W. Yost* for appellees in both cases. Reported below: 274 F. Supp. 294.

Certiorari Granted. (See also No. 861, October Term, 1965, *ante,* p. 203; Nos. 4, 5, 6, 10, 32, and 374, and No. 2, Misc., *ante,* p. 202; Nos. 9, 14, 77, 121, 798, and 1024, *ante,* p. 204; Nos. 11, 17, 19, 24, 30, 45, and 567, *ante,* p. 200; No. 18, *ante,* p. 196; No. 121, Misc., *ante,* p. 198; No. 329, Misc., *ante,* p. 206; No. 407, Misc., *ante,* p. 199; and No. 451, Misc., *ante,* p. 198.)

No. 689. CARROLL ET AL. *v.* PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE ET AL. Ct. App. Md. Certiorari granted. *Melvin L. Wulf* and *William H. Zinman* for petitioners. *Francis B. Burch,* Attorney General of Maryland, *S. Leonard Rottman,* Assistant Attorney General, and *Alexander G. Jones* for respondents. Reported below: 247 Md. 126, 230 A. 2d 452.

No. 665. PAUL H. ASCHKAR & Co. *v.* KAMEN & Co. ET AL. C. A. 9th Cir. Certiorari granted. *Allen E. Susman* for petitioner. *Jacob Shearer* for respondents. *Solicitor General Griswold, Philip A. Loomis, David Ferber, Roger S. Foster* and *Donald M. Feuerstein* for the Securities and Exchange Commission, as *amicus curiae,* in support of the petition. Reported below: 382 F. 2d 689.

No. 1003. THORPE *v.* HOUSING AUTHORITY OF THE CITY OF DURHAM. Sup. Ct. N. C. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston* and *Charles H. Jones, Jr.,* for petitioner. *Daniel K. Edwards* and *William Y. Manson* for respondent. Reported below: 271 N. C. 468, 157 S. E. 2d 147.

No. 1034. TINKER ET AL. *v.* DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari granted. *Melvin L. Wulf* for petitioners. *Allan A. Herrick* and *David W. Belin* for respondents. Reported below: 383 F. 2d 988.

No. 801. SPINELLI *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Irl B. Baris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 382 F. 2d 871.

No. 65, Misc. PEREZ *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Raymond M. Momboisse,* Deputy Attorneys General, for respondent. Reported below: 65 Cal. 2d 615, 422 P. 2d 597.

No. 978. UNIVERSAL INTERPRETIVE SHUTTLE CORP. *v.* WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jeffrey L. Nagin* and *Allen E. Susman* for petitioner. *Russell W. Cunningham* for respondent Washington Metropolitan Area Transit Commission, and *Manuel J. Davis* for respondent D. C. Transit System, Inc. *Solicitor General Griswold* for the United States, as *amicus curiae,* in support of the petition.

No. 909. DESIST ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted and case set for oral argument immediately following No. 174 (389 U. S. 1033). MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Abraham Glasser, David M. Markowitz* and *Irving Younger* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 384 F. 2d 889.

No. 902, Misc. JOHNSON *v.* AVERY, COMMISSIONER OF CORRECTION, ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Karl P. Warden* for petitioner. *George F. McCanless,* Attorney General of Tennessee, *Thomas E. Fox,* Deputy Attorney General, and *David W. McMackin,* Assistant Attorney General, for respondents. Reported below: 382 F. 2d 353.

Certiorari Denied. (See also No. 950, Misc., *ante,* p. 196; and No. 965, Misc., *ante,* p. 204.)

No. 957. YATES *v.* MANALE ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 378. O'Reilly *v.* Board of Medical Examiners of the State of California. Sup. Ct. Cal. Certiorari denied. *Ellis J. Horvitz* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Stephen H. Silver,* Deputy Attorney General, for respondent. *Solicitor General Griswold* filed a memorandum, as *amicus curiae,* by invitation of the Court [389 U. S. 966]. Reported below: 66 Cal. 2d 381, 426 P. 2d 167.

No. 748. Bretti *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Milton E. Grusmark* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Arthur L. Rothenberg* and *Arden M. Siegendorf,* Assistant Attorneys General, for respondent. Reported below: 192 So. 2d 6.

No. 868. Pranno *v.* United States. C. A. 7th Cir. Certiorari denied. *John A. McIntyre* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 385 F. 2d 387.

No. 886. Armel *v.* United States. C. A. 6th Cir. Certiorari denied. *Earl W. Allison* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 384 F. 2d 51.

No. 897. Trans World Airlines, Inc. *v.* Civil Aeronautics Board. C. A. D. C. Cir. Certiorari denied. *Charles Pickett* and *Carl S. Rowe* for petitioner. *Solicitor General Griswold, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman* and *Frederic D. Houghteling* for respondent. Reported below: 128 U. S. App. D. C. 126, 385 F. 2d 648.

No. 893. PUBLIC SERVICE COMMISSION OF WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION. C. A. D. C. Cir. Certiorari denied. *William E. Torkelson* for Public Service Commission of Wisconsin, and *Raymond F. Simon* for City of Chicago, petitioners. *Solicitor General Griswold, Richard A. Solomon, Peter H. Schiff, Israel Convisser* and *Cyril S. Wofsy* for Federal Power Commission. *Charles C. McDugald* and *William W. Brackett* for Natural Gas Pipeline Co. of America, intervenor below. *Charles F. Wheatley, Jr.*, for Village of Bethany, Illinois, et al., as *amici curiae*, in support of the petition. Reported below: 128 U. S. App. D. C. 107, 385 F. 2d 629.

No. 905. MASTRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *R. Eugene Pincham, Earl E. Strayhorn, Charles B. Evins* and *Sam Adam* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 385 F. 2d 333.

No. 906. ROVICO, INC. *v.* AMERICAN PHOTOCOPY EQUIPMENT CO. C. A. 7th Cir. Certiorari denied. *Samuel J. Stoll* for petitioner. *William C. Conner, Albert E. Jenner, Jr., John J. Crown* and *Robert A. Curley* for respondent. Reported below: 384 F. 2d 813.

No. 911. NANTAHALA POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION. C. A. 4th Cir. Certiorari denied. *Randall J. LeBoeuf, Jr.*, for petitioner. *Solicitor General Griswold, Richard A. Solomon, Peter H. Schiff, Drexel D. Journey* and *Israel Convisser* for respondent. Reported below: 384 F. 2d 200.

No. 914. SCHEMEL *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. *William J. Marshall* for petitioner. *Thomas M. Scanlon* and *Ross L. Malone* for respondent. Reported below: 384 F. 2d 802.

No. 916. HOME TOWN FOODS, INC., ET AL. *v.* WIRTZ, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *John Bacheller, Jr.*, for petitioners. *Solicitor General Griswold, Charles Donahue, Bessie Margolin* and *Robert E. Nagle* for respondent. Reported below: 381 F. 2d 653.

No. 926. SCHMIDINGER ET AL. *v.* WELSH ET AL.; and No. 981. WELSH ET AL. *v.* SCHMIDINGER ET AL. C. A. 3d Cir. Certiorari denied. *William D. Lucas* and *Melvin H. Kurtz* for petitioners in No. 926 and for respondents in No. 981. *William J. Ungvarsky* for petitioners in No. 981 and for respondents in No. 926. Reported below: 383 F. 2d 455.

No. 929. GIBSON *v.* JOHNSON ET AL. Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. *Harry D. Moreland* for petitioner. *Harold A. Ross* for respondents. Reported below: 414 S. W. 2d 235.

No. 930. ROCHELLE, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William Madden Hill* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Carolyn R. Just* for the United States. Reported below: 384 F. 2d 748.

No. 936. STEPTOE & JOHNSON ET AL. *v.* FORT MYERS SEAFOOD PACKERS, INC. C. A. D. C. Cir. Certiorari denied. *Frank F. Roberson* for petitioners. *Glenn A. Mitchell* and *Edwin M. Slote* for respondent. Reported below: 127 U. S. App. D. C. 93, 381 F. 2d 261.

No. 939. KEGLEY *v.* AETNA LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *John G. Patterson* for petitioner. *W. O. Shafer* for respondent. Reported below: 389 F. 2d 348.

No. 940. REHMAN ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. Reported below: 253 Cal. App. 2d 119, 61 Cal. Rptr. 65.

No. 942. MARKETLINES, INC. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. *Emanuel Redfield* for petitioner. *Solicitor General Griswold, Philip A. Loomis, Jr., Walter P. North* and *Jacob H. Stillman* for respondent. Reported below: 384 F. 2d 264.

No. 943. SKAGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *W. Hays Pettry* for petitioner. *Solicitor General Griswold, Robert H. Marquis* and *James H. Eldridge* for the United States. Reported below: 386 F. 2d 769.

No. 947. SCHROEDER ET UX. *v.* BUSENHART ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *William R. Ming, Jr.,* for petitioners. *Albert E. Jenner, Jr., Philip W. Tone* and *Albert J. Horrell* for respondents Busenhart et al. Reported below: 80 Ill. App. 2d 431, 225 N. E. 2d 702.

No. 948. HIGGINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Melvin M. Belli* and *John Y. Brown* for petitioner. *Solicitor General Griswold, S. Billingsley Hill* and *A. Donald Mileur* for the United States. Reported below: 384 F. 2d 504.

No. 951. SEANOR COAL CO. *v.* LEWIS ET AL., TRUSTEES. C. A. 3d Cir. Certiorari denied. *Nicholas Unkovic* for petitioner. *Welly K. Hopkins, Harold H. Bacon* and *M. E. Boiarsky* for respondents. Reported below: 382 F. 2d 437.

No. 944. UNION ELECTRIC CO. *v.* CITY OF EAST ST. LOUIS. Sup. Ct. Ill. Certiorari denied. *Robert Broderick* for petitioner. *Avern B. Scolnik* for respondent. Reported below: 37 Ill. 2d 537, 229 N. E. 2d 522.

No. 952. VILLAGE OF ROBBINS *v.* VILLAGE OF MIDLOTHIAN. App. Ct. Ill., 1st Dist. Certiorari denied. *Walter K. Black* for petitioner. *Elbert F. Elmore* and *Robert J. Nolan* for respondent. Reported below: 81 Ill. App. 2d 22, 225 N. E. 2d 651.

No. 953. INDUSTRIAL WORKERS OF THE WORLD ET AL. *v.* CLARK, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. *Marshall Patner* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 128 U. S. App. D. C. 165, 385 F. 2d 687.

No. 954. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *R. Eugene Pincham, Earl E. Strayhorn, Charles B. Evins* and *Sam Adam* for petitioner. Reported below: 37 Ill. 2d 521, 229 N. E. 2d 495.

No. 955. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* DEL RASO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Harlan L. Hackbert* for petitioner. *Robert A. Sprecher* and *Meyer Z. Grant* for respondents. Reported below: 84 Ill. App. 2d 344, 228 N. E. 2d 470.

No. 958. CUNDICK *v.* BROADBENT. C. A. 10th Cir. Certiorari denied. *John J. Rooney* for petitioner. Reported below: 383 F. 2d 157.

No. 966. PENNSYLVANIA *v.* DELL PUBLICATIONS, INC., ET AL. Sup. Ct. Pa. Certiorari denied. *Joseph M. Smith* and *Arlen Specter* for petitioner. Reported below: 427 Pa. 189, 233 A. 2d 840.

No. 956. HIBLER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Bob Huff* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Grant W. Wiprud* and *Donald A. Statland* for respondent. Reported below: 383 F. 2d 989.

No. 960. COLBERG, INC., ET AL. *v.* CALIFORNIA EX REL. DEPARTMENT OF PUBLIC WORKS. Sup. Ct. Cal. Certiorari denied. *Richard Burton Daley* for petitioners. *Harry S. Fenton* and *Robert F. Carlson* for respondent. Reported below: 67 Cal. 2d 408, 432 P. 2d 3.

No. 965. COTHREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *T. R. Bryan* and *W. H. McElwee* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 386 F. 2d 364.

No. 967. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BOYER. Sup. Ct. Ill. Certiorari denied. *Floyd Stuppi* and *Gus Svolos* for petitioner. *Sidney Z. Karasik* for respondent. Reported below: 38 Ill. 2d 31, 230 N. E. 2d 173.

No. 970. GUINN, U. S. DISTRICT JUDGE, ET AL. *v.* ACF INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. *John G. Patterson* and *Gerald K. Fugit* for petitioners. *William J. Barnes* for respondent. Reported below: 384 F. 2d 15.

No. 980. ELECTRIC FURNACE CORP. *v.* DEERING MILLIKEN RESEARCH CORP. C. A. 6th Cir. Certiorari denied. *John A. Chambliss, Jr.,* and *Sizer Chambliss* for petitioner. *B. P. Gambrell* and *Ray H. Moseley* for respondent. Reported below: 383 F. 2d 352.

No. 972. ARLEY ET UX. *v.* UNITED PACIFIC INSURANCE CO. C. A. 9th Cir. Certiorari denied. *John Caughlan* for petitioners. *Kenneth E. Roberts* for respondent. Reported below: 379 F. 2d 183.

No. 976. TOWNSHIP OF HAMILTON TOWNSHIP ET AL. *v.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC ET AL. Sup. Ct. N. J. Certiorari denied. *Patrick T. McGahn, Jr.,* for petitioners. *Isaac C. Ginsburg* for respondents Board of Chosen Freeholders of the County of Atlantic et al. Reported below: 50 N. J. 394, 235 A. 2d 891.

No. 979. KINSEY *v.* HUGGINS ET AL. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. *H. L. Hays, Jr.,* for petitioner. *Josh H. Groce* for respondent Huggins. Reported below: 414 S. W. 2d 208.

No. 982. HANES HOSIERY DIVISION-HANES CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 384 F. 2d 188.

No. 984. MONTE VISTA LODGE *v.* GUARDIAN LIFE INSURANCE CO. OF AMERICA. C. A. 9th Cir. Certiorari denied. *Kenneth Barwick* for petitioner. *Sterling Hutcheson* for respondent. Reported below: 384 F. 2d 126.

No. 985. BRUCE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Ralph J. Temple, Sarel M. Kandell, Wm. Warfield Ross, Lawrence Speiser* and *Melvin L. Wulf* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 987. Cobb *v.* United States. C. A. 5th Cir. Certiorari denied. *C. Anthony Friloux, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 383 F. 2d 789.

No. 988. Lustiger *v.* United States. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 386 F. 2d 132.

No. 990. Joslyn *v.* Joslyn et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Morris Lavine* for petitioner. *James H. Kindel, Jr.*, and *John W. Armagost* for respondents Joslyn et al.

No. 991. Joslyn *v.* Superior Court of California, County of Los Angeles, et al. Sup. Ct. Cal. Certiorari denied. *Morris Lavine* for petitioner. *James H. Kindel, Jr.*, and *John W. Armagost* for respondents Joslyn et al.

No. 996. Myzel et al. *v.* Fields et al. C. A. 8th Cir. Certiorari denied. *Leonard M. Leiman* for petitioners. *Edward M. Glennon* for respondents. Reported below: 386 F. 2d 718.

No. 998. Wilkins *v.* United States. C. A. 4th Cir. Certiorari denied. *Edward P. Morgan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 385 F. 2d 465.

No. 1013. In re Hutchins et al. C. A. 3d Cir. Certiorari denied. *Milton T. Lasher* for petitioners. Reported below: 385 F. 2d 486.

No. 994. Estes et al. *v.* Camden Fire Insurance Association of General Accident Fire & Life Assurance Corp., Ltd., et al. C. A. 6th Cir. Certiorari denied. *Edward J. Utz* for Camden Fire Insurance Assn. of General Accident Fire & Life Assurance Corp., Ltd., *Robert M. Dennis* for State Automobile Mutual Insurance Co., *Ambrose H. Lindhorst* for Gusweiler, *William B. Saxbe,* Attorney General, *James D. Newcomer,* Assistant Attorney General, and *Charles S. Lopeman* for the State of Ohio, and *Solicitor General Griswold* for the United States, respondents.

No. 999. Delman et ux. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Martin D. Cohen* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Crombie J. D. Garrett* and *Willy Nordwind, Jr.,* for respondent. Reported below: 384 F. 2d 929.

No. 1000. Milton, dba Service Check Co. *v.* United States. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Crombie J. D. Garrett* and *Carolyn R. Just* for the United States. Reported below: 382 F. 2d 976.

No. 1001. Long *v.* United States. C. A. 5th Cir. Certiorari denied. *John Patterson* and *Edmon L. Rinehart* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 377.

No. 1002. Wagor et al., Trustees *v.* Cal Kovens Construction Corp. C. A. 5th Cir. Certiorari denied. *P. D. Thomson* for petitioners. *Robert C. Ward* for respondent. Reported below: 382 F. 2d 813.

No. 1005. FULTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Frank D. Reeves* for petitioner. Reported below: 84 Ill. App. 2d 280, 228 N. E. 2d 203.

No. 1006. STATE FARM FIRE & CASUALTY CO. *v.* MCFERRIN. C. A. 5th Cir. Certiorari denied. *Fred H. Sievert, Jr.*, for petitioner. Reported below: 382 F. 2d 282.

No. 1007. BOARDMAN ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *John L. Sullivan* and *Francis W. Sullivan* for petitioners. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 180 Ct. Cl. 264, 376 F. 2d 895.

No. 1010. KNOWLES ELECTRONICS, INC., ET AL. *v.* TIBBETTS INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Wilfred S. Stone* and *Anthony S. Zummer* for petitioners. *David L. Ladd, Dugald S. McDougall* and *Charles S. Grover* for respondents. Reported below: 386 F. 2d 209.

No. 1011. BURTZ-DURHAM CONSTRUCTION CO., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Alex McLennan* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl* and *Morton Hollander* for the United States. Reported below: 384 F. 2d 913.

No. 1012. FISHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William J. Corcoran* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 387 F. 2d 165.

No. 1014. Federal Oil Co. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Martin D. Cohen* for petitioner. *Solicitor General Griswold* and *Assistant Attorney General Rogovin* for respondent. Reported below: 385 F. 2d 127.

No. 1017. Houser *v.* O'Leary, Deputy Commissioner, Fourteenth Compensation District, et al. C. A. 9th Cir. Certiorari denied. *Edwin J. Peterson* for petitioner. *Solicitor General Griswold* for O'Leary, and *Floyd A. Fredrickson* for American Mail Line, Ltd., et al., respondents. Reported below: 383 F. 2d 730.

No. 1018. Masterson *v.* United States. C. A. 2d Cir. Certiorari denied. *Joseph Goldberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 383 F. 2d 610.

No. 1019. Franklin *v.* United States. C. A. 5th Cir. Certiorari denied. *P. Walter Jones* and *Jerry W. Brimberry* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 384 F. 2d 377.

No. 1021. Santos *v.* United States. C. A. 7th Cir. Certiorari denied. *Max Cohen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 385 F. 2d 43.

No. 1035. Anderson et al. *v.* Cotner, Clerk of Cleveland City Council, et al. Sup. Ct. Ohio. Certiorari denied. *Jack G. Day* for petitioners. *Daniel J. O'Loughlin* for respondent Cotner. *Ralph Rudd* for American Civil Liberties Union of Ohio, as *amicus curiae,* in support of the petition.

No. 1020. LITTLE, AKA HARDEN *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Otto R. Skopil, Jr.*, for petitioner. *John B. Leahy* for respondent. Reported below: —— Ore. ——, 431 P. 2d 810.

No. 1022. COLONIAL STEEL & IRON CO. ET AL. *v.* MILLER EQUIPMENT CO. C. A. 4th Cir. Certiorari denied. *Nelson Woodson* for petitioners. *Lewis F. Powell, Jr.*, for respondent. Reported below: 383 F. 2d 669.

No. 1023. SOUTHERN CONSTRUCTION CO., INC., ET AL. *v.* GENERAL ELECTRIC CO. C. A. 5th Cir. Certiorari denied. *R. Emmett Kerrigan* for petitioners. *Clifford E. Hughes* and *Cromwell Warner* for respondent. Reported below: 383 F. 2d 135.

No. 1037. MANCUSO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Norman P. Ramsey* and *H. Thomas Howell* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 378 F. 2d 612.

No. 1043. SAFWAY STEEL SCAFFOLDS CO. OF GEORGIA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *P. D. Thomson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 383 F. 2d 273.

No. 1047. NATIONAL INSIDER, INC. *v.* BEST MEDIUM PUBLISHING CO., INC. C. A. 7th Cir. Certiorari denied. *Elmer Gertz* for petitioner. *Frank J. McGarr* and *Daniel A. Becco* for respondent. Reported below: 385 F. 2d 384.

No. 1042. GAY *v.* CITY OF ORLANDO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. *J. Russell Hornsby* for petitioner. *Norman Burke* for respondent. Reported below: 202 So. 2d 896.

No. 1040. GIVENS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Thorp Thomas* for petitioner. Reported below: 243 Ark. 16, 418 S. W. 2d 629.

No. 1048. EVERSHIELD PRODUCTS, INC. *v.* SAPP ET AL., DBA TICE SUPERMARKET. Sup. Ct. Fla. Certiorari denied. *Samuel Kimmel* for petitioner. *Julian Clarkson* for respondents.

No. 1077. NOWELL *v.* NOWELL. C. A. 5th Cir. Certiorari denied. *Lawrence W. Anderson* for petitioner. *W. B. West III* for respondent. Reported below: 384 F. 2d 951.

No. 874. SPIRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Esther Strum Frankel* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Paul C. Summitt* for the United States. Reported below: 384 F. 2d 159.

No. 968. BANCO NACIONAL DE CUBA *v.* FARR ET AL., DBA FARR, WHITLOCK & CO., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *C. Dickerman Williams* for Farr et al., and *Whitney North Seymour, Eastman Birkett* and *John A. Guzzetta* for Compania Azucarera Vertientes-Camaguey de Cuba et al., respondents. Reported below: 383 F. 2d 166.

No. 935. National Dairy Products Corp. *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *John T. Chadwell, Richard W. McLaren* and *Martin J. Purcell* for petitioner. *Solicitor General Griswold, Assistant Attorney General Turner* and *Raymond P. Hernacki* for the United States. Reported below: 384 F. 2d 457.

No. 983. Battle Mountain Co. *v.* Udall, Secretary of the Interior. C. A. 9th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *William Braly Murray* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis* and *A. Donald Mileur* for respondent. Reported below: 385 F. 2d 90.

No. 992. Scales et al. *v.* Riddell. C. A. 9th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Ernest R. Mortenson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Robert N. Anderson* and *Robert I. Waxman* for respondent.

No. 1009. Hannahville Indian Community et al. *v.* United States. Ct. Cl. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Robert C. Bell, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 179 Ct. Cl. 473.

No. 1033. Powell *v.* National Savings & Trust Co. C. A. D. C. Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 1031. BENDER ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *John Kennedy Lynch* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Loring W. Post* for the United States. Reported below: 383 F. 2d 656.

No. 964. LAS VEGAS LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS & BARTENDERS ET AL. *v.* LAS VEGAS HACIENDA, INC., ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE FORTAS is of the opinion that certiorari should be granted. *Roland C. Davis* for petitioners. Reported below: 383 F. 2d 667.

No. 1004. HELM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Clyde C. Randolph, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 386 F. 2d 434.

No. 1030. MCMANN, WARDEN *v.* DAVIS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes* and *Iris Steel,* Assistant Attorneys General, for petitioner. *Gretchen White Oberman* for respondent. Reported below: 386 F. 2d 611.

No. 1032. PHILLIPS *v.* MURCHISON. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Robert L. Bobrick* for petitioner. *Ronald S. Daniels* and *Richard J. Barnes* for respondent. Reported below: 383 F. 2d 370.

No. 975. SEAGO *v.* NORTH CAROLINA THEATRES, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Milton Bordwin* for petitioner. *Charles F. Young* for respondent Paramount Film Distributing Corp. et al.

No. 10, Misc. DURHAM *v.* HAYNES, TRAINING CENTER SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. *Norman H. Anderson,* Attorney General of Missouri, and *Walter W. Nowotny, Jr.,* Assistant Attorney General, for respondent. Reported below: 368 F. 2d 989.

No. 139, Misc. GUERRERO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William V. Ballough,* Deputy Attorney General, for respondent. Reported below: 247 Cal. App. 2d 687, 56 Cal. Rptr. 7.

No. 183, Misc. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 217, Misc. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. 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. 420, Misc. WHITTY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *Robert E. Sutton,* Assistant Attorney General, for respondent. Reported below: 34 Wis. 2d 278, 149 N. W. 2d 557.

No. 459, Misc. BIOT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *O. John Rogge* for petitioner. *Isidore Dollinger* and *Daniel J. Sullivan* for respondent.

No. 569, Misc. PULIDO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien* and *Clifford K. Thompson, Jr.,* Deputy Attorneys General, for respondent.

No. 578, Misc. FREEMAN *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark* and *Walter S. Turner,* Assistant Attorneys General, for respondent.

No. 596, Misc. ANDREWS, AKA TURQE *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, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 381 F. 2d 377.

No. 618, Misc. COLLINS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Peter Dorsey* for petitioner. *Douglas M. Head,* Attorney General of Minnesota, *George M. Scott* and *Henry W. McCarr, Jr.,* for respondent. Reported below: 276 Minn. 459, 150 N. W. 2d 850.

No. 672, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 381 F. 2d 382.

No. 692, Misc. TOBAR *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *Robert E. Sutton,* Assistant Attorney General, for respondent.

No. 628, Misc. BRANDL *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz* and *Thomas A. Lockyear,* Assistant Attorneys General, for respondent.

No. 727, Misc. MARES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 383 F. 2d 811.

No. 762, Misc. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 788, Misc. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Dennis G. Lyons* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Jerome M. Feit* for the United States. Reported below: 127 U. S. App. D. C. 272, 383 F. 2d 199.

No. 809, Misc. COOPER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Herman I. Pollock* and *John W. Packel* for petitioner. *Arlen Specter* for respondent.

No. 813, Misc. SIMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Russell R. Reno, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 834, Misc. CORLISS, AKA HAYES *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. *Lloyd J. Skedd* for petitioner. Reported below: 150 Mont. 40, 430 P. 2d 632.

No. 823, Misc. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 380 F. 2d 477.

No. 824, Misc. HEALD *v.* MAINE. Sup. Jud. Ct. Maine. Certiorari denied. *Clyde R. Chapman* for petitioner. *James S. Erwin,* Attorney General of Maine, and *John W. Benoit,* Assistant Attorney General, for respondent. Reported below: 232 A. 2d 79.

No. 833, Misc. DUISEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Theodore F. Schwartz* for petitioner. *Norman H. Anderson,* Attorney General of Missouri, and *Courtney Goodman, Jr.,* Assistant Attorney General, for respondent.

No. 837, Misc. VIDA *v.* CLARK, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 843, Misc. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 380 F. 2d 686.

No. 844, Misc. CLEMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 382 F. 2d 403.

No. 863, Misc. LAMPSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: —— Iowa ——, 149 N. W. 2d 116.

No. 870, Misc. BALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 381 F. 2d 702.

No. 859, Misc. AIELLO ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioners. *John T. Corrigan* and *Harvey R. Monck* for respondent.

No. 865, Misc. SWARTZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 871, Misc. DOOLEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 872, Misc. PRESTON *v.* WARDEN, KENTUCKY PENITENTIARY. C. A. 6th Cir. Certiorari denied.

No. 873, Misc. GILL *v.* OHIO. Ct. App. Ohio, Madison County. Certiorari denied. *D. Harland Jackman* for petitioner.

No. 874, Misc. CABELLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 877, Misc. NEWMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 878, Misc. SPADER *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied.

No. 879, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 880, Misc. CASTELO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 881, Misc. HOFFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 884, Misc. SHARP *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: 381 F. 2d 708.

No. 885, Misc. WISE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 127 U. S. App. D. C. 279, 383 F. 2d 206.

No. 886, Misc. GARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Luke McKissack* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 382 F. 2d 768.

No. 887, Misc. BOHMS *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied. *Charles Lacey* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 381 F. 2d 283.

No. 889, Misc. BUNKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 891, Misc. EUBANKS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Douglas M. Head,* Attorney General of Minnesota, and *George M. Scott* for respondent. Reported below: 277 Minn. 257, 152 N. W. 2d 453.

No. 892, Misc. ABINA *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 895, Misc. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 985.

No. 901, Misc. HUSKA *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 367 F. 2d 863.

No. 903, Misc. RESTREPO *v.* SAULS. Sup. Ct. Fla. Certiorari denied.

No. 908, Misc. JENKINS *v.* BEBEAU ET AL. C. A. 6th Cir. Certiorari denied.

No. 909, Misc. FULFORD *v.* SMITH, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

No. 910, Misc. MURRAY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 912, Misc. HAYES *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

No. 913, Misc. ANZAI, GUARDIAN *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. *Helen B. Ryan* for petitioner. *Bert T. Kobayashi,* Attorney General of Hawaii, and *Clinton R. Ashford,* Special Deputy Attorney General, for respondent. Reported below: —— Haw. ——, 430 P. 2d 319.

No. 915, Misc. HUDGINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 252 Cal. App. 2d 174, 60 Cal. Rptr. 176.

No. 911, Misc. EWING *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 916, Misc. BLYDEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 918, Misc. MAGGIO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *H. David Rothman* for petitioner.

No. 919, Misc. BALES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 429 P. 2d 1014.

No. 922, Misc. BELTOWSKI *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 923, Misc. SNOWDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 384 F. 2d 357.

No. 927, Misc. WHEATON *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 931, Misc. BERNHARDT *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 934, Misc. CAVE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herbert S. Siegal* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States.

No. 945, Misc. OSTROWSKI *v.* MANBECK. C. A. D. C. Cir. Certiorari denied. *Seymour J. Spelman* for respondent. Reported below: 128 U. S. App. D. C. 1, 384 F. 2d 970.

No. 935, Misc. SHURNEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 940, Misc. FURTAK *v.* NEW YORK. County Ct., Steuben County, N. Y. Certiorari denied.

No. 941, Misc. BONEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Worth Rowley* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 128 U. S. App. D. C. 279, 387 F. 2d 237.

No. 949, Misc. RICHARDSON *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 951, Misc. SCHACK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 952, Misc. JACKSON *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 953, Misc. HARTMANN *v.* LUND, MEDICAL DIRECTOR, MINNESOTA SECURITY HOSPITAL. Sup. Ct. Minn. Certiorari denied. *Lynn S. Castner* for petitioner. *Douglas M. Head,* Attorney General of Minnesota, and *William J. Hempel,* Chief Deputy Attorney General, for respondent. Reported below: 277 Minn. 398, 152 N. W. 2d 514.

No. 956, Misc. LEWIS, AKA EHRLICH *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 957, Misc. ALDRIDGE *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 382 F. 2d 288.

No. 958, Misc. ROOF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* for petitioner. *Solicitor General Griswold* for the United States.

No. 959, Misc. SWEET *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 71 Wash. 2d 172, 426 P. 2d 983.

No. 963, Misc. MARNOCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 1019.

No. 964, Misc. MITCHELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 966, Misc. BALSZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 252 Cal. App. 2d 644, 60 Cal. Rptr. 778.

No. 967, Misc. STRAUSS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 972, Misc. MALONE *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 380 F. 2d 741.

No. 974, Misc. VATELLI *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 975, Misc. ESPARZA *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 980, Misc. GILLESPIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 384 F. 2d 716.

No. 986, Misc. DUTCH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 254 Cal. App. 2d 163, 61 Cal. Rptr. 727.

No. 976, Misc. PURIFOY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 978, Misc. FOX *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 979, Misc. CASTRO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 981, Misc. FLORES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 984, Misc. JACKSON *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 987, Misc. DOUGLAS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 989, Misc. CARROLL *v.* TURNER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 990, Misc. PARKER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 992, Misc. RILEY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 993, Misc. WYNN *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 994, Misc. CANNON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1004, Misc. CARR *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *John C. Walters* for petitioner. Reported below: 44 Ala. App. 40, 202 So. 2d 59.

No. 996, Misc. McCabe *v.* United States. Ct. Cl. Certiorari denied.

No. 997, Misc. Callas *v.* Rhay, Penitentiary Superintendent. Sup. Ct. Wash. Certiorari denied.

No. 998, Misc. Washington *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 1003, Misc. McDermott *v.* District Court of Riley County. Sup. Ct. Kan. Certiorari denied.

No. 1005, Misc. Cassasa *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1010, Misc. Urbano *v.* Liston. C. A. 4th Cir. Certiorari denied. *Russell R. Reno, Jr.,* for respondent.

No. 1011, Misc. Troiani *v.* New York. Ct. App. N. Y. Certiorari denied. *Peter J. O'Connor* for respondent.

No. 1012, Misc. White *v.* Peyton, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 1018, Misc. Blanton *v.* Ropke, Judge. Ct. App. Ky. Certiorari denied. *David Kaplan* for petitioner. *John B. Breckinridge,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent.

No. 1031, Misc. Azzone *v.* Tahash, Warden. C. A. 8th Cir. Certiorari denied.

No. 1034, Misc. Allen *v.* Tennessee. Cir. Ct., Sevier County, Tenn. Certiorari denied.

No. 1037, Misc. DUARTE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1041, Misc. SOVIERO ET AL. *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1043, Misc. GREEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 236 Cal. App. 2d 1, 45 Cal. Rptr. 744.

No. 1045, Misc. DONALDSON *v.* O'CONNOR, STATE HOSPITAL SUPERINTENDENT, ET AL. C. A. 5th Cir. Certiorari denied. *Morton Birnbaum* for petitioner.

No. 1062, Misc. KEATON *v.* OHIO. Ct. App. Ohio, Pickaway County. Certiorari denied. Reported below: 9 Ohio App. 2d 139, 223 N. E. 2d 631.

No. 1080, Misc. WALLACH *v.* UNGERMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 1089, Misc. GONZALEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Robert A. Meister* and *Anthony F. Marra* for petitioner. *Frank S. Hogan* and *Michael Juviler* for respondent. Reported below: 20 N. Y. 2d 289, 229 N. E. 2d 220.

No. 1102, Misc. EVANS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Lawrence A. Aschenbrenner* for petitioner. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: —— Ore. ——, 432 P. 2d 175.

No. 230, Misc. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States.

No. 1110, Misc. LEVINE *v.* COLGATE-PALMOLIVE CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 1115, Misc. SEIDLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Marvin Juron* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 385 F. 2d 387.

No. 31, Misc. FLOYD *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. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 42, Misc. ALLEN *v.* MEIER ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for respondents. Reported below: 374 F. 2d 447.

No. 343, Misc. BARNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States. Reported below: 378 F. 2d 646.

No. 947, Misc. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States. Reported below: 383 F. 2d 398.

No. 971, Misc. COMLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 524, Misc. JOHNSON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for respondent.

No. 1078, Misc. GONZALEZ *v.* WARDEN, BROOKLYN HOUSE OF DETENTION. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, Michael Meltsner, Anthony G. Amsterdam, James M. Nabrit III, Charles Stephen Ralston* and *Melvyn Zarr* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Alan F. Scribner* for respondent. Reported below: 21 N. Y. 2d 18, 233 N. E. 2d 265.

No. 839, Misc. FISCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS is of the opinion that certiorari should be granted. *Eugene P. Souther* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 381 F. 2d 509.

No. 855, Misc. BENNETT *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. MR. JUSTICE FORTAS is of the opinion that certiorari should be granted. *United States* v. *Wade,* 388 U. S. 218, at 261–262 (separate opinion). Reported below: 381 F. 2d 814.

No. 917, Misc. ARMIJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed. *James F. Hewitt* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Jerome M. Feit* for the United States. Reported below: 384 F. 2d 694.

Rehearing Granted. (See No. 861, October Term, 1965, *ante,* p. 203.)

Rehearing Denied.

No. 933, October Term, 1966. CHINA UNION LINES, LTD. *v.* A. O. ANDERSEN & CO. ET AL.; and

No. 934, October Term, 1966. LAN JING-CHAU ET AL. *v.* A. O. ANDERSEN & CO. ET AL., 386 U. S. 933, 1000. Motion of American Trial Lawyers Association, Admiralty Section, for leave to file a brief, as *amicus curiae,* in support of petition for second rehearing denied. Motions for leave to file second petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Arthur J. Mandell* on the motion for American Trial Lawyers Association, Admiralty Section.

No. 680, Misc., October Term, 1966. RUCKER *v.* JOHNSON, CLERK OF DISTRICT COURT, 385 U. S. 941. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 21. ZSCHERNIG ET AL. *v.* MILLER, ADMINISTRATOR, ET AL., 389 U. S. 429. Petition for rehearing or clarification of opinion denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 581. Japanese War Notes Claimants Association of the Philippines, Inc. *v.* United States, 389 U. S. 971;

No. 668. Amplex of Maryland, Inc. *v.* Outboard Marine Corp., 389 U. S. 1036;

No. 720. Henry *v.* Delhi-Taylor Oil Corp., 389 U. S. 1021;

No. 735. Klein et al. *v.* United States, 389 U. S. 1037;

No. 753. Birns *v.* Ohio, 389 U. S. 1038;

No. 758. Gates *v.* P. F. Collier, Inc., 389 U. S. 1038;

No. 768. Osbourne et al. *v.* Mississippi Valley Barge Line Co. et al., 389 U. S. 579;

No. 769. Skyline Homes, Inc. *v.* National Labor Relations Board, 389 U. S. 1039;

No. 790. Braswell Motor Freight Lines, Inc., et al. *v.* United States et al., 389 U. S. 569;

No. 815. Paulaitis *v.* Paulaitis, *ante*, p. 36;

No. 820. Thrifty Shoppers Scrip Co. *v.* United States et al., 389 U. S. 580;

No. 821. Bell et ux. *v.* United States, 389 U. S. 1042;

No. 840. Miller *v.* Haines, Director, Department of Mental Hygiene and Correction of Ohio, et al., 389 U. S. 582;

No. 843. Rutherford et al. *v.* American Medical Association, Inc., et al., 389 U. S. 1043;

No. 850. James, State Treasurer of Texas, et al. *v.* Gilmore et al., 389 U. S. 572;

No. 865. E. W. Buschman Co. *v.* National Labor Relations Board, 389 U. S. 1045;

No. 927. Zuckerman et al. *v.* Greason, *ante*, p. 925; and

No. 928. Allinson *v.* Greason, *ante*, p. 925. Petitions for rehearing denied.

No. 502, Misc. EPTON *v.* NEW YORK, *ante,* p. 29;

No. 771, Misc. EPTON *v.* NEW YORK, *ante,* p. 29;

No. 702, Misc. ROGERS *v.* STANLEY, STATE HOSPITAL DIRECTOR, 389 U. S. 1055;

No. 706, Misc. BUTTERFIELD *v.* GAZELLE, 389 U. S. 1024;

No. 777, Misc. NAEGLE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 927;

No. 800, Misc. STEBBINS *v.* NATIONWIDE MUTUAL INSURANCE CO., *ante,* p. 910;

No. 803, Misc. OSWALD *v.* CROUSE, WARDEN, *ante,* p. 910; and

No. 864, Misc. TAYLOR *v.* BURKE, WARDEN, ET AL., *ante,* p. 918. Petitions for rehearing denied.

No. 366. AMERICAN INVESTORS FUND, INC. *v.* FOGEL ET AL., 389 U. S. 830. Motion for leave to file petition for rehearing denied.

No. 498. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* FOUR COUNTIES WATER USERS ASSOCIATION ET AL., 389 U. S. 1049. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 692. BYRNE *v.* CHICAGO TITLE & TRUST CO. ET AL., 389 U. S. 1005. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 900. REBENSTORF *v.* ILLINOIS, *ante,* p. 924. Motion to dispense with printing petition granted. Petition for rehearing denied.

No. 745, Misc. MCCRAY *v.* ARRAJ, CHIEF JUDGE, U. S. DISTRICT COURT, 389 U. S. 1030. Motion for leave to file petition for rehearing denied.

No. 791. SOBELL *v.* UNITED STATES, 389 U. S. 1051. Petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

MARCH 11, 1968.

Miscellaneous Orders.

No. 31, Orig. UTAH *v.* UNITED STATES. Motions of Great Salt Lake Minerals & Chemicals Corp. for leave to intervene as a plaintiff and to intervene, in the alternative, as a defendant, together with its answer and cross claim referred to Special Master for a report and recommendation. Such report and recommendation shall also include motion of Morton International, Inc., for leave to intervene heretofore referred to the Special Master. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *George E. Boss* and *Robert D. Larsen* on the motions. *Phil L. Hansen,* Attorney General, for the State of Utah in opposition; *Solicitor General Griswold* for the United States. [For earlier orders herein, see, *e. g.,* 389 U. S. 909.]

No. 416. FLAST ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. S. D. N. Y. (Probable jurisdiction noted, 389 U. S. 895.) Motion of United Americans for Public Schools for leave to file a brief, as *amicus curiae,* granted. *Henry C. Clausen* on the motion.

No. 701. IN RE WHITTINGTON. Ct. App. Ohio, Fairfield County. (Certiorari granted, 389 U. S. 819.) Motion of Defender's Office, Cleveland Legal Aid Society, to dispense with printing its brief, as *amicus curiae,* denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that the motion should be granted.

No. 742. MARYLAND ET AL. *v.* WIRTZ, SECRETARY OF LABOR, ET AL. Appeal from D. C. Md. (Probable jurisdiction noted, 389 U. S. 1031.) Motion of State of Maryland et al. for additional time for oral argument and for permission for three attorneys to participate in argument denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Francis B. Burch,* Attorney General of Maryland, and *Alan M. Wilner,* Assistant Attorney General, on the motion.

No. 802. PEYTON, PENITENTIARY SUPERINTENDENT *v.* ROWE ET AL. C. A. 4th Cir. (Certiorari granted, 389 U. S. 1035.) Motion of State of California for leave to participate in oral argument, as *amicus curiae,* denied. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien, Derald E. Granberg* and *Clifford K. Thompson,* Deputy Attorneys General, on the motion.

No. 1058. FAIRLEY ET AL. *v.* PATTERSON ET AL.; and

No. 1059. BUNTON ET AL. *v.* PATTERSON ET AL. Appeals from D. C. S. D. Miss. The Solicitor General is invited to file a brief expressing the views of the United States including the question of the jurisdiction of the three-judge court.

No. 1164, Misc. GERBERDING *v.* TAHASH, WARDEN; and

No. 1165, Misc. HENDERSON *v.* KOLOSKI, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1159, Misc. CROWDER *v.* SMITH, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1168, Misc. YOST *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. 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.

No. 1160, Misc. BRITTON ET AL. *v.* THOMSEN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus denied. *William Harris Zinman* on the motion. *Francis B. Burch,* Attorney General of Maryland, and *George W. Liebmann,* Assistant Attorney General, for respondents Bullen et al. in opposition.

Probable Jurisdiction Noted.

No. 824. WHYY, INC. *v.* BOROUGH OF GLASSBORO ET AL. Appeal from Sup. Ct. N. J. Probable jurisdiction noted. *Grover C. Richman, Jr.,* for appellant. *John W. Trimble* for appellee Borough of Glassboro. Reported below: 50 N. J. 6, 231 A. 2d 608.

Certiorari Granted. (See also No. 871, *ante,* p. 339; No. 913, *ante,* p. 338; No. 934, *ante,* p. 340; and No. 786, Misc., *ante,* p. 335.)

No. 1049. FEDERAL TRADE COMMISSION *v.* TEXACO INC. ET AL. C. A. D. C. Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Turner, Lawrence G. Wallace, James McI. Henderson* and *Alvin L. Berman* for petitioner. *Milton Handler* for Texaco Inc., and *Edgar E. Barton* for B. F. Goodrich Co., respondents. Reported below: 127 U. S. App. D. C. 349, 383 F. 2d 942.

No. 937. COMMONWEALTH COATINGS CORP. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 1st Cir. Certiorari granted. *Emanuel Harris* for petitioner. *Luther P. House, Jr.,* for respondents. Reported below: 382 F. 2d 1010.

Certiorari Denied. (See also No. 961, *ante,* p. 338; and No. 1168, Misc., *supra.*)

No. 910. SPIGNER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Burton Marks* and *Harvey A. Schneider* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edward H. Hinz, Jr.,* and *Daniel J. Kremer,* Deputy Attorneys General, for respondent.

No. 962. MCMANIGAL *v.* SIMON ET AL. C. A. 7th Cir. Certiorari denied. *Charles V. Falkenberg* for petitioner. *John J. Stamos, Edward J. Hladis* and *Ronald Butler* for respondents. Reported below: 382 F. 2d 408.

No. 986. WHEATLAND HILLS CORP. *v.* MORTON. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Eugene Gressman, Harvey J. Abel* and *Allan Milledge* for petitioner. *Marion E. Sibley* and *Irving B. Levenson* for respondent. Reported below: 199 So. 2d 122.

No. 1026. PEARSON *v.* HURSH, STATE WELFARE COMMISSIONER. C. A. 8th Cir. Certiorari denied.

No. 1041. WESTERN PACIFIC RAILROAD CO. ET AL. *v.* HABERMEYER ET AL., MEMBERS OF RAILROAD RETIREMENT BOARD, ET AL. C. A. 9th Cir. Certiorari denied. *Burnham Enersen* and *Richard Murray* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander* and *Leonard Schaitman* for respondents. Reported below: 382 F. 2d 1003.

No. 1060. JONES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 254 Cal. App. 2d 200, 62 Cal. Rptr. 304.

No. 1036. MYERS *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1053. KRECHEVSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Aaron L. Gersten* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States.

No. 1056. CITY OF JACKSONVILLE *v.* SCHUMANN ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. *Claude L. Mullis, Sr.,* and *William Lee Allen* for petitioner. *John S. Duss* for Schumann et al., and *W. D. Jones, Jr.,* for Brain et al., respondents. Reported below: 199 So. 2d 727.

No. 1073. HALDANE *v.* CHAGNON ET AL. C. A. 9th Cir. Certiorari denied. *Joseph W. Jarrett* for respondents Chagnon et al., and *Donald W. Rees* for respondent Thompson. Reported below: —— F. 2d ——.

No. 1086. MALINOU, PUBLIC ADMINISTRATOR *v.* KIERNAN, PUBLIC ADMINISTRATOR, ET AL. Sup. Ct. R. I. Certiorari denied. *Martin Malinou,* petitioner, *pro se. Bernard W. Boyer* and *Leonard A. Kiernan, Jr., pro se,* for respondent Kiernan. Reported below: —— R. I. ——, 235 A. 2d 105.

No. 1025. COINER, WARDEN *v.* SHEAR. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the case set down for oral argument. *C. Donald Robertson,* Attorney General of West Virginia, and *Leo Catsonis* and *Morton I. Taber,* Assistant Attorneys General, for petitioner.

No. 1097. EVANS REAMER & MACHINE CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Richard F. Stevens* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 181 Ct. Cl. 539, 386 F. 2d 873.

No. 447, Misc. WALKER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Richard Y. Feder* and *Alfred Hopkins* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Harold Mendelow,* Assistant Attorney General, for respondent. Reported below: 197 So. 2d 492.

No. 883, Misc. PARKER *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. *William B. Beebe* and *Hershel Shanks* for respondent National Education Association of the United States, and *J. Cookman Boyd, Jr.,* for respondents Maryland State Teachers' Assn. et al.

No. 938, Misc. DUNN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 383 F. 2d 357.

No. 942, Misc. CONNOR *v.* MASSACHUSETTS;

No. 955, Misc. LANDRY *v.* MASSACHUSETTS; and

No. 1068, Misc. DOHERTY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *James J. Twohig* for petitioner in No. 942, Misc., and *F. Lee Bailey* for petitioner in No. 1068, Misc. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Willie J. Davis* and *Howard M. Miller,* Assistant Attorneys General, for respondent in all three cases. Reported below: 353 Mass. 197, 229 N. E. 2d 267.

No. 1017, Misc. MANCILLA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States et al. Reported below: 382 F. 2d 269.

No. 977, Misc. WILKES *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. *H. O. Pemberton* for respondent. Reported below: 199 So. 2d 472.

No. 1036, Misc. SNYDER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 427 Pa. 83, 233 A. 2d 530.

No. 1052, Misc. SUCCOP *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 67 Cal. 2d 785, 433 P. 2d 473.

No. 1055, Misc. HOLLIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1056, Misc. SIPLINGER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 252 Cal. App. 2d 817, 60 Cal. Rptr. 914.

No. 1058, Misc. CAMP *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 71 Wash. 2d 620, 430 P. 2d 187.

No. 1063, Misc. WEAVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John A. Shorter, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 384 F. 2d 879.

No. 1087, Misc. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Louis P. Yangas* for petitioner. Reported below: 38 Ill. 2d 150, 230 N. E. 2d 214.

No. 1066, Misc. LONG ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *John F. McAuliffe* and *Robert C. Heeney* for petitioners. Reported below: 1 Md. App. 326, 230 A. 2d 119.

No. 1061, Misc. GIVENS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1067, Misc. HARRIS *v.* REAGAN, GOVERNOR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1069, Misc. WEILAND *v.* O'NEAL. Sup. Ct. Ill. Certiorari denied.

No. 1071, Misc. KIZER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1079, Misc. HAMLETT *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. 1086, Misc. ALEXANDER *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *W. L. Longshore* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 44 Ala. App. 143, 204 So. 2d 486.

No. 1092, Misc. PINEDA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *R. Donald Chapman* for petitioner. Reported below: 253 Cal. App. 2d 443, 62 Cal. Rptr. 144.

No. 1101, Misc. MINK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 1106, Misc. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 382 F. 2d 583.

No. 1113, Misc. ZAVALA *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1117, Misc. BUTTERFIELD *v.* GAZELLE. C. A. D. C. Cir. Certiorari denied.

No. 1118, Misc. O'TOOLE *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 386 F. 2d 168.

No. 1128, Misc. SCHACK *v.* FLORIDA ET AL. C. A. 5th Cir. Certiorari denied.

No. 1172, Misc. LOVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Leonard H. Dickstein* for the United States. Reported below: 386 F. 2d 260.

Rehearing Denied.

No. 483. DETENBER ET AL., ADMINISTRATRICES *v.* AMERICAN UNIVERSAL INSURANCE CO., 389 U. S. 987; *ante,* p. 917. Petition for rehearing denied.

MARCH 18, 1968.

Miscellaneous Orders.

No. 33, Orig. ARKANSAS *v.* TENNESSEE. Answer and counterclaim of the State of Tennessee referred to Special Master. [For earlier order herein, see 389 U. S. 1026.]

No. 133. KOLOD ET AL. *v.* UNITED STATES, *ante,* p. 136. Motion of the United States to modify order set for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Solicitor General Griswold* on the motion. *Edward Bennett Williams* for petitioners in opposition.

No. ——. LAZAROS *v.* MICHIGAN. Application for bail presented to MR. JUSTICE FORTAS, and by him referred to the Court, denied. *S. Jerome Bronson* for respondent in opposition.

No. 510. PICKERING *v.* BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY. Appeal from Sup. Ct. Ill. (Probable jurisdiction noted, 389 U. S. 925.) Motion of American Civil Liberties Union, Illinois Division, for leave to participate in oral argument, as *amicus curiae,* denied.

No. 1015. WITHERSPOON *v.* ILLINOIS ET AL. Sup. Ct. Ill. (Certiorari granted, 389 U. S. 1035); and

No. 1016. BUMPER *v.* NORTH CAROLINA. Sup. Ct. N. C. (Certiorari granted, 389 U. S. 1034.) Motion of F. Lee Bailey for leave to file a brief, as *amicus curiae,* granted. *F. Lee Bailey* on the motion.

No. 1200, Misc. SMITH *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (See No. 1105, October Term, 1966, *ante,* p. 411; and No. 1131, Misc., *ante,* p. 410.)

Certiorari Denied. (See also No. 1071, *ante,* p. 410; and No. 858, Misc., *ante,* p. 413.)

No. 1045. REED *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *Richard K. Lyon* for petitioner. *Charles T. Duncan, Hubert B. Pair* and *Ted D. Kuemmerling* for respondent.

No. 1062. COBIA ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Richard Richards* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 384 F. 2d 711.

No. 1027. HICKS ET AL. *v.* PHYSICAL THERAPISTS EXAMINING BOARD FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *G. William Hammer* for petitioners. *Charles T. Duncan, Hubert B. Pair* and *David P. Sutton* for respondent.

No. 1061. PACIFIC MARITIME ASSN. ET AL. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. *Richard Ernst* for Pacific Maritime Assn., and *Norman Leonard* for International Longshoremen's & Warehousemen's Union et al., petitioners. *Francis Heisler* for respondents. Reported below: 384 F. 2d 935.

No. 1063. OHIO VALLEY GAS CORP. *v.* FEDERAL POWER COMMISSION. C. A. D. C. Cir. Certiorari denied. *Jerome B. Libin* and *Frank J. Martin, Jr.,* for petitioner. *Solicitor General Griswold, Richard A. Solomon* and *Peter H. Schiff* for respondent.

No. 1065. MCBETH *v.* TEXAS & PACIFIC RAILWAY CO. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. *Fred S. Abney* for petitioner. *John M. Scott* for respondent. Reported below: 414 S. W. 2d 45.

No. 1074. VETERANS OF THE ABRAHAM LINCOLN BRIGADE ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *David Rein* and *Leonard B. Boudin* for petitioners. *Solicitor General Griswold* for respondents.

No. 880. BRAY *v.* CALIFORNIA. Super. Ct. Cal., County of Orange. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed. *Redrup* v. *New York,* 386 U. S. 767. *Stanley Fleishman* and *Sam Rosenwein* for petitioner. *Thomas C. Lynch,* Attorney General of California, for respondent.

No. 1075. ZUBIK ET AL. *v.* ZUBIK ET AL., EXECUTORS. C. A. 3d Cir. Certiorari denied. *Norman J. Cowie* and *Douglas A. Jacobsen* for petitioners. *Benjamin F. Stahl, Jr.,* for respondents. Reported below: 384 F. 2d 267.

No. 1078. LOUIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Norman D. Lane* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1079. F. E. MYERS & BRO. CO. *v.* FMC CORP. C. A. 6th Cir. Certiorari denied. *Everett R. Hamilton* for petitioner. *Thomas O. Herbert* and *John C. Oberlin* for respondent. Reported below: 384 F. 2d 4.

No. 1080. HEWLETT-PACKARD CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Graham B. Moody, Jr.,* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 385 F. 2d 1013.

No. 1084. NATIONAL GYPSUM CO. ET AL. *v.* UNITED STATES GYPSUM CO. C. A. 7th Cir. Certiorari denied. *Charles J. Merriam* for petitioners. *Charles M. Price, James G. Hiering* and *Albert H. Pendleton* for respondent. Reported below: 387 F. 2d 799.

No. 1085. ALLISON *v.* OVENS. Sup. Ct. Ariz. Certiorari denied. *Neal P. Rutledge* for petitioner. *Mark Wilmer* for respondent. Reported below: 102 Ariz. 520, 433 P. 2d 968.

No. 1096. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James G. Andrews, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1121. PETO *v.* MADISON SQUARE GARDEN CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 384 F. 2d 682.

No. 1046. HAILPARN *v.* NEW JERSEY. Sup. Ct. N. J. Application for extension of time to file brief in opposition to petition for writ of certiorari after denial by the Clerk denied. Certiorari denied. *Saul J. Zucker* for petitioner.

No. 1067. KNAPP BROTHERS SHOE MANUFACTURING CORP. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Robert W. Meserve* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harry Baum* and *Albert J. Beveridge III* for the United States. Reported below: 384 F. 2d 692.

No. 1095. GANNON *v.* NAVARRO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Wilfred L. Davis* for petitioner. *Philip Pierce* for respondent. Reported below: 385 F. 2d 512.

No. 1171. ATLANTIC REALTY CO. *v.* ALLEN ET AL. C. A. 5th Cir. Motion of respondents to dispense with printing brief granted. Certiorari denied. *Daniel K. Mayers* for petitioner. *Albert M. Horn* for respondents. Reported below: 384 F. 2d 527.

No. 494, Misc. O'HAIR *v.* ABRAMOVITZ ET AL. C. A. 5th Cir. Certiorari denied.

No. 657, Misc. WEINREICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 896, Misc. ELKSNIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1021, Misc. ASPEITIA *v.* LLOYD, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1022, Misc. SHERLOCK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1028, Misc. TRUAX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1039, Misc. MCGINNIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Ernest S. DeLaney, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 384 F. 2d 875.

No. 1048, Misc. BRADLEY *v.* PRESTON ET AL. C. A. D. C. Cir. Certiorari denied. *David I. Shapiro* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent United States.

No. 1051, Misc. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1064, Misc. BRIGGS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 1076, Misc. JOHNSON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *C. Paul Jones* for petitioner. Reported below: 277 Minn. 230, 152 N. W. 2d 768.

No. 1072, Misc. SUMMERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1075, Misc. FIERRO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1083, Misc. GLOVER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1085, Misc. MATTHEWS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1098, Misc. WASHINGTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Sam Adam* for petitioner. Reported below: 81 Ill. App. 2d 162, 225 N. E. 2d 673.

No. 1104, Misc. MCCONNELL *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1105, Misc. HILL *v.* COURT OF APPEAL OF CALIFORNIA, SECOND DISTRICT, DIVISION TWO, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1154, Misc. BRECHEEN *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Albert J. Ahern, Jr.*, for petitioner.

No. 1158, Misc. REINKE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1180, Misc. EWING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 386 F. 2d 10.

No. 1207, Misc. PRUCHA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William Cahn* for respondent.

No. 1215, Misc. SNIDER *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *Alex N. Apostolou* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for respondent. Reported below: 384 F. 2d 521.

No. 695, Misc. TIRADO *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 379 F. 2d 619.

No. 1046, Misc. DETORO *v.* MARYLAND;

No. 1047, Misc. RALPH *v.* WARDEN, MARYLAND PENITENTIARY; and

No. 1049, Misc. BROWN *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 J. McCarthy* for petitioner in No. 1046, Misc., and *Edward L. Genn* for petitioner in No. 1047, Misc. *Francis B. Burch,* Attorney General of Maryland, and *Edward F. Borgerding,* Assistant Attorney General, for respondents in each case.

Rehearing Granted. (See No. 1105, October Term, 1966, *ante,* p. 411.)

Rehearing Denied.

No. 434, Misc. JACOBS *v.* BROUGH, WARDEN, 389 U. S. 1058. Petition for rehearing denied.

MARCH 22, 1968.

No. —. WINTERS *v.* UNITED STATES ET AL. Application for stay presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application. *Moses M. Falk* for applicant. *Solicitor General Griswold* for the United States et al. in opposition.

MARCH 25, 1968.

Miscellaneous Orders.

No. 32, Orig. MISSOURI *v.* NEBRASKA. Answer of the State of Nebraska referred to Special Master. [For earlier order herein, see 389 U. S. 1001.]

No. 813. SHAPIRO, COMMISSIONER OF WELFARE OF THE STATE OF CONNECTICUT *v.* THOMPSON. Appeal from D. C. Conn. (Probable jurisdiction noted, 389 U. S. 1032);

No. 1134. WASHINGTON ET AL. *v.* HARRELL ET AL. Appeal from D. C. D. C. (Probable jurisdiction noted, *ante,* p. 940); and

No. 1138. REYNOLDS ET AL. *v.* SMITH ET AL. Appeal from D. C. E. D. Pa. (Probable jurisdiction noted, *ante,* p. 940.) Motion of the Attorney General of California for leave to participate in oral argument, as *amicus curiae,* denied. *Thomas C. Lynch,* Attorney General of California, on the motion.

No. 949. KING, COMMISSIONER, DEPARTMENT OF PENSIONS AND SECURITY, ET AL. *v.* SMITH ET AL. Appeal from D. C. M. D. Ala. (Probable jurisdiction noted, *ante,* p. 903.) Motion to remove case from summary calendar denied. *MacDonald Gallion,* Attorney General of Alabama, on the motion.

No. 1089. BLOCK ET AL. *v.* COMPAGNIE NATIONALE AIR FRANCE. C. A. 5th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1225, Misc. MALLERY *v.* MAXWELL, WARDEN, ET AL.;

No. 1238, Misc. SARGENT *v.* YEAGER, WARDEN, ET AL.;

No. 1246, Misc. GRAY *v.* FIELD, MENS COLONY SUPERINTENDENT, ET AL.;

No. 1250, Misc. EX PARTE MOHLER;

No. 1256, Misc. ARNOLD *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT;

No. 1263, Misc. DI PALERMO *v.* BLACKWELL, WARDEN, ET AL.;

No. 1269, Misc. SMITH *v.* NELSON, WARDEN;

No. 1271, Misc. LANDMAN *v.* CUNNINGHAM, CORRECTIONS DIRECTOR; and

No. 1274, Misc. BURTON *v.* TEXAS. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 638, Misc. FOSTER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to question whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights. Case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, and *Edward A. Hinz, Jr.,* and *Charles P. Just,* Deputy Attorneys General, for respondent.

Certiorari Denied. (See also No. 1103, *ante,* p. 458.)

No. 1126. PALMER *v.* NISSEN. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied. *William B. Mahoney* for respondent.

No. 989. RAHRIG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Harold M. Street* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1066. SECOND JUDICIAL DISTRICT COURT OF NEVADA, COUNTY OF WASHOE (WRIGHT, REAL PARTY IN INTEREST) *v.* NEVADA; and

No. 1091. SECOND JUDICIAL DISTRICT COURT OF NEVADA, COUNTY OF WASHOE (EDDINGTON, REAL PARTY IN INTEREST) *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: —— Nev. ——, 432 P. 2d 87.

No. 1087. NEW YORK *v.* MORTON SALT CO. ET AL. C. A. 3d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *George C. Mantzoros* and *Joel A. Windman,* Assistant Attorneys General, *David Berger* and *Herbert B. Newberg* for petitioner. *Lewis H. Van Dusen, Jr.,* for respondent International Salt Co. and *Israel Packel* for respondent Cayuga Rock Salt Co. Reported below: 385 F. 2d 122.

No. 1094. CORRAL SPORTSWEAR CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Karl H. Mueller* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 383 F. 2d 961.

No. 1106. MANSON *v.* INDIANA; and

No. 1107. SUBER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Palmer K. Ward* for petitioners in each case. *John J. Dillon,* Attorney General of Indiana, and *Dennis J. Dewey,* Deputy Attorney General, for respondent in both cases. Reported below: —— Ind. ——, 229 N. E. 2d 801.

No. 1099. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Stanley Hendricks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 387 F. 2d 803.

No. 1112. TANNER MOTOR TOURS, LTD., ET AL. *v.* GELFAND ET VIR. C. A. 2d Cir. Certiorari denied. *Denis R. Sheil* for petitioners. *Jacob D. Fuchsberg* for respondents. Reported below: 385 F. 2d 116.

No. 1161. VALLECITO WATER CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Herbert A. Bernhard* for petitioner. *Mary Moran Pajalich, J. Thomason Phelps* and *Cyril M. Saroyan* for respondent.

No. 528. BERGUIDO ET AL. *v.* EASTERN AIRLINES, INC. C. A. 3d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *B. Nathaniel Richter, Seymour I. Toll* and *Charles A. Lord* for petitioners. *Owen B. Rhoads, F. Hastings Griffin, Jr., Daniel L. Stonebridge* and *John J. Martin* for respondent. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander* and *Richard S. Salzman* filed a memorandum for the United States, as *amicus curiae,* by invitation of the Court. Reported below: 369 F. 2d 874. [For earlier orders herein, see 389 U. S. 925, 950.]

No. 1149. KILSHEIMER, TRUSTEE IN BANKRUPTCY *v.* BEOL, INC. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. *Samuel Newfield* and *Samuel W. Sherman* for petitioner. *Borris M. Komar* for respondent. Reported below: 387 F. 2d 365.

No. 1098. DeStefano *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 85 Ill. App. 2d 274, 229 N. E. 2d 325.

No. 166, Misc. Houston *v.* Oliver, Warden. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Raymond M. Momboisse* and *Daniel J. Kremer,* Deputy Attorneys General, for respondent.

No. 442, Misc. Young *v.* United States. C. A. D. C. Cir. Certiorari denied. *Acting Solicitor General Spritzer* for the United States.

No. 767, Misc. Ellenburg *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. *Richard C. Turner,* Attorney General of Iowa, and *David A. Elderkin,* Assistant Attorney General, for respondent. Reported below: —— Iowa ——, 149 N. W. 2d 122.

No. 818, Misc. Outing *v.* North Carolina. C. A. 4th Cir. Certiorari denied. *Emanuel Emroch* for petitioner. *Thomas Wade Bruton,* Attorney General of North Carolina, *Andrew A. Vanore, Jr.,* and *Ralph A. White, Jr.,* for respondent. Reported below: 383 F. 2d 892.

No. 875, Misc. Adams *v.* United States. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States.

No. 893, Misc. Buckley, aka Grayson *v.* United States. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 382 F. 2d 611.

No. 930, Misc. EARL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 936, Misc. GEORGEV *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 38 Ill. 2d 165, 230 N. E. 2d 851.

No. 1029, Misc. HIATT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Richard Bruckner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 384 F. 2d 675.

No. 1032, Misc. POOR *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1096, Misc. SHYVERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg, Jerome M. Feit* and *Robert G. Maysack* for the United States. Reported below: 385 F. 2d 837.

No. 1141, Misc. VICTORIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1152, Misc. RUIZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 382 F. 2d 1019.

No. 627, Misc. SAPERITO *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard C. Turner,* Attorney General of Iowa, and *David A. Elderkin,* Assistant Attorney General, for respondent.

No. 1162, Misc. JAMES *v.* COHEN, ACTING SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 384 F. 2d 784.

No. 1150, Misc. KOEBRICH *v.* CRAVEN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1157, Misc. MAINER *v.* CLARK, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1161, Misc. KINNELL *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 384 F. 2d 811.

No. 1167, Misc. WOLAK *v.* YEAGER, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 385 F. 2d 478.

No. 1169, Misc. TAFOYA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1192, Misc. MACFADDEN *v.* MACBRIDE, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

Rehearing Denied.

No. 625, Misc. LUSK *v.* UNITED STATES, 389 U. S. 1053. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 971, Misc. COMLEY *v.* UNITED STATES, *ante*, p. 973. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 789, Misc. WARNER ET UX. *v.* UNITED STATES, 389 U. S. 1057. Petition for rehearing denied.

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 Claims on April 1, 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.

APRIL 1, 1968.

Miscellaneous Orders.

No. —. DUKE *v.* CALIFORNIA. Application for reduction of bail presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. *Thomas C. Lynch,* Attorney General of California, *William E. Jones,* Assistant Attorney General, and *Richard H. Cooper,* Deputy Attorney General, in opposition to the application.

No. 34, Orig. NEW JERSEY *v.* NEW YORK ET AL. Motion for leave to file bill of complaint denied. *Arthur J. Sills,* Attorney General of New Jersey, on the motion. *Louis J. Lefkowitz,* Attorney General, *Ruth Kessler Toch,* Solicitor General, and *Julius L. Sackman* for the State of New York, and *David W. Peck* and *L. Robert Driver, Jr.,* for Hudson Rapid Tubes Corp., defendants, in opposition.

No. 1275, Misc. BOWICK *v.* HEROLD, STATE HOSPITAL DIRECTOR; and

No. 1317, Misc. THOMAS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1188, Misc. FAIR *v.* BOARD OF ELECTIONS, CITY OF TAMPA, FLORIDA. Motion for leave to file petition for writ of mandamus denied.

No. 1015. WITHERSPOON *v.* ILLINOIS ET AL. Sup. Ct. Ill.; and

No. 1016. BUMPER *v.* NORTH CAROLINA. Sup. Ct. N. C. Motions of Oscar Turner, Rebecca B. Madden, and American Friends Service Committee et al. for leave to file briefs, as *amici curiae,* in No. 1015, granted. Motion of NAACP Legal Defense & Educational Fund, Inc., et al., for leave to file brief, as *amici curiae,* in both cases, granted. *Joel W. Westbrook* for Turner; *John P. Frank* and *John J. Flynn* for Madden; *Alex Elson, Willard J. Lassers* and *Marvin Braiterman* for American Friends Service Committee et al.; and *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Leroy D. Clark, Norman C. Amaker, Charles S. Ralston* and *Anthony G. Amsterdam* for NAACP Legal Defense & Educational Fund, Inc., et al., on the motions. [For earlier orders herein, see, *e. g., ante,* p. 986.]

No. 1178, Misc. MARCHESE *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Burton Marks* and *Bruce I. Hochman* for petitioner.

Probable Jurisdiction Noted.

No. 1102. UNITED STATES *v.* CONCENTRATED PHOSPHATE EXPORT ASSN., INC., ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Turner* and *Howard E. Shapiro* for the United States. *Marcus A. Hollabaugh* and *Alan S. Ward* for appellee Concentrated Phosphate Export Association, Inc.; *Samuel W. Murphy, Jr.,* and *Andrew J. Kilcarr* for appellee American Cyanamid Co.; *Lawrence J. McKay* and *Jerrold G.*

Van Cise for appellee W. R. Grace & Co.; *Edgar E. Barton* for appellee International Minerals & Chemical Corp.; and *Edward F. Howrey* and *John Bodner, Jr.,* for appellee Mobil Oil Corp. Reported below: 273 F. Supp. 263.

Certiorari Granted. (See also No. 417, Misc., *ante,* p. 519; and No. 652, Misc., *ante,* p. 523.)

No. 1131. JOHNSON *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari granted. *Ronald L. Carlson* for petitioner. *Richard C. Turner,* Attorney General of Iowa, and *William A. Claerhout,* Assistant Attorney General, for respondent. Reported below: 386 F. 2d 677.

No. 890, Misc. KAUFMAN *v.* UNITED STATES. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Solicitor General Griswold* for the United States.

Certiorari Denied. (See also No. 1129, *ante,* p. 529; and No. 869, Misc., *ante,* p. 529.)

No. 1054. PORT AUTHORITY TRANS-HUDSON CORP. *v.* HUDSON RAPID TUBES CORP. Ct. App. N. Y. Certiorari denied. *Sidney Goldstein, Joseph Lesser, Milton H. Pachter, Whitney North Seymour, John A. Guzzetta* and *Arthur I. Settles* for petitioner. *David W. Peck* and *L. Robert Driver, Jr.,* for respondent. *Arthur J. Sills,* Attorney General, *Joseph A. Hoffman,* First Assistant Attorney General, and *Elias Abelson, David A. Biederman* and *Arthur Abba Goldberg,* Deputy Attorneys General, for the State of New Jersey, as *amicus curiae,* in support of the petition. Reported below: 20 N. Y. 2d 457, 231 N. E. 2d 734.

No. 1044. FORSYTHE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Joseph C. DaPore* for petitioner. *Robert L. Balyeat* for respondent.

No. 1110. PHILLIPS *v.* SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Frank O. Walther* for petitioner.

No. 1083. BARTLETT, TRUSTEE IN BANKRUPTCY, ET AL. *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. *Robert Haydock, Jr.*, for Bartlett, and *Robert G. Bleakney, Jr.*, for Smith et al., petitioners. *Elliot L. Richardson*, Attorney General, and *James N. Gabriel, Walter H. Mayo III* and *Richard L. Seegel*, Assistant Attorneys General, for the State of Massachusetts, and *Edward F. McLaughlin, Jr.*, and *William D. Quigley* for Massachusetts Bay Transportation Authority, respondents. Reported below: 384 F. 2d 819.

No. 1088. LAUGHLIN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Ralph J. Temple, Wm. Warfield Ross, Lawrence Speiser* and *Melvin L. Wulf* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 128 U. S. App. D. C. 27 and 35, 385 F. 2d 287 and 295.

No. 1148. WALTER E. HELLER & CO. *v.* SHAW, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Charles L. Gowen* for petitioner. *Oscar M. Smith* for respondent. Reported below: 385 F. 2d 353.

No. 1123. CHENG KAI FU *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Edward Hong* and *Thomas A. Church* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 386 F. 2d 750.

No. 1100. RABINER & JONTOW, INC., AKA ABBE RABINER, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Erwin Feldman* for petitioner. *Solicitor General Griswold* and *James McI. Henderson* for respondent. Reported below: 386 F. 2d 667.

No. 1108. MADDOX *v.* SMITH ET AL. C. A. D. C. Cir. Certiorari denied. *Luther Robinson Maddox,* petitioner, *pro se.*

No. 1122. GANDY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph P. Manners* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 386 F. 2d 516.

No. 1125. BORCHELT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Theodore F. Schwartz* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 386 F. 2d 760.

No. 1127. ROCHA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Klein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 387 F. 2d 1019.

No. 1157. PASSERO ET AL. *v.* ZONING COMMISSION OF THE TOWN OF NORWALK. Sup. Ct. Conn. Certiorari denied. *Max R. Lepofsky* for petitioners. *Vincent D. Flaherty* for respondent. Reported below: 155 Conn. 511, 235 A. 2d 660.

No. 1173. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* SMOOT. C. A. 5th Cir. Certiorari denied. *John J. Bouhan* and *Glenn B. Hester* for petitioner. *Alton D. Kitchings* for respondent. Reported below: 381 F. 2d 331.

No. 1081. BROWN *v.* CLIFFORD, SECRETARY OF DEFENSE, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin L. Wulf, Emerson L. Darnell* and *Marvin M. Karpatkin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Jerome M. Feit* for respondents. Reported below: 387 F. 2d 150.

No. 1145. PASCENTE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward J. Calihan, Jr.*, for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 923.

No. 1109. MARSHALL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Leonard R. Mellon* and *Harvey R. Klein* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 384 F. 2d 624.

No. 375, Misc. JEFFERS *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. *Charles O. Porter* for petitioner. *Robert Y. Thornton,* Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent. Reported below: 378 F. 2d 59.

No. 1204. WARREN *v.* WATERVILLE URBAN RENEWAL AUTHORITY. Sup. Jud. Ct. Maine. Certiorari denied. *Albert Raymond Rogers* for petitioner. *Philip S. Bird* for respondent. Reported below: 235 A. 2d 295.

No. 982, Misc. HAYES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Sanford Jay Rosen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 385 F. 2d 375.

No. 1042, Misc. PRINCIPE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1050, Misc. CROSSLIN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Michael Traynor* for petitioner. Reported below: 251 Cal. App. 2d 918, 60 Cal. Rptr. 309.

No. 1060, Misc. FLEET *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 1090, Misc. JASKO *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 1129, Misc. JEBB *v.* KROPP, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Stewart H. Freeman*, Assistant Attorney General, for respondents.

No. 1094, Misc. HACKER *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1156, Misc. CRAWFORD *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 253 Cal. App. 2d 524, 61 Cal. Rptr. 472.

No. 1133, Misc. SCHACK *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1135, Misc. LAWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 386 F. 2d 816.

No. 1142, Misc. FRIEND *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1143, Misc. BONNER *v.* TAHASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1146, Misc. TANNER *v.* KERNER, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 385 F. 2d 415.

No. 1153, Misc. VINSON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1155, Misc. MCGEE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 200 Kan. 188, 434 P. 2d 841.

No. 1170, Misc. DOVE *v.* JUSTICES OF CRIMINAL COURT OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied.

No. 1173, Misc. HITCHCOCK *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1179, Misc. MONTOYA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 137, 63 Cal. Rptr. 73.

No. 1175, Misc. SANDEFUR *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 1181, Misc. WRIGHT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1182, Misc. LEE *v.* MCKISSACK ET AL. C. A. 9th Cir. Certiorari denied.

No. 1183, Misc. AGUIRRE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1194, Misc. ALEXANDER *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1197, Misc. COTA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Lawrence C. Cantor* for petitioner. *Darrell F. Smith,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 102 Ariz. 416, 432 P. 2d 428.

Rehearing Denied.

No. 1047. NATIONAL INSIDER, INC. *v.* BEST MEDIUM PUBLISHING CO., INC., *ante,* p. 955;

No. 843, Misc. MORGAN *v.* UNITED STATES, *ante,* p. 962; and

No. 901, Misc. HUSKA *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante,* p. 965. Petitions for rehearing denied.

No. 704, Misc. JORDAN *v.* KAMP ET AL., 389 U. S. 1055. Motion for leave to file petition for rehearing denied.

APRIL 8, 1968.

Miscellaneous Orders.

No. ——. IAQUINTA *v.* NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM ET AL. Appeal from Ct. App. N. Y. Motions to docket and dismiss appeal under Rule 14 (3) granted. *Harry S. Taubenfeld* on the motion for appellee Rose Iaquinta. *J. Lee Rankin* on the motion for appellees New York City Employees Retirement System et al. *Jacob W. Friedman* for appellant Margaret Iaquinta in opposition. [For earlier order herein, see *ante,* p. 915.]

No. 191, October Term, 1962. IOANNOU *v.* NEW YORK ET AL., 371 U. S. 30. Appellees are requested, within 30 days, to file a response to petition for rehearing. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 635. GARDNER *v.* BRODERICK, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. (Probable jurisdiction noted, *ante,* p. 918.) Motion of Patrolmen's Benevolent Association of the City of New York, Inc., for leave to file brief, as *amicus curiae,* granted. *Michael J. Silverberg* on the motion.

No. 1015. WITHERSPOON *v.* ILLINOIS ET AL. Sup. Ct. Ill. Motion of American Civil Liberties Union, Illinois Division, for leave to participate in oral argument, as *amicus curiae,* denied. *Elmer Gertz* on the motion. [For earlier orders herein, see, *e. g., ante,* pp. 986, 1001.]

No. 1174. WHITLEY ET AL. *v.* WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL. Appeal from D. C. S. D. Miss. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1316, Misc. DAVIS *v.* CORRECTIONS DIRECTOR ET AL.; and

No. 1323, Misc. LUPINO *v.* TAHASH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 813. SHAPIRO, COMMISSIONER OF WELFARE OF THE STATE OF CONNECTICUT *v.* THOMPSON. Appeal from D. C. Conn. (Probable jurisdiction noted, 389 U. S. 1032.) Motion of Legal Aid Society of Alameda County for leave to file brief, as *amicus curiae,* granted. *Eugene M. Swann* on the motion.

No. 638. CHENG FAN KWOK *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. (Certiorari granted, *ante,* p. 918.) Motion to remove case from summary calendar granted and fifteen additional minutes allotted to counsel supporting judgment, and a similar amount of time allotted to counsel opposing judgment. *Solicitor General Griswold* for respondent on the motion.

Certiorari Granted. (See No. 854, Misc., *ante,* p. 593.)

Certiorari Denied.

No. 1008. STONE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *Jack G. Day* for petitioner. *John Breckinridge,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent. Reported below: 418 S. W. 2d 646.

No. 1093. WILBUR *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Paul T. Smith* for petitioner. *Elliot L. Richardson,* Attorney General of Massachusetts, *Willie J. Davis* and *Howard M. Miller,* Assistant Attorneys General, and *John M. Finn,* Deputy Assistant Attorney General, for respondent. Reported below: 353 Mass. 376, 231 N. E. 2d 919.

No. 945. PHILADELPHIA TRANSPORTATION CO. ET AL. *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ET AL. Sup. Ct. Pa. Certiorari denied. *Arnold R. Ginsburg* and *George J. Miller* for Philadelphia Transportation Co. et al., and *Francis T. Anderson* for Janney et al., petitioners. *William T. Coleman, Jr., Lewis H. Van Dusen, Jr.,* and *Richardson Dilworth* for Southeastern Pennsylvania Transportation Authority, and *Levy Anderson* for the City of Philadelphia, respondents. Reported below: 426 Pa. 377, 233 A. 2d 15.

No. 1118. ELLIOTT ET AL. *v.* FEDERAL HOME LOAN BANK BOARD ET AL.; and

No. 1119. ROSS *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 9th Cir. Certiorari denied. *Charles K. Chapman* for petitioner Long Beach Federal Savings & Loan Assn., and *George W. Trammell* for petitioner Shareholders' Protective Committee in No. 1118. *Harvey M. Grossman* for petitioner in No. 1119. *Solicitor General Griswold, Assistant Attorney General Weisl, Carl Eardley, John C. Eldridge, Leonard Schaitman* and *Alan J. Moscov* for respondents Federal Home Loan Bank Board et al., and *Thomas C. Lynch,* Attorney General of California, and *Arthur C. de Goede* and *David W. Halpin,* Deputy Attorneys General, for respondent Savings and Loan Commissioner, in both cases. Reported below: 386 F. 2d 42.

No. 1135. MIENTKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 1009.

No. 1140. CHANEY *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Homer I. Mitchell* and *F. La Mar Forshee* for respondents. Reported below: 386 F. 2d 962.

No. 1124. CALIFORNIA *v.* NOROFF ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Gordon Ringer,* Assistant Attorney General, *Roger Arnebergh, Philip E. Grey* and *Michael T. Sauer* for petitioner. Reported below: 67 Cal. 2d 791, 433 P. 2d 479.

No. 1136. FINCH ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *Robert O. Swimmer* for petitioners. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis* and *Raymond N. Zagone* for the United States et al. Reported below: 387 F. 2d 13.

No. 1137. AMERICAN FLYERS AIRLINE CORP. *v.* McGOHEY, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Phillip D. Bostwick, Austin P. Magner* and *J. Patrick Hickey* for petitioner. *Lee S. Kreindler* and *Andrew P. O'Rourke* for respondent. Reported below: 385 F. 2d 936.

No. 1057. FEDERAL TRADE COMMISSION *v.* AMERICAN MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Turner, Harris Weinstein, Howard E. Shapiro* and *James McI. Henderson* for petitioner. *Forrest A. Hainline, Jr.,* for respondents. Reported below: 384 F. 2d 247.

No. 255, Misc. DiPRIMA *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, Robert E. Owen* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.,* for respondent. Reported below: 373 F. 2d 797.

No. 1143. CARLE & MONTANARI, INC. *v.* JOHN W. MCGRATH CORP. ET AL. C. A. 2d Cir. Certiorari denied. *F. Herbert Prem* for petitioner. *James M. Leonard* and *Martin J. McHugh* for John W. McGrath Corp., and *M. E. De Orchis* for American Export Isbrandtsen Lines, Inc., respondents. Reported below: 386 F. 2d 839.

No. 1139. GLADDEN *v.* P. HENDERSON & CO. ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Avram G. Adler* for petitioner. *Timothy J. Mahoney* and *Thomas E. Byrne, Jr.*, for respondents. Reported below: 385 F. 2d 480.

No. 1155. STATE STREET BANK & TRUST CO. *v.* BANCO ESPANOL DE CREDITO. C. A. 1st Cir. Certiorari denied. *John M. Hall* and *Charles F. Choate* for petitioner. *Charles C. Cabot* for respondent. Reported below: 385 F. 2d 230.

No. 1158. LOUISVILLE CHAIR CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. *Stuart Rothman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondents. Reported below: 385 F. 2d 922.

No. 1167. LION DRY GOODS, INC. *v.* RETAIL STORE EMPLOYEES UNION, LOCAL 954, ET AL. C. A. 6th Cir. Certiorari denied. *Merritt W. Green* for petitioner. *Joseph E. Finley* for respondents.

No. 1052. BOEHME *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *Frank August Peters* for petitioner. *Joseph D. Mladinov* for respondent. Reported below: 71 Wash. 2d 621, 430 P. 2d 527.

No. 1175. R. V. McGinnis Theatres & Pay T. V. Inc. *v.* Video Independent Theatres, Inc., et al. C. A. 10th Cir. Certiorari denied. *Milton Bordwin* for petitioner. *Edward E. Soulé* and *Stanley Godofsky* for respondents Paramount Film Distributing Corp. et al., *Coleman Hayes* for respondent Video Independent Theatres, Inc., and *Pat Malloy* for respondent Delman Theatre Corp. Reported below: 386 F. 2d 592.

No. 1144. Donoho *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *John J. Hooker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 388 F. 2d 181.

No. 1165. Mouton, Collector of Revenue of Louisiana *v.* Mississippi River Fuel Corp. et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Emmett E. Batson* and *Chapman L. Sanford* for petitioner. *Clarence L. Yancey, Clyde R. Brown, C. McVea Oliver* and *Thomas A. Harrell* for respondents. Reported below: 382 F. 2d 929.

No. 1193, Misc. Bandy *v.* Attorney General of the United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Acting Solicitor General Spritzer, Assistant Attorney General Rogovin* and *Joseph M. Howard* for respondent.

No. 1170. Norman *v.* United States. C. A. 6th Cir. Certiorari denied. *Francis R. Salazar* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 391 F. 2d 212.

No. 1213. SANDERS *v.* BONOMI (ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK). Ct. App. N. Y. Certiorari denied. *Michael Franck* for respondent.

No. 1166. MOUTON, COLLECTOR OF REVENUE OF LOUISIANA *v.* TEXAS GAS EXPLORATION CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Emmett E. Batson* and *Chapman L. Sanford* for petitioner. *Clarence L. Yancey* for respondent. Reported below: 382 F. 2d 940.

No. 492, Misc. ROETH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jay M. Vogelson* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 380 F. 2d 755.

No. 709, Misc. SAAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 846, Misc. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 381 F. 2d 778.

No. 792, Misc. KREUTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Ora Ray Adams, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 376 F. 2d 654.

No. 740, Misc. RYAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Aaron E. Koota* and *Stanley M. Meyer* for respondent.

No. 821, Misc. ROETH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Jay M. Vogelson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 96.

No. 853, Misc. JUSTUS *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 378 F. 2d 344.

No. 1015, Misc. JONES *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: 386 F. 2d 427.

No. 1035, Misc. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 384 F. 2d 50.

No. 1054, Misc. HENIG ET AL. *v.* ODORIOSO ET AL. C. A. 3d Cir. Certiorari denied. *Victor L. Drexel* for respondents F. W. Woolworth Co. et al., and *Mark D. Alspach* for respondents Loftus et al. Reported below: 385 F. 2d 491.

No. 1091, Misc. PORTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 1184, Misc. CALLOWAY *v.* ROYSTER ET AL. C. A. 4th Cir. Certiorari denied.

No. 1139, Misc. PELLICONE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1171, Misc. CRAWFORD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 386 F. 2d 451.

No. 1174, Misc. ENDICOTT *v.* COINER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 1204, Misc. DYES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1220, Misc. CRANE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1229, Misc. THOMASTON *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1247, Misc. WELLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Sam Adam* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 387 F. 2d 807.

No. 1272, Misc. THACKER *v.* COHEN, ACTING SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. *Robert T. Winston* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 387 F. 2d 387.

No. 1289, Misc. MALOFSKY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Phylis Skloot Bamberger* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 388 F. 2d 288 and 449.

Rehearing Denied.

No. 43. ALBRECHT *v.* HERALD CO., DBA GLOBE-DEMOCRAT PUBLISHING CO., *ante,* p. 145. Motion to dismiss writ of certiorari denied. Petition for rehearing denied. *Lon Hocker* and *Thomas R. Newman* for respondent.

No. 524, Misc. JOHNSON *v.* PATE, WARDEN, *ante,* p. 973;

No. 569, Misc. PULIDO *v.* CALIFORNIA, *ante,* p. 960;

No. 883, Misc. PARKER *v.* MARYLAND ET AL., *ante,* p. 982;

No. 1012, Misc. WHITE *v.* PEYTON, PENITENTIARY SUPERINTENDENT, *ante,* p. 970;

No. 1118, Misc. O'TOOLE *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT, *ante,* p. 985; and

No 1164, Misc. GERBERDING *v.* TAHASH, WARDEN, *ante,* p. 978. Petitions for rehearing denied.

APRIL 16, 1968.

Dismissal Under Rule 60.

No. 1574, Misc. SPENCER *v.* WABASH CIRCUIT COURT ET AL. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

APRIL 19, 1968.

Miscellaneous Order.

No. ——. HARK, INC., DBA PINELLAS GENERAL HOSPITAL *v.* COHEN, ACTING SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Application for injunctive relief presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *David Linn* and *Terry A. Furnell* for applicant. *Solicitor General Griswold* in opposition.

APRIL 22, 1968.

Miscellaneous Orders.

No. 645. JONES ET UX. *v.* ALFRED H. MAYER CO. ET AL. C. A. 8th Cir. (Certiorari granted, 389 U. S. 968.) Parties requested to advise the Court within ten days what effect, if any, enactment of Civil Rights Act of 1968 has upon this litigation.

No. 673. GEORGE CAMPBELL PAINTING CORP. *v.* REID ET AL., MEMBERS OF NEW YORK CITY HOUSING AUTHORITY, ET AL. Appeal from Ct. App. N. Y. (Probable jurisdiction noted, *ante,* p. 918.) Motion of appellee Attorney General of New York to remove case from summary calendar granted and twenty additional minutes allotted each side. *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *Samuel A. Hirshowitz,* First Assistant Attorney General, on the motion.

No. 742. MARYLAND ET AL. *v.* WIRTZ, SECRETARY OF LABOR, ET AL. Appeal from D. C. Md. (Probable jurisdiction noted, 389 U. S. 1031.) Motions of American Federation of Labor & Congress of Industrial Organizations, and American Federation of State, County, & Municipal Employees, AFL–CIO, for leave to file briefs, as *amici curiae,* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *J. Albert Woll, Laurence Gold* and *Thomas E. Harris* for American Federation of Labor & Congress of Industrial Organizations, and *Henry Kaiser* and *Ronald Rosenberg* for American Federation of State, County, & Municipal Employees, AFL–CIO, on the motions.

No. 1134. WASHINGTON ET AL. *v.* LEGRANT ET AL. Appeal from D. C. D. C. (Probable jurisdiction noted, *ante,* p. 940.) Upon suggestion of death of appellee Harrell motion to change caption of case granted. *Peter S. Smith* on the motion.

No. 755. First Agricultural National Bank of Berkshire County *v.* State Tax Commission. Appeal from Sup. Jud. Ct. Mass. (Probable jurisdiction noted, 389 U. S. 1033.) Motion of National Association of Supervisors of State Banks for leave to file brief, as *amicus curiae,* granted. *James F. Bell* and *Brian C. Elmer* on the motion.

No. 800. World Airways, Inc., et al. *v.* Pan American World Airways, Inc., et al. C. A. 2d Cir. (Certiorari granted, *ante,* p. 919.) Motion to substitute Trans International Airways, Inc., a Delaware corporation, in place of Trans International Airways, Inc., a California corporation, as a party petitioner granted. Mr. Justice Marshall took no part in the consideration or decision of this motion. *Clayton L. Burwell* and *Frederick Bernays Wiener* on the motion.

No. 909. Desist et al. *v.* United States. C. A. 2d Cir. (Certiorari granted, *ante,* p. 943.) Motion of petitioners to remove case from summary calendar denied. Mr. Justice Marshall took no part in the consideration or decision of this motion. *Abraham Glasser* on the motion.

No. 949. King, Commissioner, Department of Pensions and Security, et al. *v.* Smith et al. Appeal from D. C. M. D. Ala. (Probable jurisdiction noted, *ante,* p. 903.) Motions of NAACP Legal Defense & Educational Fund, Inc., et al., and Child Welfare League of America, Inc., et al., for leave to file briefs, as *amici curiae,* granted. *Jack Greenberg, James M. Nabrit III, Leroy D. Clark* and *Charles Stephen Ralston* for NAACP Legal Defense & Educational Fund, Inc., et al., and *Helen L. Buttenwieser* and *Ephraim London* for Child Welfare League of America, Inc., et al., on the motions.

No. 974. In re Powell;

No. 1033. Powell *v.* National Savings & Trust Co., *ante,* p. 957, *infra,* p. 1037;

No. 1200. Powell *v.* Committee on Admissions and Grievances of the United States District Court for the District of Columbia; and

No. 882, Misc. In re Disbarment of Powell, see 389 U. S. 924. C. A. D. C. Cir. Motion of petitioner to consolidate these cases denied. Mr. Justice Marshall took no part in the consideration or decision of this motion.

No. 1015. Witherspoon *v.* Illinois et al. Sup. Ct. Ill. (Certiorari granted, 389 U. S. 1035); and

No. 1016. Bumper *v.* North Carolina. Sup. Ct. N. C. (Certiorari granted, 389 U. S. 1034.) Motion of NAACP Legal Defense & Educational Fund, Inc., et al. for leave to participate in oral argument, as *amici curiae,* denied. Motion of American Friends Service Committee et al. for leave to participate in oral argument, as *amici curiae,* in No. 1015 denied. Motion of the State of California for permission for three attorneys to participate in oral argument, as *amicus curiae,* in No. 1015 granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Leroy D. Clark, Norman C. Amaker, Charles S. Ralston* and *Anthony G. Amsterdam* on the motion for NAACP Legal Defense & Educational Fund, Inc., et al. *Willard J. Lassers, Alex Elson* and *Marvin Braiterman* on the motion for American Friends Service Committee et al. *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci* and *Robert R. Nock,* Deputy Attorneys General, on the motion for the State of California.

No. 1088. Laughlin et al. *v.* United States, *ante,* p. 1003. Motion to suspend effectiveness of order denying certiorari denied. *James J. Laughlin, pro se,* and *William J. Garber* for petitioners.

No. 1335, Misc. LORENZANA *v.* WARDEN, RIO PIEDRAS, PUERTO RICO, PENITENTIARY;

No. 1344, Misc. CROSBY *v.* TAHASH, WARDEN; and

No. 1381, Misc. CARTER *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1111, Misc. SANDOVAL *v.* CLARK, ATTORNEY GENERAL, ET AL. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* for respondents.

Probable Jurisdiction Noted.

No. 1064. UNITED STATES *v.* CONTAINER CORPORATION OF AMERICA ET AL. Appeal from D. C. M. D. N. C. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Turner, Lawrence G. Wallace, Robert A. Hammond III* and *Howard E. Shapiro* for the United States. *Whitney North Seymour* and *William J. Manning* for respondent Container Corporation of America; *Joseph C. Carter, Jr.,* for respondent Albermarle Paper Mfg. Co. et al.; *W. P. Sandridge* and *W. F. Womble* for respondent Carolina Container Co.; *Helmer R. Johnson* for respondent Continental Can Company, Inc.; *Howard T. Milman* for respondent Crown Zellerbach Corp.; *David J. Mays* for respondent Dixie Container Corp. et al.; *Alan W. Boyd* for respondent Inland Container Corp.; *Lawrence E. Walsh* and *Henry L. King* for respondent International Paper Co.; *Fred E. Fuller* for respondent Owens-Illinois Glass Co.; *Richard A. Whiting* for respondent St. Joe Paper Co.; *Horace R. Lamb* for respondent St. Regis Paper Co.; *James H. Epps, Jr.,* for respondent Tri-State Container Corp.; *James R. Whithrow, Jr.,* for respondent Union Bag-Camp Paper Co.; and *E. Nobles Lowe* for respondent West Virginia Pulp & Paper Co. Reported below: 273 F. Supp. 18.

Certiorari Granted. (See also No. 400, *ante*, p. 717.)

No. 963. UNITED STATES *v.* DONRUSS CO. C. A. 6th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein, Meyer Rothwacks* and *Thomas Silk, Jr.*, for the United States. *Bernard J. Long, Richard L. Braunstein* and *Bernard J. Long, Jr.*, for respondent. Reported below: 384 F. 2d 292.

No. 1193. GLOVER ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL. C. A. 5th Cir. Certiorari granted. *William M. Acker, Jr.*, for petitioners. *Paul R. Moody* for St. Louis-San Francisco Railway Co., and *Richard R. Lyman* and *Jerome A. Cooper* for Brotherhood of Railway Carmen of America, respondents. Reported below: 386 F. 2d 452.

No. 1201. SECURITIES AND EXCHANGE COMMISSION *v.* NATIONAL SECURITIES, INC., ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Griswold, Daniel M. Friedman, Philip A. Loomis, Jr., David Ferber* and *Edward B. Wagner* for petitioner. *John P. Frank* for respondents. Reported below: 387 F. 2d 25.

No. 1207. SHUTTLESWORTH *v.* CITY OF BIRMINGHAM. Sup. Ct. Ala. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Charles Stephen Ralston, Melvyn Zarr, Anthony G. Amsterdam, Arthur D. Shores* and *Orzell Billingsley, Jr.*, for petitioner. *J. M. Breckenridge, Earl McBee* and *William C. Walker* for respondent. Reported below: 281 Ala. 542, 206 So. 2d 348.

No. 1451, Misc. KAISER *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Peter L. F. Sabbatino* for petitioner. *William Cahn* for respondent. Reported below: 21 N. Y. 2d 86, 233 N. E. 2d 818.

Certiorari Denied. (See also No. 1189, Misc., *ante,* p. 713.)

No. 921. SAMUELS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Evander C. Smith* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *John T. Murphy,* Deputy Attorney General, for respondent. Reported below: 250 Cal. App. 2d 501, 58 Cal. Rptr. 439.

No. 1128. HYMORE *v.* OHIO. Ct. App. Ohio, Wood County. Certiorari denied. *Clarence M. Condon* for petitioner. *Donald D. Simmons* and *Harland M. Britz* for respondent. Reported below: See 9 Ohio St. 2d 122, 224 N. E. 2d 126.

No. 1150. TUCKY *v.* CASTLE ET AL. Sup. Ct. Hawaii. Certiorari denied. *Joseph A. Ryan* for petitioner.

No. 1151. FUNEL *v.* FIDELITY & CASUALTY CO. OF NEW YORK. C. A. 5th Cir. Certiorari denied. *Ellis C. Irwin* for petitioner. Reported below: 383 F. 2d 42.

No. 1153. O'CONNOR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *James W. Cowell* for petitioner.

No. 1156. ESCOBAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edwin Smith* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 388 F. 2d 661.

No. 1190. KINCHELOE *v.* BOARD OF MEDICAL EXAMINERS OF NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Warren E. Miller* for petitioner. *John H. Anderson, Jr.,* for respondent. Reported below: 272 N. C. 116, 157 S. E. 2d 833.

No. 1164. HILLTOP REALTY, INC., ET AL. *v.* SEATTLE FIRST NATIONAL BANK, EXECUTOR, ET AL. C. A. 9th Cir. Certiorari denied. *Herbert S. Little* for petitioners. *Richard S. White* for Seattle-First National Bank et al., and *James R. Stewart* for Austin Co., respondents. Reported below: 383 F. 2d 309.

No. 1168. COTE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. *John W. King* for petitioner. *George S. Pappagianis,* Attorney General of New Hampshire, and *Norman E. D'Amours,* Assistant Attorney General, for respondent. Reported below: 108 N. H. 290, 235 A. 2d 111.

No. 1169. KIRKLAND ET AL. *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *Moses Krislov, Harold E. Brown* and *P. D. Maktos* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *George W. McHenry, Jr.,* Assistant Attorney General, for respondent.

No. 1179. LEIGHTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 386 F. 2d 822.

No. 1180. HUNTINGTON TRUST & SAVINGS BANK *v.* H. B. AGSTEN & SONS, INC., ET AL. C. A. 4th Cir. Certiorari denied. *David M. Baker* for petitioner. *Howard R. Klostermeyer* and *William B. Maxwell III* for H. B. Agsten & Sons, Inc., et al., and *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge* and *Robert C. McDiarmid* for Small Business Administrator et al., respondents. Reported below: 388 F. 2d 156.

No. 1181. WAGNER ET AL. *v.* BALLANTYNE INSTRUMENTS & ELECTRONICS, INC. C. A. 6th Cir. Certiorari denied. *Bruce Tittel* for petitioners. *Max Wall* for respondent. Reported below: 386 F. 2d 789.

No. 1182. UELMEN ET AL. *v.* FREEMAN, SECRETARY OF AGRICULTURE. C. A. 7th Cir. Certiorari denied. *George M. St. Peter* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 388 F. 2d 308.

No. 1183. MESSINA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Glasser* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 388 F. 2d 393.

No. 1192. TACKETT, JUDGE *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. *Anthony J. Albert* for petitioner. *Boston E. Witt,* Attorney General of New Mexico, and *James V. Noble,* Assistant Attorney General, for respondent. Reported below: 78 N. M. 450, 432 P. 2d 415.

No. 1197. MCKOY ET UX., DBA BELVOIR RESTAURANT *v.* UNITED STATES BY RAMSEY CLARK, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. *Frank M. McCann* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Pollak* for the United States. Reported below: 387 F. 2d 144.

No. 1199. MEAUX ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *C. Anthony Friloux, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 370.

No. 1198. OSER *v.* SMITH, HARRIS COUNTY VOTER REGISTRAR, ET AL. 164th Jud. Dist. Tex., Harris County. Certiorari denied. *Chris Dixie* for petitioner. *Fred W. Moore* for respondent Polk.

No. 1202. MOORE-McCORMACK LINES, INC. *v.* CANDIANO. C. A. 2d Cir. Certiorari denied. *Martin J. McHugh* and *James M. Leonard* for petitioner. Reported below: 382 F. 2d 961.

No. 1205. GOLDNER *v.* SILVER, DISTRICT ATTORNEY OF KINGS COUNTY. Ct. App. N. Y. Certiorari denied. *Bernard A. Berkman, Larry S. Gordon, Joshua J. Kancelbaum* and *Gerald A. Messerman* for petitioner. *Aaron E. Koota* and *Stanley M. Meyer* for respondent.

No. 1206. SOX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Theodore W. Law III* and *George M. Lee, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1211. STERN *v.* ROBINSON ET AL. C. A. 6th Cir. Certiorari denied. *Carl H. Langschmidt, Jr.*, and *Donald W. Pemberton* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for respondent United States.

No. 1215. CARNERA, ADMINISTRATRIX *v.* LANCASTER CHEMICAL CORP. C. A. 3d Cir. Certiorari denied. *Jack Mandell* for petitioner. *John J. Budd* for respondent. Reported below: 387 F. 2d 946.

No. 1286. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* BOSTON & MAINE CORP. C. A. 2d Cir. Certiorari denied. *Donald L. Wallace* for petitioner. *Carl E. Newton* and *M. Lauck Walton* for respondent.

No. 1203. MADERA ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *Jack Greenberg, James M. Nabrit III, Michael Meltsner* and *Leroy D. Clark* for petitioners. *J. Lee Rankin, Stanley Buchsbaum* and *John J. Loflin* for respondents. Reported below: 386 F. 2d 778.

No. 1222. WIGGINS ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Conrad O. Pearson* and *Romallus O. Murphy* for petitioners. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent. Reported below: 272 N. C. 147, 158 S. E. 2d 37.

No. 1223. BALTIMORE CONTRACTORS, INC., ET AL. *v.* PERRY. Ct. App. La., 1st Cir. Certiorari denied. *Benjamin W. Yancey* and *G. Edward Merritt* for petitioners. *Frank S. Normann, David E. Normann* and *Margot Mazeau* for respondent. Reported below: 202 So. 2d 694.

No. 1226. GRUMBLES ET AL. *v.* TIMES HERALD PRINTING CO. ET AL. C. A. 5th Cir. Certiorari denied. *William F. Billings* and *Robert A. Fanning* for petitioners. *Donald L. Case* and *Jack Pew, Jr.,* for respondents. Reported below: 387 F. 2d 593.

No. 1050. NATIONAL LABOR RELATIONS BOARD *v.* CRAWFORD MANUFACTURING CO., INC., ET AL.; and

No. 1191. AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner in No. 1050. *Jacob Sheinkman* for petitioner in No. 1191. *Harry L. Browne* and *Frank A. Constangy* for respondent Crawford Manufacturing Co., Inc., in both cases. Reported below: 386 F. 2d 367.

No. 1115. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Hiram W. Kwan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 390 F. 2d 260.

No. 1187. JONES *v.* GASCH, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Edward P. Morgan* and *Thomas M. P. Christensen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent.

No. 888, Misc. GRAVES *v.* UNITED STATES; and

No. 937, Misc. OELKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 389 F. 2d 668.

No. 962, Misc. GORDON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Zona Fairbanks Hostetler* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 127 U. S. App. D. C. 343, 383 F. 2d 936.

No. 944, Misc. ANNETT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *John Fourt,* Deputy Attorneys General, for respondent. Reported below: 251 Cal. App. 2d 858, 59 Cal. Rptr. 888.

No. 1120. MARVEL SPECIALTY CO., INC. *v.* BELL HOSIERY MILLS, INC. C. A. 4th Cir. Motion to dispense with printing respondent's brief granted. Certiorari denied. *Robert F. Conrad* for petitioner. *Warley L. Parrott* for respondent. Reported below: 386 F. 2d 287.

No. 717, Misc. WISE *v.* BOSLOW, PATUXENT INSTITUTION DIRECTOR. Ct. Sp. App. Md. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, and *Alfred J. O'Ferrall III,* Assistant Attorney General, for respondent.

No. 973, Misc. MCGANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 983, Misc. AUTREY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark* and *Lloyd G. Hart,* Assistant Attorneys General, for respondent.

No. 1016, Misc. NIX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 1057, Misc. ROWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States.

No. 1059, Misc. GASQUE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent. Reported below: 271 N. C. 323, 156 S. E. 2d 740.

No. 1074, Misc. TALLEY ET AL. *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied. *Herbert E. Selwyn* for petitioners. *Roger Arnebergh, Philip E. Grey* and *Michael T. Sauer* for respondent.

No. 1107, Misc. STEVENS *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. *Herbert B. Newberg* and *Anthony G. Amsterdam* for petitioner. Reported below: 382 F. 2d 429.

No. 1108, Misc. MCMILLEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *F. Lee Bailey* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 386 F. 2d 29.

No. 1122, Misc. HOFFMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Lynn S. Castner* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 385 F. 2d 501.

No. 1126, Misc. HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 384 F. 2d 525.

No. 1132, Misc. HALL *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied. Reported below: —— Nev. ——, 434 P. 2d 425.

No. 1134, Misc. CATANZARO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1140, Misc. JEFFERSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1176, Misc. ROOF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States.

No. 1190, Misc. WARE *v.* PRESTON ET AL. C. A. D. C. Cir. Certiorari denied. *Robert L. Weinberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for respondents.

No. 1199, Misc. MALDONADO *v.* BOARD OF VETERANS APPEALS. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1205, Misc. MCCRARY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *James H. Bateman* for petitioner.

No. 1206, Misc. WHITAKER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *David Kaplan* for petitioner. Reported below: 418 S. W. 2d 750.

No. 1209, Misc. ROSS *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1213, Misc. WILLIAMS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1214, Misc. AVILA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 253 Cal. App. 2d 308, 61 Cal. Rptr. 441.

No. 1226, Misc. BOLTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 485, 63 Cal. Rptr. 153.

No. 1216, Misc. PERREA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1222, Misc. MERLE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1227, Misc. PAINTER *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1228, Misc. NOHELTY *v.* GERGEN. Sup. Ct. Wis. Certiorari denied.

No. 1230, Misc. HOWARD *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1235, Misc. PETERSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 200 Kan. 18, 434 P. 2d 542.

No. 1240, Misc. RICHIE *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied.

No. 1249, Misc. FORTIN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 203 So. 2d 207.

No. 1258, Misc. FRAZIER *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. *Herbert F. DeSimone,* Attorney General of Rhode Island, and *Donald P. Ryan,* Assistant Attorney General, for respondent. Reported below: —— R. I. ——, 235 A. 2d 886.

No. 1270, Misc. FIERRO *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1276, Misc. WHITE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1278, Misc. MONTGOMERY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 127, 62 Cal. Rptr. 895.

No. 1280, Misc. MCBRIDE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1281, Misc. ELLIS *v.* GILLETTE. Sup. Ct. Hawaii. Certiorari denied.

No. 1282, Misc. GREEN *v.* PATE, WARDEN. Cir. Ct., Cook County, Ill. Certiorari denied.

No. 1284, Misc. KEYS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1286, Misc. DANIEL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Victor M. Earle III* and *Robert S. Rifkind* for petitioner. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 1287, Misc. MORALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1291, Misc. WILLIAMS *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Gretchen White Oberman* for petitioner.

No. 1292, Misc. BIRD *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1299, Misc. TAFOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 386 F. 2d 537.

No. 1302, Misc. TUCKER, AKA WHEATLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Louis V. Mangrum* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 1303, Misc. SCHACK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1304, Misc. HARRISON *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1306, Misc. WILLIAMS *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1307, Misc. NEWSOME *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1308, Misc. SCHACK *v.* STARR. C. A. 5th Cir. Certiorari denied.

No. 1324, Misc. GOSSER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Lawrence M. Perskie* for petitioner. *William J. Hughes* and *James A. O'Neill* for respondent. Reported below: 50 N. J. 438, 236 A. 2d 377.

No. 1330, Misc. GRAY *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. 1340, Misc. GRAVES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Warren E. Magee* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1356, Misc. ROBERTSON *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. *Herbert F. DeSimone,* Attorney General of Rhode Island, and *Donald P. Ryan,* Assistant Attorney General, for respondent. Reported below: —— R. I. ——, 232 A. 2d 781.

No. 1382, Misc. HACKER *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. *J. Lee Rankin* and *Stanley Buchsbaum* for respondents. Reported below: 20 N. Y. 2d 722, 229 N. E. 2d 613.

Rehearing Denied.

No. 871. WISEMAN, DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OKLAHOMA *v.* BARBY ET UX., *ante,* p. 339;

No. 937. COMMONWEALTH COATINGS CORP. *v.* CONTINENTAL CASUALTY CO. ET AL., *ante,* p. 979;

No. 961. HETTLEMAN ET AL. *v.* CHICAGO LAW INSTITUTE ET AL., *ante,* p. 338;

No. 962. MCMANIGAL *v.* SIMON ET AL., *ante,* p. 980;

No. 980. ELECTRIC FURNACE CORP. *v.* DEERING MILLIKEN RESEARCH CORP., *ante,* p. 949;

No. 1027. HICKS ET AL. *v.* PHYSICAL THERAPISTS EXAMINING BOARD FOR THE DISTRICT OF COLUMBIA, *ante,* p. 987;

No. 672, Misc. WILLIAMS *v.* UNITED STATES, *ante,* p. 960;

No. 786, Misc. WALKER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante,* p. 335;

No. 879, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante,* p. 963;

No. 896, Misc. ELKSNIS *v.* UNITED STATES, *ante,* p. 990;

No. 1017, Misc. MANCILLA *v.* UNITED STATES ET AL., *ante,* p. 982; and

No. 1117, Misc. BUTTERFIELD *v.* GAZELLE, *ante,* p. 985. Petitions for rehearing denied.

No. 237. BIGGERS *v.* TENNESSEE, *ante*, p. 404;

No. 700. ANDERSON *v.* JOHNSON, WARDEN, *ante*, p. 456;

No. 968. BANCO NACIONAL DE CUBA *v.* FARR ET AL., DBA FARR, WHITLOCK & CO., ET AL., *ante*, p. 956; and

No. 1033. POWELL *v.* NATIONAL SAVINGS & TRUST CO., *ante*, p. 957. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 906. ROVICO, INC. *v.* AMERICAN PHOTOCOPY EQUIPMENT CO., *ante*, p. 945. Motion for leave to supplement petition for rehearing granted. Petition for rehearing denied.

APRIL 29, 1968.

Miscellaneous Orders.

No. 1082, Misc. ABBOTT *v.* TURNER, WARDEN; and

No. 1501, Misc. ARMSTRONG *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. 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. 1438, Misc. JEFFRIES *v.* FRYE, WARDEN;

No. 1439, Misc. PATTERSON *v.* LANE, WARDEN; and

No. 1444, Misc. WHITE *v.* NOBLE, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1232, Misc. DAVIS *v.* CROUSE, WARDEN; and

No. 1255, Misc. FERNANDEZ *v.* DISTRICT COURT OF PUERTO RICO, BAYAMON PART, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 813. SHAPIRO, COMMISSIONER OF WELFARE OF THE STATE OF CONNECTICUT *v.* THOMPSON. Appeal from D. C. Conn. (Probable jurisdiction noted, 389 U. S. 1032.) Motion for permission for two attorneys for leave to participate in oral argument granted. *Lorna Lawhead Williams,* Special Assistant Attorney General of Iowa, on the motion.

Probable Jurisdiction Postponed.

No. 1320, Misc. MCDONALD ET AL. *v.* BOARD OF ELECTION COMMISSIONERS OF CHICAGO ET AL. Appeal from D. C. N. D. Ill. Motion for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of the case on the merits, and case transferred to appellate docket. *Marshall Patner* on the motion.

Certiorari Granted. (See also No. 1105, *ante,* p. 745; and No. 386, Misc., *ante,* p. 746.)

No. 1209. MCCARTHY *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Barnabas F. Sears, Wayland B. Cedarquist* and *Maurice J. McCarthy* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin* and *Joseph M. Howard* for the United States. Reported below: 387 F. 2d 838.

No. 1212. UNITED STATES *v.* AUGENBLICK ET AL. Ct. Cl. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge* and *Robert V. Zener* for the United States. *Joseph H. Sharlitt* and *Steven R. Rivkin* for Augenblick and *Francis J. Steiner, Jr.,* for Juhl, respondents. Reported below: 180 Ct. Cl. 131, 377 F. 2d 586; 181 Ct. Cl. 210, 383 F. 2d 1009.

Certiorari Denied. (See also Misc. Nos. 1082 and 1501, *supra.*)

No. 1185. JOFFE *v.* JOFFE. Sup. Ct. N. J. Certiorari denied. *Eugene Gressman* and *F. Joseph Donohue* for petitioner. *J. Mortimer Rubenstein* for respondent. Reported below: 50 N. J. 265, 234 A. 2d 232.

No. 1186. JOFFE *v.* JOFFE. C. A. 3d Cir. Certiorari denied. *Eugene Gressman* and *F. Joseph Donohue* for petitioner. *J. Mortimer Rubenstein* for respondent. Reported below: 384 F. 2d 632.

No. 1214. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Ralph Rudd* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. *Marvin M. Karpatkin, Melvin L. Wulf* and *Bernard A. Berkman* for American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 389 F. 2d 172.

No. 1220. AMERICAN AIRLINES, INC. *v.* EGAN ET AL., ADMINISTRATORS. Ct. App. N. Y. Certiorari denied. *John J. Martin* and *William M. Keegan* for petitioner. *Bernard Shatzkin* and *Burton S. Cooper* for respondents. Reported below: 21 N. Y. 2d 160, 234 N. E. 2d 199.

No. 1231. HENDREX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Sanford Rosenthal* and *George Stone* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 931.

No. 1221. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* KISER. Sup. Ct. Okla. Certiorari denied. *Edward K. Wheeler* and *Eldon S. Olson* for petitioner.

No. 1224. PRESTON *v.* TYNER. Ct. App. Ohio, Fayette County. Certiorari denied. *Robert R. Crane* for petitioner.

No. 1229. FORD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *Robert C. Heeney* for petitioner.

No. 1232. HOLBROOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Benjamin F. Kelly* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1234. HO YEH SZE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* and *Jules E. Coven* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 389 F. 2d 978.

No. 1240. DAVIDSON *v.* DIVISION OF REVENUE OF THE DEPARTMENT OF TREASURY OF MICHIGAN. Ct. App. Mich. Certiorari denied. *Harold S. Sawyer* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *William D. Dexter* and *Maurice Barbour,* Assistant Attorneys General, for respondent.

No. 1051. SOLONER ET AL. *v.* GARTNER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Henry Kaiser, Eugene Gressman, Edward Davis* and *Alan R. Howe* for petitioners. Reported below: 384 F. 2d 348.

No. 1274. LEHIGH VALLEY RAILROAD CO. *v.* WM. SPENCER & SON CORP. C. A. 2d Cir. Certiorari denied. *Thomas V. McMahon* for petitioner. *Daniel A. Semel* for respondent. Reported below: 387 F. 2d 623.

No. 1082. MASTER TIME CO., LTD. *v.* DEJONGH, COMMISSIONER OF THE DEPARTMENT OF FINANCE OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Warren H. Young* for petitioner. *Francisco Corneiro,* Attorney General of the Virgin Islands, and *Bruce MacGibbon,* Assistant Attorney General, for respondent. Reported below: 384 F. 2d 569.

No. 1163. VIRGO CORP. *v.* PAIEWONSKY, GOVERNOR OF THE VIRGIN ISLANDS, ET AL. C. A. 3d Cir. Motion of Antilles Industries, Inc., for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion and petition. *William Simon, John Bodner, Jr.,* and *Gerald Kadish* for petitioner. *Francisco Corneiro,* Attorney General of the Virgin Islands, and *Bruce MacGibbon,* Assistant Attorney General, for respondents Paiewonsky et al. *John D. Conner, Ashley Sellers* and *George C. Davis* for Antilles Industries, Inc., as *amicus curiae,* in support of the petition. Reported below: 384 F. 2d 569.

No. 1151, Misc. GIFFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1216. PAUL *v.* DADE COUNTY, FLORIDA, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Alfred I. Hopkins* for petitioner. *Thomas C. Britton* and *St. Julien P. Rosemond* for respondents. Reported below: 202 So. 2d 833.

No. 1176. WILSON *v.* WIMAN, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. *John David Cole* for petitioner. *John B. Breckinridge,* Attorney General of Kentucky, and *Charles W. Runyan,* Assistant Attorney General, for respondent. Reported below: 386 F. 2d 968.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, would grant certiorari in this case. In 1933 and 1935 petitioner was convicted in the state courts of Kentucky of housebreaking. In 1964, he was convicted of storehouse breaking. The earlier convictions were used in evidence pursuant to the Kentucky recidivist statute. Petitioner was sentenced to life in prison. The trial judge did not instruct the jury that the prior convictions could be used only for the limited purpose of the recidivist statute. I believe that we should hear this case to determine whether it is governed by *Spencer* v. *Texas,* 385 U. S. 554 (1967), and if so whether *Spencer* v. *Texas* should be reconsidered. See the separate opinion of THE CHIEF JUSTICE, in which I joined, 385 U. S., at 569, and the dissent of MR. JUSTICE BRENNAN, in which MR. JUSTICE DOUGLAS joined, 385 U. S., at 587.

No. 1189. KRISEL *v.* DURAN ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Maurice M. Krisel, pro se,* and *Benjamin M. Cardozo, Michael H. Cardozo IV* and *Roman Beck* for petitioner. *Jose C. Aponte,* Attorney General of Puerto Rico, *William D. Rogers* and *Robert A. Bicks* for respondents. Reported below: 386 F. 2d 179.

No. 1260, Misc. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1253. KRAMM *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Motion to dispense with printing petition granted. Certiorari denied. *Charles K. Hackler* for petitioner. *Everett A. Corten* for respondent Workmen's Compensation Appeals Board of California, and *Sidney A. Stutz* for respondent Hartford Accident & Indemnity Co.

No. 553, Misc. GARAY *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Craig G. McIntosh,* Deputy Attorneys General, for respondent. Reported below: 247 Cal. App. 2d 833, 56 Cal. Rptr. 55.

No. 746, Misc. COLLIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 381 F. 2d 616.

No. 1195, Misc. MORRIS *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied. *George A. Daugherty* for petitioner. Reported below: 386 F. 2d 395.

No. 1264, Misc. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Milton A. Kallis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States.

No. 1290, Misc. MATTIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene P. Souther* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 388 F. 2d 368.

No. 1243, Misc. STANLEY *v.* AVERY, CORRECTIONS COMMISSIONER. C. A. 6th Cir. Certiorari denied. Reported below: 387 F. 2d 637.

No. 1254, Misc. BRYAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 254 Cal. App. 2d 231, 62 Cal. Rptr. 137.

No. 1257, Misc. ROBINSON *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1279, Misc. MINTZER *v.* DROS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1298, Misc. DENMAN *v.* BEALE ET AL. C. A. 1st Cir. Certiorari denied. *Jesse R. Fillman* for respondent Whitney.

No. 1300, Misc. RUARK *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 434 P. 2d 124.

No. 1310, Misc. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1312, Misc. HEIRENS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 38 Ill. 2d 294, 230 N. E. 2d 875.

No. 1315, Misc. PACHOLSKY *v.* PATE, WARDEN. Cir. Ct., Will County, Ill. Certiorari denied.

No. 1345, Misc. GULLETT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States. Reported below: 387 F. 2d 307.

No. 1322, Misc. BARTLAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Laurence Leff* for respondent.

No. 1359, Misc. HOLLAND *v.* CICCONE, DIRECTOR, MEDICAL CENTER FOR FEDERAL PRISONERS. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for respondent. Reported below: 386 F. 2d 825.

No. 1360, Misc. WILLIAMS *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1370, Misc. MCEACHEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Michael M. Kearney* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1376, Misc. HERRINGTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1388, Misc. BROWN *v.* FOGEL. C. A. 4th Cir. Certiorari denied. *William M. Kunstler, Arthur Kinoy* and *Morton Stavis* for petitioner. Reported below: 387 F. 2d 692.

No. 1219, Misc. WILKERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold* for the United States.

No. 1405, Misc. GALLEGOS ET AL. *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 386 F. 2d 440.

No. 1389, Misc. PEREZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1448, Misc. CARPENTER *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 389 F. 2d 53.

No. 1261, Misc. MAGRUDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Edward Fenig* for the United States.

Rehearing Denied.

No. 1095. GANNON *v.* NAVARRO, *ante,* p. 989;

No. 855, Misc. BENNETT *v.* MYERS, CORRECTIONAL SUPERINTENDENT, *ante,* p. 973;

No. 1069, Misc. WEILAND *v.* O'NEAL, *ante,* p. 984; and

No. 1238, Misc. SARGENT *v.* YEAGER, WARDEN, ET AL., *ante,* p. 994. Petitions for rehearing denied.

No. 324. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* MISSOURI STATE TAX COMMISSION ET AL., *ante,* p. 317. Motion for leave to file petition for rehearing denied.

No. 1121. PETO *v.* MADISON SQUARE GARDEN CORP. ET AL., *ante,* p. 989. Petition for rehearing and other relief denied.

No. 1096, Misc. SHYVERS *v.* UNITED STATES, *ante,* p. 998. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

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