U.S. Supreme Court

UNITED STATES REPORTS

VOLUME 393

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1968

OCTOBER 7, 1968 (BEGINNING OF TERM)
THROUGH (IN PART) MARCH 3, 1969

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA.

106 U. S. XII: the entry "Fairview *v.* Marshall . . . 583" should be deleted.

245 U. S. 469: "1851" in the last line should be "1852."

344 U. S. 115, line 4 from bottom: "1871" should be "1872."

374 U. S. 836, No. 982, Misc., last line: "313" should be "113."

386 U. S. 1041: "No. 1492" should be "No. 1492, Misc."

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.[1]
JOHN N. MITCHELL, Attorney General.[2]
ERWIN N. GRISWOLD, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

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[1] Attorney General Clark resigned effective January 20, 1969.

[2] Mr. John N. Mitchell, of New York, was nominated to be Attorney General by President Nixon on January 20, 1969. The nomination was confirmed by the Senate on January 20, 1969; he was commissioned on January 21, 1969; and took the oath of office on January 22, 1969. He was presented to the Court on February 24, 1969. (See *post*, p. v.)

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.)

PRESENTATION OF THE ATTORNEY GENERAL.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 24, 1969.

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

Mr. Solicitor General Griswold presented the Honorable John N. Mitchell, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded with the Clerk.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1968.

CALIFORNIANS FOR AN ALTERNATIVE IN NOVEMBER ET AL. *v.* CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 605. Decided October 7, 1968.

Appeal dismissed.

Doris Brian Walker for appellants.

Thomas C. Lynch, Attorney General of California, *Charles A. Barrett,* Assistant Attorney General, and *Clayton P. Roche,* Deputy Attorney General, for appellees.

PER CURIAM.

The appeal is dismissed. California is on the eve of a national election. Millions of ballots are being printed and in a few hours the absentee ballots will be sent out of State. Whatever may be the merits of the controversy, the shortness of time and the complicated task of preparing and distributing the ballots make it very doubtful if any effective relief would be possible.

McCONNELL *v.* RHAY, PENITENTIARY SUPERINTENDENT.

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

No. 87, Misc. Decided October 14, 1968.*

The decision in *Mempa* v. *Rhay*, 389 U. S. 128, holding that the Sixth Amendment, as applied through the Fourteenth Amendment, requires that counsel be afforded felony defendants in a proceeding for revocation of probation and imposition of deferred sentencing, should be applied retroactively.

Certiorari granted; judgments reversed and remanded.

Michael H. Rosen for petitioner in No. 458, Misc.

John J. O'Connell, Attorney General of Washington, and *Stephen C. Way*, Assistant Attorney General, for respondent in both cases.

PER CURIAM.

The sole issue presented by these cases is whether our decision in *Mempa* v. *Rhay*, 389 U. S. 128 (1967), should be applied retroactively.

The facts in both cases are quite similar to those in *Mempa*. Petitioner Jack D. McConnell pleaded guilty to two counts of grand larceny by check. At a hearing on December 23, 1965, he was placed on probation for five years upon condition that he serve one year in the county jail. He was released from jail the following April, but five months later the prosecuting attorney moved that the December 23 order be revoked, alleging that McConnell had violated the terms of his probation. Two hearings on the motion followed—one on September

*Together with No. 458, Misc., *Stiltner* v. *Rhay, Penitentiary Superintendent*, also on petition for writ of certiorari to the same court.

29, 1966, and the other on November 23, 1966. As a result of these hearings, McConnell was sentenced to two concurrent 15-year terms. At neither hearing was he represented by counsel or advised of his right to have counsel appointed.

Petitioner Douglas Stiltner pleaded guilty to burglary in the second degree and grand larceny, and on June 23, 1958, he was placed on probation and sentencing was deferred. As in McConnell's case, the prosecuting attorney later moved for revocation of this order. Hearings on December 30, 1958, and January 8, 1959, led to the imposition of two concurrent 15-year sentences. Stiltner was neither represented nor advised of his right to have counsel appointed. Although Stiltner was subsequently convicted of another offense and is serving a sentence for that crime, the Washington Supreme Court found that it had the power to fashion appropriate relief, were *Mempa* v. *Rhay* applicable.

In habeas corpus proceedings, the Washington Supreme Court properly found that both petitioners' Sixth Amendment rights were violated at their deferred sentencing hearings. That question was settled by our decision in *Mempa.* But the court denied relief in both cases, holding that *Mempa* should not be applied to cases in which probation and deferral or suspension of sentences had been revoked before November 13, 1967, the date upon which *Mempa* was decided. This was error.

This Court's decisions on a criminal defendant's right to counsel at trial, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); at certain arraignments, *Hamilton* v. *Alabama,* 368 U. S. 52 (1961); and on appeal, *Douglas* v. *California,* 372 U. S. 353 (1963), have been applied retroactively. The right to counsel at sentencing is no different. As in these other cases, the right being asserted relates to "the very integrity of the fact-finding process." *Linkletter* v. *Walker,* 381 U. S. 618, 639

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(1965); cf. *Roberts* v. *Russell*, 392 U. S. 293 (1968). As we said in *Mempa*, "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent." 389 U. S., at 135. The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication.

Certiorari and the motions to proceed *in forma pauperis* are granted in both cases, the judgments are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

ARSENAULT *v.* MASSACHUSETTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 187, Misc. Decided October 14, 1968.

Petitioner pleaded guilty to murder at a probable-cause hearing when he had no counsel. He testified at his trial (when he had counsel), and denied guilt. On cross-examination his prior plea was introduced. Petitioner was convicted and the State's highest court affirmed over his contention that admission of the prior plea was error. Based on *White* v. *Maryland,* 373 U. S. 59, decided after petitioner's trial, petitioner sought post-conviction relief, which that court denied on the ground that *White* was not retroactive. *Held: White* v. *Maryland,* which is indistinguishable in principle from the present case, applies retroactively.

Certiorari granted; 353 Mass. 575, 233 N. E. 2d 730, reversed.

F. Lee Bailey for petitioner.

Elliot L. Richardson, Attorney General of Massachusetts, *Howard M. Miller,* Assistant Attorney General, and *Richard L. Levine,* Deputy Assistant Attorney General, for respondent.

PER CURIAM.

In February 1955 petitioner was arrested in connection with a recent homicide and attempted robbery. The next morning at a probable-cause hearing, but unassisted by counsel, he pleaded guilty to counts of murder and assault with intent to rob. Six days later at his arraignment, and again unaided by counsel, he pleaded not guilty to an indictment charging him with first-degree murder. After being assigned counsel for trial he took the stand in his own defense and again pleaded not guilty to the indictment, asserting instead that he lacked the premeditation necessary for first-degree murder. On cross-examination, the district attorney questioned him about his prior statements at the preliminary hearing and introduced his plea of guilty for the purpose of refreshing

his memory. The jury then returned a verdict of guilty and imposed a sentence of death, since commuted to life imprisonment. On direct review by the Massachusetts Supreme Judicial Court, he assigned as error the admission at trial of his prior plea. The court rejected his claim by affirming the conviction.

In 1966 petitioner sought post-conviction relief from the Massachusetts Supreme Judicial Court on the ground that our supervening decision in *White* v. *Maryland,* 373 U. S. 59, rendered his conviction void. While recognizing a "close similarity" between his case and *White,* that court nonetheless reaffirmed the judgment below on the ground that *White* was not retroactive. Petitioner comes here by petition for a writ of certiorari. The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

In *White* v. *Maryland* an accused pleaded guilty when arraigned at a preliminary hearing, and at that time had no counsel to represent him. We held that *Hamilton* v. *Alabama,* 368 U. S. 52, was applicable, as only the aid of counsel could have enabled the accused to know all the defenses available to him and to plead intelligently. *White* v. *Maryland* is indistinguishable in principle from the present case; and we hold that it is applicable here although it was not decided until after the arraignment and trial in the instant case.

The right to counsel at the trial (*Gideon* v. *Wainwright,* 372 U. S. 335); on appeal (*Douglas* v. *California,* 372 U. S. 353); and at the other "critical" stages of the criminal proceedings (*Hamilton* v. *Alabama, supra*) have all been made retroactive, since the "denial of the right must almost invariably deny a fair trial." * See *Stovall* v. *Denno,* 388 U. S. 293, 297.

Reversed.

*For the distinction drawn between the right-to-counsel cases and those arising under the Fourth and Fifth Amendments, see also *Tehan* v. *Shott,* 382 U. S. 406, 416.

HANOVER INSURANCE CO. OF NEW YORK *v.* VICTOR.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 50. Decided October 14, 1968.

Appeal dismissed.

Florindo M. DeRosa, Duncan C. Lee, Frank A. Celentano, and *Peter J. Malloy, Jr.,* for appellant.

Harriet E. Gair for appellee.

PER CURIAM.

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

COHON ET AL. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA.

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

No. 57. Decided October 14, 1968.

256 Cal. App. 2d 158, 64 Cal. Rptr. 26, appeal dismissed.

Herbert A. Leland, Marc E. Leland, J. Bruce Fratis, Joseph L. Alioto, and *Richard Saveri* for appellants.

Thomas C. Lynch, Attorney General of California, and *Elizabeth Palmer* and *L. Stephen Porter,* 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.

MAKAH INDIAN TRIBE *v.* TAX COMMISSION OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 52. Decided October 14, 1968.

72 Wash. 2d 613, 434 P. 2d 580, appeal dismissed.

James J. McArdle for appellant.

John J. O'Connell, Attorney General of Washington, and *Timothy R. Malone* and *J. Richard Duggan,* Assistant Attorneys General, for appellee Tax Commission of Washington.

Solicitor General Griswold, Assistant Attorney General Martz, and *Roger P. Marquis* for the United States, as *amicus curiae.*

PER CURIAM.

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

DESERT OUTDOOR ADVERTISING, INC. *v.* COUNTY OF SAN BERNARDINO.

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

No. 114. Decided October 14, 1968.

255 Cal. App. 2d 765, 63 Cal. Rptr. 543, appeal dismissed.

J. Perry Langford for appellant.

William Sabourin for appellee.

PER CURIAM.

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

WHITNEY STORES, INC., ET AL. *v.* SUMMERFORD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA.

No. 85. Decided October 14, 1968.

280 F. Supp. 406, affirmed.

E. N. Zeigler for appellants.

PER CURIAM.

The judgment is affirmed.

HORNBEAK *v.* HAMM, COMMISSIONER OF REVENUE FOR ALABAMA.

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

No. 260. Decided October 14, 1968.

283 F. Supp. 549, affirmed.

Barry Hess for appellant.

MacDonald Gallion, Attorney General of Alabama, and *Willard W. Livingston* and *Herbert I. Burson,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case set for argument.

BIDDLE, ADMINISTRATRIX *v.* BOWSER ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 159. Decided October 14, 1968.

Appeal dismissed and certiorari denied.

Downey Rice 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.

BROWN ET AL. *v.* RESOR, SECRETARY OF THE ARMY.

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

No. 133, Misc. Decided October 14, 1968.

Certiorari granted; 388 F. 2d 682, vacated and remanded.

Charles Morgan, Jr., Morris Brown, Benjamin E. Smith, and *Melvin L. Wulf* for petitioners.

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

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Carafas* v. *LaVallee,* 391 U. S. 234.

LOPTIEN ET UX. *v.* CITY OF SYCAMORE.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 179. Decided October 14, 1968.

Appeal dismissed and certiorari denied.

William C. Murphy for appellee.

PER CURIAM.

The motion to strike the response to the jurisdictional statement is denied.

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.

SAMSON MARKET CO., INC. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA.

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

No. 326. Decided October 14, 1968.

261 Cal. App. 2d 577, 68 Cal. Rptr. 130, appeal dismissed and certiorari denied.

Jacques Leslie and *Lawrence Teplin* for appellant.

Thomas C. Lynch, Attorney General of California, and *Kenneth Scholtz,* Deputy Attorney General, for appellee.

PER CURIAM.

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

SAMSON MARKET CO., INC. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA.

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

No. 181. Decided October 14, 1968.

Appeal dismissed.

Jacques Leslie and *Lawrence Teplin* for appellant.

Thomas C. Lynch, Attorney General of California, and *Warren H. Deering* and *Henry G. Ullerich,* 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.

MARTONE *v.* MORGAN ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 216. Decided October 14, 1968.

251 La. 993, 207 So. 2d 770, appeal dismissed.

J. Minos Simon for appellant.

Ashton L. Stewart, Special Assistant Attorney General of Louisiana, and *Wesley Wirtz,* Assistant Attorney General, for appellees.

PER CURIAM.

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

MR. JUSTICE BLACK dissents.

LEWINSON *v.* CREWS, COUNTY CLERK OF KINGS COUNTY.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 230. Decided October 14, 1968.

Appeal dismissed.

Emanuel Redfield for appellant.

Seymour Besunder for appellee.

PER CURIAM.

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

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

ESTATE OF BURNELL *v.* COLORADO.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 239. Decided October 14, 1968.

— Colo. —, 439 P. 2d 38, appeal dismissed.

Lawrence Speiser for appellant.

Duke W. Dunbar, Attorney General of Colorado, *Richard D. Robb,* Assistant Attorney General, and *Frank E. Hickey,* Deputy Attorney General, for appellee.

PER CURIAM.

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

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

ROSSO ET UX. *v.* PUERTO RICO.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

No. 242. Decided October 14, 1968.

— P. R. R. —, appeal dismissed.

Walter L. Newsom, Jr., and *James B. Donovan* for appellants.

Rafael A. Rivera-Cruz, Solicitor General of Puerto Rico, *J. F. Rodriguez-Rivera*, Deputy Solicitor General, and *Peter Ortiz*, Assistant Solicitor 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 FORTAS took no part in the consideration or decision of this case.

ROBERTS, JUDGE, ET AL. *v.* POLLARD ET AL.

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

No. 251. Decided October 14, 1968.

283 F. Supp. 248, affirmed.

Joe Purcell, Attorney General of Arkansas, and *Don Langston*, Deputy Attorney General, for appellants.

PER CURIAM.

The judgment is affirmed.

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

ILOWITE *v.* UNITED STATES ET AL.

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

No. 263. Decided October 14, 1968.

Certiorari granted; 390 F. 2d 589, vacated and remanded with directions to dismiss the case as moot.

Victor Rabinowitz, Leonard B. Boudin, Michael B. Standard, and *David Rosenberg* for petitioner.

Solicitor General Griswold and *Henry Geller* for the United States et al.

PER CURIAM.

Upon consideration of the suggestion of mootness and an examination of the entire record, the petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals with directions to dismiss the case as moot.

BUTLER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 197, Misc. Decided October 14, 1968.

Appeal dismissed and certiorari denied.

Stephen J. McEwen, Jr., and *Vram Nedurian, Jr.,* for appellee.

PER CURIAM.

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

PENJASKA ET AL. *v.* GOODBODY & CO.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 270. Decided October 14, 1968.

Appeal dismissed and certiorari denied.

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.

BATES ET AL. *v.* NELSON, WARDEN.

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

No. 86, Misc. Decided October 14, 1968.

Certiorari granted; 385 F. 2d 771, vacated and remanded.

Richard Gladstein, Norman Leonard, and *Ruth Jacobs* for petitioners.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Charles R. B. Kirk,* Deputy Attorney General, for respondent.

PER CURIAM.

The motions to supplement the petition for a writ of certiorari and for leave to proceed *in forma pauperis* are granted. The petition for a writ of certiorari is also granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Burgett* v. *Texas,* 389 U. S. 109; *Bruton* v. *United States,* 391 U. S. 123; and *Roberts* v. *Russell,* 392 U. S. 293.

LOUISIANA EDUCATION COMMISSION FOR NEEDY CHILDREN ET AL. *v.* POINDEXTER ET AL.

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

No. 284. Decided October 14, 1968.

Affirmed.

Leander H. Perez and *Luke A. Petrovich* for appellants.

Solicitor General Griswold and *Assistant Attorney General Pollak* for appellees.

PER CURIAM.

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

WESTSIDE LIQUOR CO. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA.

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

No. 324. Decided October 14, 1968.

259 Cal. App. 2d 511, 66 Cal. Rptr. 434, appeal dismissed.

Harold Easton for appellant.

Thomas C. Lynch, Attorney General of California, and *Lynn Henry Johnson,* Deputy Attorney General, for appellee.

PER CURIAM.

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

GUERRA *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 286. Decided October 14, 1968.

209 So. 2d 627, appeal dismissed.

W. D. Kendall for appellant.

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 355. Decided October 14, 1968.

Affirmed.

Bryce Rea, Jr., and *Thomas M. Knebel* for appellants.

Solicitor General Griswold, Assistant Attorney General Zimmerman, Robert W. Ginnane, and *Emmanuel H. Smith* for the United States et al., *James T. Johnson* for Pacific Progress Shippers Assn., Inc., and *Ronald N. Cobert* and *Philip R. Ehrenkranz* for American Institute of Shippers' Assns., Inc., appellees.

PER CURIAM.

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

PENNWICK CORP. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA.

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

No. 325. Decided October 14, 1968.

Appeal dismissed.

Jacques Leslie and *Lawrence Teplin* for appellant.

Thomas C. Lynch, Attorney General of California, and *Lynn Henry Johnson,* Deputy Attorney General, for appellee.

PER CURIAM.

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

TYRRELL *v.* CROUSE, WARDEN.

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

No. 59, Misc. Decided October 14, 1968.

Certiorari granted; judgment reversed.

Robert C. Londerholm, Attorney General of Kansas, and *J. Richard Foth* and *Jon K. Sargent,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. In accordance with the concession by the respondent the judgment is reversed. *Peyton* v. *Rowe,* 391 U. S. 54.

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BLABON *v.* NELSON, WARDEN.

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

No. 3, Misc. Decided October 14, 1968.

Certiorari granted; 370 F. 2d 997, vacated and remanded.

Thomas C. Lynch, Attorney General of California, and *Edward P. O'Brien* and *Derald E. Granberg,* Deputy Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *In re Bevill,* 68 Cal. 2d 854, 442 P. 2d 679.

LEMANSKI *v.* LEMANSKI.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

No. 473, Misc. Decided October 14, 1968.

87 Ill. App. 2d 405, 231 N. E. 2d 191, appeal dismissed and certiorari denied.

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.

JONES *v.* GEORGIA.

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

No. 149, Misc. Decided October 14, 1968.

Certiorari granted; 224 Ga. 283, 161 S. E. 2d 302, vacated and remanded.

Frank B. Hester for petitioner.

Lewis R. Slaton and *J. Walter LeCraw* 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 Georgia for further consideration in light of *Witherspoon* v. *Illinois,* 391 U. S. 510.

WORKMAN *v.* UTAH.

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

No. 39, Misc. Decided October 14, 1968.

Certiorari granted; 20 Utah 2d 178, 435 P. 2d 919, reversed.

Jimi Mitsunaga for petitioner.

Phil L. Hansen, Attorney General of Utah, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Miranda* v. *Arizona,* 384 U. S. 436; *Johnson* v. *New Jersey,* 384 U. S. 719.

ANDERSEN ET AL. *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 335. Decided October 14, 1968.

208 So. 2d 814, appeal dismissed.

William Y. Akerman for appellants.

PER CURIAM.

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

MUNIZ *v.* BETO, CORRECTIONS DIRECTOR.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 430, Misc. Decided October 14, 1968.

Appeal dismissed and certiorari denied.

Joseph A. Calamia for appellant.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, *Robert C. Flowers* and *Allo B. Crow, Jr.,* Assistant Attorneys General, and *W. Barton Boling* for appellee.

PER CURIAM.

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

WILLIAMS ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 543. Argued October 7, 1968.—Decided October 15, 1968.*

Under the Ohio election laws a new political party seeking ballot position in presidential elections must obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last gubernatorial election and must file these petitions early in February of the election year. These requirements and other restrictive statutory provisions virtually preclude a new party's qualifying for ballot position and no provision exists for independent candidates doing so. The Republican and Democratic Parties may retain their ballot positions by polling 10% of the votes in the last gubernatorial election and need not obtain signature petitions. The Ohio American Independent Party (an appellant in No. 543), was formed in January 1968, and during the next six months by securing over 450,000 signatures exceeded the 15% requirement but was denied ballot position because the February deadline had expired. The Socialist Labor Party (an appellant in No. 544), an old party with a small membership, could not meet the 15% requirement. Both Parties brought actions challenging the Ohio election laws as violating the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court held those laws unconstitutional and ruled that the Parties were entitled to write-in space but not ballot position. The Parties appealed to this Court. The Independent Party immediately sought interlocutory relief from MR. JUSTICE STEWART, which he granted by order after a hearing at which Ohio represented that it could place the Party's name on the ballot without disrupting the election if there was not a long delay. Several days after that order the Socialist Labor Party sought a stay which he denied because of that Party's failure to move quickly for relief, the State having represented that at that time the granting of relief would disrupt the election. *Held:*

1. The controversy in these cases is justiciable. P. 28.

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*Together with No. 544, *Socialist Labor Party et al.* v. *Rhodes, Governor of Ohio, et al.*, also on appeal from the same court.

2. State laws enacted pursuant to Art. II, § 1, of the Constitution to regulate the selection of electors must meet the requirements of the Equal Protection Clause of the Fourteenth Amendment. Pp. 28–29.

3. Ohio's restrictive election laws taken as a whole are invidiously discriminatory and violate the Equal Protection Clause because they give the two old, established parties a decided advantage over new parties. Pp. 30–34.

(a) The state laws here involved heavily burden the right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. Pp. 30–31.

(b) The State has shown no "compelling interest" justifying those burdens. Pp. 31–32.

4. Under the circumstances here Ohio must allow the Independent Party and its candidates for President and Vice President to remain on the ballot, subject to compliance with valid state laws. Ohio is not at this late date required to place the Socialist Labor Party on the ballot for the coming election. Pp. 34–35.

290 F. Supp. 983, No. 543, modified; No. 544, affirmed.

David J. Young argued the cause and filed briefs for appellants in No. 543. *Jerry Gordon* argued the cause, *pro hac vice,* and filed briefs for appellants in No. 544.

Charles S. Lopeman argued the cause for appellees in both cases. With him on the briefs was *William B. Saxbe,* Attorney General of Ohio.

MR. JUSTICE BLACK delivered the opinion of the Court.

The State of Ohio in a series of election laws has made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party, which has a very small number of members, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States.

Ohio Revised Code, § 3517.01, requires a new party to obtain petitions signed by qualified electors totaling 15%

of the number of ballots cast in the last preceding gubernatorial election. The detailed provisions of other Ohio election laws result in the imposition of substantial additional burdens, which were accurately summarized in Judge Kinneary's dissenting opinion in the court below and were substantially agreed on by the other members of that court.[1] Together these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties. These two Parties face substantially smaller burdens because they are allowed to retain their

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[1] Judge Kinneary describes, in his dissenting opinion below, the legal obstacles placed before a would-be third party even after the 15% signature requirement has been fulfilled:

"*First*, at the primary election, the new party, or any political party, is required to elect a state central committee consisting of two members from each congressional district and county central committees for each county in Ohio. [Ohio Rev. Code §§ 3517.02–3517.04.] *Second*, at the primary election the new party must elect delegates and alternates to a national convention. [Ohio Rev. Code § 3505.10.] Since Section 3513.19.1, Ohio Rev. Code, prohibits a candidate from seeking the office of delegate to the national convention or committeeman if he voted as a member of a different party at a primary election in the preceding four year period, the new party would be required to have over twelve hundred members who had not previously voted in another party's primary, and who would be willing to serve as committeemen and delegates. *Third*, the candidates for nomination in the primary would have to file petitions signed by qualified electors. [Ohio Rev. Code § 3513.05.] The term 'qualified electors' is not adequately defined in the Ohio Revised Code [§ 3501.01 (H)], but a related section [§ 3513.19], provides that a qualified elector at a primary election of a political party is one who, (1) voted for a majority of that party's candidates at the last election, or, (2) has never voted in any election before. Since neither of the political party plaintiffs had any candidates at the last preceding regular state election, they would, of necessity, have to seek out members who had never voted before to sign the nominating petitions, and it would be only these persons who could vote in the primary election of the new party."

positions on the ballot simply by obtaining 10% of the votes in the last gubernatorial election and need not obtain any signature petitions. Moreover, Ohio laws make no provision for ballot position for independent candidates as distinguished from political parties. The State of Ohio claims the power to keep minority parties and independent candidates off the ballot under Art. II, § 1, of the Constitution, which provides that:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."

The Ohio American Independent Party, an appellant in No. 543, and the Socialist Labor Party, an appellant in No. 544, both brought suit to challenge the validity of these Ohio laws as applied to them, on the ground that they deny these Parties and the voters who might wish to vote for them the equal protection of the laws, guaranteed against state abridgment by the Equal Protection Clause of the Fourteenth Amendment. The three-judge District Court designated to try the case ruled these restrictive Ohio election laws unconstitutional but refused to grant the Parties the full relief they had sought, 290 F. Supp. 983 (D. C. S. D. Ohio 1968), and both Parties have appealed to this Court. The cases arose in this way:

The Ohio American Independent Party was formed in January 1968 by Ohio partisans of former Governor George C. Wallace of Alabama. During the following six months a campaign was conducted for obtaining signatures on petitions to give the Party a place on the ballot and over 450,000 signatures were eventually obtained, more than the 433,100 required. The State contends and the Independent Party agrees that due to the interaction of several provisions of the Ohio laws, such petitions were required to be filed by February 7, 1968,

and so the Secretary of the State of Ohio informed the Party that it would not be given a place on the ballot. Neither in the pleadings, the affidavits before the District Court, the arguments there, nor in our Court has the State denied that the petitions were signed by enough qualified electors of Ohio to meet the 15% requirement under Ohio law. Having demonstrated its numerical strength, the Independent Party argued that this and the other burdens, including the early deadline for filing petitions and the requirement of a primary election conforming to detailed and rigorous standards, denied the Party and certain Ohio voters equal protection of the laws. The three-judge District Court unanimously agreed with this contention and ruled that the State must be required to provide a space for write-in votes. A majority of the District Court refused to hold, however, that the Party's name must be printed on the ballot, on the ground that Wallace and his adherents had been guilty of "laches" by filing their suit too late to allow the Ohio Legislature an opportunity to remedy, in time for the presidential balloting, the defects which the District Court held the law possessed. The appellants in No. 543 then moved before MR. JUSTICE STEWART, Circuit Justice for the Sixth Circuit, for an injunction which would order the Party's candidates to be put on the ballot pending appeal. After consulting with the other members of the Court who were available, and after the State represented that the grant of interlocutory relief would be in the interests of the efficient operation of the electoral machinery if this Court considered the chances of successful challenge to the Ohio statutes good, MR. JUSTICE STEWART granted the injunction.

The Socialist Labor Party, an appellant in No. 544, has all the formal attributes of a regular party. It has conventions and a State Executive Committee as required by the Ohio law, and it was permitted to have a place on

the ballot until 1948. Since then, however, it has not filed petitions with the total signatures required under new Ohio laws for ballot position, and indeed it conceded it could not do so this year. The same three-judge panel heard the Party's suit and reached a similar result—write-in space was ordered but ballot position was denied the Socialist Labor Party. In this case the District Court assigned both the Party's small membership of 108 and its delay in bringing suit as reasons for refusing to order more complete relief for the 1968 election. A motion to stay the District Court's judgment was presented to MR. JUSTICE STEWART several days after he had ordered similar relief in the Independent Party case. The motion was denied principally because of the Socialist Party's failure to move quickly to obtain relief, with the consequent confusion that would be caused by requiring Ohio once again to begin completely reprinting its election ballots, but the case was set by this Court for oral argument, along with the Independent Party case.

I.

Ohio's claim that the political-question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times. It was rejected by the Court unanimously in 1892 in the case of *McPherson* v. *Blacker,* 146 U. S. 1, 23–24, and more recently it has been squarely rejected in *Baker* v. *Carr,* 369 U. S. 186, 208–237 (1962), and in *Wesberry* v. *Sanders,* 376 U. S. 1, 5–7 (1964). Other cases to the same effect need not now be cited. These cases do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena.

II.

The State also contends that it has absolute power to put any burdens it pleases on the selection of electors

because of the First Section of the Second Article of the Constitution, providing that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ." to choose a President and Vice President. There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to "lay and collect Taxes," [2] but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination.[3] Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote "for electors for President or Vice President." Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No State shall . . . deny to any person . . . the equal protection of the laws."

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[2] Art. I, § 8, cl. 1.

[3] *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968).

III.

We turn then to the question whether the court below properly held that the Ohio laws before us result in a denial of equal protection of the laws. It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause.[4] In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.[5] In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment.[6] And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same

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[4] *Skinner* v. *Oklahoma,* 316 U. S. 535, 539–541 (1942); *Cox* v. *Louisiana,* 379 U. S. 536, 557 (1965); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Loving* v. *Virginia,* 388 U. S. 1 (1967).

[5] See, *e. g., Carrington* v. *Rash,* 380 U. S. 89 (1965); *Skinner* v. *Oklahoma, supra.*

[6] *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S. 217 (1967); *NAACP* v. *Button,* 371 U. S. 415 (1963); *NAACP* v. *Alabama,* 357 U. S. 449 (1958).

protection from infringement by the States.[7] Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." [8]

No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438 (1963).

The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.

The State asserts that the following interests are served by the restrictions it imposes. It claims that the State may validly promote a two-party system in order to en-

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[7] See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 276–277 (1964), and cases there cited.

[8] *Wesberry* v. *Sanders, supra,* at 17. See also *Carrington* v. *Rash, supra.*

courage compromise and political stability. The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

Ohio makes a variety of other arguments to support its very restrictive election laws. It points out, for example, that if three or more parties are on the ballot, it is possible that no one party would obtain 50% of the vote, and the runner-up might have been preferred to the plurality winner by a majority of the voters. Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters. But to grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year. Considering these Ohio laws in their totality, this interest cannot justify the very severe restrictions on voting and associational rights which Ohio has imposed.

The State also argues that its requirement of a party structure and an organized primary insures that those who disagree with the major parties and their policies "will be given a choice of leadership as well as issues" since any leader who attempts to capitalize on the disaffection of such a group is forced to submit

to a primary in which other, possibly more attractive, leaders can raise the same issues and compete for the allegiance of the disaffected group. But while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected "group" will rarely if ever be a cohesive or identifiable group until a few months before the election. Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot and the Ohio system thus denies the "disaffected" not only a choice of leadership but a choice on the issues as well.

Finally Ohio claims that its highly restrictive provisions are justified because without them a large number of parties might qualify for the ballot, and the voters would then be confronted with a choice so confusing that the popular will could be frustrated. But the experience of many States, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required.[9] It is true that the existence of multitudinous fragmentary groups might justify some regulatory control but in Ohio at the present time this danger seems to us no more than "theoretically imaginable." [10] No such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case.

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[9] Forty-two States require third parties to obtain the signatures of only 1% or less of the electorate in order to appear on the ballot. It appears that no significant problem has arisen in these States which have relatively lenient requirements for obtaining ballot position.

[10] Cf. *Mine Workers* v. *Illinois Bar Assn., supra,* at 224.

Of course, the number of voters in favor of a party, along with other circumstances, is relevant in considering whether state laws violate the Equal Protection Clause. And, as we have said, the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors. But here the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause.

IV.

This leaves only the propriety of the judgments of the District Court. That court held that the Socialist Labor Party could get relief to the extent of having the right, despite Ohio laws, to get the advantage of write-in ballots. It restricted the Independent Party to the same relief. The Independent Party went before the District Court, made its challenge, and prayed for broader relief, including a judgment declaring the Ohio laws invalid. It also asked that its name be put on the ballot along with the Democratic and Republican Parties. The Socialist Labor Party also went to the District Court and asked for the same relief. On this record, however, the parties stand in different positions before us. Immediately after the District Court entered its judgment, the new Independent Party brought its case to this Court where MR. JUSTICE STEWART conducted a hearing. At that hearing Ohio represented to MR. JUSTICE STEWART that the Independent Party's name could be placed on the ballot without disrupting the state election, but if there was a long delay, the situation would be different. It was not until several days after that hearing was concluded and after MR. JUSTICE STEWART had issued his order staying the judgment against the Independent Party that the Socialist Labor Party asked for similar relief. The State

objected on the ground that at that time it was impossible to grant the relief to the Socialist Labor Party without disrupting the process of its elections; accordingly MR. JUSTICE STEWART denied it relief, and the State now repeats its statement that relief cannot be granted without serious disruption of election process. Certainly at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters. Under the circumstances we require Ohio to permit the Independent Party to remain on the ballot, along with its candidates for President and Vice President, subject, of course, to compliance with valid regulatory laws of Ohio, including the law relating to the qualification and functions of electors. We do not require Ohio to place the Socialist Party on the ballot for this election. The District Court's judgment is affirmed with reference to No. 544, the Socialist Labor Party case, but is modified in No. 543, the Independent Party case, with reference to granting that Party the right to have its name printed on the ballot.

It is so ordered.

MR. JUSTICE STEWART concurs in the judgment in No. 544 insofar as it denies equitable relief to the appellants.

MR. JUSTICE DOUGLAS.

I.

Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy

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to names on the ballot; [1] it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; [2] it has defined "political party" in such a way as to exclude virtually all but the two major parties.[3]

A candidate who seeks a place on the Ohio presidential ballot must first compile signatures of qualified voters who total at least 15% of those voting in the last gubernatorial election. In this election year, 1968, a candidate would need 433,100 such signatures. Moreover, he must succeed in gathering them long before the general election, since a nominating petition must be filed with the Secretary of State in February.[4] That is not all: having compiled those signatures, the candidate must further show that he has received the nomination of a group which qualifies as a "political party" within the meaning of Ohio law.[5] It is not enough to be an independent candidate for President with wide popular support; one must trace his support to a political party.[6]

To qualify as a party, a group of electors must participate in the state primary, electing one of its members from each county ward or precinct to a county central committee; two of its members from each congressional district to a state central committee; [7] and some of its members as delegates and alternates to a na-

[1] Ohio Rev. Code § 3505.03 (1960 Repl. Vol.).

[2] Independent candidacy in Ohio is limited to municipal offices, Ohio Rev. Code §§ 3513.251–3513.252; county offices, Ohio Rev. Code § 3513.256; state offices, and federal offices excluding President, Ohio Rev. Code §§ 3513.257–3513.258.

[3] Ohio Rev. Code §§ 3505.10, 3513.05–3513.191, 3517.01–3517.04.

[4] A candidate for President must first formulate a party by gathering signatures, Ohio Rev. Code § 3517.01, which must, in turn, be presented in time for the party to participate in the state primary. Ohio Rev. Code §§ 3513.256–3513.262.

[5] Ohio Rev. Code § 3513.258.

[6] Ohio Rev. Code § 3505.10.

[7] Ohio Rev. Code § 3517.02–3517.04.

tional convention.[8] Moreover, those of its members who seek a place on the primary ballot as candidates for positions as central committeemen and national convention delegates must demonstrate that they did not vote in any other party primary during the preceding four years; [9] and must present petitions of endorsement on their behalf by anywhere from five to 1,000 voters who likewise failed to vote for any other party in the last preceding primary.[10] Thus, to qualify as a third party, a group must first erect elaborate political machinery, and then rest it upon the ranks of those who have proved both unwilling and unable to vote.

Having elected a central committee, the group has it convene a state convention attended by 500 delegates duly apportioned throughout the State according to party strength.[11] Delegates to the state convention then go on to choose presidential electors for certification on the November ballot, while elected delegates to the national convention go on to nominate their candidate for President.[12] Ohioans, to be sure, as a result of the decision below, enjoy the opportunity of writing in the man of their choice on the ballot. But in a presidential election, a vote for a candidate is only operative as a vote for the electors representing him; and where the State has prevented that candidate from presenting a slate of electors for certification, the write-in vote has no effect. Furthermore, even where operative, the write-ins are no substitute for a place on the ballot.

To force a candidate to rely on write-ins is to burden him with disability. It makes it more difficult for him to get elected, and for the voters to elect him.

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[8] Ohio Rev. Code § 3505.10.

[9] Ohio Rev. Code § 3513.191.

[10] Ohio Rev. Code § 3513.05.

[11] Ohio Rev. Code § 3513.11.

[12] Ohio Rev. Code § 3513.12.

These barriers of party, timing, and structure are great obstacles. Taken together they render it difficult, if not impossible, for a man who disagrees with the two major parties to run for President in Ohio, to organize an opposition, and to vote a third ticket.

II.

The selection of presidential electors is provided in Art. II, § 1, of the Constitution. It is unnecessary in this case to decide whether electors are state rather than federal officials, whether States may select them through appointment rather than by popular vote, or whether there is a constitutional right to vote for them. For in this case Ohio has already provided for them to be chosen by right of popular suffrage. Having done so, the question is whether Ohio may encumber that right with conditions of the character imposed here.

III.

The First Amendment, made applicable to the States by reason of the Fourteenth Amendment, lies at the root of these cases. The right of association is one form of "orderly group activity" (*NAACP* v. *Button,* 371 U. S. 415, 430), protected by the First Amendment. The right "to engage in association for the advancement of beliefs and ideas" (*NAACP* v. *Alabama,* 357 U. S. 449, 460), is one activity of that nature that has First Amendment protection. As we said in *Bates* v. *Little Rock,* 361 U. S. 516, 523, "freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." And see *Louisiana* v. *NAACP,* 366 U. S. 293, 296. At the root of the present controversy is the right to vote—a "fundamental political right" that is "preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370. The rights of expression

and assembly may be "illusory if the right to vote is undermined." *Wesberry* v. *Sanders,* 376 U. S. 1, 17.

In our political life, third parties are often important channels through which political dissent is aired: "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250–251 (opinion of WARREN, C. J.).

The Equal Protection Clause of the Fourteenth Amendment permits the States to make classifications and does not require them to treat different groups uniformly. Nevertheless, it bans any "invidious discrimination." *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 667.

That command protects voting rights and political groups (*Carrington* v. *Rash,* 380 U. S. 89), as well as economic units, racial communities, and other entities. When "fundamental rights and liberties" are at issue (*Harper* v. *Virginia Board, supra,* at 670), a State has less leeway in making classifications than when it deals with economic matters. I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects.

Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, "compelling" or not, in abridging those

rights, because "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg* v. *State Bar,* 366 U. S. 36, 61 (BLACK, J., dissenting). Appellees would imply that "no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment." (*Id.,* at 67.) I reject that suggestion.[13]

A three-judge district court held that appellants were entitled to the use of write-in ballots. Yet it refrained from ordering the Ohio American Independent Party to be placed on the ballot, relying partly on laches and partly on the presence of what it deemed to be so-called "political" questions. 290 F. Supp. 983. First Amendment rights, the right to vote, and other "fundamental rights and liberties" (*Harper* v. *Virginia Board, supra,* at 670) have a well-established claim to inclusion in justiciable, as distinguished from "political," questions; and the relief the Court grants meets the practical needs of appellees in preparing and distributing the ballots.

The Socialist Labor Party, with a lineage that goes back to the presidential contest in 1892, by 1964 was on the ballot in 16 States. Today, although it has only 108 members in Ohio, it earnestly presses its claim for recognition. Yet it started the present action so late that concededly it would now be impossible to get its name on all the ballots. The relief asked is of such a character that we properly decline to allow the federal courts to play a disruptive role in this 1968 state election. On the merits, however, the Socialist Labor Party has as strong a case as the American Independent Party, as my Brother HARLAN states and as the Court apparently

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[13] *Bates* v. *City of Little Rock,* 361 U. S. 516, 528 (BLACK and DOUGLAS, JJ., concurring); *Smith* v. *California,* 361 U. S. 147, 157 (BLACK, J., concurring).

agrees. It is therefore proper for us to grant it declaratory relief.

Hence I concur in today's decision; and, while my emphasis is different from the Court's, I join its opinion.

MR. JUSTICE HARLAN, concurring in the result.

I agree that the American Independent Party is entitled to have the names of its Presidential and Vice Presidential candidates placed on the Ohio ballot in the forthcoming election, but that, for the practical reasons stated by the Court, the Socialist Labor Party is not. However, I would rest this decision entirely on the proposition that Ohio's statutory scheme violates the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment. See *NAACP* v. *Button,* 371 U. S. 415 (1963); *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *NAACP* v. *Alabama,* 357 U. S. 449 (1958). It is true that Ohio has not directly limited appellants' right to assemble or discuss public issues or solicit new members. Compare *Thomas* v. *Collins,* 323 U. S. 516 (1945); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937); *Near* v. *Minnesota,* 283 U. S. 697 (1931). Instead, by denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights. The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association.

It follows that the particular method by which Presidential Electors are chosen is not of decisive importance

to a solution of the constitutional problem before us. Just as a political group has a right to organize effectively so that its position may be heard in court, *NAACP* v. *Button, supra,* or in the legislature, cf. *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 137–138 (1961); *United States* v. *Rumely,* 345 U. S. 41, 46–47 (1953); *United States* v. *Harriss,* 347 U. S. 612, 625–626 (1954); so it has the right to place its candidate for the Presidency before whatever body has the power to make the State's selection of Electors. Consequently, it makes no difference that the State of Ohio may, under the Second Article of the Constitution, place the power of Electoral selection beyond the control of the general electorate. The requirement imposed by the Due Process Clause remains the same—no matter what the institution to which the decision is entrusted, political groups have a right to be heard before it. A statute that would require that all Electors be members of the two major parties is subject to the same constitutional challenge regardless of whether it is the legislature, the people, or some other body that is empowered to make the ultimate decision under the laws of the State.

Of course, the State may limit the right of political association by invoking an impelling policy justification for doing so. But as my Brother BLACK's opinion demonstrates, Ohio has been able to advance no such justification for denying almost half a million of its citizens their fundamental right to organize effectively for political purposes. Consequently, it may not exclude them from the process by which Presidential Electors are selected.

In deciding this case of first impression, I think it unnecessary to draw upon the Equal Protection Clause.[1]

[1] The fact that appellants have chosen to pitch their argument throughout on the Equal Protection Clause does not, of course, limit us in reaching our decision here.

I am by no means clear that equal protection doctrine, especially as it has been propounded in the recent state reapportionment cases, *e. g., Reynolds* v. *Sims,* 377 U. S. 533 (1964), may properly be applied to adjudicate disputes involving the mere procedure by which the President is selected, as that process is governed by profoundly different principles.[2] Despite my doubts on this score, I think it perfectly consistent and appropriate to hold the Due Process Clause applicable. For I believe that our task is more difficult than one which involves merely the mechanical application of the commands to be found in the Fourteenth Amendment or in the first section of the Second Article to the Constitution. Rather, we must attempt to accommodate as best we may the narrow provision drafted by the Philadelphia Convention with the broad principles announced in the Fourteenth Amendment, generations later.

A decision resting solely upon the Due Process Clause would permit such an accommodation—for such a holding fully respects the original purposes and early development of the Electoral College. When one looks beyond the language of Article II, and considers the Convention's understanding of the College, Ohio's restrictive approach is seen to undermine what the draftsmen understood to be its very essence. The College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice

[2] At no stage in the complex process by which a President is chosen is the "one man, one vote" principle of *Reynolds* v. *Sims* followed. The constitutional decision to grant each State at least three Electors, regardless of population, was a necessary part of the effort to gain the consent of the small States, as was the provision that when the choice of the President fell to the House, each state delegation would cast but one vote. See N. Peirce, The People's President 43–50 (1968); L. Wilmerding, The Electoral College 17–22 (1958).

by the citizenry at large.[3] If a State declares that an entire class of citizens is ineligible for the position of Elector, and that class is defined in a way in which individual merit plays no part, it strikes at the very basis of the College as it was originally conceived.

The constitutional grant of power to the States was intended for a different purpose. While Madison reports that the popular election of Electors on a district-by-district basis was the method "mostly, if not exclusively, in view when the Constitution was framed and adopted," 3 M. Farrand, The Records of the Federal Convention of 1787, p. 459 (1911), it is quite clear that a significant, if not dominant, group[4] at the Convention contemplated that Electors would be chosen by other methods. It was to accommodate these members that the state legislatures were given their present leeway.[5] While during the first four decades of the Republic, the States did in fact adopt a variety of methods for selecting their Electors,[6] the parties in this case

[3] Federalist Papers, No. 68 (Alexander Hamilton) (H. Lodge ed. 1908); American Bar Association, Electing The President 15 (1967); Wilmerding, *supra*, n. 2, at 10; R. MacBride, The American Electoral College 16–17 (1953).

[4] The large number of leaders, of varying ideological convictions, who favored popular election included Hamilton, Madison, James Wilson, John Dickinson, Rufus King, Daniel Carroll, and Abraham Baldwin. The opponents of popular selection included Gerry, Ellsworth, Luther Martin, and Roger Sherman. See Chief Justice Fuller's illuminating opinion in *McPherson* v. *Blacker*, 146 U. S. 1, 28 (1892). See also Wilmerding, *supra*, n. 2, at 13–14.

[5] The story of the compromise is to be found in Wilmerding, *supra*, n. 2, at 17–22. The Convention did not, however, direct its attention to the precise meaning of the clause that is the subject of consideration here. See Peirce, *supra*, n. 2, at 45.

[6] Electors were chosen by the legislature itself, by the general electorate on an at-large and district-by-district basis, partly by the legislature and partly by the people, by the legislature from a list of candidates selected by the people, and in other ways. See *McPherson* v. *Blacker*, *supra*, 28–33; Wilmerding, *supra*, n. 2, c. 3; Peirce, *supra*, n. 2, at 309.

have pointed to, and I have found, no case in which the legislature attempted by statute to restrict the class of the enfranchised citizenry that could be considered for the office by whatever body was to make the choice.[7]

Nothing in the history of the Electoral College from the moment of its inception, then, indicates that the original understanding of that institution would at all be compromised if we refuse to read the language of Art. II, § 1, as granting a power of arbitrary action which is so radically inconsistent with the general principles of the Due Process Clause. Consequently, there is no obstacle to a holding which denies the States, absent an overriding state interest, the right to prevent third parties from having an opportunity to put their candidates before the attention of the voters or whatever other body the State has designated as the one which is to choose Electors.

A word should be added about the constitutional status of Ohio's requirement that a third party, to qualify for ballot position, must collect the signatures of eligible voters in a number equal to 15% of those voting at the last gubernatorial election. As I do not understand the State to contest the fact that Mr. Wallace and his partisans have successfully gathered more than the 433,100 signatures required by law, we can only properly reach this issue in the *Socialist Labor Party* case—for this Party did not even attempt to comply with the

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[7] Nor does the leading case in this area, *McPherson* v. *Blacker*, *supra*, support such a claim. There the plaintiffs-in-error had challenged Michigan's attempt to permit its voters to select Electors on a district-by-district, rather than an at-large, basis. The Court held that, given the early history, see n. 6, *supra*, the States have the plenary power to alter the method by which Electors are selected so long as the method cannot be attacked on Fourteenth Amendment grounds. Pursuing this analysis, the unanimous Court found the district-by-district approach free of any Fourteenth Amendment defect, 146 U. S., at 37–40. I can perceive no reason to doubt the continuing validity of this holding.

statutory command. While the Court's opinion, striking down Ohio's statutory scheme in its entirety, does, as I read it, afford the Socialist Labor Party declaratory relief from the 15% provision, I think it well to deal with it more explicitly than the Court has done.

In my view, this requirement, even when regarded in isolation, must fall. As my Brother BLACK's opinion suggests, the only legitimate interest the State may invoke in defense of this barrier to third-party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion.[8] Ohio's requirement cannot be said to be reasonably related to this interest. Even in the unprecedented event of a complete and utter popular disaffection with the two established parties, Ohio law would permit as many as six additional party candidates to compete with the Democrats and Republicans only if popular support should be divided relatively evenly among the

[8] My Brother STEWART is, of course, quite right in pointing out that the presence of third parties may on occasion result in the election of the major candidate who is in reality less preferred by the majority of the voters. It seems clear to me, however, that many constitutional electoral structures could be designed which would accommodate this valid state interest, without depriving other political organizations of the right to participate effectively in the political process. A runoff election may be mandated if no party gains a majority, or the decision could be left to the State Legislature in such a case, compare *Fortson* v. *Morris*, 385 U. S. 231 (1966). Alternatively, the voter could be given the right, at the general election, to indicate both his first and his second choice for the Presidency—if no candidate received a majority of first-choice votes, the second-choice votes could then be considered. Finally, Electors could be chosen on a district-by-district rather than an at-large basis, thereby apportioning the electoral vote in a way more nearly approximating the popular vote. See *McPherson* v. *Blacker*, *supra*, and text, at n. 4, *supra*. I would conclude that, with the substantial variety of less restrictive alternatives that are available, compare *NAACP* v. *Alabama*, 377 U. S. 288, 307–308 (1964); *Saia* v. *New York*, 334 U. S. 558, 562 (1948); *Martin* v. *Struthers*, 319 U. S.

new groups. And with fundamental freedoms at stake, such an unlikely hypothesis cannot support an incursion upon protected rights, especially since the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion. As both Ohio's electoral history [9] and the actions taken by the overwhelming majority of other States [10] suggest, opening the ballot to this extent is perfectly consistent with the effective functioning of the electoral process. In sum, I think that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association.

141, 146–149 (1943); *Thornhill* v. *Alabama*, 310 U. S. 88, 96 (1940); *Schneider* v. *State*, 308 U. S. 147 (1939), this interest cannot support Ohio's 15% requirement.

[9] Ohio's present statutory scheme is a product of legislative action taken between 1948 and 1952. Before that time, independent candidates had been granted a place on the ballot if they could gather the signatures of registered voters in the number of 1% of those voting at the preceding gubernatorial election and present their petitions 60 days before the general election. The State's experience under this unexacting regime is instructive. Voting statistics compiled by Ohio's Secretary of State reveal that since 1900 no more than seven parties have appeared on the ballot to compete for a major statewide or national office. And even this number was not attained after 1908. During the last 10 years of the old regime, there are only two third-party candidates of record. The State took effective action only after Electors pledged to Henry A. Wallace gained some 30,000 votes out of the 3,000,000 cast in 1948. Since Harry S Truman carried the State by some 7,000 votes, the Wallace vote might well have been decisive if it had increased marginally.

[10] The other 49 States may be grouped in the following categories with regard to the size of the barriers they raise against third-party candidacies:

Signatures Required as a % of Electorate	*No. of States*
De minimis to 0.1%	16
0.1% to 1%	26
1.1% to 3%	3
3.1% to 5%	4

Since Ohio's requirement is so clearly disproportionate to the magnitude of the risk that it may properly act to prevent, I need not reach the question of the size of the signature barrier a State may legitimately raise against third parties on this ground. This should be left to the Ohio Legislature in the first instance.

MR. JUSTICE STEWART, dissenting in No. 543.*

If it were the function of this Court to impose upon the States our own ideas of wise policy, I might be inclined to join my Brethren in compelling the Ohio election authorities to disregard the laws enacted by the legislature of that State. We deal, however, not with a question of policy, but with a problem of constitutional power. And to me it is clear that, under the Constitution as it is written, the Ohio Legislature has the power to do what it has done.

I.

The Constitution does not provide for popular election of a President or Vice President of the United States, either nationally or on a state-by-state basis. On the contrary, the Constitution explicitly specifies:

> "Each State shall *appoint, in such Manner as the Legislature thereof may direct,* a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." [1] (Emphasis supplied.)

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*[REPORTER'S NOTE: For MR. JUSTICE STEWART'S separate statement in No. 544, *Socialist Labor Party et al.* v. *Rhodes, Governor of Ohio, et al.*, see *ante*, p. 35.]

[1] U. S. Const., Art. II, § 1. This provision represented a compromise among several conflicting views expressed at the Constitutional Convention regarding the most salutary method for choosing a President, most of which favored some method other than popular election. See *McPherson* v. *Blacker*, 146 U. S. 1, 28.

> "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ." [2]

Chief Justice Fuller, therefore, was stating no more than the obvious when he wrote for a unanimous Court in *McPherson* v. *Blacker,* 146 U. S. 1, more than 75 years ago:

> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.
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> . . . . . .
>
> "In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. . . ." *Id.,* at 27, 35.

A State is perfectly free under the Constitution to provide for the selection of its presidential electors by the legislature itself. Such a process of appointment was in fact utilized by several States throughout our early history, and by one State, Colorado, as late as 1876.[3] Or a state legislature might nominate two slates of electors, and allow all eligible voters of the State to choose between them. Indeed, many of the States formerly provided for the appointment of presidential electors by

[2] U. S. Const., Amdt. 12. The Twelfth Amendment also specifies the procedures for selecting a President and Vice President in the event that no candidate receives a majority of votes in the electoral college.

[3] See *McPherson* v. *Blacker, supra,* at 35.

various kinds of just such cooperative action of their legislatures and their electorates.[4]

Here, the Ohio Legislature has gone further, and has provided for a choice by the State's eligible voters among slates of electors put forward by all political parties that meet the even-handed requirements of long-standing state laws. We are told today, however, that, despite the power explicitly granted to the state legislatures under Art. II, § 1, the Legislature of Ohio nonetheless violated the Constitution in providing for the selection of electors in this way. I can perceive no such constitutional violation.

I agree with my Brethren that, in spite of the broad language of Art. II, § 1, a state legislature is not completely unfettered in choosing whatever process it may wish for the appointment of electors. Three separate constitutional amendments explicitly limit a legislature's power. The Fifteenth Amendment makes clear that if voters are to be included in the process, no voter may be excluded "on account of race, color, or previous condition of servitude." The Nineteenth Amendment makes equally clear that no voter may be excluded "on account of sex." And the Twenty-fourth Amendment prohibits exclusion of any voter "by reason of failure to pay any poll tax or other tax." But no claim has been or could be made in this case that any one of these Amendments has been violated by Ohio.

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[4] "[V]arious modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways . . . ." *McPherson* v. *Blacker*, *supra*, at 29.

For a fuller description of the diverse methods pursued by the States in appointing their electors under Art. II, § 1, during this Country's first century of constitutional experience, see *id.*, at 26–35.

Rather, it is said that Ohio has violated the provisions of the Fourteenth Amendment. The Court holds that the State has violated that Clause of the Amendment which prohibits it from denying "to any person within its jurisdiction the equal protection of the laws." And two concurring opinions emphasize First Amendment principles, made applicable to the States through the Fourteenth Amendment's guarantees, in summarily concluding that Ohio's statutory scheme is invalid. I concede that the Fourteenth Amendment imposes some limitations upon a state legislature's freedom to choose a method for the appointment of electors. A State may not, for example, adopt a system that discriminates on grounds of religious or political belief. But I cannot agree that Ohio's system violates the Fourteenth Amendment in any way.

II.

In view of the broad leeway specifically given the States by Art. II, § 1, of the Constitution, it seems clear to me that the basic standard of constitutional adjudication under the Equal Protection Clause—a standard under which only "invidious discrimination" is forbidden—is the most stringent test that properly can be held applicable here. A single quotation should suffice to summarize that standard of equal protection:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U. S. 420, 425–426.

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The provisions enacted by the Ohio Legislature fully meet that standard.[5]

The laws of Ohio classify political parties, for purposes of access to that State's ballot, according to size and strength.[6] Those that timely demonstrate widespread support in the State may submit a slate of presidential electors to Ohio's voters, while those that neither have participated in past elections nor can show the support of 15% of the voting public 90 days before a primary election may not.[7] The appellants claim that these provisions discriminate against them. They assert that although Ohio may establish "reasonable" qualifying standards so that ballots do not become unwieldy, the

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[5] It is clear that this Court's decisions in such cases as *Baker* v. *Carr*, 369 U. S. 186; *Gray* v. *Sanders*, 372 U. S. 368; and *Reynolds* v. *Sims*, 377 U. S. 533, all involving the direct popular election of candidates to state or federal office, do not control the issues in this case. Indeed, no opinion today suggests that those cases are apposite. They sustained the right of a voter to cast a ballot whose numerical weight is the equal of that of any other vote cast within the jurisdiction in question. No claim is made in this case that Ohio has in any way violated that right.

[6] The appellants plainly do not object to working through or voting for candidates of partisan political organizations, and I do not understand them to claim discrimination on the basis of Ohio's failure to allow access to its presidential ballot via an "independent nominating petition."

[7] Appellants have cited us to a complex group of Ohio statutes which they say are relevant to the participation of political parties in that State's presidential elections. See Ohio Rev. Code §§ 3505.10, 3513.05, 3513.11, 3513.19, 3513.191, 3517.01–3517.04. It is not entirely clear that all of those provisions are applicable to parties participating in the electoral process for the first time. But we need not examine that question since in any event the appellants clearly failed to file with the Secretary of State of Ohio on February 7 of this year, 90 days before the State's primary election, a petition signed by a number of voters equal to 15% of the number participating in Ohio's last gubernatorial election. Ohio Rev. Code §§ 3505.10, 3517.01.

strength of the American Independent Party is so substantial that no such requirement could possibly suffice to keep the Party's candidates off the presidential ballot. Ohio's requirements are so high, they contend, that the legislative purpose behind those requirements can be only to keep new parties—even those that, like the American Independent Party, have gained considerably more than "splinter" support—off the ballot. And such requirements, they conclude, thus deny persons in their position equal protection of the laws.

Ohio for its part concedes that the legislative objective underlying the statutes in question is to prevent the appearance on its ballot of slates of presidential electors whose substantial party support has not been timely demonstrated. That the basic classification drawn by the provisions is not "irrelevant to the achievement of the State's objective"—the traditional standard for judging the validity of a legislative classification under the Equal Protection Clause—is clear. The Court seems to concede as much, but nonetheless holds that the Ohio provisions are invalid—a result which may rest in part, I believe, upon possible doubts regarding the permissibility of the legislative objective itself. The propriety of that objective is, then, a critical issue for determination.

III.

I can discern no basis for the position that Ohio's objective is in any way an illegitimate one. Surely a State may justifiably assert an interest in seeing that its presidential electors vote for the candidate best able to draw the support of a majority of voters within the State. By preventing parties that have not demonstrated timely and widespread support from gaining places on its ballot, Ohio's provisions tend to guard against the possibility that small-party candidates will draw enough support to prevent either of the major contenders from obtaining

an absolute majority of votes—and against the consequent possibility that election may be secured by candidates who gain a plurality but who are, *vis-à-vis* their principal opponents, preferred by less than half of those voting.[8] Surely the attainment of these objectives is well within the scope of a State's authority under our Constitution. One may perhaps disagree with the political theory on which the objectives are based, but it is inconceivable to me that the Constitution imposes on the States a political philosophy under which they must be satisfied to award election on the basis of a plurality rather than a majority vote.

In pursuing this interest Ohio has, at the same time, not completely prevented new parties from gaining access to that State's ballot. It has authorized ballot position for parties that can demonstrate by petition the support of 15% of the voting public 90 days before a primary election is to be held. My Brethren seem to suggest that the percentage figure is set too high, and the date too early. But I cannot join in this kind of second-guessing. While necessarily arbitrary, Ohio's standards can only be taken to represent reasonable

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[8] This interest, which several States have chosen to protect in the context of state and local primary contests by providing for runoff elections, may be illustrated by a hypothetical example. Assume a State in which a dissident faction of one of the two major parties—party A—becomes dissatisfied with that party's nominees and sets itself up as a "third party"—party C—putting forward candidates more to its liking. Still, the members of party C much prefer the candidates of party A to those of party B. A situation is possible in which party B's candidates poll, for example, 46% of the vote, party A's candidates 44%, and party C's candidates 10%. Party B's candidates would in such a situation be elected by plurality vote. In an election involving only the candidates of parties A and B, however, those persons preferring party C's candidates might well have voted overwhelmingly for party A's, thus giving party A's candidates a substantial majority victory.

attempts at accommodating the conflicting interests involved.[9]

Although Ohio's provisions do not freeze the Republican and Democratic Parties into the State's election structure by specific reference to those parties, it is true that established parties, once they become participants in the electoral process, continue to enjoy ballot position so long as they have polled 10% of the vote in the most recent Ohio gubernatorial election. It is suggested that the disparity between this figure and the 15% requirement applicable to new parties is invidiously discriminatory. But I cannot accept the theory that Ohio is constitutionally compelled to apply precisely the same numerical test in determining whether established parties enjoy widespread support as it applies in determining that question with regard to new parties.

It is by no means clear to me that as an abstract matter there are no differences between parties that have long been on the ballot in a State and those that have not, such as might justify disparate standards for determining in those two classes of cases when widespread support, required for ballot position, has been demonstrated. In any event, I cannot conclude that the disparity involved here denies equal protection of the laws. The difference in figures is a difference between the requirements for getting on and staying on the ballot. It seems to me to be well within the State's powers to set somewhat different standards for those two requirements, so long as it applies them uniformly to all political parties. The only remaining argument would seem to be that the Republican and Democratic Parties never had to meet the 15% requirement: they were on the ballot in Ohio at the time the statutory scheme was

[9] The date specified, for instance, is related to Ohio's requirement that all political parties hold primary elections—another provision that is, it seems to me, well within the State's power to enact.

enacted, and so have had only to make certain they remain on by meeting the 10% standard. But the Ohio Legislature could well have taken notice at the time the provisions were enacted that the parties which had polled over 10% of the vote in the most recent gubernatorial election—the Republican and Democratic Parties—had both demonstrated strength far beyond the 15% figure specified for ballot entry by new parties. It seems to me totally unrealistic, therefore, to conclude that this minor disparity in standards cannot be justified by "any state of facts [that] reasonably may be conceived." *McGowan* v. *Maryland, supra,* at 426.

IV.

The Court's opinion appears to concede that the State's interest in attempting to ensure that a minority of voters do not thwart the will of the majority is a legitimate one, but summarily asserts that this legitimate interest cannot constitutionally be vindicated. That assertion seems to echo the claim of my concurring Brethren—a claim not made by the appellants—that Ohio's statutory requirements in some way infringe upon First Amendment rights. I cannot agree.

As the language of Art. II, § 1, and a great deal of history under that section make clear, there is no constitutional right to vote for presidential electors.[10] I take it, therefore, that the First Amendment theory of my Brethren rests on the view that, despite the legitimacy of the objective underlying Ohio's laws, those laws nonetheless have the effect of stifling the activity of persons who disagree with the major political parties now in existence. The concurring opinions cite a series of decisions protecting what has been termed the First

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[10] Cf. *Minor* v. *Happersett,* 21 Wall. 162, 178:

"[T]he Constitution of the United States does not confer the right of suffrage upon any one . . . ."

Amendment right of association. *NAACP* v. *Button,* 371 U. S. 415; *Bates* v. *Little Rock,* 361 U. S. 516; *NAACP* v. *Alabama,* 357 U. S. 449; *Thomas* v. *Collins,* 323 U. S. 516; *De Jonge* v. *Oregon,* 299 U. S. 353. In my view, however, the principles on which those decisions were based do not call for today's result.

In *Thomas* v. *Collins* and *De Jonge* v. *Oregon, supra,* the very design of the statutes in question was to prevent persons from freely meeting together to advance political or social views. Ohio's laws certainly are not of that nature. In the other three cases cited, all involving the activities of the National Association for the Advancement of Colored People, the statutes challenged were not on their face calculated to affect associational rights. We were able to determine with a good deal of certainty in those cases, however, (1) that application of the statutes to the NAACP would clearly result in a considerable impairment of those rights, and (2) that the interest said to underlie the statutes was insubstantial in the contexts presented. I believe that those conclusions should as a general matter be regarded as prerequisites to any holding that laws such as those involved here, which serve a legitimate state interest but are said to have some impact on First Amendment activity, are invalid. Cf. *United States* v. *O'Brien,* 391 U. S. 367.

In *NAACP* v. *Alabama, supra,* for instance, where the NAACP was ordered in accord with state law to disclose its membership lists, we outlined the issues as follows:

> "We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and

other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

. . . . . .

"We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. . . .

. . . . . .

". . . The exclusive purpose [of the state authorities] was to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute, and the membership lists were expected to help resolve this question. The issues in the litigation commenced by Alabama by its bill in equity were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them. . . ." 357 U. S., at 462–464.

And in *Bates* v. *Little Rock, supra,* where an almost identical requirement was involved, we stated:

> "On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members. There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. . . . Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote.
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> "Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. . . .
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> . . . . . .
>
> "In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the

Advancement of Colored People. . . ." 361 U. S., at 523–525.[11]

Here, there certainly is no comparable showing that Ohio's ballot requirements have any substantial impact on the attempts of political dissidents to organize effectively. Such persons are entirely free to assemble, speak, write, and proselytize as they see fit. They are free either to attempt to modify the character of the established major parties or to go their own way and set up separate political organizations. And if they can timely demonstrate that they have substantial support within the State—according to Ohio's reasonable standards for deciding that question—they may secure ballot position for the candidates they support. Ohio has restricted only their ability to secure ballot position without demonstrating that support. To me the conclusion that that single disability in any way significantly impairs their First Amendment rights is sheer speculation. As my Brethren's surveys of ballot requirements in the various States suggest, the present two-party system in this country is the product of social and political forces rather than of legal restrictions on minority parties. This Court has been shown neither that in States with minimal ballot restrictions third parties have flourished, nor that in States with more difficult requirements they are moribund. Mere speculation ought not to suffice to strike down a State's duly enacted laws.

Nor, I think, can we with any confidence conclude that Ohio's interest in attempting to ensure that the will of the majority shall prevail is an insubstantial one. It requires more insensitivity to constitutional principles of federalism than I possess to tell Ohio that that interest is, ac-

[11] The NAACP cases, furthermore, held invalid only the application of the state laws in question to the parties involved. Here, however, Ohio is told, as I read the opinion of the Court and the concurring opinions, that it cannot in any circumstances validly enforce its ballot requirements.

cording to this Court's scale of values, somehow unworthy of implementation.[12] I cannot conclude, therefore, that First Amendment principles call for the result reached today.

V.

It is thought by a great many people that the entire electoral college system of presidential selection set up by the Constitution is an anachronism in need of major overhaul.[13] As a citizen, I happen to share that view. But this Court must follow the Constitution as it is written, and Art. II, § 1, vests in the States the broad discretion to select their presidential electors as they see fit. The method Ohio has chosen may be unwise as a matter of policy, but I cannot agree that it violates the Constitution.[14]

MR. JUSTICE WHITE, dissenting in No. 543 and concurring in No. 544.

I agree with much of what my Brother STEWART says in his dissenting opinion in No. 543. In my view, neither

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[12] My Brother HARLAN suggests that Ohio's interest may be protected in "less restrictive" ways. In light of the views I have stated above, I do not see why Ohio should be compelled to utilize one method for achieving its ends rather than another. In any event, each of the methods mentioned by MR. JUSTICE HARLAN appears to me to entail consequences which arguably would frustrate other legitimate state interests. Nor do all of them serve as effectively to promote the interest in question here as does the statutory scheme the Ohio Legislature has in fact enacted. I do not think problems such as those raised in this case can be solved by means of facile and unelaborated suggestions of "less restrictive alternatives"; issues of legislative policy are too complex for such easy answers to be satisfactory.

[13] Similar suggestions were being made as early as 1804, at the time of the adoption of the Twelfth Amendment. See *McPherson* v. *Blacker*, 146 U. S. 1, 33.

[14] For the reasons stated in this opinion, and the further reasons stated in Part IV of the opinion of the Court, I agree with the Court's denial of equitable relief to the appellants in No. 544, the *Socialist Labor Party* case.

the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment prohibits Ohio from requiring that the appointment of presidential electors be carried out through the political party process. The Court does not hold that Ohio must accord ballot position to those who are unwilling to work through the framework of an established or nascent political party, nor do I understand appellants to make this contention. In this connection, there is no suggestion in the majority opinion that Ohio, merely by requiring potential candidates to participate in a primary, has acted unreasonably. Indeed, this requirement provides the opportunity for the presentation and winnowing out of candidates which is surely a legitimate objective of state policy. Nor is it held that Ohio's requirement, pursuant to this objective, that parties must show their base of popular support by obtaining the signatures of 15% of Ohio's gubernatorial voters is itself unreasonable.

In the face of such requirements, which neither alone nor in combination are unconstitutional, I do not understand how the American Independent Party may be ordered on the ballot over the objections of the State. The Independent Party has not complied with the provision that it show a sufficient base of popular support in time for participation in a primary. Indeed, the Party made no effort whatsoever to comply with these provisions. It claims it secured the necessary number of signatures but admits it wholly ignored the requirement that the petitions be filed prior to the primary election date. Had it filed them, and been denied participation in the primary or the election for failure to meet some other requirement, the case would be very different. But it did not even commence judicial challenge of the signature requirement, not to mention gathering signatures, in time to participate in the primary. The Independent Party is in no position to complain that it would have been impos-

sible for its members to gather the necessary signatures—which they were in fact able to assemble subsequently—or that it might in its progress toward ballot position have encountered some later obstacle.

That other Ohio provisions related to later phases of the election process might have imposed unconstitutional barriers to ballot position is no reason to excuse the Independent Party from complying with those preconditions which the State may validly impose. Why a majority of the Court insists on holding the primary petition requirement impermissible, not on its own demerits, but because it appears in the statute books with more questionable provisions is the major mystery of the majority position. Neither the Independent nor the Socialist Labor Party is entitled to relief in this Court.

MR. CHIEF JUSTICE WARREN, dissenting.

We have had but seven days to consider the important constitutional questions presented by these cases. The rationale of the opinion of the Court, based both on the Equal Protection Clause and the First Amendment guarantee of freedom of association, will apply to all elections, national, state, and local. Already, litigants from Alabama, California, Illinois, and Virginia have requested similar relief virtually on the eve of the 1968 presidential election. I think it fair to say that the ramifications of our decision today may be comparable to those of *Baker* v. *Carr,* 369 U. S. 186 (1962), a case we deliberated for nearly a year.[1] Appellants' belated requests for extraordinary relief have compelled all members of this Court to decide cases of this magnitude without the unhurried deliberation which is essential to the formulation of sound constitutional principles.

[1] *Baker* was originally argued on April 19–20, 1961. On May 1, 1961, it was set for reargument and was reargued on October 9, 1961. Our decision was not announced until March 26, 1962, over 11 months after the original argument.

I.

I cannot agree that the State of Ohio should be compelled to place the candidates of the American Independent Party on the ballot for the impending presidential election. Nor can I draw a distinction between this Party and the Socialist Labor Party. Both suits were filed in July of this year, and both were decided on August 29, 1968. The following week the American Independent Party petitioned the Circuit Justice for its Circuit for provisional relief, which was granted on September 10. The Socialist Labor Party sought similar relief only three days after the September 10 order was issued. MR. JUSTICE STEWART granted provisional relief to one, but denied it to the other. No Ohio statutory deadline compelled that result, and presumably Ohio could have complied with an order granting the same relief to both Parties.[2] Both Parties should be treated alike; otherwise, we are bowing to a show of strength rather than applying constitutional principles.

Appellants have invoked the equity jurisdiction of the federal courts. Placed in this context, the litigation be-

[2] MR. JUSTICE STEWART based his denial of the Socialist Labor Party's request for provisional relief upon the following considerations: "the late date on which this motion was presented, the action already taken by the Ohio authorities, the relief already granted the appellants by the district court, and the fact that the basic issues they present will be fully canvassed in the argument of the appeal in *Williams* v. *Rhodes* . . . ." He did not suggest that the State of Ohio made any representations that it could not comply with an order granting the Socialist Labor Party the same relief already granted the American Independent Party.

I do not think any significance should be given to the fact that the interim relief granted by MR. JUSTICE STEWART made it physically possible to place the American Independent Party on the ballot. This relief, as explicitly recognized by MR. JUSTICE STEWART, was granted solely to allow Ohio to comply with all possible orders of this Court.

fore us presents an issue not treated by the opinion of the Court: did the District Court abuse its discretion in denying the extraordinary equitable relief requested by appellants? [3] A review of the facts before the District Court convinces me that it did not, and therefore the emergency relief sought by appellants should be denied.

The Socialist Labor Party has been an organized political party in Ohio since the end of the 19th century, and although it has not achieved ballot position since the enactment in 1948 of the laws it challenges,[4] not until July 2, 1968, did it press its claims for equitable relief. Similarly, the supporters of George C. Wallace did not institute their action until July 29, 1968, although early in 1967 Governor Wallace had expressed interest in the Presidency,[5] and, in the spring of that year, he voiced concern for the restrictive nature of Ohio's qualifying laws.[6]

Nevertheless, neither the American Independent Party nor the Socialist Labor Party made an effort to comply with Ohio's election laws. Nor has either timely invoked the jurisdiction of the courts. That both had the opportunity to do so cannot be denied. Because the

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[3] This is the traditional standard for review of the denial of equitable relief. See, *e. g., Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528, 535 (1960); *United Fuel Gas Co.* v. *Public Serv. Comm'n*, 278 U. S. 322, 326 (1929).

[4] Appellants' Complaint in No. 544, pp. 1–2.

[5] New York Times, Jan. 26, 1967, p. 20, col. 3.

[6] Commencing in late April 1967, Governor Wallace began a four-day tour of selected northern States. At a press conference in Pittsburgh on April 27 he stated that he expected to run for President in all 50 States and that it might be necessary to institute suit in States where third parties had difficulty obtaining ballot position. Aides to the Governor mentioned California and Ohio as States in which difficulty might be encountered. New York Times, April 28, 1967, p. 28, col. 5.

State of Ohio does not challenge the validity of the signatures gathered by the American Independent Party, a majority of this Court assumes they reflect the strength of that Party in Ohio. However, since the signatures were not submitted to Ohio in timely compliance with the State's election laws, they have never been verified; in fact, appellants in No. 543 did not seek to file their signatures until over five months after the statutory filing date.[7]

Despite these delays in instituting suit and the failure of either party to make an effort to comply with any of Ohio's election laws, the District Court ordered Ohio to provide for write-in voting. This relief guaranteed that each Ohio voter would have the right to vote for the candidate of his choice, including the candidates of these two Parties. At worst, therefore, denying appellants a position on the ballot for the 1968 election prevented their candidates from competing on a completely equal basis with the candidates of the two major parties.

The imminence of the election, the Parties' failure to comply with Ohio law and the District Court's grant of partial relief must be considered in conjunction with the need to promote orderly federal-state relationships. Our reports are replete with decisions concerning the nature of the relief to be afforded in these sensitive areas, yet the opinion of the Court does not address itself to the principles of these cases. In the analogous area of legislative apportionment, we have often tolerated a temporary dilution of voting rights to protect the legitimate interests of the States in fashioning their own elec-

[7] The Ohio election laws require that petitions for a position on the Ohio ballot be filed 90 days before the state primary. Ohio Rev. Code §§ 3513.256–3513.262, 3517.01 (1960 Repl. Vol.). Appellants in No. 543 concede in their brief that their deadline was February 7, 1968, yet they apparently did not attempt to file their petitions until late in July. Appellants' Brief 86.

tion laws, see, *e. g., Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 739 (1964); cf. *Davis* v. *Mann,* 377 U. S. 678, 692–693 (1964); and in the area of school desegregation we have demonstrated even greater deference to the States. On occasion, we have even counseled abstention where First Amendment rights have been allegedly infringed by state legislation. See *Harrison* v. *NAACP,* 360 U. S. 167 (1959).

For example, in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964), holding unconstitutional the apportionment of New York's Legislature, we stated that on remand the District Court "acting under equitable principles, must now determine whether, because of the imminence of that election *and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan,* it would be desirable to permit the 1964 election of legislators to be conducted pursuant to the existing [unconstitutional] provisions, or whether under the circumstances the effectuation of appellants' right to a properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election." [8] *Id.,* at 655. (Emphasis added.)

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[8] The prior history of *Preisler* v. *Secretary of State,* 279 F. Supp. 952 (D. C. W. D. Mo. 1967), probable jurisdiction noted *sub nom. Kirkpatrick* v. *Preisler,* 390 U. S. 939 (1968), aptly demonstrates the deference we have paid legislative action in this area. On January 4, 1965, the United States District Court for the Western District of Missouri held that the 1961 Missouri Congressional Redistricting Act was unconstitutional, but it refused to grant any additional relief "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem . . . ." *Preisler* v. *Secretary of State,* 238 F. Supp. 187, 191 (D. C. W. D. Mo. 1965). The Missouri General Assembly then enacted the 1965 Congressional Redistricting Act. On August 5, 1966, the District Court held this new plan unconstitutional, but it nevertheless permitted the 1966 Missouri congressional elections to be conducted under the void act. *Preisler* v. *Secretary of State,* 257 F. Supp. 953

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Green v. *County School Board,* 391 U. S. 430 (1968), decided only last Term, provides an even more striking example of our concern for the need to refrain from usurping the authority of the States in areas traditionally entrusted to them. *Green* reached this Court 13 years after *Brown* v. *Board of Education,* 349 U. S. 294 (1955), required that schools be established free of racial discrimination with "all deliberate speed." Although we held in *Green* that the particular "freedom-of-choice" plan adopted by the school board did not pass constitutional muster, the case was remanded to the District Court so that the school board could once again attempt to formulate a constitutional plan.

The result achieved here is not compatible with recognized equitable principles, nor is it compatible with our traditional concern, manifested in both the reapportionment and school desegregation cases, for preserving the properly exercised powers of the States in our federal system. Moreover, in none of these analogous areas did we deal with an express constitutional delegation of power to the States. That delegation is unequivocal here. U. S. Const., Art. II, § 1.

The net result of the Court's action is that this Court is writing a new presidential election law for the State of Ohio without giving the Legislature or the courts of that State an opportunity to appraise their statutes in litigation [9] or to eliminate any constitutional defects

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(D. C. W. D. Mo. 1966). We affirmed on January 9, 1967, *sub nom. Kirkpatrick* v. *Preisler,* 385 U. S. 450. In 1967, the Missouri General Assembly made still another attempt to enact a constitutional plan, but on December 29, 1967, this plan was also invalidated. 279 F. Supp. 952.

[9] Cf. *Scott* v. *Germano,* 381 U. S. 407, 409 (1965), in which we stated that the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."

prior to a decision by this Court. Given both the lateness of the hour and the legitimate demands of federalism, the District Court did not abuse its discretion in denying the extraordinary relief appellants demanded.

II.

Although I believe that the court below properly exercised its discretionary equitable powers, this litigation involves far more than a resolution of whether either Party is entitled to ballot position for the 1968 election. Appellants' request for declaratory relief, challenging the constitutionality of Ohio's system of conducting presidential elections, has raised a question which may be fairly classified as one of first impression: [10] to what extent may a State, consistent with equal protection and the First Amendment guarantee of freedom of association, impose restrictions upon a candidate's desire to be placed upon the ballot? As I have already stated, the principles which would of necessity evolve from an answer to this question could not be confined either to the State of Ohio or to presidential elections.

Both the opinion of this Court and that of the District Court leave unresolved what restrictions, if any, a State can impose. Although both opinions treat the Ohio statutes as a "package," giving neither Ohio nor the courts any guidance, each contains intimations that a State can by reasonable regulation condition ballot posi-

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[10] *MacDougall* v. *Green,* 335 U. S. 281 (1948), did contest the constitutionality of Illinois' system of nominating candidates representative of new political parties. However, *MacDougall* was decided during the reign of *Colegrove* v. *Green,* 328 U. S. 549 (1946). *Baker* v. *Carr,* 369 U. S. 186 (1962), and its progeny have substantially modified the constitutional matrix in this area. *Fortson* v. *Morris,* 385 U. S. 231 (1966), although concerning the constitutionality of state election laws, involved consideration of a State's post-election procedure, not state requirements for initial ballot qualification.

tion upon at least three considerations—a substantial showing of voter interest in the candidate seeking a place on the ballot, a requirement that this interest be evidenced sometime prior to the election, and a party structure demonstrating some degree of political organization. With each of these propositions I can agree. I do not believe, however, as does MR. JUSTICE STEWART, that the Equal Protection Clause has only attenuated applicability to the system by which a State seeks to control the selection of presidential electors.

Whatever may be the applicable constitutional principles, appellants and the State of Ohio are entitled to know whether any of the various provisions attacked in this litigation do comport with constitutional standards. As demonstrated by *Zwickler* v. *Koota,* 389 U. S. 241 (1967),[11] this matter should be first resolved by the court below. Given the magnitude of the questions presented and the need for unhurried deliberation, I would dispose of appellants' request for declaratory relief in a manner consistent with *Zwickler* by a remand to the District Court for a clearer determination of the serious constitutional questions raised in these cases.

I must therefore dissent from the failure of the Court's opinion to explore or dispose adequately of the declaratory judgment actions, as well as from the grant of extraordinary relief in No. 543.

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[11] "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." 389 U. S., at 254.

Per Curiam.

FEDERAL POWER COMMISSION *v.* UNITED GAS PIPE LINE CO.

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

No. 247. Decided October 21, 1968.*

This Court previously sustained the formula of the Federal Power Commission (FPC) for determining the tax component of respondent's cost of service but remanded the cases (386 U. S. 237) with respect to whether it was significant in applying the formula that respondent had both jurisdictional and nonjurisdictional income. The Court of Appeals held that the issue had been sufficiently raised by respondent's petition for rehearing before the FPC and that the formula required that consolidated tax savings be first allocated to respondent's nonjurisdictional income. *Held:* Since the FPC did not disclose the basis for its order and did not "give clear indication that it has exercised the discretion with which Congress has empowered it," *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197, the cases were not in the proper posture for judicial review and should have been remanded to the FPC for further consideration.

Certiorari granted; 388 F. 2d 385, reversed and remanded.

Solicitor General Griswold, Harris Weinstein, Richard A. Solomon, and *Peter H. Schiff* for petitioner in No. 247. *Reuben Goldberg* and *George E. Morrow* for petitioner in No. 248.

David T. Searls and *Vernon W. Woods* for respondent in both cases.

PER CURIAM.

When these cases were here the first time, we sustained the authority of the Federal Power Commission to determine the tax component of United's cost of service in

*Together with No. 248, *Memphis Light, Gas & Water Division* v. *United Gas Pipe Line Co.*, also on petition for writ of certiorari to the same court.

accordance with the formula developed by it in *Cities Service Gas Co.*, 30 F. P. C. 158 (1963), but remanded the cases with respect to whether in applying the *Cities Service* formula it was significant that United apparently had both jurisdictional and nonjurisdictional activities and income. *FPC* v. *United Gas Pipe Line Co.*, 386 U. S. 237 (1967). Over the objections of the Commission, the Court of Appeals held that the issue had been sufficiently raised by United in its petition for rehearing before the Commission in accordance with § 19 of the Natural Gas Act, 52 Stat. 831, as amended, 15 U. S. C. § 717r, and that the *Cities Service* formula required that consolidated return tax savings coming to United be first allocated to United's nonjurisdictional income.

The petitions for certiorari are granted and the judgment of the Court of Appeals is reversed.† Although we acquiesce in the Court of Appeals' construction of United's petition for rehearing filed with the Commission, the issue on remand was not in the proper posture for final determination by the Court of Appeals and should have been remanded to the Commission for further consideration. It is true that the Commission in its opinion had remarked that "United is largely a regulated company, and we shall designate it as such for the purpose of these computations." *United Gas Pipe Line Co.*, 31 F. P. C. 1180, 1190 (1964). But the Commission made no effort to justify this characterization of United in terms of the findings, the fundamentals of the *Cities Service* formula, or the applicable law. This may have been because the adversary proceedings were primarily concerned with the validity of the formula itself and never focused precisely on the question of intra-company revenue and cost allocation. Whatever the reason, there was "no indication of the basis on which the Commission exercised its expert

†The motion for leave to use the record in the prior proceedings before this Court, Nos. 127 and 128, October Term, 1966, is granted.

discretion," no articulation of "any rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 167, 168 (1962). On this issue the Commission's order was vulnerable on rehearing and in the Court of Appeals.

But it does not follow that the Court of Appeals, in the face of the Commission's insistence that its decision was wholly consistent with its *Cities Service* formula, should have itself determined that consolidated return savings be first allocated to nonjurisdictional income and that "income from the unregulated component of United is sufficiently large to absorb all such net tax losses and no excess remains to reduce the regulated taxable income of United." *United Gas Pipe Line Co.* v. *FPC,* 388 F. 2d 385, 391–392 (C. A. 5th Cir. 1968) (footnote omitted). These questions should have had adequate attention from the Commission in the first instance before being subjected to judicial review. Before the courts can properly review agency action, the agency must disclose the basis of its order and "give clear indication that it has exercised the discretion with which Congress has empowered it," *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 197 (1941); otherwise the courts are propelled "into the domain which Congress has set aside exclusively for the administrative agency." *SEC* v. *Chenery Corp.,* 332 U. S. 194, 196 (1947). The judgment of the Court of Appeals is reversed and the cases are remanded with instructions to return the cases to the Commission for further proceedings.

It is so ordered.

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

INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* N. V. NEDERL. AMERIK STOOMV. MAATS.

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

No. 379. Decided October 21, 1968.

Respondent, a shipowner, sought indemnity from petitioner, a stevedoring company, for damages respondent had paid petitioner's employee, who had been injured while working on respondent's ship. The Court of Appeals reversed the jury's verdict for petitioner on the ground that as a matter of law petitioner had not taken reasonable action to avoid the injury. *Held:* Under the Seventh Amendment the issue as to the reasonableness of petitioner's conduct should have been left to the jury. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 (1962).

Certiorari granted; 392 F. 2d 763, reversed.

Sidney A. Schwartz for petitioner.

Edmund F. Lamb for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted.

The respondent, a shipowner, sought indemnity from the petitioner, a stevedoring company, for damages the shipowner had paid to an employee of the stevedore who was injured while working aboard the respondent's ship. See *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 382 U. S. 283 (1965). A jury found that the stevedoring company had fulfilled its duty of workmanlike service and, accordingly, that no indemnity was due. See *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). The Court of Appeals reversed this verdict and held, as a matter of law, that the stevedore had not taken reasonable action to avert the injury. 392 F. 2d 763 (1968).

The cause of the longshoreman's injury was carbon monoxide inhalation that occurred as he and other longshoremen were using gasoline-powered vehicles to move cargo in the ship's lower hold. The shipowner contends that the stevedore's hatch boss acted unreasonably. When longshoremen complained about the lack of ventilation in the hold, the hatch boss informed one of the ship's officers that his men would walk off the job unless the officer turned on the ship's ventilating system. The officer told the men to continue working and promised to activate the ventilating system, which was within the shipowner's exclusive control and which was concededly adequate to ventilate the hold. When, less than 10 minutes later, the hatch boss realized that the ventilating system had not been turned on, he ordered the men from the hold. The injured longshoreman collapsed as he was ascending a ladder to leave.

The Court of Appeals said that the hatch boss should have ceased work when he first learned that the ship's ventilating system was not operating, despite the officer's promise to turn on the system. Alternatively, he should have used the stevedore's blowers, which had been left on the pier, to ventilate the hold. The jury, however, in response to a special interrogatory, found that the stevedore had acted reasonably in continuing to work for a brief period in reliance on the officer's promise. We cannot agree with the Court of Appeals that the stevedore acted unreasonably as a matter of law. Under the Seventh Amendment, that issue should have been left to the jury's determination. Any other ruling would be inconsistent with this Court's decision in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 (1962).

The judgment of the Court of Appeals is

Reversed.

BOUNDS, WARDEN *v.* CRAWFORD.

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

No. 279. Decided October 21, 1968.

Certiorari granted; 395 F. 2d 297, vacated and remanded.

Thomas Wade Bruton, Attorney General of North Carolina, and *Andrew A. Vanore, Jr.,* for petitioner.

PER CURIAM.

The motion of the respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Witherspoon* v. *Illinois,* 391 U. S. 510, and for consideration of the other constitutional questions raised in the case.

MR. JUSTICE BLACK dissents.

IN RE HAGOPIAN.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 352. Decided October 21, 1968.

Appeal dismissed and certiorari denied.

PER CURIAM.

The motion for leave to file an amended jurisdictional statement is granted. 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.

LAKE ET VIR *v.* POTOMAC LIGHT & POWER CO.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 364. Decided October 21, 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.

DYMYTRYSHYN ET AL. *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 380. Decided October 21, 1968.

285 F. Supp. 507, affirmed.

John J. Abt for appellants.

Solicitor General Griswold, Assistant Attorney General Vinson, and *Philip R. Monahan* for appellee.

PER CURIAM.

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

CHEMICAL TANK LINES, INC. *v.* HOLSTINE.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 195. Decided October 21, 1968.

Appeal dismissed and certiorari denied.

J. Campbell Palmer III and *Albert L. Bases* for appellant.

Robert H. C. Kay and *Stanley E. Preiser* 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 BLACK dissents.

CONTINENTAL OIL CO. *v.* UNITED STATES.

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

No. 206. Decided October 21, 1968.

Affirmed.

David T. Searls, Harry M. Reasoner, and *Lloyd F. Thanhouser* for appellant.

Solicitor General Griswold, Assistant Attorney General Zimmerman, and *Lawrence W. Somerville* for the United States.

PER CURIAM.

Being convinced on the record before us that Malco Refineries, Inc., was not a "failing company," *United States* v. *Third National Bank,* 390 U. S. 171, 183 (1968); *International Shoe Co.* v. *FTC,* 280 U. S. 291 (1930), and that the record otherwise supports the decree, *United States* v. *Pabst Brewing Co.,* 384 U. S. 546 (1966), we affirm the judgment of the District Court.

MR. JUSTICE HARLAN, believing that this case involves issues of fact and law which should not be decided without plenary consideration, would note probable jurisdiction and set the case for argument.

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

FULLER *v.* ALASKA.

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

No. 249. Decided October 28, 1968.

Lee v. *Florida*, 392 U. S. 378, which held inadmissible in state criminal trials evidence violative of § 605 of the Federal Communications Act, is to be applied only to trials in which such evidence is sought to be introduced after the date of that decision.

Certiorari granted; 437 P. 2d 772, affirmed.

George Kaufmann for petitioner.

PER CURIAM.

Petitioner was convicted of shooting with intent to kill or wound and was sentenced to 10 years in prison. Over petitioner's objection that it was obtained in violation of § 605 of the Federal Communications Act, 48 Stat. 1103, 47 U. S. C. § 605, the prosecution introduced in evidence a telegram allegedly sent by petitioner to an accomplice. The Supreme Court of Alaska affirmed, holding that it did not need to decide whether § 605 had actually been violated since the evidence was in any event admissible in state trials under *Schwartz* v. *Texas*, 344 U. S. 199.

In *Lee* v. *Florida*, 392 U. S. 378, we overruled *Schwartz* v. *Texas* and held that evidence violative of § 605 is not admissible in state criminal trials. The decision of the Alaska Supreme Court cannot stand, therefore, if *Lee* is to be applied retroactively. We hold, however, that the exclusionary rule of *Lee* is to be given prospective application, and, accordingly, we affirm.

Prospective application of *Lee* is supported by all of the considerations outlined in *Stovall* v. *Denno,* 388 U. S. 293, 297.[1] The purpose of *Lee* was in no sense to "enhance the reliability of the fact-finding process at trial." *Johnson* v. *New Jersey,* 384 U. S. 719, 729. Like *Mapp* v. *Ohio,* 367 U. S. 643, *Lee* was designed to enforce the federal law.[2] *Linkletter* v. *Walker,* 381 U. S. 618, 639. And evidence seized in violation of the federal statute is no less relevant and reliable than that seized in violation of the Fourth Amendment to the Constitution. Moreover, the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible.

Retroactive application of *Lee* would overturn every state conviction obtained in good-faith reliance on *Schwartz.* Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*

The petition for a writ of certiorari is granted, and the judgment of the Supreme Court of Alaska is affirmed.

Mr. Justice Black dissents for the reasons set out in his dissenting opinion in *Linkletter* v. *Walker,* 381

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[1] These considerations were more recently applied in *DeStefano* v. *Woods,* 392 U. S. 631, 633, in which we concluded that the right to a jury trial in state criminal prosecutions under *Duncan* v. *Louisiana,* 391 U. S. 145, and *Bloom* v. *Illinois,* 391 U. S. 194, was prospective only.

[2] *Lee* v. *Florida,* 392 U. S., at 386–387:

"We conclude, as we concluded in *Elkins* and in *Mapp,* that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States,* 364 U. S., at 217."

U. S. 618, 640. But see his dissent in *Lee* v. *Florida,* 392 U. S. 378, 387.

MR. JUSTICE DOUGLAS, believing that the rule of *Lee* v. *Florida,* 392 U. S. 378, which was applied retroactively in that case, should be applied retroactively in other cases, too, dissents.

MENGELKOCH ET AL. *v.* INDUSTRIAL WELFARE COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 375. Decided October 28, 1968.

A three-judge federal court dissolved itself for want of jurisdiction. A single district judge then dismissed the case on the ground of abstention and incorporated the three-judge court's dissolution order in his opinion by reference. In this appeal from both judgments *held* that the Court of Appeals, and not this Court, has jurisdiction over the appeal from the dissolution order and from the abstention decision.

284 F. Supp. 950, vacated and remanded; 284 F. Supp. 956, dismissed.

Marguerite Rawalt for appellants.

Thomas C. Lynch, Attorney General of California, and *Edward M. Belasco, Jay L. Linderman,* and *William L. Zessar,* Deputy Attorneys General, for appellees.

PER CURIAM.

A three-judge federal court, convened pursuant to 28 U. S. C. § 2281, determined that "there is no jurisdiction for a three-judge court" and entered an order dissolving itself. 284 F. Supp. 950, 956. The single district judge in whose court the case was originally filed considered further and dismissed the case without prejudice under the doctrine of abstention, stating in his memorandum opinion that "[t]he order dissolving the three-judge court is incorporated in this memorandum by reference." 284 F. Supp. 956, 957. Appellants appeal from both judgments. In these circumstances, we have no jurisdiction to entertain a direct appeal from the decision of the single judge; such jurisdiction is possessed only by the appropriate United States Court of Appeals. 28 U. S. C. § 1291. Moreover, we have held that when, as here, a

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three-judge court dissolves itself for want of jurisdiction, an appeal lies to the appropriate Court of Appeals and not to this Court. *Wilson* v. *Port Lavaca,* 391 U. S. 352.*

Although the appellants have lodged in the Court of Appeals for the Ninth Circuit a protective appeal from the decision of the single judge, it does not appear from the record that such an appeal has been filed with respect to the three-judge order. Therefore, we vacate the order of the three-judge court and remand the case to the District Court so that a timely appeal may be taken to the Court of Appeals. See *Wilson* v. *Port Lavaca, supra; Utility Comm'n* v. *Pennsylvania R. Co.,* 382 U. S. 281, 282. The appeal from the decision of the single judge is dismissed for want of jurisdiction.

It is so ordered.

*We think it makes no difference in principle that in *Wilson* v. *Port Lavaca* the single judge actually adopted the opinion of the three-judge court as his own.

OVERTON *v.* NEW YORK.

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

No. 212. Decided October 28, 1968.

Certiorari granted; vacated and remanded.

Melvin L. Wulf and *David C. Gilberg* for petitioner.

Carl A. Vergari and *James J. Duggan* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Appellate Term of the Supreme Court of New York is vacated, and the case is remanded for further consideration in the light of *Bumper* v. *North Carolina,* 391 U. S. 543 (1968).

MR. JUSTICE BLACK dissents and would affirm the judgment of conviction here.

LICHTEN ET AL. *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 414. Decided October 28, 1968.

434 S. W. 2d 128, appeal dismissed.

Chris Dixie for appellants.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Hawthorne Phillips, Gilbert J. Pena,* and *Allo B. Crow, Jr.,* 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.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and the case set for argument.

Syllabus.

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL.

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

No. 13. Argued October 17, 1968.—Decided November 12, 1968.*

The Interstate Commerce Commission (ICC), pursuant to § 15 (6) of the Interstate Commerce Act, ordered new divisions for North-South joint rail rates, finding that the Northern lines' costs warranted an increased share of the revenues. The North-South traffic, the costs for which were not isolated in the ICC's findings, represents 6% of the total North traffic and 21.4% of the total South traffic. The average costs used by the ICC relate to all Northern and all Southern traffic, although 80% of all Northern traffic is intra-territorial. The District Court ruled that territorial average costs did not meet the statutory requirements for precise and relevant findings absent evidence relating the territorial average to North-South traffic, and held that the ICC's order was not supported by substantial evidence and reasoned findings, and remanded for further proceedings. *Held:*

1. While mathematical precision and exactitude are not required, the nature and volume of the traffic must be known and exposed, if costs are to govern rate divisions. Pp. 91–92.

2. If average territorial costs are shown to be a distortion when applied to particular North-South traffic, reliance on administrative "expertise" is not sufficient, but it must be shown that there is, in fact, no basic material difference, or there must be an adjustment which fairly reflects the difference in costs. Pp. 92–93.

3. On remand the ICC must make specific findings to adjust average territorial costs with respect to commuter deficits, interchange of cars in North-South traffic at territorial border points, and empty freight car return ratios. Pp. 93–95.

270 F. Supp. 695, affirmed as modified.

Edward A. Kaier argued the cause for appellants in No. 13. With him on the briefs were *Joseph F. Eshel-*

*Together with No. 15, *Interstate Commerce Commission* v. *Aberdeen & Rockfish Railroad Co. et al.*, on appeal from the same court.

man, Richard B. Montgomery, Jr., Eugene E. Hunt, Kenneth H. Lundmark, and *Kemper A. Dobbins. Arthur J. Cerra* argued the cause for appellant in No. 15. With him on the brief was *Robert W. Ginnane.*

Howard J. Trienens argued the cause for the Southern railroad appellees. With him on the brief were *Ashton Phelps, George L. Saunders, Jr., John W. Adams, Phil C. Beverly, James A. Bistline, James W. Hoeland, John E. McCullough,* and *Donal L. Turkal. Carl E. Sanders* argued the cause for appellees Southern Governors' Conference et al. With him on the brief was *Walter R. McDonald.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In these cases the Interstate Commerce Commission undertook to prescribe just, reasonable, and equitable divisions of joint rates pursuant to § 15 (6) of the Interstate Commerce Act, 24 Stat. 384, as amended.[1] The

[1] 49 U. S. C. §15 (6) provides in relevant part:

"Whenever . . . the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential . . . the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers . . . . In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

Commission found that existing divisions violated § 15 (6) because they allocated to Northern lines a lesser share of the revenues from the joint rates than would be warranted by their share of the expenditures made in providing the joint service. 325 I. C. C. 1, 50.

The Southern lines brought suit before a three-judge District Court to enjoin and to set aside the Commission's order. The District Court set aside the Commission's order and remanded the case for further proceedings. 270 F. Supp. 695. We noted probable jurisdiction. 390 U. S. 940.

Both Northern and Southern lines used Rail Form A as their basic formula, that form being a rail freight formula for determining freight service costs which utilizes the expenses and statistics for a given year as reported to the Commission by the carriers and supplemented by special studies of the carriers.

The Southern lines proposed 12 adjustments, five of which the Commission accepted and seven of which it rejected. The year 1956 was the one both Southern and Northern lines used in the final cost analysis. The cost level for that year, said the Commission, was higher in the North than in the South for like services; and it concluded that that situation would most likely continue in the immediate future. In that year the Northern lines received 44.64% of the revenues while incurring 46.35318% of the fully distributed costs. Accordingly, the Commission prescribed new divisions based on the fully distributed costs and divided the revenues in the same proportion to those costs. The shift in revenues resulting from the new divisions was approximately $8,000,000 a year, giving the Northern lines an overall increase in revenues from the traffic involved of 3.5% and reducing the revenues of Southern lines by about 3%.

When the Southern lines sued to set aside the new divisions, the Northern lines intervened as defendants. The District Court held that the Commission's order was not supported by substantial evidence and reasoned findings within the meaning of §§ 8 (b)[2] and 10 (e)[3] of the Administrative Procedure Act and, as noted, remanded the case for further proceedings.

The present problem of divisions deals only with North-South traffic which represents 6% of the total traffic of the North and 21.4% of the total traffic of the South. The costs of that North-South traffic are not isolated in the findings. The average costs used relate to all Northern traffic and to all Southern traffic. Nearly 80% of the total Northern traffic is intra-territorial and handled entirely in the North, and it is therefore argued that that traffic has the dominant influence on the Northern average. As the District Court said, it is difficult to maintain that these intra-territorial Northern costs are the same or approximately the same as Northern costs in handling traffic between North and South. In another divisions case, the Commission ruled

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[2] Section 8 (b), 60 Stat. 242, now 5 U. S. C. § 557 (c) (1964 ed., Supp. III), provides in relevant part:

"The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

"(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

"(B) the appropriate rule, order, sanction, relief, or denial thereof."

[3] Section 10 (e), 60 Stat. 243, now 5 U. S. C. § 706 (1964 ed., Supp. III), provides in relevant part:

"The reviewing court shall . . .

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .

"(E) unsupported by substantial evidence . . . ."

that territorial average costs are entitled to little weight in determining the costs of handling particular movements. *Increased Freight Rates, 1967,* 332 I. C. C. 280, 303. The use of "unsifted averages" of costs does not necessarily establish greater costs either in rate cases (*ICC* v. *Mechling,* 330 U. S. 567, 583) or in divisions cases. The ruling of the District Court was, not that territorial average costs were irrelevant or that Rail Form A was not a usable and useful tool for cost determination, but that territorial average costs could not be used consistently with the statutory requirements for precise and relevant findings without any evidence relating the territorial average costs to North-South traffic. While Southern lines had offered evidence showing the costs of handling North-South traffic in the South, there was not always any such Northern offer; nor did the Commission always exercise its undoubted authority to gather it on its own.

On the question whether territorial average costs represent costs of the North-South traffic, the Commission only replies that where particular traffic uses physical facilities and employees' services in common with other traffic "and has been shown to have no distinguishing characteristics," the application of Rail Form A costs is proper. Yet the Commission stated "its exclusive standard" for resolving this divisions question to be "the relevant cost of handling the specific freight traffic to which the divisions apply." 270 F. Supp., at 710.

We agree with the District Court that there is no substantial evidence that territorial average costs are necessarily the same as the comparative costs incurred in handling North-South freight traffic. If we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an

end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming " 'a monster which rules with no practical limits on its discretion.' " *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 167. That is impermissible under the Administrative Procedure Act. If indeed that lax procedure were sanctioned in a North-South divisions case, whose solution turns solely on costs, the class rate discrimination in favor of the North and against the South which we condemned in *New York* v. *United States,* 331 U. S. 284, could well flourish in another form.

Rail Form A was used in *Chicago & N. W. R. Co.* v. *Atchison, T. & S. F. R. Co.,* 387 U. S. 326, and we approved its use. Moreover, ever since the *New England Divisions Case,* 261 U. S. 184, at 196–197, it has been held that mathematical exactness in dividing each rate of each carrier is not necessary, because practical necessities demand otherwise. In addition we repeat what we said in *Chicago & N. W. R. Co.* v. *Atchison, T. & S. F. R. Co., supra,* at 358, that there are no "mechanical restrictions on the range of remedies from which the Commission may choose" in solving a divisions case or making its expert judgment as to what scale of costs should be used in making the allocation. Precision and exactitude in the mathematical sense are not possible. Yet the nature and volume of the traffic in question must be known and exposed, if the costs of other traffic are to govern a division of rates. Moreover, where Rail Form A costs are shown to be a distortion when applied to the particular traffic over which the divisions dispute arises, some effort must be exerted to make an adjustment which

fairly reflects the difference in the costs or to make clear that there is in fact no basic, material difference. The Commission states to us that it cannot be expected to know whether peculiar characteristics may exist respecting the traffic involved in the divisions dispute or whether special studies may be needed. Yet if that is true, the Commission's expertise is not equal to the task and the opposed carriers must be directed to expose the various versions of the conflict so that the Commission may make its informed decision. That was done on aspects of the present cases (325 I. C. C., at 25) and no reason is apparent why it cannot be done on other aspects of the controversy.

The Commission in its argument before us said that Rail Form A territorial average costs were "adjusted" to reflect the costs attributable to the North-South traffic issue, which is true as respects five [4] of the 12 adjustments proposed by the Southern lines.

On remand of the cases to the Commission we think specific findings must be made on the several items of so-called "adjustment" of average territorial costs to which we now turn.

One is the question of commuter deficits, which swell the average territorial costs in the North while they are less important in the South that does not yet have substantial commuter operations. Passenger deficits generally are considered as part of the costs of providing freight service, since the common facilities that support each must be maintained for both types of service. There is, however, evidence that in some territories as much as one-half of the track facilities are maintained solely because of the company's suburban service and even a larger

[4] These five constituted way and through train separation, platform costs, switching and terminal companies, short lines (Class II railroads), train tonnage adjustment—all as discussed in Appendix B to the Commission's opinion. 325 I. C. C., at 55 *et seq.*

proportion of other facilities such as stations, terminals, coach yards, and repair shops is maintained exclusively for commuter service.

The Commission, however, ruled that costs of commuter service include "common costs which must be incurred to provide freight service or intercity passenger service" and that the deficit from suburban operations was properly included in "the constant costs." The Commission on the other hand found that "many individual items of suburban service can be considered solely related . . . to suburban service." 325 I. C. C., at 78. How these two findings can be reconciled is not apparent. The Commission in its argument before us rests primarily on revenue needs—"Such losses must be recovered from railroad freight operations if railroads are to remain solvent." Section 15 (6) makes plain that revenue needs come into focus in divisions cases. Revenue problems under § 15 (6) at times have resulted in putting a part of one area's transportation costs upon other sections of the country. See *New England Divisions Case,* 261 U. S. 184, 191–195. But that issue is not presented in these cases. The issue in the present cases was costs, not revenue.[5] The allocation either to the North or to the South of costs peculiar to its territorial traffic is a task with which the Commission is familiar. Thus in these very cases it excluded certain platform deficits incurred by the Northern lines because they were not related to North-South freight traffic. 325 I. C. C., at 56. There is no apparent reason why costs related solely to commuter service in the North cannot be determined.

As to the costs of interchanging cars in North-South traffic at territorial border points, there is evidence in

[5] On revenue needs the Commission said:

"We find that no affirmative reasons appear in this record which would warrant any adjustment of the divisions in question over and above the relative costs of service, either on the grounds of greater revenue needs or otherwise." 325 I. C. C., at 49.

the record that the interchange operations performed by Northern lines are no more costly than those performed by Southern lines. Yet the Commission allowed the Northern lines a border interchange cost that is 58% higher than the one allowed the Southern lines. That apparently was done solely because Rail Form A showed higher interchange costs when all territorial interchanges were considered. We cannot bridge the gap by blind reliance on expertise which in this instance would be a mere assertion that no difference means a substantial difference.

The empty freight car return ratios is another example of deficient findings. There is evidence that higher costs of Northern lines result from the Commission's use of higher Northern territorial average empty return ratios. There was no attempt made to show that the latter were at all applicable to North-South traffic. The problem arises in the North by reason of boxcars on shuttle from Detroit to automobile plants, most of which are in the North. These shuttle boxcars return empty to Detroit. We know from the record that this is a major cost item as 800,000 carloads of automobile parts move out of Detroit each year. The record does not show the extent to which these empty returns swell the territorial average costs in the North, though it does show that Northern use of these shuttle boxcars is substantially higher than the Southern proportion. The District Court concluded the territorial average boxcar empty return ratios could not be said, absent specific findings, to reflect the costs of the North-South freight traffic relevant to this problem of divisions.

There are other proposed adjustments [6] on which we think the Commission's findings are adequate.

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[6] *Car costs.* The Southern lines sought to substitute average car costs for the entire country in lieu of Rail Form A territorial average. The Commission concluded that the "use of a national average car

The judgment of the District Court is modified and as modified it is

Affirmed.

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cost conceals territorial differences in cost which are important in the consideration of divisions between the two involved territories." 325 I. C. C., at 64.

Cars interchanged between rail and water carriers at ports. The Southern and Northern lines submitted opposed evidence and views and the Commission concluded that the count of cars in Rail Form A was warranted. 325 I. C. C., at 58–60.

Transit commodities. They move under a single published rate and receive some kind of storage or processing in transit and the rate covers the movement of the raw material into and the movement of the finished product beyond the transit or processing point. The Southern lines would include deficits on pulpwood and wet phosphate rock which they claim to be related in transit to the outbound movement of paper products and dry phosphate rock. But these were intraterritorial costs of the Southern lines which the Commission found were not properly transferable to the interterritorial costs, the only costs pertinent to this divisions case. 325 I. C. C., at 80.

Switching costs. The Southern lines made special studies of switching costs which the Commission reviewed at length. 325 I. C. C., at 71–77. The Northern lines sought to discredit the studies and the sample on which they rested. The Commission took Rail Form A territorial average switching costs as the most accurate measure of the relative switching costs, saying:

"Territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories. In our opinion, and we so find, the depressing effect, if any, of volume switching commodities on the average would affect both territories and, for purposes of comparison, would be largely offsetting." 325 I. C. C., at 76. Contrary to the District Court, we believe these are adequate findings.

Syllabus.

EPPERSON ET AL. *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 7. Argued October 16, 1968.—Decided November 12, 1968.

Appellant Epperson, an Arkansas public school teacher, brought this action for declaratory and injunctive relief challenging the constitutionality of Arkansas' "anti-evolution" statute. That statute makes it unlawful for a teacher in any state-supported school or university to teach or to use a textbook that teaches "that mankind ascended or descended from a lower order of animals." The State Chancery Court held the statute an abridgment of free speech violating the First and Fourteenth Amendments. The State Supreme Court, expressing no opinion as to whether the statute prohibits "explanation" of the theory or only teaching that the theory is true, reversed the Chancery Court. In a two-sentence opinion it sustained the statute as within the State's power to specify the public school curriculum. *Held:* The statute violates the Fourteenth Amendment, which embraces the First Amendment's prohibition of state laws respecting an establishment of religion. Pp. 102–109.

(a) The Court does not decide whether the statute is unconstitutionally vague, since, whether it is construed to prohibit explaining the Darwinian theory or teaching that it is true, the law conflicts with the Establishment Clause. Pp. 102–103.

(b) The sole reason for the Arkansas law is that a particular religious group considers the evolution theory to conflict with the account of the origin of man set forth in the Book of Genesis. Pp. 103, 107–109.

(c) The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. Pp. 103–107.

(d) A State's right to prescribe the public school curriculum does not include the right to prohibit teaching a scientific theory or doctrine for reasons that run counter to the principles of the First Amendment. P. 107.

(e) The Arkansas law is not a manifestation of religious neutrality. P. 109.

242 Ark. 922, 416 S. W. 2d 322, reversed.

Eugene R. Warren argued the cause for appellants. With him on the brief was *Bruce T. Bullion.*

Don Langston, Assistant Attorney General of Arkansas, argued the cause for appellee. With him on the brief was *Joe Purcell,* Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *Leo Pfeffer, Melvin L. Wulf,* and *Joseph B. Robison* for the American Civil Liberties Union et al., and by *Philip J. Hirschkop* for the National Education Association of the United States et al.

MR. JUSTICE FORTAS delivered the opinion of the Court.

I.

This appeal challenges the constitutionality of the "anti-evolution" statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of "fundamentalist" religious fervor of the twenties. The Arkansas statute was an adaptation of the famous Tennessee "monkey law" which that State adopted in 1925.[1] The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated *Scopes* case in 1927.[2]

The Arkansas law makes it unlawful for a teacher in any state-supported school or university "to teach the

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[1] Chapter 27, Tenn. Acts 1925; Tenn. Code Ann. § 49–1922 (1966 Repl. Vol.).

[2] *Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363 (1927). The Tennessee court, however, reversed Scopes' conviction on the ground that the jury and not the judge should have assessed the fine of $100. Since Scopes was no longer in the State's employ, it saw "nothing to be gained by prolonging the life of this bizarre case." It directed that a *nolle prosequi* be entered, in the interests of "the peace and dignity of the State." 154 Tenn., at 121, 289 S. W., at 367.

theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.[3]

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course did not have a section on the Darwinian Theory. Then, for the academic year 1965–1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth "the theory about the origin . . . of man from a lower form of animal."

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[3] Initiated Act No. 1, Ark. Acts 1929; Ark. Stat. Ann. §§ 80–1627, 80–1628 (1960 Repl. Vol.). The text of the law is as follows:

"§ 80–1627.—Doctrine of ascent or descent of man from lower order of animals prohibited.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

"§ 80–1628.—Teaching doctrine or adopting textbook mentioning doctrine—Penalties—Positions to be vacated.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act by teaching the theory or doctrine mentioned in section 1 hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars; and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member."

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Susan Epperson, a young woman who graduated from Arkansas' school system and then obtained her master's degree in zoology at the University of Illinois, was employed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal.

She instituted the present action in the Chancery Court of the State, seeking a declaration that the Arkansas statute is void and enjoining the State and the defendant officials of the Little Rock school system from dismissing her for violation of the statute's provisions. H. H. Blanchard, a parent of children attending the public schools, intervened in support of the action.

The Chancery Court, in an opinion by Chancellor Murray O. Reed, held that the statute violated the Fourteenth Amendment to the United States Constitution.[4] The court noted that this Amendment encompasses the prohibitions upon state interference with freedom of speech and thought which are contained in the First Amendment. Accordingly, it held that the challenged statute is unconstitutional because, in violation of the First Amendment, it "tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach." [5] In this perspective, the Act,

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[4] The opinion of the Chancery Court is not officially reported.

[5] The Chancery Court analyzed the holding of its sister State of Tennessee in the *Scopes* case sustaining Tennessee's similar statute. It refused to follow Tennessee's 1927 example. It declined to confine the judicial horizon to a view of the law as merely a direction

it held, was an unconstitutional and void restraint upon the freedom of speech guaranteed by the Constitution.

On appeal, the Supreme Court of Arkansas reversed.[6] Its two-sentence opinion is set forth in the margin.[7] It sustained the statute as an exercise of the State's power to specify the curriculum in public schools. It did not address itself to the competing constitutional considerations.

Appeal was duly prosecuted to this Court under 28 U. S. C. § 1257 (2). Only Arkansas and Mississippi have such "anti-evolution" or "monkey" laws on their books.[8] There is no record of any prosecutions in Arkan-

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by the State as employer to its employees. This sort of astigmatism, it held, would ignore overriding constitutional values, and "should not be followed," and it proceeded to confront the substance of the law and its effect.

[6] 242 Ark. 922, 416 S. W. 2d 322 (1967).

[7] "Per Curiam. Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. § 80–1627 and § 80–1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

"The decree is reversed and the cause dismissed.

"Ward, J., concurs. Brown, J., dissents.

"Paul Ward, Justice, concurring. I agree with the first sentence in the majority opinion.

"To my mind, the rest of the opinion beclouds the clear announcement made in the first sentence."

[8] Miss. Code Ann. §§ 6798, 6799 (1942). Ark. Stat. Ann. §§ 80–1627, 80–1628 (1960 Repl. Vol.). The Tennessee law was repealed in 1967. Oklahoma enacted an anti-evolution law, but it was repealed in 1926. The Florida and Texas Legislatures, in the period between 1921 and 1929, adopted resolutions against teaching the doctrine of evolution. In all, during that period, bills to this effect were introduced in 20 States. American Civil Liberties Union (ACLU), The Gag on Teaching 8 (2d ed., 1937).

sas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States.[9] Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

II.

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas' Supreme Court. That court, perhaps reflecting the discomfort which the statute's quixotic prohibition necessarily engenders in the modern mind,[10] stated that it "expresses no opinion" as to whether the Act prohibits "explanation" of the theory of evolution or merely forbids "teaching that the theory is true." Regardless of this uncertainty, the court held that the statute is constitutional.

On the other hand, counsel for the State, in oral argument in this Court, candidly stated that, despite the State Supreme Court's equivocation, Arkansas would interpret the statute "to mean that to make a student aware of the theory . . . just to teach that there was

[9] Clarence Darrow, who was counsel for the defense in the *Scopes* trial, in his biography published in 1932, somewhat sardonically pointed out that States with anti-evolution laws did not insist upon the fundamentalist theory in all respects. He said: "I understand that the States of Tennessee and Mississippi both continue to teach that the earth is round and that the revolution on its axis brings the day and night, in spite of all opposition." The Story of My Life 247 (1932).

[10] R. Hofstadter & W. Metzger, in The Development of Academic Freedom in the United States 324 (1955), refer to some of Darwin's opponents as "exhibiting a kind of phylogenetic snobbery [which led them] to think that Darwin had libeled the [human] race by discovering simian rather than seraphic ancestors."

such a theory" would be grounds for dismissal and for prosecution under the statute; and he said "that the Supreme Court of Arkansas' opinion should be interpreted in that manner." He said: "If Mrs. Epperson would tell her students that 'Here is Darwin's theory, that man ascended or descended from a lower form of being,' then I think she would be under this statute liable for prosecution."

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas' statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term "teaching." Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.[11]

III.

The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine,

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[11] In *Scopes* v. *State,* 154 Tenn. 105, 126, 289 S. W. 363, 369 (1927), Judge Chambliss, concurring, referred to the defense contention that Tennessee's anti-evolution law gives a "preference" to "religious establishments which have as one of their tenets or dogmas the instantaneous creation of man."

and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[12]

As early as 1872, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones,* 13 Wall. 679, 728. This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[13] On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960). As this

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[12] *Everson* v. *Board of Education,* 330 U. S. 1, 18 (1947); *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Zorach* v. *Clauson,* 343 U. S. 306, 313–314 (1952); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961).

[13] See the discussion in Developments in The Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1051–1055 (1968).

Court said in *Keyishian* v. *Board of Regents,* the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U. S. 589, 603 (1967).

The earliest cases in this Court on the subject of the impact of constitutional guarantees upon the classroom were decided before the Court expressly applied the specific prohibitions of the First Amendment to the States. But as early as 1923, the Court did not hesitate to condemn under the Due Process Clause "arbitrary" restrictions upon the freedom of teachers to teach and of students to learn. In that year, the Court, in an opinion by Justice McReynolds, held unconstitutional an Act of the State of Nebraska making it a crime to teach any subject in any language other than English to pupils who had not passed the eighth grade.[14] The State's purpose in enacting the law was to promote civic cohesiveness by encouraging the learning of English and to combat the "baneful effect" of permitting foreigners to rear and educate their children in the language of the parents' native land. The Court recognized these purposes, and it acknowledged the State's power to prescribe the school curriculum, but it held that these were not adequate to support the restriction upon the liberty of teacher and pupil. The challenged statute, it held, unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). See also *Bartels* v. *Iowa,* 262 U. S. 404 (1923).

For purposes of the present case, we need not re-enter the difficult terrain which the Court, in 1923, traversed without apparent misgivings. We need not take advantage of the broad premise which the Court's decision

[14] The case involved a conviction for teaching "the subject of reading in the German language" to a child of 10 years.

in *Meyer* furnishes, nor need we explore the implications of that decision in terms of the justiciability of the multitude of controversies that beset our campuses today. Today's problem is capable of resolution in the narrower terms of the First Amendment's prohibition of laws respecting an establishment of religion or prohibiting the free exercise thereof.

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. In *Everson* v. *Board of Education,* this Court, in upholding a state law to provide free bus service to school children, including those attending parochial schools, said: "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U. S. 1, 15 (1947).

At the following Term of Court, in *McCollum* v. *Board of Education,* 333 U. S. 203 (1948), the Court held that Illinois could not release pupils from class to attend classes of instruction in the school buildings in the religion of their choice. This, it said, would involve the State in using tax-supported property for religious purposes, thereby breaching the "wall of separation" which, according to Jefferson, the First Amendment was intended to erect between church and state. *Id.,* at 211. See also *Engel* v. *Vitale,* 370 U. S. 421 (1962); *Abington School District* v. *Schempp,* 374 U. S. 203 (1963). While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion. *Id.,* at 225. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition

of theory which is deemed antagonistic to a particular dogma. As Mr. Justice Clark stated in *Joseph Burstyn, Inc.* v. *Wilson*, "the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . ." 343 U. S. 495, 505 (1952). The test was stated as follows in *Abington School District* v. *Schempp, supra,* at 222: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

These precedents inevitably determine the result in the present case. The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees. *Keyishian* v. *Board of Regents,* 385 U. S. 589, 605–606 (1967).

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens.[15] It is clear

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[15] Former Dean Leflar of the University of Arkansas School of Law has stated that "the same ideological considerations underlie the anti-evolution enactment" as underlie the typical blasphemy statute. He says that the purpose of these statutes is an "ideological" one which "involves an effort to prevent (by censorship) or punish the presentation of intellectually significant matter which

that fundamentalist sectarian conviction was and is the law's reason for existence.[16] Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a

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contradicts accepted social, moral or religious ideas." Leflar, Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155, 158 (1956). See also R. Hofstadter & W. Metzger, The Development of Academic Freedom in the United States 320–366 (1955) (*passim*); H. Beale, A History of Freedom of Teaching in American Schools 202–207 (1941); Emerson & Haber, The *Scopes* Case in Modern Dress, 27 U. Chi. L. Rev. 522 (1960); Waller, The Constitutionality of the Tennessee Anti-Evolution Act, 35 Yale L. J. 191 (1925) (*passim*); ACLU, The Gag on Teaching 7 (2d ed., 1937); J. Scopes & J. Presley, Center of the Storm 45–53 (1967).

[16] The following advertisement is typical of the public appeal which was used in the campaign to secure adoption of the statute:

"THE BIBLE OR ATHEISM, WHICH?

"All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolshevists laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote FOR ACT NO. 1." The Arkansas Gazette, Little Rock, Nov. 4, 1928, p. 12, cols. 4–5.

Letters from the public expressed the fear that teaching of evolution would be "subversive of Christianity," *id.*, Oct. 24, 1928, p. 7, col. 2; see also *id.*, Nov. 4, 1928, p. 19, col. 4; and that it would cause school children "to disrespect the Bible," *id.*, Oct. 27, 1928, p. 15, col. 5. One letter read: "The cosmogony taught by [evolution] runs contrary to that of Moses and Jesus, and as such is nothing, if anything at all, but atheism. . . . Now let the mothers and fathers of our state that are trying to raise their children in the Christian faith arise in their might and vote for this anti-evolution bill that will take it out of our tax supported schools. When they have saved the children, they have saved the state." *Id.*, at cols. 4–5.

lower order of animals." [17] Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language.[18] It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

The judgment of the Supreme Court of Arkansas is

Reversed.

MR. JUSTICE BLACK, concurring.

I am by no means sure that this case presents a genuinely justiciable case or controversy. Although Arkansas Initiated Act No. 1, the statute alleged to be unconstitutional, was passed by the voters of Arkansas in 1928, we are informed that there has never been even a single attempt by the State to enforce it. And the pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law

[17] Arkansas' law was adopted by popular initiative in 1928, three years after Tennessee's law was enacted and one year after the Tennessee Supreme Court's decision in the *Scopes* case, *supra*.

[18] In its brief, the State says that the Arkansas statute was passed with the holding of the *Scopes* case in mind. Brief for Appellee 1.

should it remain on the books for the next century. Now, nearly 40 years after the law has slumbered on the books as though dead, a teacher alleging fear that the State might arouse from its lethargy and try to punish her has asked for a declaratory judgment holding the law unconstitutional. She was subsequently joined by a parent who alleged his interest in seeing that his two then school-age sons "be informed of all scientific theories and hypotheses . . . ." But whether this Arkansas teacher is still a teacher, fearful of punishment under the Act, we do not know. It may be, as has been published in the daily press, that she has long since given up her job as a teacher and moved to a distant city, thereby escaping the dangers she had imagined might befall her under this lifeless Arkansas Act. And there is not one iota of concrete evidence to show that the parent-intervenor's sons have not been or will not be taught about evolution. The textbook adopted for use in biology classes in Little Rock includes an entire chapter dealing with evolution. There is no evidence that this chapter is not being freely taught in the schools that use the textbook and no evidence that the intervenor's sons, who were 15 and 17 years old when this suit was brought three years ago, are still in high school or yet to take biology. Unfortunately, however, the State's languid interest in the case has not prompted it to keep this Court informed concerning facts that might easily justify dismissal of this alleged lawsuit as moot or as lacking the qualities of a genuine case or controversy.

Notwithstanding my own doubts as to whether the case presents a justiciable controversy, the Court brushes aside these doubts and leaps headlong into the middle of the very broad problems involved in federal intrusion into state powers to decide what subjects and schoolbooks it may wish to use in teaching state pupils. While I hesitate to enter into the consideration and deci-

sion of such sensitive state-federal relationships, I reluctantly acquiesce. But, agreeing to consider this as a genuine case or controversy, I cannot agree to thrust the Federal Government's long arm the least bit further into state school curriculums than decision of this particular case requires. And the Court, in order to invalidate the Arkansas law as a violation of the First Amendment, has been compelled to give the State's law a broader meaning than the State Supreme Court was willing to give it. The Arkansas Supreme Court's opinion, in its entirety, stated that:

> "Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. § 80–1627 and § 80–1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised."

It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum. And, for all the Supreme Court of Arkansas has said, this particular Act may prohibit that and nothing else. This Court, however, treats the Arkansas Act as though it made it a misdemeanor to teach or to use a book that teaches that evolution is true. But it is not for this Court to arrogate to itself the power to determine the scope of Arkansas statutes. Since the highest court of

Arkansas has deliberately refused to give its statute that meaning, we should not presume to do so.

It seems to me that in this situation the statute is too vague for us to strike it down on any ground but that: vagueness. Under this statute as construed by the Arkansas Supreme Court, a teacher cannot know whether he is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true. It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process. See, *e. g.*, *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). Holding the statute too vague to enforce would not only follow long-standing constitutional precedents but it would avoid having this Court take unto itself the duty of a State's highest court to interpret and mark the boundaries of the State's laws. And, more important, it would not place this Court in the unenviable position of violating the principle of leaving the States absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command.

The Court, not content to strike down this Arkansas Act on the unchallengeable ground of its plain vagueness, chooses rather to invalidate it as a violation of the Establishment of Religion Clause of the First Amendment. I would not decide this case on such a sweeping ground for the following reasons, among others.

1. In the first place I find it difficult to agree with the Court's statement that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." It may be instead that the people's motive was merely that it would be best to remove this contro-

versial subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. And this Court has consistently held that it is not for us to invalidate a statute because of our views that the "motives" behind its passage were improper; it is simply too difficult to determine what those motives were. See, *e. g., United States* v. *O'Brien,* 391 U. S. 367, 382–383 (1968).

2. A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to schoolchildren? The very cases cited by the Court as supporting its conclusion hold that the State must be neutral, not favoring one religious or anti-religious view over another. The Darwinian theory is said to challenge the Bible's story of creation; so too have some of those who believe in the Bible, along with many others, challenged the Darwinian theory. Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.

3. I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic,

political, or religious subjects that the school's managers do not want discussed. This Court has said that the rights of free speech "while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana,* 379 U. S. 536, 554; *Cox* v. *Louisiana,* 379 U. S. 559, 574. I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.

Certainly the Darwinian theory, precisely like the Genesis story of the creation of man, is not above challenge. In fact the Darwinian theory has not merely been criticized by religionists but by scientists, and perhaps no scientist would be willing to take an oath and swear that everything announced in the Darwinian theory is unquestionably true. The Court, it seems to me, makes a serious mistake in bypassing the plain, unconstitutional vagueness of this statute in order to reach out and decide this troublesome, to me, First Amendment question. However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.

I would either strike down the Arkansas Act as too vague to enforce, or remand to the State Supreme Court for clarification of its holding and opinion.

MR. JUSTICE HARLAN, concurring.

I think it deplorable that this case should have come to us with such an opaque opinion by the State's highest court. With all respect, that court's handling of the

case savors of a studied effort to avoid coming to grips with this anachronistic statute and to "pass the buck" to this Court. This sort of temporizing does not make for healthy operations between the state and federal judiciaries. Despite these observations, I am in agreement with this Court's opinion that, the constitutional claims having been properly raised and necessarily decided below, resolution of the matter by us cannot properly be avoided.* See, *e. g., Chicago Life Insurance Co.* v. *Needles,* 113 U. S. 574, 579 (1885).

I concur in so much of the Court's opinion as holds that the Arkansas statute constitutes an "establishment of religion" forbidden to the States by the Fourteenth Amendment. I do not understand, however, why the Court finds it necessary to explore at length appellants' contentions that the statute is unconstitutionally vague and that it interferes with free speech, only to conclude that these issues need not be decided in this case. In the process of *not* deciding them, the Court obscures its otherwise straightforward holding, and opens its opinion to possible implications from which I am constrained to disassociate myself.

MR. JUSTICE STEWART, concurring in the result.

The States are most assuredly free "to choose their own curriculums for their own schools." A State is en-

*Short of reading the Arkansas Supreme Court's opinion to have proceeded on the premise that it need not consider appellants' "establishment" contention, clearly raised in the state courts and here, in view of its holding that the State possesses plenary power to fix the curriculum in its public schools, I can perceive no tenable basis for remanding the case to the state court for an explication of the purpose and meaning of the statute in question. I am unwilling to ascribe to the Arkansas Supreme Court any such quixotic approach to constitutional adjudication. I take the first sentence of its opinion (*ante,* at 101, n. 7) to encompass an overruling of appellants' "establishment" point, and the second sentence to refer only to their "vagueness" claim.

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tirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not.

It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth.

The Arkansas Supreme Court has said that the statute before us may or may not be just such a law. The result, as MR. JUSTICE BLACK points out, is that "a teacher cannot know whether he is forbidden to mention Darwin's theory at all." Since I believe that no State could constitutionally forbid a teacher "to mention Darwin's theory at all," and since Arkansas may, or may not, have done just that, I conclude that the statute before us is so vague as to be invalid under the Fourteenth Amendment. See *Cramp* v. *Board of Pub. Instruction,* 368 U. S. 278.

WHYY, INC. *v.* BOROUGH OF GLASSBORO ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 10. Argued October 17, 1968.—Decided November 12, 1968.

Appellant, a Pennsylvania nonprofit corporation, operates a noncommercial television station. It has broadcasting facilities in New Jersey and has registered and qualified to transact business there. Appellant's request for exemption, as a nonprofit corporation, from New Jersey real and personal property taxes was denied by local tax boards. The Superior Court held that while appellant qualified for the exemption in all other respects, the statute exempted only New Jersey nonprofit corporations. The State Supreme Court rejected appellant's argument that it was denied equal protection by being discriminated against solely because of its foreign incorporation. *Held:* When a foreign corporation is permitted to enter a State it is entitled to equal protection with domestic corporations, and New Jersey cannot deny appellant an opportunity equivalent to that of a domestic corporation to show that it meets the requirements for a nonprofit corporation under local law.

50 N. J. 6, 231 A. 2d 608, reversed and remanded.

James M. Marsh argued the cause for appellant. With him on the briefs were *Grover C. Richman, Jr.*, and *Lewis Weinstock.*

John W. Trimble argued the cause and filed a brief for appellee Borough of Glassboro.

PER CURIAM.

The appellant is a nonprofit corporation organized under the laws of Pennsylvania. Under a license issued by the Federal Communications Commission, it operates a noncommercial television station which broadcasts cultural, recreational, and educational programs. The broadcasting facilities for one of the television channels allocated to the appellant are in New Jersey; on its 50-acre plot in the Borough of Glassboro in that State

appellant has erected a transmittal station and a tower. Signals on this channel reach approximately 8,000,000 people in the Delaware Valley area, of whom 29.5% are estimated to live in New Jersey. Some of the programs are designed to appeal especially to the residents of New Jersey. In accordance with New Jersey law, the appellant has registered and qualified to transact business in the State.[1]

In November of 1963 the appellant wrote to the Glassboro Council requesting exemption, as a nonprofit organization, from state real and personal property taxes on its land and facilities for 1964. The request was denied, as was a similar petition to the Gloucester County Tax Board. The Division of Tax Appeals upheld the County Board, and the appellant took a further appeal to the Superior Court. That court held that while the appellant qualified for the exemption in all other respects, the statute exempted only those nonprofit corporations which were incorporated in New Jersey.[2]

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[1] N. J. Stat. Ann. § 14:15–2 requires a foreign corporation, in order to obtain a certificate of authorization to transact business in the State, to file with the Secretary of State a copy of its charter and a statement setting forth the amounts of its authorized and issued capital stock, the character of the business to be transacted in the State, the place of the principal office within the State, and the name of a resident agent for the service of process.

[2] N. J. Stat. Ann. § 54:4–3.6 provides in pertinent part that the "exemptions shall apply only where the association, corporation or institution claiming the exemption owns the property in question and is incorporated or organized under the laws of this State and authorized to carry out the purposes on account of which the exemption is claimed."

By Chapter 24 of the Laws of 1967, N. J. Stat. Ann. § 54:4–3.6a was added. It provides an exemption for the following property: "All buildings and structures located in this State and used exclusively by a nonprofit association or corporation organized under the laws of this or another State for the production and broadcasting of educational television; the land whereon the buildings and struc-

91 N. J. Super. 269, 219 A. 2d 893. On appeal to the Supreme Court of New Jersey, the appellant argued for the first time that the statute denied it equal protection of the laws in violation of the Fourteenth Amendment to the Constitution by discriminating against it solely on the basis of its foreign incorporation. The Supreme Court noted that it had discretion not to consider a question not raised in the lower court, but nevertheless proceeded to decide the constitutional question because of its widespread importance. It concluded that the classification was not wholly irrational and sustained the denial of exemption.[3] 50 N. J. 6, 231 A. 2d 608. We noted probable jurisdiction to consider the constitutional question thus raised. 390 U. S. 979. Cf. *Raley* v. *Ohio,* 360 U. S. 423, 436.

This Court has consistently held that while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, "the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis." *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 571–572. See *Reserve Life Ins. Co.* v. *Bowers,* 380 U. S. 258; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494; *Southern R. Co.* v.

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tures are erected and which may be necessary for the fair enjoyment thereof, and which is devoted to the foregoing purpose, and no other purpose, and does not exceed 30 acres in extent; the furniture, equipment and personal property in said buildings and structures if used and devoted to the foregoing purpose." The amendment applies only "to taxes payable in 1968 and thereafter."

[3] Because it concluded that the appellant was not entitled to an exemption in any event, the New Jersey Supreme Court noted that it did not have to decide whether the failure of the appellant to comply with the normal procedure for claiming an exemption under N. J. Stat. Ann. § 54:4–4.4 should preclude it from asserting an exempt status.

Greene, 216 U. S. 400. Yet New Jersey has denied the appellant a tax exemption which it accords other nonprofit corporations solely because of the appellant's foreign incorporation. This is not a case in which the exemption was withheld by reason of the foreign corporation's failure or inability to benefit the State in the same measure as do domestic nonprofit corporations. Compare *Board of Education* v. *Illinois,* 203 U. S. 553. Nor have the appellees advanced any other distinction between this appellant and domestic nonprofit corporations which would justify the inequality of treatment.

The New Jersey Supreme Court concluded that the legislative purpose could reasonably have been to avoid the administrative burden which the taxing authorities would bear if they had to examine the laws of other jurisdictions in order to determine whether a corporation with nonprofit status under those laws would also satisfy New Jersey requirements. But this burden would exist only if a foreign corporation sought exemption in New Jersey on the basis of its nonprofit status at home. It is one thing for a State to avoid this extra burden by refusing to grant such an automatic exemption. It is quite another to deny a foreign corporation an opportunity equivalent to that of a domestic corporation to demonstrate that it meets the requirements for a nonprofit corporation under local law. Neither the New Jersey Supreme Court nor the appellees have suggested that there is any greater administrative burden in evaluating a foreign than a domestic corporation under New Jersey law. We must therefore conclude, as we did in *Wheeling,* that the appellant has not been "accorded equal treatment, and the inequality is not because of the slightest difference in [New Jersey's] relation to the decisive transaction, but solely because of the different residence of the owner." 337 U. S., at 572.

The judgment of the New Jersey Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BLACK dissents from the reversal of this case and would affirm it.

SMITH *v.* YEAGER, WARDEN.

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

No. 399. Decided November 12, 1968.

Following the Supreme Court of New Jersey's affirmance of petitioner's murder conviction, in 1961 petitioner sought a writ of habeas corpus in the District Court, asserting, among other grounds, that his confession had been coerced. Petitioner's then counsel, though asserting the right to an evidentiary hearing, relinquished it. Relying on the state trial record, the court held, *inter alia,* that the confession was not coerced and denied the petition. Thereafter *Townsend* v. *Sain,* 372 U. S. 293, was decided, which substantially increased the availability of evidentiary hearings in habeas corpus proceedings. The Court of Appeals affirmed. In 1965 petitioner again sought habeas corpus in the District Court and asked for an evidentiary hearing. Noting that the coercion issue had been adjudicated in the prior habeas corpus proceeding, the District Court, without conducting an evidentiary hearing, denied the application. The Court of Appeals affirmed, concluding that petitioner had waived his claim to such a hearing in 1961. *Held:*

1. The essential question in a subsequent habeas corpus proceeding (to which the usual principles of *res judicata* do not apply and regardless of waiver standards in other circumstances) is whether the petitioner in the prior proceeding "deliberately withheld the newly asserted ground or otherwise abused the writ."

2. Petitioner's failure to demand an evidentiary hearing in 1961 followed by such a demand after this Court decided *Townsend* v. *Sain,* constitutes no abuse of the writ of habeas corpus or a waiver of his claim to a hearing.

Certiorari granted; 395 F. 2d 245, reversed and remanded.

Edward Bennett Williams, Steven M. Umin, and *Stephen F. Lichtenstein* for petitioner.

PER CURIAM.

This petition for a writ of certiorari presents the question whether petitioner's relinquishment of an evidentiary

hearing in a federal habeas corpus proceeding taking place prior to *Townsend* v. *Sain,* 372 U. S. 293, bars him from obtaining such a hearing on a subsequent application made after *Townsend* was decided.

In 1957, petitioner was convicted of first-degree murder in a New Jersey court, and sentenced to death. The Supreme Court of New Jersey affirmed the conviction, *State* v. *Smith,* 27 N. J. 433, 142 A. 2d 890, and subsequently affirmed the denial of a motion for a new trial. *State* v. *Smith,* 29 N. J. 561, 150 A. 2d 769.

Petitioner thereafter sought a writ of habeas corpus in the United States District Court for the District of New Jersey. During oral argument before the District Court on June 5, 1961, petitioner's counsel, referring to the then recent decision in *Rogers* v. *Richmond,* 365 U. S. 534, stated:

> "The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here.
>
> "I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length." Appendix to Petition 69a.

The District Court did not conduct an evidentiary hearing. Relying on the state trial record, it denied the application, holding, *inter alia,* that petitioner's confession, introduced at his trial, was not the product of coercion. *United States ex rel. Smith* v. *New Jersey,* 201 F. Supp. 272. The Court of Appeals affirmed. 322 F. 2d 810.[1]

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[1] Petitioner has sought, and was denied, certiorari in this Court on three previous occasions—twice to the state courts, 361 U. S. 861; 379 U. S. 1005, once to the United States Court of Appeals in the

In 1965, petitioner again sought habeas corpus in the District Court, requesting an evidentiary hearing. As supplemented, the application alleged facts relevant to the admissibility of the confession which were not brought out at trial, and which, if proved, presented a stronger case that the confession was coerced.[2] The District Court denied the application without conducting an evidentiary hearing, noting that the issue of coercion had been adjudicated in the prior habeas proceeding. The Court of Appeals affirmed *per curiam,* Judge Biggs dissenting. Referring to the above-quoted statement by petitioner's counsel, and to some remarks of the District Court at an earlier stage of the 1961 proceeding,[3] the Court of Appeals concluded that petitioner had waived his claim to an evidentiary hearing in 1961. 395 F. 2d 245. Rehearing *en banc* was denied, Judge Freedman dissenting,[4] and this petition for certiorari followed.

We note initially that the usual principles of *res judicata* are inapplicable to successive habeas corpus pro-

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prior habeas corpus proceeding, 376 U. S. 928. It is worth noting that the present pleadings below substantially expand and clarify the claims heretofore presented by petitioner.

[2] The allegations, which include claims of physical harassment by the police, are set out in Judge Biggs' dissenting opinion below, 395 F. 2d 245, 253, n. 12.

[3] On May 15, 1961, during argument on the State's motion to strike petitioner's "Amended and/or Supplemental Petition," the District Court indicated its concern that the record be complete to the satisfaction of both parties. The Court of Appeals construed this as an offer to conduct an evidentiary hearing. No explicit mention of an evidentiary hearing was made, however. A reading of the entire colloquy in the District Court, though not unambiguous, suggests, as Judge Biggs noted in dissent below, that the discussion was concerned only with "the issue of whether or not the case would proceed upon the original petition for habeas corpus and answer, the supplemental petition for habeas corpus and answer, or on both sets of pleadings." 395 F. 2d 245, 249, n. 4.

[4] Judge Biggs did not participate.

ceedings.[5] *Salinger* v. *Loisel,* 265 U. S. 224; cf. *Sanders* v. *United States,* 373 U. S. 1. Whatever the standards for waiver may be in other circumstances, the essential question here is whether the petitioner "deliberately withheld the newly asserted ground" in the prior proceeding, or "otherwise abused the writ." 28 U. S. C. § 2244 (b) (1964 ed., Supp. III).

At the time of the 1961 proceeding, *Brown* v. *Allen,* 344 U. S. 443, indicated that a District Court's discretion to hold an evidentiary hearing was to be exercised only in "unusual circumstances," 344 U. S., at 463, or where a "vital flaw" existed in the state procedure. 344 U. S., at 506 (opinion of Mr. Justice Frankfurter). *Townsend* v. *Sain, supra,* had not yet been decided. This Court recognized in *Townsend* "that the opinions in *Brown* v. *Allen* . . . do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results," 372 U. S., at 310, and established criteria for the granting of evidentiary hearings "which must be considered to supersede, to the extent of any inconsistencies, the opinions in *Brown* v. *Allen* . . . ." 372 U. S., at 312. *Townsend* v. *Sain* substantially increased the availability of evidentiary hearings in habeas corpus proceedings, and made mandatory much of what had previously been within the broad discretion of the District Court. See also *Fay* v. *Noia,* 372 U. S. 391.

It is at least doubtful whether petitioner could have obtained an evidentiary hearing as the law stood in 1961. Indeed, at the time, the State argued to the District Court with some cogency that petitioner presented "no unusual circumstances calling for a hearing." We do not believe that petitioner should be placed in a worse position be-

[5] For this reason, if no other, the fact that *Townsend* v. *Sain* was decided before the Court of Appeals' decision in the first proceeding, and considered by the Court of Appeals there in denying rehearing *en banc,* is not dispositive of the present case.

cause his then counsel asserted that he had a right to an evidentiary hearing and then relinquished it. Whatever counsel's reasons for this obscure gesture of *noblesse oblige*,[6] we cannot now examine the state of his mind, or presume that he intentionally relinquished a known right or privilege, *Johnson* v. *Zerbst*, 304 U. S. 458, 464, when the right or privilege was of doubtful existence at the time of the supposed waiver. In short, we conclude that petitioner's failure to demand an evidentiary hearing in 1961, followed by such a demand after the decision in *Townsend* v. *Sain, supra,* constitutes no abuse of the writ of habeas corpus.

"If, for any reason not attributable to the inexcusable neglect of petitioner . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled." *Townsend* v. *Sain, supra,* at 317. Petitioner's assertion that he comes within this principle is not controverted by respondent or by the record below. We do not, however, pass on this question, or on the other questions presented in the petition. These, as well as other issues appropriately raised below, may be considered by the District Court. We hold only that petitioner has not, by reason of anything that occurred during the 1961 habeas proceeding, waived his claim to an evidentiary hearing in the District Court.

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

It is so ordered.

MR. JUSTICE WHITE dissents and would grant certiorari and set the case for oral argument.

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[6] As the State pointed out during the 1961 hearing, *Rogers* v. *Richmond, supra,* the case chiefly relied on by petitioner, does not appear to support his claim to an evidentiary hearing. See especially 365 U. S., at 547.

ATLANTIC OCEAN PRODUCTS, INC., ET AL. *v.* LETH, DIRECTOR, DEPARTMENT OF AGRICULTURE OF OREGON, ET AL.

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

No. 417. Decided November 12, 1968.

292 F. Supp. 615, affirmed.

Thomas H. Tongue for appellants.

Robert Y. Thornton, Attorney General of Oregon, and *Harold E. Burke,* Assistant Attorney General, for appellees.

PER CURIAM.

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

DOOLIN, DBA NATIONAL NOVELTY CO., ET AL. *v.* KORSHAK, DIRECTOR OF REVENUE, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 439. Decided November 12, 1968.

39 Ill. 2d 521, 236 N. E. 2d 897, appeal dismissed.

Owen Rall for appellants.

William G. Clark, Attorney General of Illinois, and *John J. O'Toole,* Assistant Attorney General, for appellees.

PER CURIAM.

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

CROSS ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 533, Misc. Decided November 12, 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.

Syllabus.

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL.

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

No. 16. Argued October 22, 1968.—Decided November 18, 1968.*

Appellees, a group of interstate railroads operating in Arkansas, sought declaratory and injunctive relief in the District Court, claiming, *inter alia,* that Arkansas' "full-crew" laws violate the Commerce Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The full-crew laws require minimum train crews for certain conditions of railroad operation in the State but, through mileage classification, have the effect of exempting the State's intrastate railroads from those requirements. The laws were enacted in 1907 and 1913 to further railroad safety and, though several times subsequently re-evaluated, have been retained for that purpose. Conflicting evidence was given to support the railroads' claims that full-crew requirements merely facilitate featherbedding and appellants' claims that such requirements promote safety. Though earlier decisions of this Court upheld the statutes against constitutional challenge, the District Court concluded that conditions have changed and that the full-crew laws now impermissibly burden interstate commerce. The court also held that the full-crew laws are "unreasonable and oppressive," and thus violate the Due Process Clause of the Fourteenth Amendment. The court did not reach appellees' contention that the laws discriminate against interstate commerce in favor of intrastate commerce in violation of the Commerce and Equal Protection Clauses. *Held:*

1. Whether full-crew laws are necessary to further railroad safety is a matter for legislative determination. In the circumstances of this case the District Court erred in rejecting the legislative judgment that such laws promote railroad safety and that

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*Together with No. 18, *Hardin, Prosecuting Attorney, et al.* v. *Chicago, Rock Island & Pacific Railroad Co. et al.,* on appeal from the same court.

the cost of additional crewmen is justified by the safety such laws might achieve. Pp. 136–140.

2. The mileage classification of the Arkansas laws is permissible under the Commerce and Equal Protection Clauses. Pp. 140–142.

3. The full-crew laws do not violate the Equal Protection Clause by singling out railroads from other forms of transportation, and appellees' contention that the statutes are "unduly oppressive" under the Due Process Clause affords no basis for their invalidation apart from any effect on interstate commerce. Pp. 142–143.

274 F. Supp. 294, reversed and remanded.

James E. Youngdahl argued the cause for appellants in No. 16. *Leslie Evitts,* Chief Assistant Attorney General of Arkansas, argued the cause for appellants in No. 18. With them on the briefs were *Joe Purcell,* Attorney General of Arkansas, *Robert D. Ross,* and *John P. Sizemore.*

Robert V. Light and *Martin M. Lucente* argued the cause for appellees in both cases. With them on the brief were *W. J. Smith, H. H. Friday,* and *R. W. Yost.*

MR. JUSTICE BLACK delivered the opinion of the Court.

These cases raise the question whether the Arkansas "full-crew" laws, specifying a minimum number of employees who must serve as part of a train crew under certain circumstances, violate the Commerce Clause or the Fourteenth Amendment. The constitutionality of these Arkansas laws has been specifically upheld against challenges under the same constitutional provisions in three decisions of this Court, in 1911, in 1916, and again in 1931.[1] In the present cases, however, the District Court found that as a result of economic and technical

[1] *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453 (1911); *St. L., I. M. & S. R. Co.* v. *Arkansas,* 240 U. S. 518 (1916); *Missouri Pac. R. Co.* v. *Norwood,* 283 U. S. 249 (1931), 290 U. S. 600 (1933). The Court's holdings in these cases were also reaffirmed, in dictum, in *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 782 (1945).

developments since our last decision on this subject, the statutes were no longer justified as safety measures, the ground on which they had formerly been sustained, and struck them down as contrary to the Commerce Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment. 274 F. Supp. 294 (D. C. W. D. Ark. 1967). We noted probable jurisdiction, 390 U. S. 941 (1968). We disagree with the District Court's holding that the railroads have shown a change in circumstances sufficient to justify departure from our three previous decisions. We therefore reaffirm those cases and reverse the judgment of the District Court.

The first of the two statutes challenged here was enacted in 1907, and this law makes it an offense for a railroad operating a line of more than 50 miles to haul a freight train consisting of more than 25 cars, unless the train has a crew of not "less than an engineer, a fireman, a conductor and three [3] brakemen . . . ." [2] The second statute, enacted in 1913, makes it an offense for any railroad with a line of 100 miles or more to engage in switching operations in cities of designated populations, with "less than one [1] engineer, a fireman, a foreman and three [3] helpers . . . ." [3] These two statutes, the constitutionality of which this Court previously upheld, are precisely the statutes here challenged and struck down.

This latest attack on these Arkansas laws was commenced by a group of interstate railroads operating in Arkansas which asked the United States District Court to declare the statutes unconstitutional and enjoin two Arkansas prosecuting attorneys, appellants here, from enforcing them. The railroad brotherhoods, also appel-

[2] Ark. Laws 1907, Act 116, Ark. Stat. Ann. §§ 73–720 through 73–722 (1957 Repl. Vol.).

[3] Ark. Laws 1913, Act 67, Ark. Stat. Ann. §§ 73–726 through 73–729 (1957 Repl. Vol.).

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lants here, were allowed to intervene in the District Court in order to defend the validity of the state statutes. In their complaint appellees charged that both statutes (1) operate in an "arbitrary, capricious, discriminatory and unreasonable" manner in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) unduly interfere with, burden, and needlessly increase the cost of interstate transportation in violation of the Commerce Clause, Art. I, § 8, cl. 3, of the Constitution, and contrary to the National Transportation Policy expressed in the Interstate Commerce Act; (3) discriminate against interstate commerce in favor of local or intrastate commerce; and (4) invade a field of federal legislation pre-empted by the Federal Government primarily through Pub. L. 88–108, passed by Congress in 1963 [4] to avert a nationwide railroad strike.

In its first opinion in these cases, the District Court granted the railroads' motion for summary judgment, holding that the field of full-crew legislation was pre-empted by Pub. L. 88–108, 239 F. Supp. 1 (D. C. W. D. Ark. 1965), but we reversed on the pre-emption question, *sub nom. Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423 (1966). We also held that the railroads were not entitled to summary judgment on their alternative theory that because the effect of the mileage exemption in the two Acts is to free all of the State's intrastate railroads from the full-crew requirements while ensuring coverage of most of the interstate railroads, the two Acts "constitute discriminatory legislation against interstate commerce in favor of intrastate commerce." *Id.*, at 437–438. On remand the District Court held an evidentiary hearing and, after compiling a voluminous record, found that the full-crew requirements had "no substantial effect on safety of operations," placed "substantial financial burdens" upon the carriers, and caused

[4] 77 Stat. 132, 45 U. S. C. following § 157.

"some delays" and interference with the continuity of railroad operations. On the basis of these findings the District Court held the Arkansas laws unconstitutional as impermissible burdens on interstate commerce and also ruled that because the laws were "unreasonable and oppressive" they violated the Due Process Clause of the Fourteenth Amendment. The court did not reach the railroads' further argument that the Arkansas laws discriminate against interstate commerce in favor of intrastate commerce in violation of the Commerce and Equal Protection Clauses. Appellants challenge both the accuracy of the District Court's findings and holdings and their relevance to adjudication of the constitutional issues presented. They ask us to hold that the Arkansas laws do not impermissibly burden interstate commerce or otherwise violate any provision of the Constitution.

I.

The question of crew size has been a subject of dispute between the railroads and their employees for more than half a century. Much of the controversy has of course been fought out by collective bargaining between the railroads and the unions.[5] In many States attempts have been made to settle the controversy by legislation. The Arkansas statutes before us were passed in 1907 and 1913, along with a number of other laws designed to further railroad safety, such as headlight standards, regulations concerning the obstruction of train crossings, and so on.[6] Many other States have also passed full-crew laws as parts of detailed codes regulating railroad safety.[7]

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[5] The long and troublesome history of this aspect of the dispute is briefly summarized in our prior opinion in these cases, 382 U. S., at 430–432.

[6] See, *e. g.*, Ark. Stat. Ann. §§ 73–704 through 73–706; 73–718, 73–719 (1957 Repl. Vol.).

[7] The approach taken in other States is summarized in the opinion of the District Court in these cases, 274 F. Supp., at 299.

These safety codes, and the full-crew provisions in particular, have been subject to continual re-evaluation throughout the country. In New York, for example, the Public Service Commission in 1960 recommended total repeal of the State's full-crew legislation, and in 1966 two of the three New York laws in the field were repealed, but the legislature explicitly rejected a proposal to repeal the third law, which requires both a fireman and an engineer to be on duty in the engine cab, in addition to the brakeman who serves in the cab on freight hauls.[8] In Arkansas the railroad safety laws have similarly been subject to close scrutiny. Additional safety requirements have been added from time to time,[9] and some safety requirements considered out of date have been repealed.[10] With respect to the full-crew statutes specifically, a proposal to repeal these statutes was placed on the ballot for popular referendum in 1958 and was decisively defeated by the voters. Congress too has been concerned with the problem of the rules governing crew size and in 1963 passed a statute referring the dispute between the railroads and the unions to arbitration, but as we held in our prior decision, Congress was aware of state full-crew laws and did not intend to override them. 382 U. S., at 429–437.

In spite of this background of frequent and recent legislative re-evaluation of the full-crew problem, both at the state and national levels, the railroads now ask us to determine as a judicial matter that these laws no longer make a significant contribution to safety and so

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[8] See *New York Central R. Co.* v. *Lefkowitz*, 23 N. Y. 2d 1, 241 N. E. 2d 730 (1968).

[9] *E. g.*, Ark. Laws 1951, Act 253, Ark. Stat. Ann. § 73–740 (1957 Repl. Vol.); Ark. Laws 1953, Act 130, Ark. Stat. Ann. §§ 73–741 through 73–744 (1957 Repl. Vol.).

[10] *E. g.*, Ark. Laws 1965, Act 501, Ark. Stat. Ann. § 73–730 (Supp. 1967).

seriously burden the railroads in their operations that they should no longer stand under the Commerce Clause. The essence of the railroads' position is that the requirement of additional crewmen amounts to nothing more than featherbedding. They claim that the firemen once needed to tend the furnaces on steam locomotives are not necessary on the diesel engines now generally in use. Although the railroads recognize that the fireman performs a valuable lookout function on passenger trains, where he and the engineer are the only crewmen in the engine cab, they assert that in both freight hauling operations and yard switching operations other railroad employees are available to provide an adequate lookout and assist the engineer in correcting mechanical problems and performing other miscellaneous duties. The railroads thus maintain that the firemen, and some of the other required crewmen, perform no useful function and make no significant contribution to safety. At the same time, the railroads contend, the full-crew requirements substantially increase their cost of operation, hampering their ability to improve railroad service and to compete with other modes of transportation, and also burden commerce by requiring interstate trains passing through Arkansas to slow down or stop at the border to pick up and let off the extra crewmen.

The State of Arkansas and the railroad brotherhoods, all appellants here, take a different view of the functions performed by the firemen and other additional crewmen required under the statutes. They claim that the work performed by these employees—serving as lookout, passing signals, relieving the engineer in emergencies, inspecting the engine and other cars, and helping to make needed adjustments and repairs while the train is moving—is still necessary and cannot be performed by other employees without unduly burdening them and interfering with the proper performance of their other tasks. Ap-

pellants argue that although some technological improvements have tended to eliminate safety hazards and lighten the work of the train crew, other developments, such as the increased size and speed of trains, the heavier automobile traffic over train crossings, and the competitive pressures for faster switching of trains, have had exactly the opposite effect.

The District Court analyzed these conflicting contentions and the conflicting evidence adduced to support them and concluded that the full-crew requirements have "no substantial effect on safety of operations." The court also said that even if these requirements did add "some increment of safety to the operation, we think that such an increment is negligible . . . and not worth the cost." As additional factors justifying its conclusion that the laws created an unconstitutional burden on interstate commerce, the court emphasized "the financial burden of compliance, which is out of all proportion to the benefit, if any, derived, and the added burden involved in the taking on and discharging men at or near the Arkansas State line . . . ."

We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause. The evidence as to the need for firemen and other additional crewmen was certainly conflicting and to a considerable extent inconclusive. Many railroad employees gave direct testimony as to incidents in which, for example, the presence of a fireman as a lookout helped avert a serious accident. With respect to statistical evidence, the District Court itself noted: "The statistical evidence as to the effect upon safety of the reductions in force authorized by the basic award and by the awards of the special adjustment boards [under the 1963 arbitration] is not entirely satisfactory either way . . . ." Indeed, as the

court below recognized, the statistics showed that railroad accidents had actually increased during the period from 1964–1966, when the size of train crews was being reduced.[11]

It would hardly be possible to summarize here all the other evidence in the record relevant to the safety question, and, as we have indicated, it is wholly unnecessary to do so. A brief summary of some of the findings of Arbitration Board No. 282, the panel set up pursuant to Pub. L. 88–108, should suffice to show that the question of safety is clearly one for legislative determination. In quoting from this report, of course, we in no way intend to indicate that the District Court should have accepted any of its specific conclusions or that this evidence was necessarily any more persuasive than any of the many other sources of information about the problem. We single it out only because it is one of the more recent reports and because it was heavily relied upon by the District Court and by the railroads themselves. The Board stated as its very first finding:

> "1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work."

The Board then went on to deal specifically with the various functions for which firemen were claimed to be necessary. It concluded that firemen were not necessary to perform the lookout function in "the great majority of cases" and that they were not needed to perform cer-

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[11] The District Court dealt with this fact by simply stating that this trend had been observed in years preceding the effective date of the arbitration award and concluding: "Why accident rates have been increasing we do not know with certainty, but it would be pure speculation to say that crew size has had anything to do with it."

tain mechanical duties. The Board also held, however, that in order to insure relief of an engineer who becomes incapacitated while operating the train, firemen were clearly necessary in yard service on engines that were not equipped with a fully operative dead-man control, and the record before us in the present cases indicates that a substantial percentage of the engines operated in Arkansas are not equipped with this device. Although the Board thus thought that firemen could be eliminated in most cases, the Board emphasized:

> "[W]e are satisfied that a certain number of such assignments require the continued employment of firemen in order to prevent excessive safety hazard to lives and property, to avoid imposing an undue burden upon the remaining crew members, and to assure adequate and safe transportation service to the public."

Finally, and most significant, the Board itself stressed in conclusion the subjective nature of its findings with reference to safety:

> "Safety is, of course, essentially a relative concept; once adequate minimum standards have been achieved, the decision as to how much more safety is required must necessarily be governed by all the accompanying circumstances. Railroading is, unfortunately, a hazardous occupation, and the problem before us cannot be viewed simply in terms of preventing or not preventing accidents."

This summary, taken from evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives. The District Court's re-

sponsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation."

Of the other matters relied upon by the District Court, the problem of delay at the state borders apparently has not changed appreciably since the days of this Court's earliest full-crew decisions, and this Court's statement of the insignificance of the problem in *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 782 (1945), is equally valid today:

> "While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency . . . ."

Nor was it open to the District Court to place a value on the additional safety in terms of dollars and cents, in order to see whether this value, as calculated by the court, exceeded the financial cost to the railroads.[12] As we said

[12] The record contains no meaningful estimate of what this cost actually is. The railroads computed the total wages paid per year to the allegedly unnecessary employees and claimed that this total figure, $7,600,000, represents the cost of compliance. But it was admitted that the net cost is actually lower than this because elimination of the additional crewmen would create new expenses, such as the special compensatory allowance paid to engineers who operate without the assistance of a fireman, additional overtime pay, and other costs associated with somewhat slower operations in terminals

in *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520 (1959), where the District Court had struck down an Illinois law requiring trucks to be equipped with contour mudguards, on the ground that the equipment had no safety advantages and was very costly to install and maintain:

> "Cost taken into consideration with other factors might be relevant in some cases to the issue of burden on commerce. But it has assumed no such proportions here. If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law under the authority of the *Sproles* [286 U. S. 374 (1932)], *Barnwell* [303 U. S. 177 (1938)], and *Maurer* [309 U. S. 598 (1940)] cases. The same result would obtain if we had to resolve the much discussed issues of safety presented in this case." *Id.,* at 526.[13]

It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways. We certainly cannot do so on this showing.

II.

We deal next with the contention that because of the mileage exemption, the full-crew laws discriminate against interstate commerce in favor of intrastate commerce. This contention, like the railroads' other claims,

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and en route. The railroads introduced no evidence to indicate the approximate amount of such new expenses, and we have no way of knowing whether, as appellants claim, these expenses would to a substantial extent offset the wage savings associated with the reduction in crew sizes.

[13] Although we struck down the Illinois law in *Bibb,* we did so on the carefully limited basis that the contour mudguard requirement flatly conflicted with laws, enforced in at least one other State, that trucks must be equipped with straight mudguards.

was of course specifically rejected in this Court's earlier decisions dealing with these same Arkansas statutes. We noted in our prior opinion in the present cases that the effect of the mileage exemptions was to free all of the State's 17 intrastate railroads from the coverage of the Acts, while 10 of the 11 interstate railroads are subject to the 1907 Act, and eight of them are subject to the 1913 Act. We went on to say, however, that the difference in treatment based on differing track mileage might have a rational basis, and we therefore held that the mileage classification could not, "on the record now before us," be considered a discrimination in violation of the Commerce and Equal Protection Clauses. 382 U. S., at 437.

Despite the extensive testimony and exhibits added to the record since our previous consideration of these cases, we have found no basis for altering our conclusion that the mileage classification is permissible. The railroads argue that the extra men, if needed at all, are equally necessary on all trains, regardless of whether the company operating them happens to own a more or a less extensive system of track. But evidence in the record establishes a number of legitimate reasons for the mileage exemption. In the case of at least one of the short-line roads, the maximum speed for trains running over its main track is 35 miles per hour, while trains moving over the longer lines have speed limits of 65 and in some cases 75 miles per hour. The apparent use of much slower trains over the short lines certainly provides a basis upon which the Arkansas Legislature could conclude that the hazards encountered in line-haul operations are less serious, and accordingly that the need for regulation is less pressing, on the short lines. Similarly in connection with the switching operations, there was evidence that the usefulness of additional employees depends to some extent on the length of the train being switched,

another factor that—like speed—tends to vary according to the railroad's total trackage. Finally, the legislature could also conclude that the smaller railroads would be less able to bear the cost of additional crewmen, even though the total additional cost would of course tend to be smaller in the case of the smaller companies.

Although the railroads claim that other criteria could provide a more precise test of the situations where a larger crew is desirable, these other standards have inadequacies of their own, and are for the most part far too vague to provide a basis for a statutory classification. And in any event the courts may not force a state legislature to attain scientific perfection in determining the coverage of statutes of this type. As we stressed in the *Bibb* case, 359 U. S., at 524:

> "These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field."

Mileage classifications have repeatedly been upheld on this basis, not only in this Court's previous decisions dealing with these very statutes but in many other cases involving similar problems. See, *e. g., New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628 (1897). Nothing suggests that full-crew laws should now be treated differently.

III.

There remains for consideration only the railroads' contention that the Arkansas laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Little need be said of the claim that the statutes violate the Equal Protection Clause for the reason that they discriminate against the railroad industry

by singling it out for regulation and making no provision for minimum crews on "motor buses, taxicabs, airplanes, barges, cargo trucks, or any other segment of the transportation industry." The statutes as written, requiring, for example, not "less than an engineer, a fireman, a conductor and three [3] brakemen," could scarcely be extended in their present terms to such means of transportation as taxicabs or airplanes. Nor was the legislature, in attempting to deal with the safety problems in one industry, required to investigate the various differing hazards encountered in all competing industries and then to enact additional legislation to meet these distinct problems.

The railroads also argue that the statutes violate the Due Process Clause because they are "unduly oppressive" and impose costs on the regulated industry that exceed the public benefits of the regulation. The District Court agreed with this position, holding that the impact of the full-crew laws today is "unreasonable and oppressive" and therefore a violation of due process. Insofar as these arguments seek to present an independent basis for invalidating the laws, apart from any effect on interstate commerce, we think, with all due deference to appellees and the District Court, that these contentions require no further consideration. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955); *Olsen* v. *Nebraska,* 313 U. S. 236 (1941); *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937); *Nebbia* v. *New York,* 291 U. S. 502 (1934).

IV.

Under all the circumstances we see no reason to depart from this Court's previous decisions holding that the Arkansas full-crew laws do not unduly burden interstate commerce or otherwise violate the Constitution. Undoubtedly heated disputes will continue as to the extent

to which these laws contribute to safety and other public interests, and the extent to which such contributions are justified by the cost of the additional manpower. These disputes will continue to be worked out in the legislatures and in various forms of collective bargaining between management and the unions. As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry. The judgment of the District Court is reversed, and the cases are remanded to that court with instructions to dismiss the complaint.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, dissenting.

I would agree with the Court that if the constitutionality of these Arkansas laws were to be judged as safety measures under the State's police power, they would have to be sustained. But as I indicated in my dissent in *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423, 438, Congress in enacting Pub. L. 88–108, 77 Stat. 132, undertook to displace state "full-crew" laws by delegating power to a national arbitration board to determine, for example, the necessity of firemen on diesel freights and the minimum size of train and switching crews.

I would, therefore, remand the cases to the District Court for further proceedings consistent with Pub. L. 88–108 and the awards that have been made under it.

COMMONWEALTH COATINGS CORP. *v.* CONTINENTAL CASUALTY CO. ET AL.

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

No. 14. Argued October 22, 1968.—Decided November 18, 1968.

Petitioner, a subcontractor, sued the sureties on the prime contractor's bond to recover money allegedly due for a painting job. Pursuant to the arbitration provision in the contract, petitioner appointed an arbitrator, the prime contractor appointed another, and these two appointed a third. The third arbitrator was an engineering consultant whose services were used sporadically by the prime contractor, resulting in fees of about $12,000 over a period of four to five years. Petitioner challenges the arbitration award on the ground that this close business connection was not revealed until after the award was made. The Court of Appeals affirmed the District Court's refusal to set aside the award. *Held:* Arbitrators should disclose to the parties any dealings which might create an impression of possible bias, and since the business connection between the arbitrator and the prime contractor was not disclosed here, the award can be vacated under § 10 of the United States Arbitration Act, which authorizes vacation of an award "procured by . . . undue means" or "where there was evident partiality . . . in the arbitrators." Pp. 146–150.

382 F. 2d 1010, reversed.

Emanuel Harris argued the cause for petitioner. With him on the briefs was *Max E. Greenberg.*

Overton A. Currie argued the cause for respondents. With him on the briefs were *Luther P. House, Jr., Federico Ramirez Ros,* and *Edward H. Wasson, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration.

The petitioner, Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. The contract for painting contained an agreement to arbitrate such controversies. Pursuant to this agreement petitioner appointed one arbitrator, the prime contractor appointed a second, and these two together selected the third arbitrator. This third arbitrator, the supposedly neutral member of the panel, conducted a large business in Puerto Rico, in which he served as an engineering consultant for various people in connection with building construction projects. One of his regular customers in this business was the prime contractor that petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit. An arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made. Petitioner challenged the award on this ground, among others, but the District Court refused to set aside the award. The Court of Appeals affirmed, 382 F. 2d 1010 (C. A. 1st Cir. 1967), and we granted certiorari, 390 U. S. 979 (1968).

In 1925 Congress enacted the United States Arbitration Act, 9 U. S. C. §§ 1–14, which sets out a comprehen-

sive plan for arbitration of controversies coming under its terms, and both sides here assume that this Federal Act governs this case. Section 10, quoted below, sets out the conditions upon which awards can be vacated.[1] The two courts below held, however, that § 10 could not be construed in such a way as to justify vacating the award in this case. We disagree and reverse. Section 10 does authorize vacation of an award where it was "procured by corruption, fraud, or undue means" or "[w]here there was evident partiality . . . in the arbitrators." These provisions show a desire of Congress to provide not merely for *any* arbitration but for an impartial one. It is true that petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives. But neither this arbitrator nor the prime contractor gave to petitioner even an

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[1] "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

"(a) Where the award was procured by corruption, fraud, or undue means.

"(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

"(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

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intimation of the close financial relations that had existed between them for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. This is shown beyond doubt by *Tumey* v. *Ohio,* 273 U. S. 510 (1927), where this Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. Although in *Tumey* it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. Nor should it be at all relevant, as the Court of Appeals apparently thought it was here, that "[t]he payments received were a very small part of [the arbitrator's] income . . . ." [2] For in *Tumey* the Court held that a decision should be set aside where there is "the slightest pecuniary interest" on the part of the judge, and specifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . ." [3] Since in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of "evident partiality" or the use of "undue means." See also *Rogers* v. *Schering Corp.,* 165 F. Supp. 295, 301 (D. C. N. J. 1958). It is true that arbitrators cannot sever all their ties with the business world, since

[2] 382 F. 2d, at 1011.

[3] 273 U. S., at 524.

they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

While not controlling in this case, § 18 of the Rules of the American Arbitration Association, in effect at the time of this arbitration, is highly significant. It provided as follows:

> "Section 18. Disclosure by Arbitrator of Disqualification—At the time of receiving his notice of appointment, the prospective Arbitrator is requested to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the Tribunal Clerk shall immediately disclose it to the parties, who if willing to proceed under the circumstances disclosed, shall, in writing, so advise the Tribunal Clerk. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of this Rule."

And based on the same principle as this Arbitration Association rule is that part of the 33d Canon of Judicial Ethics which provides:

> "33. Social Relations.
>
> ". . . [A judge] should, however, in pending or prospective litigation before him be particularly

careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct."

This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Reversed.

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

While I am glad to join my Brother BLACK's opinion in this case, I desire to make these additional remarks. The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. Cf. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party.* But if the law requires the disclosure, no such imputation can arise. And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm

*In fact, the District Court found—on the basis of the record and petitioner's admissions—that the arbitrator in this case was entirely fair and impartial. I do not read the majority opinion as questioning this finding in any way.

which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.

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

I dissent and would affirm the judgment.

The facts in this case do not lend themselves to the Court's ruling. The Court sets aside the arbitration award despite the fact that the award is unanimous and no claim is made of actual partiality, unfairness, bias, or fraud.

The arbitration was held pursuant to provisions in the contracts between the parties. It is not subject to the rules of the American Arbitration Association. It is governed by the United States Arbitration Act, 9 U. S. C. §§ 1–14.

Each party appointed an arbitrator and the third arbitrator was chosen by those two. The controversy relates to the third arbitrator.

The third arbitrator was not asked about business connections with either party. Petitioner's complaint is that he failed to volunteer information about professional services rendered by him to the other party to the contract, the most recent of which were performed over a year before the arbitration. Both courts below held, and petitioner concedes, that the third arbitrator was innocent of any actual partiality, or bias, or improper motive. There is no suggestion of concealment as distinguished from the innocent failure to volunteer information.

The third arbitrator is a leading and respected consulting engineer who has performed services for "most

of the contractors in Puerto Rico." He was well known to petitioner's counsel and they were personal friends. Petitioner's counsel candidly admitted that if he had been told about the arbitrator's prior relationship "I don't think I would have objected because I know Mr. Capacete [the arbitrator]."

Clearly, the District Judge's conclusion, affirmed by the Court of Appeals for the First Circuit, was correct, that "the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them, and that plaintiff's objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' "

The Court nevertheless orders that the arbitration award be set aside. It uses this singularly inappropriate case to announce a *per se* rule that in my judgment has no basis in the applicable statute or jurisprudential principles: that, regardless of the agreement between the parties, if an arbitrator has any prior business relationship with one of the parties of which he fails to inform the other party, however innocently, the arbitration award is always subject to being set aside. This is so even where the award is unanimous; where there is no suggestion that the nondisclosure indicates partiality or bias; and where it is conceded that there was in fact no irregularity, unfairness, bias, or partiality. Until the decision today, it has not been the law that an arbitrator's failure to disclose a prior business relationship with one of the parties will compel the setting aside of an arbitration award regardless of the circumstances.[1]

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[1] See *Firemen's Fund Ins. Co.* v. *Flint Hosiery Mills*, 74 F. 2d 533 (C. A. 4th Cir. 1935); *Texas Eastern Transmission Corp.* v. *Barnard*, 177 F. Supp. 123, 128–129 (D. C. E. D. Ky. 1959), rev'd on other grounds, 285 F. 2d 536 (C. A. 6th Cir. 1960); *Ilios Shipping*

I agree that failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias. But where there is no suggestion that the nondisclosure was calculated, and where the complaining party disclaims any imputation of partiality, bias, or misconduct, the presumption clearly is overcome.[2]

I do not believe that it is either necessary, appropriate, or permissible to rule, as the Court does, that, regardless of the facts, innocent failure to volunteer information constitutes the "evident partiality" necessary under § 10 (b) of the Arbitration Act to set aside an award. "Evident partiality" means what it says: conduct—or at least an attitude or disposition—by the arbitrator favoring one party rather than the other. This case demonstrates that to rule otherwise may be a palpable injustice, since all agree that the arbitrator was innocent of either "evident partiality" or anything approaching it.

Arbitration is essentially consensual and practical. The United States Arbitration Act is obviously designed to protect the integrity of the process with a minimum

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& Trading Corp. v. *American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698, 700 (D. C. S. D. N. Y.), aff'd, 245 F. 2d 873 (1957); *Cross Properties, Inc.* v. *Gimbel Bros.*, 15 App. Div. 2d 913, 225 N. Y. S. 2d 1014, aff'd, 12 N. Y. 2d 806, 187 N. E. 2d 129 (1962). Cf. *Isbrandtsen Tankers, Inc.* v. *National Marine Engineers' Beneficial Assn.*, 236 N. Y. S. 2d 808, 811 (1962).

[2] At the time of the contract and the arbitration herein, § 18 of the Rules of the American Arbitration Association, which the Court quotes, was phrased merely in terms of a "request" that the arbitrator "disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator." In 1964, the rule was changed to provide that "the prospective neutral Arbitrator *shall* disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator." (Emphasis supplied.)

of insistence upon set formulae and rules.[3] The Court applies to this process rules applicable to judges and not to a system characterized by dealing on faith and reputation for reliability. Such formalism is not contemplated by the Act nor is it warranted in a case where no claim is made of partiality, of unfairness, or of misconduct in any degree.

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[3] The reports on the Act make this purpose clear. H. R. Rep. No. 96, 68th Cong., 1st Sess., 1–2; S. Rep. No. 536, 68th Cong., 1st Sess., 3. Cf. *Wilko* v. *Swan,* 346 U. S. 427, 431 (1953).

GRUNENTHAL *v.* LONG ISLAND RAIL ROAD CO.

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

No. 35. Argued October 24, 1968.—Decided November 18, 1968.

Petitioner was awarded a jury verdict of $305,000 in damages in an action for a severe foot injury which he brought under the Federal Employers' Liability Act. Having concluded that the relevant evidence weighed heavily in favor of the jury's award, the trial court denied respondent railroad's motion to set the award aside as excessive. On the railroad's appeal the Court of Appeals, in accordance with *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, limited its inquiry to determining whether the trial judge abused his discretion in denying the railroad's motion. The court made no detailed appraisal of the evidence bearing on damages but found an abuse of discretion and ordered the District Court to grant the railroad a new trial unless petitioner agreed to remit $105,000 of the award. *Held:* This Court makes its own independent appraisal, and concludes that there was no abuse of the trial court's discretion in allowing the award to stand. Pp. 159–162.

388 F. 2d 480, reversed and remanded.

Milford J. Meyer argued the cause for petitioner. With him on the briefs was *Irving Younger*.

Daniel M. Gribbon argued the cause for respondent. On the brief was *Paul F. McArdle*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was working for respondent as foreman of a track gang when a 300-pound railroad tie being lifted by the gang fell and severely crushed his right foot. He sued respondent for damages under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, and a jury in the District Court for the

Southern District of New York awarded him $305,000.[1] The trial judge denied the railroad's motion to set the award aside as excessive. The railroad appealed the denial to the Court of Appeals for the Second Circuit, and that court, one judge dissenting, ordered the District Court to grant the railroad a new trial unless the petitioner would agree to remit $105,000 of the award. 388 F. 2d 480 (1968). We granted certiorari, 391 U. S. 902 (1968).[2] We reverse.

Petitioner argues that the Court of Appeals exceeded its appellate powers in reviewing the denial of the railroad's motion, either because such review is constitutionally precluded by the provision of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," [3] or

[1] Petitioner's complaint sought damages of $250,000. This was amended with leave of the trial judge to $305,000 after the jury returned its verdict in that amount.

[2] The Court of Appeals rejected the railroad's grounds of appeal addressed to liability and to the dismissal of a third-party claim of the railroad against the contracting company which furnished a boom truck used by the track gang. None of those questions was brought here.

[3] All 11 courts of appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive. *Boyle* v. *Bond,* 88 U. S. App. D. C. 178, 187 F. 2d 362 (1951); *Compania Trasatlantica Espanola, S. A.* v. *Melendez Torres,* 358 F. 2d 209 (C. A. 1st Cir. 1966); *Dagnello* v. *Long Island R. Co.,* 289 F. 2d 797 (C. A. 2d Cir. 1961); *Russell* v. *Monongahela R. Co.,* 262 F. 2d 349, 352 (C. A. 3d Cir. 1958); *Virginian R. Co.* v. *Armentrout,* 166 F. 2d 400 (C. A. 4th Cir. 1948); *Glazer* v. *Glazer,* 374 F. 2d 390 (C. A. 5th Cir. 1967); *Gault* v. *Poor Sisters of St. Frances,* 375 F. 2d 539, 547–548 (C. A. 6th Cir. 1967); *Bucher* v. *Krause,* 200 F. 2d 576, 586–587 (C. A. 7th Cir. 1952); *Bankers Life & Cas. Co.* v. *Kirtley,* 307 F. 2d 418 (C. A. 8th Cir. 1962); *Covey Gas & Oil Co.* v. *Checketts,* 187 F. 2d 561 (C. A. 9th Cir. 1951); *Barnes* v. *Smith,* 305 F. 2d 226, 228 (C. A. 10th Cir. 1962).

because such review is prohibited by the Federal Employers' Liability Act itself. We have no occasion in this case to consider that argument, for assuming, without deciding, that the Court of Appeals was empowered to review the denial and invoked the correct standard of review, the action of the trial judge, as we view the evidence, should not have been disturbed. See *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955).

The trial judge filed an unreported opinion.* He considered that in deciding the railroad's motion he "must indulge . . . in a fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced." He concluded that the motion should be denied because, applying that standard, the relevant evidence weighed heavily in favor of the jury's assessment. His instructions to the jury had limited the items of damages to wages lost before trial, compensation for loss of future earnings, and past and continuing pain and suffering. His opinion detailed the items of evidence which, in his view, were sufficient to support the jury in finding that (1) wages lost before trial amounted to approximately $27,000, (2) loss of future wages based on petitioner's present salary of $6,000 per annum plus likely increases over a life expectancy of 27.5 years would amount to $150,000 present value, and (3) "an amount approaching $150,000 [would be appropriate] for plaintiff's pain and suffering—past and future." The judge conceded that the aggregate award seemed generous, but he concluded nevertheless that it was "not generous to a fault or outside the bounds of legal appropriateness." He emphasized that "the trial record here has many unusual features, the most outstanding one being the non-controversial nature of the defense as to damages. The jury, impressed by the

*[Reporter's Note: The opinion was subsequently reported at 292 F. Supp. 813 (D. C. S. D. N. Y. 1967).]

uncontroverted proof adduced by plaintiff, may well have adopted *in toto* its full significance and drawn such normal and natural inferences therefrom as the law endorses."

The Court of Appeals regarded its inquiry as limited to determining whether the trial judge abused his discretion in denying the railroad's motion. Its guide for that determination, the court stated, was the standard of review announced in its earlier decision in *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, 806 (1961): "[W]e appellate judges [are] not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." [4]

We read *Dagnello,* however, as requiring the Court of Appeals in applying this standard to make a detailed appraisal of the evidence bearing on damages. Indeed this re-examination led to the conclusion in *Dagnello* that it was not a denial of justice to permit the jury's award to stand. If the Court of Appeals made a similar appraisal of the evidence in this case, the details are not disclosed in the majority opinion. Beyond attaching unexplained significance to petitioner's failure in his complaint "to ask for damages in such a large sum as $305,000," the relevant discussion is limited to the bald statement that "giving Grunenthal the benefit of

[4] The standard has been variously phrased: "Common phrases are such as: 'grossly excessive,' 'inordinate,' 'shocking to the judicial conscience,' 'outrageously excessive,' 'so large as to shock the conscience of the court,' 'monstrous,' and many others." *Dagnello* v. *Long Island R. Co., supra,* at 802.

every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello* . . . we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000." 388 F. 2d, at 484. We have therefore made our own independent appraisal of the evidence. We conclude that the trial judge did not abuse his discretion in finding "nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head."

The liability and damage issues were tried separately before the same jury. The evidence at the trial on damages consisted of stipulated hospital and employment records, a stipulation that petitioner's life expectancy was 27.5 years, and the oral testimony of the petitioner, his medical expert, and an official of his railroad union. The railroad offered no witnesses.

Petitioner was 41 years of age at the time of his injury and had been in the railroad's employ for over 20 years. The railroad concedes in its brief that he was earning approximately $6,000 annually and that the jury could properly find that he was entitled to $27,000 for wages already lost over the four and one-half year period between injury and judgment. The railroad further concedes that an award of $100,000 for loss of future wages would not be improper, this on the premise that invested in federal securities that sum would realize $6,000 annually. The trial judge on the other hand appraised the evidence on future earnings as sufficient to support an award of $150,000 for loss of future wages in light of the "convincing testimony not refuted . . . demonstrating the steady wage increases in recent time for work equivalent to that rendered by plaintiff, and the strong likelihood that similar increases would continue."

We cannot say that the trial judge's view that the jury might properly have awarded $150,000 for loss of future earnings is without support in the evidence. The judge

had instructed the jury without objection from the railroad that it was free to find on the evidence that the injury so disabled the petitioner "that it in effect closed out his working career." Although petitioner's medical witness testified that the condition of his foot would not prevent petitioner from engaging in "sedentary work," petitioner's unchallenged evidence of his unsuccessful efforts to obtain and keep jobs of that kind might reasonably have led the jury to decide that petitioner's chances of obtaining or holding any employment were most doubtful. Petitioner testified that his applications for work had often been turned down: "[W]hen they found out I had a bad foot they wouldn't take a chance." On one occasion when he obtained employment as a salesman during the Christmas rush, "I worked there for about four or five days but I couldn't stand it." Moreover, the railroad refused to employ him for any kind of work when he failed a medical examination given him by a railroad physician; after being told, "You failed the medical and we can't take you back," petitioner said he began receiving a "disability pension from the railroad."

Since the jury's award for lost future earnings may properly have been as high as $150,000, its award for pain and suffering might have been as low as $128,000 rather than the $150,000 deemed permissible by the trial judge. In any event we cannot say that the trial judge's opinion that the jury might have awarded the higher $150,000 amount is without support in the record. Petitioner's injury caused his hospitalization at five different times over a period of less than two years. His foot was so badly crushed that serious infection developed. The wounds did not heal properly and skin grafts were made from his right thigh about a year after his injury. Several months later gangrene set in and his doctors were concerned that the "foot was about to die." A

sympathectomy was performed, consisting of an incision of the abdomen to reach the spinal column and the sympathetic ganglia along the spine "to remove [the] controls which maintain the closing down of the blood vessels." This operation was successful but six months later petitioner was forced to submit to yet another operation to remove a piece of bone over the ball of the great toe. Petitioner's medical witness testified that there is still a hazard of more surgery because "this is just a mess of bones"—"the metatarsal has been completely crushed"—"the joint is completely lost"—"the overall black appearance of the bone"—"indicates decalcification or demineralization"—"the nourishment to the foot is so bad that the skin shows the unhealthy condition of the foot." Petitioner testified that "I always have a pain, it is like a dull toothache, to this day," and that "I just take it for granted now. It doesn't bother me now." The jury might well have concluded that petitioner suffered and would continue to suffer great pain, although he had learned to live with it. As Judge Hays noted, 388 F. 2d, at 485, the trial judge referred to "the total absence of exaggeration" in petitioner's testimony describing "the excruciating physical pain and mental anguish" he had endured since the accident. "On the record here," said the trial judge, "[the jury] had good and sufficient reason to regard and assess [the plaintiff's pain and suffering—past and future] as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery."

We therefore conclude that the action of the trial judge should not have been disturbed by the Court of Appeals.

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 judgment of the District Court.

It is so ordered.

MR. JUSTICE HARLAN, dissenting.

I think it clear that the only issue which might conceivably justify the presence of this case in this Court is whether a United States Court of Appeals may constitutionally review the refusal of a district court to set aside a verdict for excessiveness. The Court purports not to decide that question, preferring to rest its decision upon the alleged correctness of the District Court's action in the circumstances of this case. Like my Brother STEWART, I am at an utter loss to understand how the Court manages to review the District Court's decision and find it proper while at the same time proclaiming that it has avoided decision of the issue whether appellate courts ever may review such actions.

Even assuming that this feat of legal gymnastics has been successfully performed, I believe that the correctness of this particular District Court decision, a matter whose proper resolution depends upon a detailed examination of the trial record and which possesses little if any general significance, is not a suitable issue for this Court. Accordingly, I think it appropriate to vote to dismiss the writ as improvidently granted, even though the case formally is here on an unlimited writ. See my dissenting opinion in *Protective Committee* v. *Anderson,* 390 U. S. 414, 454 (1968). To the extent that this position is inconsistent with my having joined the *per curiam* opinion in *Neese* v. *Southern R. Co.,* 350 U. S. 77 (1955), in which the Court adopted a course similar to that followed today, I feel bound frankly to say that the incongruity of today's decision brings me face-to-face with the question whether that earlier disposition was correct, and that I now believe it to have been wrong.*

*I feel entitled to state, by way of partial confession and avoidance of my action in *Neese,* that the writ in *Neese* was granted before I took my seat on the Court. See 348 U. S. IX, and 950 (1955).

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Since the Court professes not to reach the constitutional issue in this case, I consider it inappropriate for me, as an individual Justice, to express my opinion on it.

MR. JUSTICE STEWART, dissenting.

The Court professes not to consider the petitioner's argument that the Seventh Amendment and "the Federal Employers' Liability Act itself" prohibit judicial review of a district judge's order refusing to set aside a verdict as excessive. Yet by the very act of proceeding to review the district judge's order in this case, the Court necessarily, and I think quite correctly, completely rejects that argument. I fully agree with the Court and with the 11 courts of appeals that "nothing in the Seventh Amendment [or in the FELA] precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." *

In *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, the Court of Appeals for the Second Circuit, in a thorough and carefully considered opinion written by Judge Medina, articulated the standard to be followed by that court in reviewing a trial judge's refusal to set aside a verdict as excessive:

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every

*See *ante*, at 157, n. 3.

> doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law. . . ." *Id.*, at 806.

I believe this standard of judicial review is the correct one and can think of no better way to verbalize it.

In the present case Judge Medina again wrote the prevailing opinion. This Court criticizes that opinion for not setting out "a detailed appraisal of the evidence bearing on damages." But the Court of Appeals devoted several paragraphs to a review of all the relevant particulars of the petitioner's financial loss and physical injuries, concluding its discussion of the evidence with the following passage:

> "[G]iving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello,* where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000." 388 F. 2d 480, 484.

While it is arguable that a fuller written factual discussion might have been in order, I can find no reason to suppose that the Court of Appeals did not apply the standard of judicial review that it said it was applying—the standard of the *Dagnello* case. Since I believe that standard to be the correct one, and since I further believe that review of issues of this kind in individualized personal injury cases should be left primarily to the courts of appeals, I would affirm the judgment.

RECZNIK *v.* CITY OF LORAIN.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF OHIO, LORAIN COUNTY.

No. 323. Decided November 18, 1968.

Police officers, on the basis of tips from unidentified persons, "suspected a crime was being committed" on premises owned by petitioner. The officers noted an unusually large number of cars parked nearby, met petitioner outside the rear entrance to an upper apartment which was located over a cigar store closed for the night, warned him against illegal activities, and said they would return. They returned shortly, saw several men enter the apartment, climbed the stairs, and entered through the rear doorway unannounced. When petitioner emerged from a front room to tell the officers they could not enter, one of them through the open door saw a dice game in progress. They entered the room, arrested everyone present, and seized the money and equipment used in the game. Petitioner's motion to suppress the seized evidence was denied, the court ruling that the officers "entered this public establishment and observed gambling being conducted openly and in full view." Petitioner was convicted for keeping a gambling place and exhibiting a gambling device and these convictions were affirmed by the state appellate courts. *Held:* Petitioner's rights under the Fourth and Fourteenth Amendments were infringed by the entry of the police onto his premises.

(a) There was no support for the finding that the apartment was a "public establishment," as the cigar store was closed and had a separate entrance, and the fact that a large number of persons congregate in a private home does not transform it into a public place.

(b) Entry was not justified as incidental to petitioner's arrest, as the police officers did not have probable cause to believe that a crime was being committed. Even where a search warrant is obtained the police must show more than a mere assertion by an unidentified informer, and at least as much is needed to support a warrantless search.

Certiorari granted; reversed and remanded.

Meyer Gordon for petitioner.

Henry T. Webber for respondent.

PER CURIAM.

On the night of June 10, 1965, two police officers of the City of Lorain, Ohio, left their assigned cruising district and drove to the premises at 1420–1422 Broadway because they "suspected a crime was being committed" there. This suspicion was founded upon tips from persons who had stopped the officers on the street. Petitioner is the owner of the building at 1420–1422 Broadway, which contains two unconnected units. No. 1420 consists of the ground floor and basement and houses a cigar shop and storeroom. No. 1422 is a second story suite of rooms. When the officers arrived at the premises at approximately 1 a. m., they noticed an unusually large number of cars parked in the vicinity. According to their testimony they met the petitioner outside the rear entrance to the upstairs suite, warned him that there had better be nothing illegal going on inside, and said they would return in half an hour.

When they did return 20 minutes later, a large number of cars were still parked near the building, and the officers observed several men entering the upstairs apartment. The officers then climbed the stairs, listened to the sound of voices within, and tried to look through the window and door. Unable to see inside, they walked through the back doorway unannounced. As they headed for the front of the apartment, the petitioner emerged from a front room and told the officers they could not enter. Through the door opened by the petitioner, one of the officers saw a dice game in progress. The officers entered the room, placed everyone present under arrest, and seized the table, chips, dice, and money which were being used in the game. Those arrested, including the petitioner, were taken to the police station. The police continued to search the apartment, and came across some keys which they thought might open the store and basement downstairs. Apparently because the

officers "had information that there were all sorts of gaming devices downstairs," the store and basement were also searched thoroughly, and various numbers game paraphernalia were discovered and seized.

Petitioner was convicted in the Municipal Court of Lorain of violating three ordinances which prohibit keeping a gambling place, exhibiting a gambling device, and possessing a numbers game. His motion to suppress all the evidence which had been seized at 1420–1422 Broadway was denied, the court ruling, upon the evidence above summarized, that the officers had "entered this public establishment and observed gambling being conducted openly and in full view." On appeal to the Court of Common Pleas, the conviction for possession of the numbers game paraphernalia found in the lower unit of the building was reversed. The court held that since the petitioner had already been taken to the police station and booked, "the search of the storeroom in this case was too remote in time to have been incidental to the arrest." The Court of Appeals affirmed the convictions on the two remaining counts, and the Supreme Court of Ohio dismissed an appeal. Since we have concluded that the petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution were infringed by the entry of the police onto his premises, we grant certiorari and reverse. *Mapp* v. *Ohio,* 367 U. S. 643.

The finding of the Municipal Court that the petitioner's apartment was a "public establishment" has no support in the record. While the cigar store was usually open to the public during business hours, it was closed and dark at the time of the arrest. The upstairs suite was an entirely separate unit, with a different address and different entrances. The respondent's suggestion that the officers were privileged to enter because the apartment "at that point had taken on, from the amount of people, a public appearance," is untenable. The congregation of

a large number of persons in a private home does not transform it into a public place open to the police.

Respondent argues that the entry into the apartment was justified as incidental to the arrest of the petitioner, who the officers had probable cause to believe was conducting an illegal game. The senior arresting officer, however, did not so view the matter, for he conceded that when he entered the apartment, he "had no evidence to make an arrest." Nevertheless, it is argued, the officers could have entered to arrest the petitioner in view of the tips received from informers that evening and their own corroborating observations of the activities at the apartment. We cannot agree that the knowledge of the officers revealed by this record amounted to probable cause to believe that a crime was being committed. The testimony of one officer that the building was a "noted gambling joint" was stricken by the trial judge, and no further effort was made to show that either the petitioner or the apartment was at that time connected with illicit gambling operations. Nor did the respondent even attempt to establish that the informers were reliable. The officers identified these informers only as "people on the street" who were previously unknown to the officers and whose names they did not bother to ask because "there was no reason for it." They did not relate what information they received from these nameless individuals other than that there were "all sorts of gaming devices *downstairs.*" (Emphasis supplied.)

We have held that the prosecution has not met its burden when an arresting officer "said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner." *Beck* v. *Ohio,* 379 U. S. 89, 97. Even where a search warrant is obtained, the police must show a basis for the search beyond the mere fact of an assertion by an informer. *Aguilar* v. *Texas,* 378 U. S. 108. At least as much is

required to support a search without a warrant. *Beck* v. *Ohio, supra*, at 96. Since the respondent did not meet the burden of showing probable cause in this case, the motion to suppress should have been granted.

The conviction is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART and MR. JUSTICE WHITE would deny the petition for certiorari.

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

The Court here summarily reverses the jury's conviction of petitioner, Pete Recznik, for violating the city's laws against keeping a gambling house and having possession of gambling tables and other gambling devices. The Court simply grants certiorari and reverses, giving the City of Lorain no opportunity at all to argue its case before us. I dissent from such a hasty, ill-considered reversal. To reverse the conviction, this Court holds that it was error for the trial court to deny Recznik's motion to suppress evidence obtained in part by a search without a warrant of the gambling establishment. Having read the entire 388 pages of testimony, I think that they show beyond doubt that there was no unlawful search and seizure and I think that an argument would reveal that fact to this Court. This is made clear by the *per curiam* opinion's reliance on an order of July 7, 1965, refusing, prior to trial, to suppress the evidence. This Court bases its reversal on its disagreement with the pretrial finding that petitioner's gambling house was a "public establishment." The Court states that this finding "has no support in the record." While I think that the testimony contains far more than enough evidence to support a finding that the so-called "apart-

ment" was maintained as a public gambling house, and not as a private residence, it happens that this was only an alternative ground for the trial court's refusal to suppress at this pretrial hearing. The other ground was this:

> "The Court upon consideration overrules defendant's motion for the following reasons, to wit: That no evidence of any illegal search or seizure was presented. Defendant merely presented oral and written arguments in support of his motion."

The fact that no sworn evidence was presented to support the motion to suppress was, of course, sufficient to dispose of the pretrial motion as the court did. That this first pretrial motion is not now relied on by petitioner is shown by his statement to the court at the beginning of the trial to this effect:

> "Mr. Gordon: On the motion to suppress the evidence in this case, the Court is to consider the evidence in the main case that will be presented to the Jury at this time and make its decision later."

At the end of the city's evidence the motion to suppress was made again and denied; it was again made and denied at the conclusion of all the evidence. So it is not to the first pretrial motion to suppress of July 7, 1965, that we must look but to the whole record. That record, in my judgment, shows that the petitioner, who owned the premises which he permitted to be used as a gambling establishment, not only did not object to the officers going into the building but also actually invited them.

As the Court says, the building into which the officers entered belongs to the petitioner, Pete Recznik. He is evidently a well-known gambler around town since he testified that he had been in and out of jail for around a quarter of a century, as had John Micjan whom the

petitioner asserted was his upstairs "tenant" in the private "apartment" which was filled with dice, game tables, and other gambling devices. In fact, Micjan had come to the "apartment" straight from the jail only a month or two before.

The arrest took place in the following factual context. While Police Officer Kochan was cruising around the streets someone told him that gambling was going on at Recznik's building. He and his partner decided to go up and look around in the area of the building. Now, of course, this street information they had received would not alone have been enough to give probable cause either for a search warrant or an arrest. Nor did the officers treat it as enough. It was enough, however, for the officers to investigate, which they did. They went to the building about midnight and saw signs of extraordinary activities around it. While the bottom floor was dark, the upstairs, where the gambling paraphernalia were located, was well lighted. They saw about 40 to 50 automobiles parked in the front and rear of the building. They observed men coming in cars, getting out, going up the back stairs, and entering the upstairs rooms without any difficulty whatever. They observed someone upstairs peeping at them through venetian blinds and shortly thereafter petitioner Recznik came out and talked with them. Recznik did not then or at any time order the officers not to come up. Instead, according to petitioner Recznik's own testimony, he told Officer Kochan that they were having a party upstairs and, addressing the officer directly, said: "If you want to come up you can come up." Again, Recznik testified: "I told him the first time, we had a party, that he was invited up. He says, 'I will be back later.' "

After these invitations the officers went away and came back about 1 a. m., finding the place still lighted and filled with people. The officers walked up the

back steps, where they had seen the others walking in and out. They opened the door which they testified was unlocked. They saw many people there. Recznik testified that they pulled the screen door off its hinges. The officers denied it and obviously neither the jury that convicted nor the judge that refused to suppress the evidence believed Recznik. Once inside, the officers met Recznik. Recznik testified as follows in response to questions from the prosecuting attorney:

"Q. There has been a lot of talk about a warrant. Did you ask him to see a warrant?

"A. No, I didn't say nothing.

"Q. Did you tell him to stay out?

"A. No. Absolutely not.

"Q. Did you say, 'You can't come in here?'

"A. No.

"Q. You just said, 'What do you want?'

"A. I said, 'What do you want.'

. . . . .

"Q. Did you tell him 'You can't search this place?'

"A. Absolutely not. Why would I tell him that?"

. . . . .

Officer Kochan testified that he saw dice and other gambling devices and that when Recznik opened the door to another room he, Kochan, looked over Recznik's shoulder and saw many people gambling on a large dice table upon which was money and a green table covering. Micjan explained the presence of the money and dice table in this illuminating way: The money, $213, he had found on the street in a purse; the large dice table had been brought to him by strangers and left in his "apartment." The moment Kochan (who had been invited by Recznik to come to the "party") saw all these gambling paraphernalia, saw the people with money in their hands crying out in gambler's language "I fade you,"

he stated that all there were under arrest. That was his duty. Ohio law provides that an officer seeing a person committing a misdemeanor has a duty to arrest. Since the arrest was legal, the officer then had the authority to search the remainder of the building without a warrant. This he did. And when the case got to the jury it promptly convicted.

There is no case decided by this Court that calls for a reversal here on the ground that the officer lacked probable cause to arrest for the misdemeanors he actually saw committed. One who will take the time to read this entire record as I have will find, I think, that this gambling establishment was so notorious in Lorain that it is not at all surprising that strangers to the police were urging them to do something about it. I wonder if in addition to having its just conviction reversed the City of Lorain will be compelled to return to their guilty owners the dice, dice tables, and other gambling devices that the officers took away as contraband. I regret very much that this Court, by its hasty, summary reversal, is providing its critics with such choice ammunition for their attacks.

I would deny certiorari. If, however, four members of the Court are determined to grant certiorari, I would set the case down for argument in the conventional fashion and the normal way.

CARROLL ET AL. *v.* PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE ET AL.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 6. Argued October 21, 1968.—Decided November 19, 1968.

Petitioners, members of the "white supremacist" National States Rights Party, held a public rally in Princess Anne, Maryland, on August 6, 1966, at which aggressively and militantly racist speeches were made to a crowd of both whites and Negroes. It was announced that the rally would be resumed the next night, August 7. That day the respondents, local officials, obtained an *ex parte* restraining order from the Somerset County Circuit Court, there having been no notice to or informal communication with petitioners. The order restrained petitioners for 10 days from holding rallies "which will tend to disturb and endanger the citizens of the County," and the August 7 rally was not held. After trial 10 days later, the Circuit Court issued another injunction, extending the effect of the earlier order for 10 months. The Maryland Court of Appeals affirmed the 10-day order, but reversed the 10-month order, holding that "the period of time was unreasonable." *Held:*

1. The case is not moot. The Maryland Court of Appeals' approval of the 10-day order continues to play a role in the response of local officials to petitioners' efforts to continue their activities in the county. Pp. 178–179.

2. The 10-day restraining order must be set aside because, where the principles guaranteed by the First Amendment and applicable to the States by the Fourteenth are involved, there is no place for such *ex parte* order, issued without formal or informal notice to petitioners, where no showing is made that it is impossible to serve or notify the opposing parties and to give them an opportunity to participate in an adversary proceeding. Pp. 179–185.

247 Md. 126, 230 A. 2d 452, reversed.

Eleanor Holmes Norton and *William H. Zinman* argued the cause for petitioners. With them on the brief were *Melvin L. Wulf* and *Leon Friedman.*

S. Leonard Rottman and *Alexander G. Jones* argued the cause for respondents. With them on the brief was *Francis B. Burch,* Attorney General of Maryland.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioners are identified with a "white supremacist" organization called the National States Rights Party. They held a public assembly or rally near the courthouse steps in the town of Princess Anne, the county seat of Somerset County, Maryland, in the evening of August 6, 1966. The authorities did not attempt to interfere with the rally. Because of the tense atmosphere which developed as the meeting progressed, about 60 state policemen were brought in, including some from a nearby county. They were held in readiness, but for tactical reasons only a few were in evidence at the scene of the rally.

Petitioners' speeches, amplified by a public address system so that they could be heard for several blocks, were aggressively and militantly racist. Their target was primarily Negroes and, secondarily, Jews. It is sufficient to observe with the court below, that the speakers engaged in deliberately derogatory, insulting, and threatening language, scarcely disguised by protestations of peaceful purposes; and that listeners might well have construed their words as both a provocation to the Negroes in the crowd and an incitement to the whites. The rally continued for something more than an hour, concluding at about 8:25 p. m. The crowd listening to the speeches increased from about 50 at the beginning to about 150, of whom 25% were Negroes.

In the course of the proceedings it was announced that the rally would be resumed the following night, August 7.[1]

[1] Petitioner Norton said, "I want you to . . . be back here at the same place tomorrow night, bring every friend you have . . . . We're going to take it easy tonight . . . " and "You white folks

On that day, the respondents, officials of Princess Anne and of Somerset County, applied for and obtained a restraining order from the Circuit Court for Somerset County. The proceedings were *ex parte,* no notice being given to petitioners and, so far as appears, no effort being made informally to communicate with them, although this is expressly contemplated under Maryland procedure.[2] The order restrained petitioners for 10 days from holding rallies or meetings in the county "which will tend to disturb and endanger the citizens of the County." [3] As a result, the rally scheduled for August 7 was not held. After the trial which took place 10 days later, an injunction was issued by the Circuit Court on August 30, in effect extending the restraint for 10 additional months. The court had before it, in addition to the testimony of witnesses, tape recordings made by the police of the August 6 rally.

On appeal, the Maryland Court of Appeals affirmed the 10-day order, but reversed the 10-month order on the ground that "the period of time was unreasonable and that it was arbitrary to assume that a clear and present

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bring your friends, come back tomorrow night. . . . Come on back tomorrow night, let's raise a little bit of hell for the white race."

[2] Maryland Rule of Procedure BB72.

[3] The text of the Writ of Injunction is as follows:

"We command and strictly enjoin and prohibit you the said Joseph Carroll, Richard Norton, J. B. Stoner, Connie Lynch, Robert Lyons, William Brailsford and National States Rights Party from holding rallies or meetings in Somerset County which will tend to disturb and endanger the citizens of the County and to enjoin you, the said defendants, from using and operating or causing to be operated within the County any devices or apparatus for the application [*sic*] of the human voice or records from any radio, phonograph or other sound making or producing device thereby disturbing the tranquility of the populace of the County, until the matter can be heard and determined in equity, or for a period of ten days from the date hereof.

"Hereof, fail not, as you will act to the contrary at your peril."

danger of civil disturbance and riot would persist for ten months."

Petitioners sought review by this Court, under 28 U. S. C. § 1257 (3), asserting that the case is not moot and that the decision of the Maryland Court of Appeals continues to have an adverse effect upon petitioners' rights. We granted certiorari.

We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities.[4] In these circumstances, our jurisdiction is not at an end.

This is the teaching of *Bus Employees* v. *Missouri,* 374 U. S. 74 (1963), which concerned a labor dispute which had led to state seizure of the business. This Court held that, although the seizure had been terminated, the case was not moot because "the labor dispute [which gave rise to the seizure] remains unresolved. There thus exists . . . not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues . . . ." *Id.,* at 78.

In *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498 (1911), this Court declined to hold that the case was moot although the two-year cease-and-desist order at

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[4] Petitioners recite that they were denied the right to hold a rally in Princess Anne on July 17, 1967, and that the letter of rejection relied upon the Court of Appeals' decision. They acknowledge that on July 25, they were authorized to hold rallies in Princess Anne on July 28, 29, and 30, 1967; but they appear to complain that the permit stipulated that the sound should not be amplified for more than 250 feet, and that "you will not be permitted to use racial epithets or to make slanderous remarks about the members of any race or ethnic group."

issue had expired. It said: "The questions involved in the orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review . . . ." *Id.,* at 515.

These principles are applicable to the present case. The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings.

This conclusion—that the question is not moot and ought to be adjudicated by this Court—is particularly appropriate in view of this Court's decision in *Walker* v. *Birmingham,* 388 U. S. 307 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity. Petitioners have here pursued the course indicated by *Walker;* and in view of the continuing vitality of petitioners' grievance, we cannot say that their case is moot.

Since the Maryland Court of Appeals reversed the 10-month injunction of August 30, 1966, we do not consider that order. We turn to the constitutional problems raised by the 10-day injunctive order.

The petitioners urge that the injunction constituted a prior restraint on speech and that it therefore violated the principles of the First Amendment which are applicable to the States by virtue of the Fourteenth Amendment. In any event, they assert, it was not constitution-

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ally permissible to restrain petitioners' meetings because no "clear and present danger" existed.

Respondents, however, argue that the injunctive order in this case should not be considered as a "prior restraint" because it was based upon the events of the preceding evening and was directed at preventing a continuation of those events, and that, even if considered a "prior restraint," issuance of the order was justified by the clear and present danger of riot and disorder deliberately generated by petitioners.

We need not decide the thorny problem of whether, on the facts of this case, an injunction against the announced rally could be justified. The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte,* without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment. In *Cantwell* v. *Connecticut,* 310 U. S. 296, at 308 (1940), this Court said that "[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot." See also *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 294 (1941). Ordinarily, the State's constitutionally permissible interests are adequately served by criminal

penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.[5]

The Court has emphasized that "[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan,* 372 U. S. 58, 70 (1963); *Freedman* v. *Maryland,* 380 U. S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman* v. *Maryland, supra,* at 58, a noncriminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."

Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte,* without formal or informal notice to the petitioners or any effort to advise them of the proceeding, cannot be sustained. Cf. *Marcus* v. *Search Warrant,* 367 U. S. 717, 731 (1961);[6] *A Quantity of Books* v. *Kansas,*

[5] The elimination of prior restraints was a "leading purpose" in the adoption of the First Amendment. See *Lovell* v. *Griffin,* 303 U. S. 444, at 451–452 (1938).

[6] *Marcus* rejected the contention that *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957), supported "the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity." 367 U. S., at 736. In *Kingsley,* a New York statute authorizing an injunction *pendente lite* against the distribution of obscene books was upheld. By statute, the person enjoined

378 U. S. 205 (1964).[7] In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. MR. JUSTICE BRENNAN, speaking for a plurality of the Court, condemned the statute for "not first affording [the seller of the books] an adversary hearing." *Id.*, at 211. In the present case, the reasons for insisting upon an opportunity for hearing and notice, at least in the absence of a showing that reasonable efforts to notify the adverse parties were unsuccessful, are even more compelling than in cases involving allegedly obscene books. The present case involves a rally and "political" speech in which the element of timeliness may be important. As MR. JUSTICE HARLAN, dissenting in *A Quantity of Books* v. *Kansas*, pointed out, speaking of "political and social expression":

> "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest." 378 U. S., at 224.

In the present case, the record discloses no reason why petitioners were not notified of the application for injunction. They were apparently present in Princess Anne. They had held a rally there on the night preceding the application for and issuance of the injunction. They were scheduled to have another rally on the very

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could get a hearing "within one day after joinder of issue." The New York courts have subsequently held that no *ex parte* injunction may be issued under the statute. *Tenney* v. *Liberty News Distribs., Inc.*, 13 App. Div. 2d 770, 215 N. Y. S. 2d 663 (1961).

[7] Compare the considerations leading to the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115. See F. Frankfurter & N. Greene, The Labor Injunction 200–205 (1930).

evening of the day when the injunction was issued.[8] And some of them were actually served with the writ of injunction at 6:10 that evening. In these circumstances, there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise.[9] In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.[10]

The same is true of the fashioning of the order. An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ

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[8] The petition for the temporary injunction recited that Carroll and the others against whom the injunction was sought "are presently in Somerset or Wicomico Counties of the State of Maryland."

[9] Cf. Frankfurter & Greene, The Labor Injunction, *supra.*

[10] There is a danger in relying exclusively on the version of events and dangers presented by prosecuting officials, because of their special interest. *Freedman* v. *Maryland, supra,* at 57–58.

"means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose.[11] Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure.

Finally, respondents urge that the failure to give notice and an opportunity for hearing should not be considered to invalidate the order because, under Maryland procedure, petitioners might have obtained a hearing on not more than two days' notice. Maryland Rule of Procedure BB72. But this procedural right does not overcome the infirmity in the absence of a showing of justification for the *ex parte* nature of the proceedings. The issuance of an injunction which aborts a scheduled rally or public meeting, even if the restraint is of short duration, is a matter of importance and consequence in view of the First Amendment's imperative. The denial of a basic procedural right in these circumstances is not excused by the availability of post-issuance procedure which could not possibly serve to rescue the August 7 meeting, but, at best, could have shortened the period in which petitioners were prevented from holding a rally.

We need not here decide that it is impossible for circumstances to arise in which the issuance of an *ex parte* restraining order for a minimum period could be justified

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[11] Cf. *Williams* v. *Wallace*, 240 F. Supp. 100 (D. C. M. D. Ala. 1965). There District Judge Johnson initially refused to issue an injunction *ex parte* against the absent state officials. Then, after a hearing at which the plaintiffs submitted a detailed plan for their proposed Selma-Montgomery march, he enjoined the State from interfering with the march as proposed in the plan.

because of the unavailability of the adverse parties or their counsel, or perhaps for other reasons. In the present case, it is clear that the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding before the holding of the rally was restrained, is incompatible with the First Amendment. Because we reverse the judgment below on this basis, we need not and do not decide whether the facts in this case provided a constitutionally permissible basis for temporarily enjoining the holding of the August 7 rally.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, adheres to his dissent in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 446–447, and to his concurring opinion in *Freedman* v. *Maryland,* 380 U. S. 51, 61–62.

UNIVERSAL INTERPRETIVE SHUTTLE CORP. *v.* WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 19. Argued October 21–22, 1968.—Decided November 25, 1968.

Respondent Washington Metropolitan Area Transit Commission (WMATC) sued to enjoin petitioner, a concessionaire under contract with the Secretary of the Interior, from operating "minibus" guided tours of the Mall, a park area in the center of Washington, D. C., without obtaining from WMATC a certificate of convenience and necessity. The WMATC concedes the Secretary's substantial powers over the Mall under specific authority dating from 1898 and as part of the national park lands over which he has broad statutory jurisdiction. WMATC contends, however, that the interstate compact under which it was established to centralize responsibility over mass transit service in the Washington metropolitan area implicitly limits the Secretary's power to contract for provision of tour services by a concessionaire uncertified by WMATC. WMATC-certified carriers furnishing mass transit and sightseeing services in Washington, including D. C. Transit System, Inc., which contends that its franchise also limits the Secretary's power, intervened as plaintiffs. The District Court dismissed the suit and the Court of Appeals reversed. *Held:*

1. When Congress established the WMATC, it did not intend to create dual regulatory jurisdiction by divesting the Secretary of the Interior of his long-standing "exclusive charge and control" over the Mall, and the WMATC is without authority to require that petitioner obtain from it a certificate of convenience and necessity. Pp. 189–194.

2. D. C. Transit's franchise, which protects it from competition by an uncertified bus line transporting passengers over a given route on a fixed schedule in areas under WMATC jurisdiction, does not protect it against competition from petitioner's leisurely sightseeing service on the Mall outside WMATC jurisdiction. Pp. 194–196.

Reversed and remanded.

Jeffrey L. Nagin argued the cause for petitioner. With him on the briefs were *Allen E. Susman* and *Ralph S. Cunningham, Jr.*

Russell W. Cunningham argued the cause and filed a brief for respondent Washington Metropolitan Area Transit Commission. *Manuel J. Davis* argued the cause for respondent D. C. Transit System, Inc. With him on the brief was *Samuel M. Langerman.*

Assistant Attorney General Martz argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Griswold, Francis X. Beytagh, Jr., S. Billingsley Hill,* and *Thomas L. McKevitt.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Secretary of the Interior is responsible for maintaining our national parks, and for providing facilities and services for their public enjoyment through concessionaires or otherwise.[1] In meeting this responsibility, he has contracted for petitioner to conduct guided tours of the Mall, a grassy park located in the center of the City of Washington and studded with national monuments and museums. Visitors to the Mall may board petitioner's open "minibuses" which travel among the various points of interest at speeds under 10 miles per hour. Guides on the buses and at certain stationary locations describe the sights. Visitors may debark to tour the museums, boarding a later bus to return to the point of departure.

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[1] 16 U. S. C. §§ 1, 17b, 20 (1964 ed. and Supp. III). This responsibility is met principally through the National Park Service, which was created by the Act of August 25, 1916, c. 408, § 1, 39 Stat. 535, as an agency of the Department of the Interior. Since there is no conflict between them, we shall refer directly to the Secretary of the Interior rather than to the Director of the National Park Service.

Suit was brought by the Washington Metropolitan Area Transit Commission (hereafter WMATC) to enjoin petitioner from conducting tours of the Mall without a certificate of convenience and necessity from the WMATC. Carriers permitted by WMATC to provide mass transit and sightseeing services in the City of Washington intervened as plaintiffs, and the United States appeared as *amicus curiae*. The concessionaire and the United States contend that the Secretary's authority over national park lands, and in particular his grant of "exclusive charge and control" over the Mall dating from 1898,[2] permit him to contract for this service without interference. The carriers and WMATC argue that the interstate compact which created the WMATC implicitly limited the Secretary's authority over the Mall, and gave rise to dual jurisdiction over these tours in the Secretary and the WMATC. One carrier, D. C. Transit System, Inc., also argues that its franchise limits the Secretary's power. In a detailed opinion the District Court dismissed the suit. The Court of Appeals reversed without opinion. We granted certiorari and, having heard the case and examined the web of statutes on which it turns, we reverse, finding the Secretary's exclusive authority to contract for services on the Mall undiminished by the compact creating WMATC or by the charter granted a private bus company.

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[2] In the Act of July 1, 1898, c. 543, § 2, 30 Stat. 570, Congress placed the District of Columbia parks under the "exclusive charge and control" of the United States Army Chief of Engineers. This authority was transferred in the Act of February 26, 1925, c. 339, 43 Stat. 983, to the Director of Public Buildings and Public Parks of the National Capital. And in Executive Order No. 6166, June 10, 1933, H. R. Doc. No. 69, 73d Cong., 1st Sess., § 2, this authority finally devolved upon the agency now called the National Park Service. Act of March 2, 1934, c. 38, § 1, 48 Stat. 389.

I.

That the Secretary has substantial power over the Mall is undisputed. The parties agree that he is free to enter into the contract in question. They also agree that he is free to exclude traffic from the Mall altogether, or selectively to exclude from the Mall any carrier licensed by the WMATC or following WMATC instructions. Moreover, the parties agree that the Secretary could operate the tour service himself without need to obtain permission from anyone.[3] Yet the WMATC argues that before the Secretary's power may be exercised through a concessionaire, the consent of the WMATC must be obtained.

This interpretation of the statutes involved would result in a dual regulatory jurisdiction overlapping on the most fundamental matters. The Secretary is empowered by statute to "contract for services . . . provided in the national parks . . . for the public . . . as may be required in the administration of the National Park Service . . . ." Act of May 26, 1930, c. 324, § 3, 46 Stat. 382, 16 U. S. C. § 17b. Moreover, he is "to encourage and enable private persons and corporations . . . to provide and operate facilities and services which he deems desirable . . . ." Pub. L. 89–249, § 2, 79 Stat. 969, 16 U. S. C. § 20a (1964 ed., Supp. III). Congress was well aware that the services provided by these national park concessionaires include transportation. Hearings on H. R. 5796, 5872, 5873, 5886, and 5887 before the Subcommittee on National Parks of the House Committee on Interior and Insular Affairs, 88th Cong., 2d Sess., 151–159 (1964). In this case the Sec-

[3] D. C. Transit System, Inc., an intervening carrier, contends otherwise. But that position is not directly at issue in our view of the case.

retary concluded that there was a public need for a motorized, guided tour of the grounds under his control, and that petitioner was most fit to provide it.

The WMATC, however, also asserts the power to decide whether this tour serves "public convenience and necessity," and the power to require the concessionaire to "conform to the . . . requirements of the Commission" and the "terms and conditions" which it may impose. Pub. L. 86–794, Tit. II, Art. XII, § 4 (b), 74 Stat. 1037. The Secretary's contract leaves the tour's route under his control, but the WMATC would in its certificate specify the "service to be rendered and the routes over which" the concessionaire might run within the Mall. Pub. L. 86–794, Tit. II, Art. XII, § 4 (d)(1), 74 Stat. 1037. Moreover, the WMATC might require the provision of additional service on or off the Mall and forbid the discontinuance of any existing service. Pub. L. 86–794, Tit. II, Art. XII, §§ 4 (e) and (i), 74 Stat. 1038, 1039. The contract with the Secretary provides fare schedules, pursuant to statutory authority in the Secretary to regulate the concessionaire's charges. Pub. L. 89–249, § 3, 79 Stat. 969, 16 U. S. C. § 20b (1964 ed., Supp. III). The WMATC would have the power to "suspend any fare, regulation, or practice" depending on the WMATC's views of the financial condition, efficiency, and effectiveness of the concessionaire and the reasonableness of the rate. Pub. L. 86–794, Tit. II, Art. XII, § 6, 74 Stat. 1040. And under the same section the WMATC could set whatever fare it found reasonable, although a profit of 6½% or less could not be prohibited. The Secretary is given statutory authority to require the keeping of records by the concessionaire and to inspect those records, and the Comptroller General is required to examine the concessionaire's books every five years. Pub. L. 89–249, § 9, 79 Stat. 971, 16 U. S. C. § 20g

(1964 ed., Supp. III). The WMATC would also have the power to require reports and to prescribe and have access to the records to be kept. Pub. L. 86–794, Tit. II, Art. XII, § 10, 74 Stat. 1042. Finally, the Secretary is given by statute the general power to specify by contract the duties of a concessionaire, 16 U. S. C. §§ 17b, 20–20g (1964 ed. and Supp. III); the WMATC would claim this power by regulation and rule. Pub. L. 86–794, Tit. II, Art. XII, § 15, 74 Stat. 1045.

We cannot ascribe to Congress a purpose of subjecting the concessionaire to these two separate masters, who show at the outset their inability to agree by presence on the opposite sides of this lawsuit. There is no indication from statutory language or legislative history that Congress intended to divest the Secretary partly or wholly of his authority in establishing the WMATC. When the WMATC was formed there was in the statute books, as there is now, a provision that the "park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service." Act of July 1, 1898, c. 543, § 2, 30 Stat. 570, as amended, D. C. Code § 8–108(1967). He was, and is, explicitly "authorized and empowered to make and enforce all regulations for the control of vehicles and traffic." Act of June 5, 1920, c. 235, § 1, 41 Stat. 898, D. C. Code § 8–109 (1967). And this extends to sidewalks and streets which "lie between and separate the said public grounds." Act of March 4, 1909, c. 299, § 1, 35 Stat. 994, D. C. Code § 8–144 (1967).[4] The creation

[4] The Secretary's power does not extend beyond these limits, however. In order to institute a transportation service from the Mall to a proposed Visitors' Center in Union Station he sought specific authorization from Congress to add to and confirm his existing authority and provide a service embracing both the Mall and its surroundings. S. Rep. No. 959, 90th Cong., 2d Sess., 8–10 (1968). Congress simply directed him to study the transportation

of the Public Utilities Commission—the predecessor of the WMATC—was not intended "to interfere with the exclusive charge and control . . . committed to" the predecessor of the National Park Service. Act of March 3, 1925, c. 443, § 16 (b), 43 Stat. 1126, as amended, D. C. Code § 40–613 (1967).

In this context the WMATC was established. After World War II, metropolitan Washington had expanded rapidly into Maryland and Virginia. The logistics of moving vast numbers of people on their daily round became increasingly complicated, and increasingly in need of coordinated supervision. Congress therefore gave its consent and approval through a joint resolution to an interstate compact which "centralizes to a great degree in a single agency . . . the regulatory powers of private transit now shared by four regulatory agencies." S. Rep. No. 1906, 86th Cong., 2d Sess., 2 (1960). These four agencies were "the public utility regulatory agencies of the States of Virginia, Maryland, and the District of Columbia and the Interstate Commerce Commission." Pub. L. 86–794, 74 Stat. 1031. The Secretary was not included in this listing. Moreover, Congress specifically provided that nothing in the Act or compact "shall affect the normal and ordinary police powers . . . of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities . . . ." [5]

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needs of the entire area. Pub. L. 90–264, Tit. I, § 104, 82 Stat. 44 (1968); S. Rep. No. 959, 90th Cong., 2d Sess., 3 (1968); H. R. Rep. No. 810, 90th Cong., 1st Sess., 5 (1967).

[5] Pub. L. 86–794, § 3, 74 Stat. 1050. The term "police power" is a vague one which "embraces an almost infinite variety of subjects." *Munn* v. *Illinois*, 94 U. S. 113, 145 (1877) (economic regulation of grain storage an aspect of police power). It is broad enough to embrace the full range of the Secretary's power over the Mall, which even prior to the compact was ordinarily directed to ends quite different from that of the surrounding municipalities in regulating their streets. The Secretary sought explicit recognition

Finally, the House Report on the compact lists the federal legislation which was suspended to give effect to the compact, and the laws giving exclusive control of the Mall to the Secretary are not on the list. H. R. Rep. No. 1621, 86th Cong., 2d Sess., 29–30 (1960).

There is thus no reason to ignore the principle that repeals by implication are not favored [6] or to suspect that the Congress, in creating the WMATC, disturbed the exclusivity of the Secretary's control over the Mall either by extinguishing entirely his power to contract for transportation services or by burdening the concessionaire with two separate agencies engaged in regulating precisely the same aspects of its conduct. Congress was endeavoring to simplify the regulation of transportation by creating the WMATC, not to thrust it further into a bureaucratic morass. It therefore established the WMATC to regulate the mass transit of commuters and workers. A system of minibuses, proceeding in a circular route around the Mall at less than 10 miles per hour, and stopping from time to time to describe the sights before disgorging most passengers where it picked them up, serves quite a different function.[7] The Mall is, and was intended to be,

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of these differences through use of more specific language in the compact, but his clarification was not adopted. H. R. Rep. No. 1621, 86th Cong., 2d Sess., 20, 48–49 (1960).

[6] *E. g., Wood* v. *United States,* 16 Pet. 342, 363 (1842); *FTC* v. *A. P. W. Paper Co.,* 328 U. S. 193, 202 (1946).

[7] This transportation is undertaken by contract with the Federal Government to serve a purpose of the Federal Government, and so might be thought to fall within the specific exemption from the compact for transportation by the Federal Government. Pub. L. 86–794, Tit. II, Art. XII, § 1 (a)(2), 74 Stat. 1036. Moreover, it is not primarily designed to transport people "between any points" but rather back to the same point of departure, and might therefore be excepted from the WMATC's jurisdiction. Pub. L. 86–794, Tit. II, Art. XII, § 1 (a), 74 Stat. 1035. But we find it unnecessary to reach these arguments, which would involve much more severe limits on the power of the WMATC throughout the city.

an expansive, open sanctuary in the midst of a metropolis; a spot suitable for Americans to visit to examine the historical artifacts of their country and to reflect on monuments to the men and events of its history. The Secretary has long had exclusive control of the Mall and ample power to develop it for these purposes. We hold that the WMATC has not been empowered to impose its own regulatory requirements on the same subject matter.

II.

If the WMATC is without jurisdiction to issue a certificate of convenience and necessity in this case, as we have found, then the D. C. Transit System's interpretation of its franchise as protecting it from any uncertified sightseeing service on the Mall would give it an absolute monopoly of service there: the WMATC, lacking jurisdiction over the Mall, would have no authority to certify another carrier. The Secretary, if D. C. Transit is right, would have to take D. C. Transit or no one. Nothing in the statute confers so rigid a monopoly.

Section 1 (a) of D. C. Transit's franchise, Pub. L. 757, c. 669, Tit. I, pt. 1, 70 Stat. 598, confers the power to operate a "mass transportation system."[8] That this does not include sightseeing is clearly shown by

[8] "There is hereby granted to D. C. Transit System, Inc. . . . a franchise to operate a mass transportation system of passengers for hire within the District of Columbia . . . the cities of Alexandria and Falls Church, and the counties of Arlington and Fairfax in the Commonwealth of Virginia and the counties of Montgomery and Prince Georges in the State of Maryland . . . *Provided,* That nothing in this section shall be construed to exempt the Corporation from any law or ordinance of the Commonwealth of Virginia or the State of Maryland or any political subdivision of such Commonwealth or State, or of any rule, regulation, or order issued under the authority of any such law or ordinance, or from applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder."

the separate grant of power to operate "charter or sightseeing services" in § 6, 70 Stat. 599.[9] The section giving D. C. Transit a measure of exclusivity is § 3, 70 Stat. 598, which protects it from any uncertified "competitive . . . bus line" for the "transportation of passengers of the character which runs over a given route on a fixed schedule . . . ." [10] In determining what is "competitive" one must refer back to the sections which grant the franchise.

Even if §§ 1 and 3 together would protect "mass transportation" on the Mall from uncertified competition, and even if § 3 protects § 6 activity, it does not follow that D. C. Transit has a monopoly over sightseeing on the Mall. Section 6 explicitly saves the "laws . . . of the District of Columbia," including the "exclusive charge and control" of the Secretary over the Mall. D. C. Code § 8–108 (1967). D. C. Transit admits the Secretary could exclude its sightseeing service from the Mall; if so, surely the franchise protection does not extend there. Moreover, §§ 3 and 6 together cannot confer a monopoly of Mall sightseeing both because this would involve an impairment of the Secretary's power under District law contrary to § 6, and because it would be unreasonable to construe the protection of § 3 against carriers uncerti-

[9] "The Corporation is hereby authorized and empowered to engage in special charter or sightseeing services subject to compliance with applicable laws, rules and regulations of the District of Columbia and of the municipalities or political subdivisions of the States in which such service is to be performed, and with applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder."

[10] "No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established to operate in the District of Columbia without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia . . . to the effect that the competitive line is necessary for the convenience of the public."

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fied by the WMATC to apply where the WMATC has no powers of certification.

And even were § 3 so construed, its protection against "transportation of passengers of the character which runs over a given route on a fixed schedule" was evidently aimed at commuter service whose most important qualities are speed and predictability, not the service here whose most important qualities are interesting dialogue and leisurely exposure of the rider to new and perhaps unexpected experiences. The agenda of the tour will be varied by the Secretary according to the events of the day. The franchise does not protect D. C. Transit against competition in this sort of service on the Mall.

We reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court. If the Congress, which has the matter before it, wishes to clarify or alter the relationship of these statutes and agencies, it is entirely free to do so.

Reversed and remanded.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

We have said over and again that we do not sit to review decisions on local law by District of Columbia courts where the reach of that law is confined to the District. *District of Columbia* v. *Pace,* 320 U. S. 698, 702; *Busby* v. *Electric Utilities Union,* 323 U. S. 72, 75.

That law is not only peculiarly local; it is a compendium of a variety of laws drawn from numerous sources,*

*The law of the District of Columbia is (1) the principles and maxims of equity as they existed in England and in the Colonies in 1776; (2) the common law of England and the Acts of Parlia-

with which the judges in the District are much more familiar than are we. No legal problem is more obviously peculiar to the District than the one posed by the present case. Traffic, including the movement of tourists, is a special concern of local government. The District Court held that the Secretary of the Interior, not WMATC, was the appropriate licensing authority. The Court of Appeals by a two-to-one vote reversed but did not file an opinion because "the interests of the parties and of the public would be better served" by a prompt disposition of the case. The Court of Appeals *en banc,* two judges dissenting, denied a petition for rehearing.

The contrariety of views below suggests that this question of local law is not free from doubt. Certainly it is not a case where the decision is so palpably wrong as to make it the exceptional case for review by this Court. Nor is this question of local law so enmeshed with constitutional questions as to make appropriate its resolution here. See *District of Columbia* v. *Little,* 339 U. S. 1, 4, n. 1; *District of Columbia* v. *Thompson Co.,* 346 U. S. 100.

These considerations make much more appropriate here than in *Fisher* v. *United States,* 328 U. S. 463, 476 (from which the quotation is taken), the following observation:

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of

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ment which were in effect in the Colonies in 1776 (and which were not locally inapplicable); (3) the laws of Virginia and Maryland as they existed on February 27, 1801 (2 Stat. 103); (4) the Acts of the Legislative Assembly created by the Act of February 21, 1871 (16 Stat. 419); (5) all Acts of Congress applicable to the District. See District of Columbia Code (1940 ed.), Tit. 1–24, p. IX *et seq.;* Comp. Stat. D. C. 1887–1889, pp. V–VI.

law which they fashion, save in exceptional situations where egregious error has been committed.

"Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere."

The present case could not be more precisely described.

Syllabus.

UNITED STATES *v.* CONCENTRATED PHOSPHATE EXPORT ASSN., INC., ET AL.

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

No. 29. Argued October 24, 1968.—Decided November 25, 1968.

The Government filed a civil antitrust action against appellee association and its member firms charging violations of § 1 of the Sherman Act with regard to 11 sales by the association of concentrated phosphate to the Republic of Korea under the United States foreign aid program. In two cases the Government itself let the contracts and the remaining nine were let by an agency of the Korean Government. The Agency for International Development (AID) retained effective control over the transactions, from approving the procurement, through the financing thereof by the United States, to the shipping. The trial court upheld appellees' contention that they were exempt from antitrust liability under § 2 of the Webb-Pomerene Act as acts "done in the course of export trade." Appellee association has since dissolved itself, alleging that a recent AID regulation has made continued operation uneconomical. *Held:*

1. The case is not moot. Pp. 202–204.

(a) The Government sought relief not only against the association but also against its members. Pp. 202–203.

(b) The AID regulation does not apply to all contracts on which the former members of the association might bid. P. 203.

(c) Appellees' statement that it would be uneconomical to engage in further joint operations, standing alone, does not satisfy the stringent test for mootness; but appellees may show on remand that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. Pp. 203–204.

2. The antitrust exemption of the Webb-Pomerene Act, which was enacted to "extend our foreign trade" without significantly injuring American consumers, does not insulate transactions initiated, controlled, and financed by the United States Government, merely because a foreign government is the nominal "purchaser." Pp. 206–210.

(a) The economic reality of the transactions shows that American participation was overwhelmingly dominant, the foreign

elements were comparatively insignificant, and the burden of noncompetitive pricing fell, not on the foreign purchaser, but on the American taxpayer; and it stretches neither the language nor the purpose of the Act to determine that such sales are not "exports." Pp. 208–209.

(b) On the contracts involved here the world's major trading nations were ineligible to compete as procurement was limited essentially to the United States and the underdeveloped countries, so that the major impact of permitting the combination appellees desire would be, not to encourage exports, but to deprive Americans of the main benefits of competition among American firms. P. 209.

273 F. Supp. 263, reversed and remanded.

Deputy Attorney General Christopher argued the cause for the United States. On the brief were *Solicitor General Griswold, Acting Assistant Attorney General Zimmerman, Lawrence G. Wallace,* and *Howard E. Shapiro.*

Samuel W. Murphy, Jr., argued the cause for appellees. On the brief were *Marcus A. Hollabaugh* and *Alan S. Ward* for Concentrated Phosphate Export Assn., Inc., *Mr. Murphy* and *Andrew J. Kilcarr* for American Cyanamid Co., *Lawrence J. McKay* and *Jerrold G. Van Cise* for W. R. Grace & Co., *Edgar E. Barton* for International Minerals & Chemical Corp., *Edward F. Howrey* and *John Bodner, Jr.,* for Mobil Oil Corp., *Alfred D. Berman* and *Randolph Guggenheimer, Jr.,* for Tennessee Corp., appellees.

Mr. Justice Marshall delivered the opinion of the Court.

Involved in this case are 11 sales of concentrated phosphate made between 1961 and 1966 by appellee association. The phosphate was supplied by the association's members,[1] which are all producers of fertilizer, and was

[1] Appellee-members are American Cyanamid Co., W. R. Grace & Co., International Minerals & Chemical Corp., Tennessee Corp.,

then shipped to the Republic of Korea under the United States foreign aid program. The Government, in a civil antitrust complaint filed on December 21, 1964, contended that the concerted activities of the association and its members in regard to these 11 sales violated § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. § 1. Appellees defended on the ground, *inter alia,* that their activities were exempted from antitrust liability by § 2 of the Webb-Pomerene Act, 40 Stat. 517 (1918), 15 U. S. C. § 62,[2] as "act[s] done in the course of export trade." The trial court held that the Webb-Pomerene Act did immunize appellees' conduct, 273 F. Supp. 263 (1967), and dismissed the complaint.

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and Mobil Oil Corp. Not all of these companies were members during the entire period involved in this case; the association was dissolved on December 28, 1967.

[2] "Nothing contained in sections 1–7 of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *Provided,* That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

Section 1 of the Act, 40 Stat. 516 (1918), 15 U. S. C. § 61, defines "export trade" as "solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale."

The Government perfected a direct appeal to this Court under the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U. S. C. § 29. Probable jurisdiction was noted, 390 U. S. 1001 (1968).

I.

We are met at the outset with appellees' contention that this case is now moot. Appellees' argument rests on two events which occurred after the case had been submitted to the District Court. On January 1, 1967, the Agency for International Development (AID), the State Department agency in charge of the foreign aid program, amended its regulations to preclude Webb-Pomerene associations from bidding on certain procurement contracts whenever procurement was limited to United States suppliers.[3] According to appellees, this new regulation made it uneconomical for the association to continue in operation,[4] since a large proportion of AID-financed procurement is limited to American sources.[5] Accordingly, on December 28, 1967, appellee association dissolved itself.[6] The new regulation and the dissolution, we are told, moot this case.

Two factors make this argument untenable. First of all, the dissolved association was not the only defendant in this case. The Government sought injunctive relief against the association's members as well; they were to be

[3] 31 Fed. Reg. 16693 (1966), codified as 22 CFR §§ 201.01 (v), 201.52 (a) (7), Appendix D (1968). The amended regulation applies only to certain specified commodities.

[4] Motion to Affirm or Dismiss 5, 14–15.

[5] See AID, Operations Report, Fiscal Year 1967, p. 74. The very large percentage of foreign aid procurement actually coming from American sources exceeds that required by regulation.

[6] Appellees contend that economic factors dictated the dissolution, *supra*, n. 4, and the Government does not argue that the dissolution was related to the fact that a notice of appeal in this case was filed on November 9, 1967.

prohibited from forming any new export associations without court approval and from continuing in effect any prices jointly agreed upon. Therefore, even if dissolution would have made it impossible to frame effective relief were the association the only party, here there is no such difficulty. Secondly, the new AID regulation does not apply to all contracts on which the former members of the association might bid. Whenever foreign bidders are eligible, AID still permits American Webb-Pomerene associations to compete. In fact, foreign bidders were eligible in all 11 of the transactions which gave rise to this suit. Therefore, however much the new regulation may reduce the practical importance of this case, it does not completely remove the controversy. Absent the relief prayed for, appellees would be free to act in concert in certain situations where the Government contends they must compete.

The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); see, *e. g.*, *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes. *United States* v. *W. T. Grant Co.*, 345 U. S., at 633. Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. *Id.*, at 633–636. This is

a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it.

II.

The 11 transactions involved in this case were not simple cash purchases by the Republic of Korea.[7] Not only were they financed by the United States Government; AID retained effective control over them at every stage.

The transactions involved were controlled by an impressive network of international treaties and agreements, as well as by American statutes, regulations, and administrative procedures. The procurement process, as revealed by the stipulated record, was rather involved. It began when funds were appropriated by Congress. Those funds were allocated to various development programs by AID, in accordance with the provisions of the applicable statutes and AID's assessments of its priorities. The money allocated to Korea by this process was not simply shipped to Seoul, to be used as Korea wished. In fact, most of it never left this country. In accordance with a series of agreements, Korea was authorized to request that the United States finance purchases of certain "eligible commodities." [8] A rather complicated "Procure-

[7] The Government evidently does not contest the "export" status of two fertilizer sales to Korea made in 1962. One was paid for by Korea's own foreign exchange funds; the other was financed out of a special stabilization fund granted by the United States. The use of this latter fund was not as fully controlled as were the grants which financed the 11 purchases involved here.

[8] This particular limitation to a specific list of commodities is contained in the record in a Program Assistance Grant Agreement, dated November 29, 1965. Appendix 108, 116. Although this agreement could not have applied to the earlier transactions involved here, the stipulated record contains only examples—and not a complete compilation—of all the documents involved. In any case, earlier agreements which are included in the record contain limitations which give the Government equivalent powers. See, *e. g.*, Appendix 81.

ment Authorization Application" was then prepared on an AID form for Korean signature. The application sets forth not only the goods to be purchased but also rather detailed specifications of quality, delivery plans, bidding procedures, and a statement explaining Korea's need for the goods. Even though AID officials obviously must have participated in drafting these "requests," AID was in no way obligated to approve them. The agreement with Korea specifically states that AID "may decline to finance any specific commodity or service when, in its judgment, such financing would be inconsistent with the purposes of this grant or of the Foreign Assistance Act of 1961, as amended." When each transaction was approved, a "Procurement Authorization" was issued by AID; it was specifically made subject to detailed regulations which specify the procedures to be followed in awarding any contracts.[9] It also contained an authorization to a specified American bank to pay for the goods to be procured.

After AID had in this way chosen what goods were to be purchased, either of two methods of procurement was used. In two cases, the Government itself let the contracts, through its General Services Administration. In the other nine cases, the formal act of letting the contracts was performed by the Office of Supply of the Republic of Korea (OSROK). In performing this task, the Koreans were subject to detailed regulation by AID. The invitation for bids even had to be submitted to AID so that it could be circulated in this country. All documents had to be in English, and criteria for selecting the winning contractors were carefully defined in advance. An abstract of bids received and a notice naming the contractor selected had to be sent to Washington. Finally, a letter of credit was issued, the supplier paid, and the payor bank reimbursed by the United States Treas-

[9] These regulations are collected in 22 CFR § 201 (1968).

ury. The goods were shipped consigned to OSROK, but AID—as a last precaution—reserved the right to vest title in itself if "such action is necessary to assure compliance with the provisions or purposes of any act of Congress." 22 CFR § 201.44 (1968).

We are asked to decide whether transactions of this sort constitute "act[s] done in the course of export trade," within the meaning of the Webb-Pomerene exemption from the Sherman Act.[10] Although the Webb-Pomerene Act has been on the statute books for a half century, this is the first time this Court has been called upon to interpret the meaning of the words "export trade." Upon a full consideration of the language, the purpose, and the legislative history of the statute, we reverse the judgment below.

III.

The Webb-Pomerene Act was passed "to aid and encourage our manufacturers and producers to extend our foreign trade." H. R. Rep. No. 1118, 64th Cong., 1st Sess., 1 (1916). Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels. But while Congress was willing to create an exemption from the antitrust laws to serve this narrow purpose, the exemption created was carefully hedged in to avoid substantial injury to domestic interests. Congress evidently made the economic judgment that joint export associations could increase American foreign trade without depriving American consumers of the main advantages of competition.

This reading of the Act is confirmed both by its structure and its legislative history. The Act itself contains

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[10] The Government raises no questions under any of the various provisos included in the Webb-Pomerene Act. Accordingly, we intimate no opinion about their scope.

a number of provisos obviously designed to protect domestic interests from the combinations Congress was authorizing. No act done by the export association could be "in restraint of trade within the United States," § 2, 15 U. S. C. § 62; the words "export trade" were to exclude, among other things, "selling for consumption . . . within the United States," § 1, 15 U. S. C. § 61; and the association was forbidden to enter into any agreement "which artificially or intentionally enhances or depresses prices within the United States . . . , or which substantially lessens competition within the United States or otherwise restrains trade therein," § 2, 15 U. S. C. § 62.

The legislative history is even more explicit. During the hearings on the bill, one Congressman, Charles C. Carlin of Virginia, stated clearly what was later to be one of the dominant themes of the floor debate. In a question addressed to the Chairman of the Federal Trade Commission, who was testifying in support of the bill, he said:

> "I am frank to say that personally I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturers get the largest price possible, but if by indirection we are going to set up a system which is going to fix a higher price eventually at home, through a combination as suggested in this bill, I think you can very well see that such a system is a very dangerous one." Hearings before the House Committee on the Judiciary on H. R. 16707, 64th Cong., 1st Sess., 7 (1916).

The same theme was reiterated on the floor by the Act's two main sponsors. Senator Pomerene said bluntly, "[W]e have not reached that high plane of business morals which will permit us to extend the same privi-

leges to the peoples of the earth outside of the United States that we extend to those within the United States." 55 Cong. Rec. 2787 (1917). And Congressman Webb declared, "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." 55 Cong. Rec. 3580 (1917).

In this atmosphere, the Act was passed. It is clear what Congress was doing; it thought it could increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers. Cf. *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 211 (1945). The validity of this economic judgment is not for us to question, but it is quite relevant in interpreting the language Congress chose. The question before us is whether Congress meant its exemption to insulate transactions initiated, controlled, and financed by the American Government, just because a foreign government is the nominal "purchaser." We think it did not.

In interpreting the antitrust laws, we are not bound by formal conceptions of contract law. *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964). We must look at the economic reality of the relevant transactions. Here, although the fertilizer shipments were consigned to Korea and although in most cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell, not on any foreign purchaser, but on the American taxpayer. The United States was, in essence, furnishing fertilizer to Korea. AID selected the commodity, determined the amount to be purchased, controlled the contracting process, and paid the bill. The foreign elements in the transactions were, by comparison, insignificant.

It stretches neither the language nor the purpose of the Act to determine that such sales are not "exports."

Appellees contend that a contrary result should be reached because they were competing for contracts with foreign suppliers. Evidently, it is their contention that they therefore fall within the class which Congress intended to allow to form export associations. But AID has already given American suppliers great competitive advantages in their battle with foreign firms. The governing statute requires a preference for American procurement. Foreign Assistance Act of 1961, § 604, 75 Stat. 439, 22 U. S. C. § 2354. On none of the contracts involved here were any of the major trading nations of the world eligible to compete; procurement was limited essentially to the United States and the underdeveloped countries. To say that American producers need an additional stimulus to be able to compete strains credulity. The major impact of allowing the combination appellees desire would not be to encourage American exports; it would be to place the burden of noncompetitive pricing on the shoulders of the American taxpayer. But whatever the impact on exports might be, it is clear that the framers of the Webb-Pomerene Act did not intend that Americans should be deprived of the main benefits of competition among American firms.[11] Since in all relevant aspects the transactions involved here were American, not Korean, we hold that they are not "export trade"

[11] There was a brief mention during the congressional debates of the existence of American loans to European nations whose purchasing power might be reduced by higher American export prices. See 55 Cong. Rec. 2789 (1917). Such an isolated statement cannot determine the meaning of a statute. But in any case, it is clear that America's World War I loans bear little if any resemblance to the modern foreign aid program. Not only was it expected that they would be repaid, but also the loans were not made subject to the detailed American administrative control typical of today's foreign aid program.

within the meaning of the Webb-Pomerene Act. On remand, the District Court may decide the other issues relevant to a resolution of the controversy.

Reversed.

MR. JUSTICE HARLAN took no part in the decision of this case.

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

The majority holds today that concentrated phosphate shipped from an American firm in Florida to the Republic of Korea, which has itself solicited bids on the world market,[1] are not "exports" within the meaning of the Webb-Pomerene Act, § 1, 40 Stat. 516 (1918), 15 U. S. C. § 61. The United States supplied the funds which Korea used to pay for the purchases, and retained limited power to control their expenditure. Korea was not obliged to repay the funds to the United States directly, but it was required to set aside proceeds of resale of the phosphate as "counterpart funds" to be spent in ways prescribed by the United States.[2] This decision conforms neither to the plain meaning of the word "exports" nor to the underlying purposes of the Webb-Pomerene Act.

The statute defines "export trade" as trade in goods "exported, or in the course of being exported from the United States." § 1, 15 U. S. C. § 61. In this case, more than 800,000 tons of concentrated phosphate were shipped directly from the association in Florida to

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[1] In two of the 11 transactions challenged here, the General Services Administration solicited the bids for Korea, but neither the Government nor the Court finds that distinction significant.

[2] These funds were used to support the Korean and American military establishments in Korea and to finance public works. They were generally available to the United States "as requested."

Korea. In any ordinary sense, these "goods" were "exported from the United States." Even the AID regulations refer to receiving countries as "importers" and to these transactions as "exports." *E. g.*, 22 CFR § 201.42 (1968).[3] And the District Court found that AID encouraged, or at least tolerated, bidding by Webb-Pomerene associations in these transactions. Nor does the exclusion from the definition of exports of goods sold "for consumption . . . within the United States," § 1, 15 U. S. C. § 61, discussed by the majority, have any application to this case. The parties have so stipulated, since the phosphate was obviously to be consumed in Korea. And there is no contention here that purely domestic trade was "restrained" in any way, or that prices in it were "enhanced" or "depressed."[4] Given the clarity of the statute, there is no need to resort to legislative history. *E. g., Unexcelled Chemical Corp.* v. *United States,* 345 U. S. 59, 64 (1953).

But even the legislative history lends no support to the majority, and indeed leads to a contrary conclusion. The majority asserts that Congress thought it could increase American exports by ending competition for foreign shipments among American firms without impairing domestic competition. That is correct. Congress recognized that trade in foreign nations is not ringed about with the antitrust restrictions which keep domestic industry competitive. Congress found foreign trusts to have substantial advantages over their American competitors. They can offer to extend credit and fill large orders which no single American firm could fill; they can maintain staffs to keep in touch with foreign demand

[3] Indeed, even government statistics relating to balance of payments refer to shipments such as these as "exports." *E. g.*, Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 1968, at 669, 801; 15 CFR § 30.1 *et seq.* (1968).

[4] § 2, 15 U. S. C. § 62.

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more cheaply than any single American seller; and their advertising and distribution costs are generally lower than those of separate American firms.[5] Having made these findings, Congress concluded that American firms should be allowed to combine to achieve lower costs, lower prices, and more comprehensive and effective service, in order to be able to compete on an equal footing for foreign shipments.

In a transaction such as this, where American goods compete with foreign goods for foreign consumption, Congress had no objection to the formation of American associations to achieve lower prices and compete with foreign suppliers. That such competition was involved here is graphically illustrated by the fact that in most of the Korean purchases involved in this case[6] foreign bidders were successful in capturing at least part of the market, and the Government admits that foreign competition was never absent. It was precisely to enable American firms to meet such competition that the Webb-Pomerene Act was passed.

Moreover, it is no kindness to the American taxpayer to carve out an exception forbidding the formation of Webb-Pomerene associations in this case, given the assumptions on which the Act was passed. Congress specifically discussed phosphate as a commodity where American associations were necessary in order to achieve the savings and organization which would enable them to compete with foreign cartels in price and service.[7]

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[5] See, *e. g.*, S. Rep. No. 1056, 64th Cong., 2d Sess. (1917); H. R. Rep. No. 1118, 64th Cong., 1st Sess. (1916); Hearings on H. R. 17350 before the Senate Committee on Interstate Commerce, 64th Cong., 2d Sess., 44 (1917).

[6] Thirteen phosphate purchases were made by Korea, of which the Government challenges only the 11 to which the AID regulations apply. In those transactions alone, foreign bidders captured 18% of the business.

[7] 56 Cong. Rec. 110–111 (remarks of Senator Kellogg).

Without Webb-Pomerene associations, Congress concluded that American firms could not underbid their foreign competitors. Even in this case, with the Association bidding, foreign cartels captured 18% of the business. Under the majority opinion, American taxpayers would be paying out more American dollars to buy from foreign cartels goods which could have been obtained more cheaply from American associations employing American workers.

Congress explicitly found that Webb-Pomerene associations would lead to lower, not higher, prices in competition with foreign suppliers. It was on this basis that joint efforts by American companies in the export trade were exempted from the antitrust laws. Those charged with the duty faithfully to execute the laws should honor that exemption, not challenge it with facile assertions that the Act was "chauvinistic." Certainly this Court is not equipped or empowered to challenge either the exemption or the assumptions on which it rests.

To carve out an exception from the word "export" based on this Court's notions of sound economic policy is to contradict the plain words of the statute and the congressional judgment that American associations were necessary to lower prices and combat foreign competition. If such an exception were ever justified, it would be in a case where not only are Americans paying the bill, but also foreign competition is absent. This is not such a case.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 520. Decided November 25, 1968.

287 F. Supp. 354, affirmed.

S. R. Brittingham, Jr., for Atchison, Topeka & Santa Fe Railway Co., and *Albert E. Jenner, Jr., Thomas P. Sullivan, William R. McDowell, Thomas L. Farmer,* and *Thomas A. Loose* for the Texas & Pacific Railway Co. et al., appellants.

Solicitor General Griswold, Assistant Attorney General Zimmerman, Howard E. Shapiro, and *Robert W. Ginnane* for the United States et al., and *Richard Maguire* and *Gavin W. O'Brien* for the Permian Basin Railroad Co., appellees.

PER CURIAM.

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

CITY OF AUSTIN *v.* WEBSTER.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 499. Decided November 25, 1968.

Appeal dismissed and certiorari denied.

James W. Wilson 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.

COLLINS *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 134. Decided November 25, 1968.

Certiorari granted; 388 F. 2d 353, vacated and remanded.

Donald P. Moyers for petitioner.

Solicitor General Griswold, Assistant Attorney General Rogovin, Jonathan S. Cohen, and *Robert J. Campbell* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of the opinion of the Supreme Court of Oklahoma in *Collins* v. *Oklahoma Tax Comm'n,* 446 P. 2d 290.

ARTHUR *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 501. Decided November 25, 1968.

Appeal dismissed and certiorari denied.

Wm. Rosenberger, Jr., for appellant.

PER CURIAM.

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

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

FARBENFABRIKEN BAYER A. G. *v.* UNITED STATES.

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

No. 504. Decided November 25, 1968.

Appeal dismissed.

Allen F. Maulsby, Arnold M. Lerman, Max O. Truitt, Jr., and *Daniel K. Mayers* for appellant.

Solicitor General Griswold for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

GREEN *v.* TURNER, WARDEN.

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

No. 88, Misc. Decided November 25, 1968.

Certiorari granted; vacated and remanded.

Phil L. Hansen, Attorney General of Utah, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Garrison* v. *Patterson,* 391 U. S. 464.

STAMLER ET AL. *v.* WILLIS ET AL.

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

No. 478. Decided November 25, 1968.*

287 F. Supp. 734, appeals dismissed.

Albert E. Jenner, Jr., Thomas P. Sullivan, and *Arthur Kinoy* for appellants in No. 478. *Mr. Jenner* for appellant in No. 479.

Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney, and *Lee B. Anderson* for appellees in both cases.

Briefs of *amici curiae* were filed by *Jack G. Day* and *Melvin L. Wulf* for the American Civil Liberties Union, and by *Vern Countryman, Robert F. Drinan, Clark Byse, David F. Cavers, George T. Frampton,* and *Ira M. Heyman* for certain law school deans and professors.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE HARLAN are of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the cases on the merits and that the cases should be set for oral argument.

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

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*Together with No. 479, *Cohen* v. *Willis et al.*, also on appeal from the same court.

PALMIERI *v.* FLORIDA.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 131. Argued November 20, 1968.—Decided December 9, 1968.

198 So. 2d 633, dismissed.

Phillip Goldman, by appointment of the Court, 392 U. S. 920, argued the cause and filed a brief for petitioner.

Howard Mendelow, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Earl Faircloth,* Attorney General, and *Edward Cowart,* Assistant Attorney General.

PER CURIAM.

The petitioner was convicted of robbery in the Criminal Court of Dade County, Florida, and the judgment of conviction was affirmed by the District Court of Appeal, 189 So. 2d 512, and the Supreme Court of Florida, 198 So. 2d 633. We granted certiorari because the case appeared to present a substantial constitutional question concerning the admissibility at trial of "lineup" identifications made after the petitioner was arrested without probable cause for the sole purpose of gathering evidence against him. 391 U. S. 934. However, upon the complete review of the record that has now become possible, and in the light of oral argument by able and conscientious counsel, it has become evident that the legality of the petitioner's arrest was not at issue in the Florida appellate courts, and is not challenged here. Accordingly, the writ is dismissed as improvidently granted.

It is so ordered.

STILES *v.* UNITED STATES.

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

No. 74. Argued November 20, 1968.—Decided December 9, 1968.

Certiorari dismissed.

Charles J. Rogers, Jr., by appointment of the Court, *post*, p. 813, argued the cause and filed a brief for petitioner.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Vinson, Jerome M. Feit,* and *Lawrence P. Cohen.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

SHAW *v.* GARRISON ET AL.

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

No. 579. Decided December 9, 1968.

Affirmed.

Herve Racivitch for appellant.

Eberhard P. Deutsch and *René H. Himel, Jr.*, for appellees.

PER CURIAM.

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

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

LANDRY ET AL. *v.* BOYLE, CHIEF JUDGE, ET AL.

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

No. 659. Decided December 9, 1968.

280 F. Supp. 938, appeal dismissed.

Robert L. Tucker, R. Eugene Pincham, Jean F. Williams, Leonard Karlin, William M. Kunstler, and *Arthur Kinoy* for appellants.

PER CURIAM.

The appeal is dismissed for failure to comply with Rule 13 (1).

MOORE *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 423, Misc. Decided December 9, 1968.

Appeal dismissed and certiorari denied.

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.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 747, Misc. Decided December 9, 1968.

40 Ill. 2d 85, 237 N. E. 2d 437, appeal dismissed and certiorari denied.

John Unger 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.

SOUTH CAROLINA STATE BOARD OF EDUCATION ET AL. *v.* BROWN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA.

No. 553. Decided December 9, 1968.*

Affirmed.

Daniel R. McLeod, Attorney General of South Carolina, and *D. W. Robinson* for appellants in No. 553. *J. C. Long* for appellants in No. 563.

Solicitor General Griswold and *Assistant Attorney General Pollak* for appellee United States in both cases.

PER CURIAM.

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

*Together with No. 563, *Cribb et al.* v. *Brown et al.,* also on appeal from the same court.

Syllabus.

FEDERAL TRADE COMMISSION *v.* TEXACO INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 24. Argued November 13, 1968.—Decided December 16, 1968.

Respondent Texaco Inc., one of the country's largest petroleum companies, made an agreement with respondent Goodrich to promote the sale of Goodrich tires, batteries, and accessories (TBA) to Texaco's service station dealers. The Federal Trade Commission (FTC) in this proceeding and two related proceedings, each of which involved a major oil company and a major tire manufacturer, challenged the sales-commission arrangements as an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. Relying on this Court's decision upholding invalidation of such an arrangement in one of these cases, *Atlantic Refining Co. v. FTC,* 381 U. S. 357 (1965), the FTC on remand reaffirmed its conclusion that the Texaco-Goodrich arrangement violated § 5 of the Act. The Court of Appeals reversed on the ground that the evidence did not support the FTC's conclusions. Respondents contend, *inter alia,* that the absence here of "overt economic practices" distinguishes this case from *Atlantic. Held:*

1. The FTC's determinations of "unfair methods of competition" under § 5 of the Act are entitled to great weight. Pp. 225–226.

2. Texaco, as the record clearly shows and respondents do not dispute, holds dominant economic power over its dealers. Pp. 226–227.

3. The sales-commission system for marketing TBA is inherently coercive, and, despite the absence here of the kind of overtly coercive acts shown in *Atlantic,* Texaco exerted its dominant economic power over its dealers. Pp. 228–229.

4. The FTC correctly determined that the Texaco-Goodrich arrangement adversely affected competition in marketing TBA, the TBA manufacturer having purchased the oil company's economic power and used it as a partial substitute for competitive merit in gaining a major share of the substantial TBA market. Pp. 229–231.

127 U. S. App. D. C. 349, 383 F. 2d 942, reversed and remanded.

Daniel M. Friedman argued the cause for petitioner. On the brief were *Solicitor General Griswold, Assistant Attorney General Turner, Lawrence G. Wallace, James McI. Henderson,* and *Alvin L. Berman.*

Milton Handler and *Edgar E. Barton* argued the cause for respondents. With them on the brief were *Stanley D. Robinson* and *Macdonald Flinn.*

Mr. Justice Black delivered the opinion of the Court.

The question presented by this case is whether the FTC was warranted in finding that it was an unfair method of competition in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45, for respondent Texaco to undertake to induce its service station dealers to purchase Goodrich tires, batteries, and accessories (hereafter referred to as TBA) in return for a commission paid by Goodrich to Texaco. In three related proceedings instituted in 1961, the Commission challenged the sales-commission method of distributing TBA and in each case named as a respondent a major oil company and a major tire manufacturer. After extensive hearings, the Commission concluded that each of the arrangements constituted an unfair method of competition and ordered each tire company and each oil company to refrain from entering into any such commission arrangements. In one of these cases, *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357 (1965), this Court affirmed the decision of the Court of Appeals for the Seventh Circuit sustaining the Commission's order against Atlantic Refining Company and the Goodyear Tire & Rubber Company. In a second case, *Shell Oil Co.* v. *FTC,* 360 F. 2d 470, cert. denied, 385 U. S. 1002, the Court of Appeals for the Fifth Circuit, following this Court's decision in *Atlantic,* sustained the Commission's order against the Shell Oil Company and the Firestone Tire & Rubber

Company. In contrast to the decisions of these two Courts of Appeals, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order in this, the third of the three cases, involving respondents Goodrich and Texaco. 118 U. S. App. D. C. 366, 336 F. 2d 754 (1964).[1] The Commission petitioned this Court for review and, one week following our *Atlantic* decision, we granted certiorari and remanded for further consideration in light of that opinion. 381 U. S. 739 (1965). The Commission, on remand, reaffirmed its conclusion that the Texaco-Goodrich arrangement, like that involved in the other two cases, violated § 5 of the Federal Trade Commission Act. The Court of Appeals for the District of Columbia Circuit again reversed, this time holding that the Commission had failed to establish that Texaco had exercised its dominant economic power over its dealers or that the Texaco-Goodrich arrangement had an adverse effect on competition. 127 U. S. App. D. C. 349, 383 F. 2d 942. We granted certiorari to determine whether the court below had correctly applied the principles of our *Atlantic* decision. 390 U. S. 979.

Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition. In large measure the task of defining "unfair methods of competition" was left to the Commission. The legislative history shows that Congress concluded that the best check on unfair competition would be "an administrative

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[1] The sales-commission arrangement between Texaco and the Firestone Tire & Rubber Company was also the subject of Commission action. Firestone is not a respondent in this action, however, since it is already subject to a final order of the Commission prohibiting its use of a sales-commission plan with any oil company. See *Shell Oil Co.* v. *FTC*, 360 F. 2d 470, 474 (C. A. 5th Cir.), cert. denied, 385 U. S. 1002.

body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19. *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357, 367. While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight. *FTC* v. *Motion Picture Advertising Serv. Co.,* 344 U. S. 392, 396 (1953); *FTC* v. *Cement Institute,* 333 U. S. 683, 720 (1948). This is especially true here, where the Commission has had occasion in three related proceedings to study and assess the effects on competition of the sales-commission arrangement for marketing TBA. With this in mind, we turn to the facts of this case.

The Commission and the respondents agree that the Texaco-Goodrich arrangement for marketing TBA will fall under the rationale of our *Atlantic* decision if the Commission was correct in its three ultimate conclusions (1) that Texaco has dominant economic power over its dealers; (2) that Texaco exercises that power over its dealers in fulfilling its agreement to promote and sponsor Goodrich products; and (3) that anticompetitive effects result from the exercise of that power.

That Texaco holds dominant economic power over its dealers is clearly shown by the record in this case. In fact, respondents do not contest the conclusion of the Court of Appeals below and the Court of Appeals for the Fifth Circuit in *Shell* that such power is "inherent in the structure and economics of the petroleum distribution system." 127 U. S. App. D. C. 349, 353, 383 F. 2d 942, 946; 360 F. 2d 470, 481 (C. A. 5th Cir.). Nearly 40% of the Texaco dealers lease their stations from Texaco.

These dealers typically hold a one-year lease on their stations, and these leases are subject to termination at the end of any year on 10 days' notice. At any time during the year a man's lease on his service station may be immediately terminated by Texaco without advance notice if in Texaco's judgment any of the "housekeeping" provisions of the lease, relating to the use and appearance of the station, are not fulfilled. The contract under which Texaco dealers receive their vital supply of gasoline and other petroleum products also runs from year to year and is terminable on 30 days' notice under Texaco's standard form contract. The average dealer is a man of limited means who has what is for him a sizable investment in his station. He stands to lose much if he incurs the ill will of Texaco. As Judge Wisdom wrote in *Shell,* "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord." 360 F. 2d 470, 487.

It is against the background of this dominant economic power over the dealers that the sales-commission arrangement must be viewed. The Texaco-Goodrich agreement provides that Goodrich will pay Texaco a commission of 10% on all purchases by Texaco retail service station dealers of Goodrich TBA. In return, Texaco agrees to "promote the sale of Goodrich products" to Texaco dealers. During the five-year period studied by the Commission (1952–1956) $245,000,000 of the Goodrich and Firestone TBA sponsored by Texaco was purchased by Texaco dealers, for which Texaco received almost $22,000,000 in retail and wholesale commissions. Evidence before the Commission showed that Texaco carried out its agreement to promote Goodrich products through constantly reminding its dealers of Texaco's desire that they stock and sell the sponsored Goodrich TBA. Texaco emphasizes the importance of TBA and the recommended brands as early as its initial interview

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with a prospective dealer and repeats its recommendation through a steady flow of campaign materials utilizing Goodrich products. Texaco salesmen, the primary link between Texaco and the dealers, promote Goodrich products in their day-to-day contact with the Texaco dealers. The evaluation of a dealer's station by the Texaco salesman is often an important factor in determining whether a dealer's contract or lease with Texaco will be renewed. Thus the Texaco salesmen, whose favorable opinion is so important to every dealer, are the key men in the promotion of Goodrich products, and on occasion accompany the Goodrich salesmen in their calls on the dealers. Finally, Texaco receives regular reports on the amount of sponsored TBA purchased by each dealer. Respondents contend, however, that these reports are used only for maintaining Texaco's accounts with Goodrich and not for policing dealer purchases.

Respondents urge that the facts of this case are fundamentally different from those involved in *Atlantic* because of the presence there, and the absence here, of "overt coercive practices" designed to force the dealers to purchase the sponsored brand of TBA. We agree, as the Government concedes, that the evidence in this case regarding coercive practices is considerably less substantial than the evidence presented in *Atlantic*. The *Atlantic* record contained direct evidence of dealers threatened with cancellation of their leases, the setting of dealer quotas for purchase of certain amounts of sponsored TBA, the requirement that dealers purchase TBA from single assigned supply points, refusals by Atlantic to honor credit card charges for nonsponsored TBA, and policing of Atlantic dealers by "phantom inspectors." While the evidence in the present case fails to establish the kind of overt coercive acts shown in *Atlantic,* we think it clear nonetheless that Texaco's dominant eco-

nomic power was used in a manner which tended to foreclose competition in the marketing of TBA. The sales-commission system for marketing TBA is inherently coercive. A service station dealer whose very livelihood depends upon the continuing good favor of a major oil company is constantly aware of the oil company's desire that he stock and sell the recommended brand of TBA. Through the constant reminder of the Texaco salesman, through demonstration projects and promotional materials, through all of the dealer's contacts with Texaco, he learns the lesson that Texaco wants him to purchase for his station the brand of TBA which pays Texaco 10% on every retail item the dealer buys. With the dealer's supply of gasoline, his lease on his station, and his Texaco identification subject to continuing review, we think it flies in the face of common sense to say, as Texaco asserts, that the dealer is "perfectly free" to reject Texaco's chosen brand of TBA. Equally applicable here is this Court's judgment in *Atlantic* that "[i]t is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers." 381 U. S., at 376.

We are similarly convinced that the Commission was correct in determining that this arrangement has an adverse effect on competition in the marketing of TBA. Service stations play an increasingly important role in the marketing of tires, batteries, and other automotive accessories. With five major companies supplying virtually all of the tires that come with new cars, only in the replacement market can the smaller companies hope to compete. Ideally, each service station dealer would stock the brands of TBA that in his judgment were most favored by customers for price and quality. To the extent that dealers are induced to select the sponsored brand in order to maintain the good favor of the oil

company upon which they are dependent, the operation of the competitive market is adversely affected. As we noted in *Atlantic,* the essential anticompetitive vice of such an arrangement is "the utilization of economic power in one market to curtail competition in another." 381 U. S. 357, 369. Here the TBA manufacturer has purchased the oil company's economic power and used it as a partial substitute for competitive merit in gaining a major share of the TBA market.[2] The nonsponsored brands do not compete on the even terms of price and quality competition; they must overcome, in addition, the influence of the dominant oil company that has been paid to induce its dealers to buy the recommended brand. While the success of this arrangement in foreclosing competitors from the TBA market has not matched that of the direct coercion employed by Atlantic, we feel that the anticompetitive tendencies of such a system are clear, and that the Commission was properly fulfilling the task that Congress assigned it in halting this practice in its incipiency. The Commission is not required to show that a practice it condemns has totally eliminated competition in the relevant market. It is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce. *International Salt Co.* v. *United States,* 332 U. S. 392 (1947); *United States* v. *Loew's, Inc.,* 371 U. S. 38, 45, n. 4 (1962); *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357, 371 (1965).

The Commission was justified in concluding that more than an insubstantial amount of commerce was involved.

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[2] The Commission's conclusion that under a sales-commission plan, a dealer would not make his choice solely on the basis of competitive merit was bolstered by the testimony of 31 sellers of competing, nonsponsored TBA that they were unable to sell to particular Texaco stations because of the dealers' concern that Texaco would disapprove of their purchase of nonsponsored products.

Texaco is one of the Nation's largest petroleum companies. It sells its products to approximately 30,000 service stations, or about 16.5% of all service stations in the United States. The volume of sponsored TBA purchased by Texaco dealers in the five-year period 1952–1956 was $245,000,000, almost five times the amount involved in the *Atlantic* case.

For the reasons stated above, we reverse the judgment below and remand to the Court of Appeals for enforcement of the Commission's order with the exception of paragraphs five and six of the order against Texaco, the setting aside of which by the Court of Appeals the Government does not contest.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion, with the following statement. To the extent that my action in joining today's opinion is inconsistent with my action in joining my Brother STEWART's dissent in *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357, 377 (1965), candor compels me to say that further reflection has convinced me that the portions of the Commission's order which the Court today sustains were within the authority granted to the Commission under § 5 of the Federal Trade Commission Act.

MR. JUSTICE STEWART, dissenting.

We are told today that "[t]he sales-commission system for marketing TBA is inherently coercive." If that is so, then the Court went to a good deal of unnecessary trouble in *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357, 368, to establish that Atlantic "not only exerted the persuasion that is a natural incident of its economic power, but coupled with it direct and overt threats of reprisal . . . ."

The Court acknowledges that "the evidence in this case regarding coercive practices is considerably less substantial than the evidence presented in *Atlantic*." But that is an understatement. For the fact is that in this case the Court of Appeals was totally unable to "find that Texaco used its controlling economic power to compel its dealers to purchase sponsored TBA." 127 U. S. App. D. C. 349, 356, 383 F. 2d 942, 949. That is why this Court must perforce create today's *per se* rule of "inherent" coercion.

For the reasons set out at some length in my separate opinion in *Atlantic, supra,* at 377, I cannot agree to any such *per se* rule. Accordingly, I would affirm the judgment of the Court of Appeals.

OESTEREICH *v.* SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, CHEYENNE, WYOMING, ET AL.

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

No. 46. Argued October 24, 1968.—Decided December 16, 1968.

Petitioner, a theological student preparing for the ministry, was classified IV–D by his Selective Service Board in accordance with § 6 (g) of the Selective Service Act, which provides that "students preparing for the ministry" in qualified schools "shall be exempt from training and service" under the Act. He returned his registration certificate "for the sole purpose of expressing dissent from the participation by the United States in the war in Vietnam." His Board then declared him delinquent for failure (1) to have his registration certificate in his possession and (2) to provide the Board with notice of his local status, and changed his classification to I–A. Petitioner took an administrative appeal and lost, and was ordered to report for induction. He sued to restrain his induction, but the District Court dismissed the complaint and the Court of Appeals affirmed, in part on the basis of § 10 (b) (3) of the Military Selective Service Act of 1967, which states that there shall be no pre-induction judicial review "of the classification or processing of any registrant," judicial review being limited to a defense in a criminal prosecution or to habeas corpus after induction. *Held:* Pre-induction judicial review is not precluded in this case. Pp. 235–239.

(a) There is no legislative authority to deny an unequivocal statutory exemption to a registrant who has qualified for one because of conduct or activities unrelated to the merits of granting or continuing the exemption, and delinquency proceedings cannot be used for that purpose. Pp. 236–237.

(b) Section 10 (b) (3) cannot be construed to impair the clear mandate of § 6 (g) governing the exemption for theological students. P. 238.

390 F. 2d 100, reversed and remanded.

Melvin L. Wulf argued the cause for petitioner. With him on the brief were *Alan H. Levine, John Griffiths,*

Marvin M. Karpatkin, Eleanor Holmes Norton, and *William F. Reynard.*

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Weisl, Francis X. Beytagh, Jr., Morton Hollander,* and *Robert V. Zener.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner is enrolled as a student at a theological school preparing for the ministry and was accordingly classified as IV–D by the Selective Service Board. Section 6 (g) of the Selective Service Act, 62 Stat. 611, as amended, now § 6 (g) of the Military Selective Service Act of 1967 (see 81 Stat. 100, § 1 (a)), 50 U. S. C. App. § 456 (g), gives such students exemption from training and service under the Act.[1] He returned his registration certificate to the Government, according to the complaint in the present action, "for the sole purpose of expressing dissent from the participation by the United States in the war in Vietnam." Shortly thereafter his Board declared him delinquent (1) for failure to have the registration certificate in his possession,[2] and (2) for

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[1] Section 6 (g) reads as follows:

"Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title."

[2] Section 1617.1 of the Selective Service System Regulations requires a registrant to have the certificate in his personal possession at all times (32 CFR § 1617.1), and § 1642.4, 32 CFR § 1642.4 (a), provides that whenever a registrant fails to perform "any duty"

failure to provide the Board with notice of his local status. The Board thereupon changed his IV–D classification to I–A. He took an administrative appeal and lost and was ordered to report for induction.

At that point he brought suit to restrain his induction. The District Court dismissed the complaint, 280 F. Supp. 78, and the Court of Appeals affirmed. 390 F. 2d 100. The case is here on a petition for a writ of certiorari which we granted. 391 U. S. 912.

As noted, § 6 (g) of the Act states that "students preparing for the ministry" in qualified schools "shall be exempt from training and service" under the Act.[3] Equally unambiguous is § 10 (b)(3) of the Military Selective Service Act of 1967, 81 Stat. 104, which provides that there shall be no pre-induction judicial review "of the classification or processing of any registrant," [4] judicial review being limited to a defense in a criminal prosecution or, as the Government concedes, to habeas corpus after induction.[5] See *Estep* v. *United States*, 327

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required of him (apart from the duty to obey an order to report for induction) the Board may declare him to be "a delinquent."

[3] The United States admits for purposes of the present proceeding by its motion to dismiss that petitioner satisfies the requirements of the exemption provided by § 6 (g).

[4] Section 10 (b)(3) reads in pertinent part as follows:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

[5] See S. Rep. No. 209, 90th Cong., 1st Sess., 10, where it is stated: "A registrant who presents himself for induction may challenge his classification by seeking a writ of habeas corpus after his induction. If the registrant does not submit to induction, he may raise as a

U. S. 114, 123–125; *Eagles* v. *Samuels,* 329 U. S. 304; *Witmer* v. *United States,* 348 U. S. 375, 377. If we assume, as we must for present purposes, that petitioner is entitled to a statutory exemption as a divinity student, by what authority can the Board withhold it or withdraw it and make him a delinquent?

In 1967 Congress added a provision concerning the immediate service of members of a "prime age group" after expiration of their deferment, stating that they were the first to be inducted "after delinquents and volunteers." 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. III). Congress has also made criminal the knowing failure or neglect to perform any duty prescribed by the rules or regulations of the Selective Service System. 50 U. S. C. App. § 462 (a) (1964 ed., Supp. III). But Congress did

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defense to a criminal prosecution the issue of the legality of the classification."

In *Falbo* v. *United States,* 320 U. S. 549, a Jehovah's Witness had been given conscientious objector status and ordered to report to a domestic camp for civilian work in lieu of military service. In defense to a criminal prosecution for disobeying that order, he argued that his local board had wrongly classified him by denying him an exemption as a minister. Without deciding whether Congress envisaged judicial review of such classifications, we held that a registrant could not challenge his classification without first exhausting his administrative remedies by reporting, and being accepted, for induction. Because he might still have been rejected at the civilian camp for mental or physical disabilities, Falbo had omitted a "necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." *Id.,* at 553. In *Estep* v. *United States,* 327 U. S. 114, petitioners were Jehovah's Witnesses like Falbo who had been denied ministerial exemptions and who challenged that classification in defense to a criminal prosecution for refusing induction. In their case, however, they had exhausted their administrative remedies by reporting, and being accepted, for service, before then refusing to submit to induction. We found nothing in the 1940 Act to preclude judicial review of selective service classifications in defense to a criminal prosecution for refusing induction.

not define delinquency; nor did it provide any standards for its definition by the Selective Service System. Yet Selective Service, as we have noted,[6] has promulgated regulations governing delinquency and uses them to deprive registrants of their statutory exemption, because of various activities and conduct and without any regard to the exemptions provided by law.

We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served.

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[6] *Supra,* at n. 2.

See *Townsend* v. *Zimmerman,* 237 F. 2d 376. In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of § 6 (g) governing the exemption. Our construction leaves § 10 (b)(3) unimpaired in the normal operations of the Act.

No one, we believe, suggests that § 10 (b)(3) can sustain a literal reading. For while it purports on its face to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent. Examples are legion where literalness in statutory language is out of harmony either with constitutional requirements, *United States* v. *Rumely,* 345 U. S. 41, or with an Act taken as an organic whole. *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480, 488–489. We think § 10 (b)(3) and § 6 (g) are another illustration; and the Solicitor General agrees. Since the exemption granted divinity students is plain and unequivocal and in no way contested here,[7] and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has

[7] We would have a somewhat different problem were the contest over, say, the quantum of evidence necessary to sustain a Board's classification. Then we would not be able to say that it was plain on the record and on the face of the Act that an exemption had been granted and there would therefore be no clash between § 10 (b)(3) and another explicit provision of the Act.

granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type.

We accordingly reverse the judgment and remand the case to the District Court where petitioner must have the opportunity to prove the facts alleged and also to demonstrate that he meets the jurisdictional requirements of 28 U. S. C. § 1331.

Reversed.

MR. JUSTICE HARLAN, concurring in the result.

I concur in the holding that pre-induction review is available in this case, but I reach this conclusion by means of a somewhat different analysis from that contained in the opinion of my Brother DOUGLAS.

At the outset, I think it is important to state what this case does and does not involve. Petitioner does not contend that the Selective Service System has improperly resolved factual questions, or wrongfully exercised its discretion, or even that it has acted without any "basis in fact," as that phrase is commonly used in this area of law. See *Estep* v. *United States,* 327 U. S. 114, 122–123 (1946); *ante,* at 238, n. 7. He asserts, rather, that the procedure pursuant to which he was reclassified and ordered to report for induction—a procedure plainly mandated by the System's self-promulgated published regulations, 32 CFR, pt. 1642—is unlawful. Specifically, he asserts that the delinquency reclassification scheme is not authorized by any statute, that it is inconsistent with his statutory exemption as a ministerial student, 50 U. S. C. App. § 456 (g), and that, whether or not approved by Congress, the regulations are facially unconstitutional.[1]

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[1] Petitioner makes several other arguments which I do not find necessary to discuss.

The pivotal language of § 10 (b)(3), for present purposes, is the statute's proscription of pre-induction judicial review "of the classification or processing of any registrant . . . ." I take the phrase "classification or processing" to encompass the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service Board must make prior to issuing an order to report for induction. I do not understand that phrase to prohibit review of a claim, such as that made here by petitioner, that the very statutes or regulations which the Board administers are facially invalid.

"Classification is the key to selection," 32 CFR § 1622.1 (b), and among a local Board's most important functions is "to decide, subject to appeal, the class in which each registrant shall be placed." 32 CFR § 1622.1 (c). Classification is a highly individualized process, in which a Board must consider all pertinent information presented to it. *Ibid.* Thus, a Board may be required to determine, on a conflicting record, whether a registrant is conscientiously opposed to participation in war in any form, 32 CFR § 1622.14, or whether the registrant's deferment "is in the national interest and of paramount importance to our national security . . . ." 32 CFR § 1622.20. A Board also exercises considerable discretion in the processing of registrants—for example, in securing information relevant to classification, 32 CFR §§ 1621.9–1621.15, scheduling of physical examinations, 32 CFR, pt. 1628, and scheduling and postponement of induction itself, 32 CFR, pt. 1632.

Congress' decision to defer judicial review of such decisions by the Selective Service Boards until after induction was, I believe, responsive to two major considerations. *First,* because these determinations are of an individualized and discretionary nature, a reviewing court must often examine Board records and other docu-

mentary evidence, hear testimony, and resolve controversies on a sizable record. Even though the scope of judicial review is narrow, see *Estep* v. *United States, supra,* at 122–123, this cannot be done quickly. To stay induction pending such review would work havoc with the orderly processing of registrants into the Nation's armed forces. See 113 Cong. Rec. 15426 (Senator Russell); cf. *Estep* v. *United States, supra,* at 137 (Mr. Justice Frankfurter, concurring in the result).

Second, the registrant has been afforded, prior to his induction, the opportunity for a hearing and administrative appeals within the Selective Service System. 32 CFR, pts. 1624–1627. It is properly presumed that a registrant's Board has fully considered all relevant information presented to it, and that it has classified and processed him regularly, and in accordance with the applicable statutes and regulations. *Greer* v. *United States,* 378 F. 2d 931 (1967); *Storey* v. *United States,* 370 F. 2d 255 (1966); cf. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15 (1926); *Chin Yow* v. *United States,* 208 U. S. 8, 12 (1908); *Martin* v. *Mott,* 12 Wheat. 19 (1827).

These factors are significantly altered where the registrant contends that the procedure employed by the Board is invalid on its face.

First, such a claim does not invite the court to review the factual and discretionary decisions inherent in the "classification or processing" of registrants, and does not, therefore, present opportunity for protracted delay. To be sure, collateral factual determinations—for example, whether the registrant was subjected to the statute or regulation drawn in question (in this case, the delinquency reclassification procedure)—may sometimes be necessary. But, in general, a court may dispose of a challenge to the validity of the procedure on the plead-

ings. Insubstantial claims can usually be weeded out with dispatch.[2]

Second, a challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity,[3] but also presents an issue beyond the competence of the Selective Service Boards to hear and determine. Adjudication of the constitutionality of congressional enactments[4] has generally been thought beyond the jurisdiction of administrative agencies. See *Public Utilities Comm'n* v. *United States,* 355 U. S. 534, 539 (1958); *Engineers Public Service Co.* v. *SEC,* 78 U. S. App. D. C. 199, 215–216, 138 F. 2d 936, 952–953 (1943), dismissed as moot, 332 U. S. 788. The Boards have no power to promulgate regulations, and are not expressly delegated any authority to pass on the validity of regulations or statutes. Such authority cannot readily be inferred, for the composition of the Boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters: local and appeal Boards consist of part-time, uncompensated members, chosen ideally to be representative of the

[2] Moreover, a court should be hesitant to grant a preliminary injunction staying induction except upon a strong showing that the registrant is likely to succeed on the merits.

[3] A suggestive analogy may be found in the Court's construction of the civil rights removal statute, 28 U. S. C. § 1443. Where state statutory procedure is valid on its face, it is presumed that the state courts will treat a defendant fairly, and removal is not permitted. *Georgia* v. *Rachel,* 384 U. S. 780, 803–804 (1966); *Virginia* v. *Rives,* 100 U. S. 313, 321–323 (1880). But, subject to qualifications not here pertinent, a defendant may remove the cause when the state statutory procedure is facially invalid: "When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions . . . ." *Id.,* at 321. See also *Greenwood* v. *Peacock,* 384 U. S. 808 (1966).

[4] It may be noted that the Selective Service System urges that the delinquency reclassification provisions have been approved by Congress. Brief for the Respondents 71.

registrants' communities; [5] the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 CFR § 1624.1 (b), seems incompatible with the Boards' serious consideration of such purely legal claims. Indeed, the denial of counsel has been justified on the ground that the proceedings are nonjudicial. *United States* v. *Sturgis,* 342 F. 2d 328, 332 (1965), cert. denied, 382 U. S. 879; cf. *United States* v. *Capehart,* 141 F. Supp. 708, 719 (1956), aff'd, 237 F. 2d 388 (1956), cert. denied, 352 U. S. 971.

To withhold pre-induction review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of § 10 (b)(3) would raise serious constitutional problems,[6] and is not indicated by the stat-

[5] See 32 CFR §§ 1603.3, 1604.22; Memorandum from General Hershey, S. Doc. No. 82, 89th Cong., 2d Sess., 4; Weekly Compilation of Presidential Documents, March 13, 1967, p. 395; Report of the National Advisory Commission on Selective Service 74–79 (1967).

Although each local Board has assigned to it a part-time, uncompensated appeal agent—"whenever possible, a person with legal training and experience," 32 CFR § 1604.71 (c)—his pertinent responsibilities to the Board are limited to assisting its members by "interpreting for them laws, regulations, and other directives," 32 CFR § 1604.71 (d)(4), and he must be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters." 32 CFR § 1604.71 (d)(5).

[6] It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims. Cf. *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 596–598 (1953); *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 152–153 (1941); *United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 463 (1934); *Londoner* v. *City and County of Denver,* 210 U. S. 373, 385 (1908); *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (1961). But cf. *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950); *Bowles* v. *Willingham,* 321 U. S. 503, 520 (1944); *North American*

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ute's history,[7] language, or purpose. On the foregoing basis I agree that § 10 (b)(3) does not forbid pre-induction review in this instance.

Cold Storage Co. v. *Chicago,* 211 U. S. 306 (1908). The validity of summary administrative deprivation of liberty without a full hearing may turn on the availability of a prompt subsequent hearing, cf. U. S. Const., Amdt. VI; *United States* v. *Ewell,* 383 U. S. 116, 120 (1966); *Freedman* v. *Maryland,* 380 U. S. 51 (1965)—something not made meaningfully available to petitioner here, either by the option of defending a criminal prosecution for refusing to report for induction, see *Ex parte Young,* 209 U. S. 123 (1908); *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331 (1920); cf. *Reisman* v. *Caplin,* 375 U. S. 440 (1964), or by filing a petition for a writ of habeas corpus after induction. See *ante,* at 235–236; *Estep* v. *United States, supra,* at 129–130 (concurring opinion of Mr. Justice Murphy).

The problem is exacerbated by petitioner's nonfrivolous argument that induction pursuant to the delinquency reclassification procedure constitutes "punishment" for violation of collateral regulations, without jury trial, right to counsel, and other constitutional requisites. See *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963). It is not necessary to decide this issue. If petitioner's claim is valid, however, then postponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty, without possibility of bail, until such time as the petitioner is able to secure his release by a writ of habeas corpus. This would, at the very least, cut against the grain of much that is fundamental to our constitutional tradition. Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1380–1383 (1953).

[7] The salient parts of the statute's sparse legislative history are set out in my Brother STEWART'S dissenting opinion, *post,* at 247–248. Both the House and Senate committees were "disturbed by the apparent inclination of some courts to review the classification action of local or appeal Boards before the registrant had exhausted his administrative remedies." H. R. Rep. No. 267, 90th Cong., 1st Sess., 30 (1967); S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967). As I have discussed in the preceding text, the Boards can provide no remedy for a registrant's claim that the regulations or statutes are themselves invalid. (This is not to say that a registrant making such a claim may come into court before he has exhausted his administrative appeals, for the System may decide in his favor on other

Because both the District Court and the Court of Appeals passed on the merits of petitioner's challenge to the delinquency reclassification regulations, this issue is ripe for our consideration. Whatever validity the procedure may have under other circumstances, I agree that the delinquency reclassification of petitioner for failure to possess his registration certificate is inconsistent with petitioner's conceded statutory exemption as a student of the ministry.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

It is clear that in enacting § 10 (b)(3) of the Military Selective Service Act of 1967,[1] Congress intended to

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grounds, obviating the need for further review. Cf. my dissent in *Public Utilities Comm'n* v. *United States, supra,* at 549–550; *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 772 (1947). Petitioner here has exhausted available remedies. Appendix 4.)

Section 10 (b)(3) was likely precipitated by the Second Circuit's well-publicized decision in *Wolff* v. *Selective Service Bd.,* 372 F. 2d 817 (1967). See dissenting opinion of MR. JUSTICE STEWART, *post,* at 247; Brief for Respondent 18, n. 4, 69, n. 32. *Wolff,* as well as the other "recent cases" to which the committee reports probably referred, and this Court's decisions construing the antecedent to § 10 (b)(3), all involved claims that the Selective Service Boards had maladministered or misapplied the applicable statutes or regulations, and not challenges to the validity of the laws themselves. *Wolff* v. *Selective Service Bd., supra* (loss of deferment for participating in demonstration); *Townsend* v. *Zimmerman,* 237 F. 2d 376 (1956) (failure to follow proper appeal procedure); *Schwartz* v. *Strauss,* 206 F. 2d 767 (1953) (concurring opinion) (misclassification); *Ex parte Fabiani,* 105 F. Supp. 139 (1952) (refusal to recognize foreign medical school for deferment); *Tomlinson* v. *Hershey,* 95 F. Supp. 72 (1949) (refusal to hear request for deferment); *Estep* v. *United States, supra* (entitlement to ministerial exemption); *Falbo* v. *United States,* 320 U. S. 549 (1944) (entitlement to conscientious objector status).

[1] 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. III). The Act amends and supersedes the Universal Military Training and Service Act.

specify the exclusive methods by which the determinations of Selective Service Boards may be judicially reviewed. Since under the terms of that provision the present suit is plainly premature, I would affirm the judgment of the Court of Appeals.

Section 10 (b)(3) provides in pertinent part as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ."

It is unquestioned that the overriding purpose of this provision was "to prevent litigious interruptions of procedures to provide necessary military manpower." [2] To be sure, the provision is somewhat inartistically drawn, but its background and legislative history clearly resolve whatever difficulties might otherwise be presented by the imprecision of the draftsman's language.

In interpreting the less explicit terms of predecessor statutes,[3] this Court had established the general rule that draft classifications could not be judicially reviewed prior to the time a registrant was to be inducted. Review was held to be proper only when challenges to such determinations were raised either (1) in defense to a criminal prosecution following a refusal to be inducted, or (2) in habeas corpus proceedings initiated after induc-

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[2] 113 Cong. Rec. 15426 (1967) (Senator Russell).

[3] See § 10 (a)(2) of the Selective Training and Service Act of 1940, 54 Stat. 893:

"[D]ecisions of . . . local boards shall be final except where an [administrative] appeal is authorized . . . ."

See also *Estep* v. *United States,* 327 U. S. 114, 119, 123–125.

tion. See *Witmer* v. *United States,* 348 U. S. 375, 377; *Estep* v. *United States,* 327 U. S. 114; *Billings* v. *Truesdell,* 321 U. S. 542; *Falbo* v. *United States,* 320 U. S. 549.

Occasionally, however, other federal courts had allowed exceptions to this rule.[4] Section 10 (b)(3) was proposed and enacted shortly after the Court of Appeals for the Second Circuit had, in the well-publicized case of *Wolff* v. *Selective Service Bd.,* 372 F. 2d 817, permitted just such an exception.[5] In adopting the section Congress specifically disapproved those decisions that had deviated from the rule against pre-induction review, and made explicit its absolute commitment against premature judicial interference with the orderly processing of registrants. The Senate Armed Services Committee put the matter this way:

> "Until recently, there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." [6]

A similar statement of intent was included in the report of the House Armed Services Committee:

> "The committee was disturbed by the apparent inclination of some courts to review the classification

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[4] See *Townsend* v. *Zimmerman,* 237 F. 2d 376; *Schwartz* v. *Strauss,* 206 F. 2d 767 (concurring opinion); *Ex parte Fabiani,* 105 F. Supp. 139; *Tomlinson* v. *Hershey,* 95 F. Supp. 72.

[5] In *Wolff* the court allowed pre-induction review of the reclassification of two students who had demonstrated against the hostilities in Vietnam.

[6] S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967).

> action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." [7]

Although the language of § 10 (b)(3) contains no explicit reference to habeas corpus as a remedy for inductees seeking to challenge their classifications, that remedy was plainly recognized and approved by Congress. The section provides for review "after the registrant has responded *either affirmatively or negatively* to an order to report for induction . . . ." (Emphasis added.) The remedy for one who responds affirmatively cannot, of course, be by way of "defense to a criminal prosecution" for refusing to be inducted; the only remedy in such a case is habeas corpus, and the Senate Committee Report made quite clear Congress' understanding in this regard:

> "A registrant who presents himself for induction may challenge his classification by seeking a writ of habeas corpus after his induction. If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality of the classification." [8]

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[7] H. R. Rep. No. 267, 90th Cong., 1st Sess., 30–31 (1967).

[8] S. Rep. No. 209, *supra*, at 10.

Thus there can be no doubt that § 10 (b)(3) was designed to permit judicial review of draft classifications only in connection with criminal prosecutions or habeas corpus proceedings. Today, however, the Court holds that § 10 (b)(3) does not mean what it says in a case like this, where it is "plain on the record and on the face of the Act that an exemption ha[s] been granted." [9] In such a case, it is said, there is a "clash" between the exemption and the provisions of § 10 (b)(3). With all respect, I am simply unable to perceive any "clash" whatsoever. Exemptions from service are substantive, while § 10 (b)(3) is purely procedural, specifying *when* substantive rights may be asserted. How the Court can conclude that the provisions of § 10 (b)(3) somehow do "violence to" the divinity student exemption is a mystery to me.[10]

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[9] The Court seems to limit its holding to statutory "exemptions"; yet "deferments" may just as "plainly" preclude a registrant's induction. See, *e. g.*, 50 U. S. C. App. § 456 (h)(1) (1964 ed., Supp. III); 32 CFR § 1622.25 (1968) (full-time college students).

[10] A different ground for permitting review in the present case is set out in the separate opinion of my Brother HARLAN. His opinion is founded on the proposition that constitutional problems would be presented by a system that "deprive[d] petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." MR. JUSTICE HARLAN seeks to avoid such difficulties by viewing § 10 (b)(3) as intended to prohibit, not all delays in the processing of registrants, but merely those protracted delays that result from judicial consideration of factual claims.

As the absence of any exception in its terms indicates, however, § 10 (b)(3) plainly was intended to prevent any interruption whatever of the orderly processing of registrants. There is not a glimmer of evidence in the section's legislative history that Congress intended to prevent some sorts of delay but not others. Moreover, it is difficult to reconcile the distinction MR. JUSTICE HARLAN seeks to draw—between claims "that the procedure employed by the Board

The only other reason the Court offers for its casual disregard of § 10 (b)(3) is the suggestion that obedience to the statute would lead to "unnecessary harshness." But if the statute is constitutional, we have no power to disregard it simply because we think it is harsh. That is a judgment for Congress, not for us. And the Court does not question the law's constitutionality.[11] To the

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is invalid on its face" and challenges to a Board's factual determinations—with his recognition that the enactment of § 10 (b)(3) was in substantial part a congressional reaction to the Second Circuit's decision in *Wolff* v. *Selective Service Bd.*, 372 F. 2d 817. *Wolff* involved no factual dispute whatsoever; rather, that decision held that, on the basis of admitted facts, the "delinquency" reclassification of the registrants there involved had been entirely unauthorized under both the statute and the applicable regulations.

Nor can I view the constitutional theory suggested by my Brother HARLAN as presenting a justifiable ground for decision. It is noteworthy, first of all, that no such theory has ever been advanced by the petitioner. Furthermore, persons arrested for criminal offenses are routinely deprived of their liberty—to a greater extent than are military inductees—without any prior opportunity for the adjudication of legal or constitutional claims, and often without any hope of securing release on bail. Preliminary hearings before magistrates, by and large, determine only the existence of a prima facie case for the prosecution, and do not begin to reach defenses that might be raised, whether factual, legal, or constitutional. Nor does § 10 (b)(3) necessarily compel deprivation of liberty. A registrant in the petitioner's position is free to refuse induction, keeping open the option of raising his claims should a criminal prosecution be brought against him. And it is entirely possible, of course—and more than likely in the petitioner's case—that no such prosecution will ever be instituted.

[11] The petitioner suggests that where the action of a draft board is challenged as a violation of freedom of speech, the postponement of judicial review until after the scheduled time of induction might have a "chilling effect" upon First Amendment activity. But petitioner's complaint presents no bona fide First Amendment issue. His alleged return of his registration certificate to the Government would not be protected expression. *United States* v. *O'Brien*, 391 U. S. 367.

contrary, the constitutionality of § 10 (b)(3) is upheld this very day in *Clark* v. *Gabriel, post,* p. 256, in reaffirmation of several previous decisions in which this Court has enunciated and applied the rule against pre-induction review of Selective Service determinations.[12]

The Court states that its "construction leaves § 10 (b)(3) unimpaired in the normal operations of the Act." The implication seems to be that the present case is somehow exceptional. But the Court has carved out an "exception" to § 10 (b)(3) in exactly the kind of case where, in terms of the interests at stake, an exception seems least justified. The registrant with a clear statutory exemption is precisely the one least jeopardized by the procedural limitations of § 10 (b)(3). For, as the Government has acknowledged, "the Department of Justice would not prosecute [such a registrant] if he refuses to be inducted, and would promptly confess error if he submits to induction and brings a habeas corpus action." [13]

It is upon those registrants, rather, whose rights are *not* so clear that the burden of § 10 (b)(3) most harshly falls. For it is they who must choose whether to run the serious risk of a criminal prosecution or submit to

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[12] In *Falbo* v. *United States,* 320 U. S. 549, 550, for instance, a registrant who had not reported for induction sought review of his classification, claiming—as the petitioner claims here—"that he was entitled to a statutory exemption from all forms of national service . . . ." In refusing to permit judicial review, the Court, through MR. JUSTICE BLACK, stated:

"Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service." *Id.,* at 554.

See also *Witmer* v. *United States,* 348 U. S. 375, 377; *Estep* v. *United States,* 327 U. S. 114; *Billings* v. *Truesdell,* 321 U. S. 542.

[13] Brief for Respondents 70, n. 33.

induction with the uncertain hope of prevailing in a habeas corpus proceeding. Yet the Court has made plain today in *Clark* v. *Gabriel, supra,* that a registrant whose exemption from service is not clear will under § 10 (b)(3) be put to just such a fateful choice. In light of *Gabriel,* the allowance of pre-induction review in the present case thus stands as all the more irrational and unjustified.

I respectfully dissent.

JOHNSON *v.* BENNETT, WARDEN.

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

No. 32. Argued November 13–14, 1968.—Decided December 16, 1968.

At petitioner's trial for murder in 1934, several witnesses testified that petitioner was in another city when the crime was committed. In accordance with Iowa law, the trial judge instructed the jury that the defendant had the burden of proof on an alibi defense. Petitioner was convicted, and his conviction was upheld by the Iowa Supreme Court. Contending that it violated the Due Process Clause of the Fourteenth Amendment to place on him the burden of proving an alibi defense, petitioner sought a writ of habeas corpus. The District Court denied the writ, and the Court of Appeals affirmed. After this Court granted certiorari, the Court of Appeals, sitting *en banc* in another case, held that to place on the defendant the burden of proving an alibi defense violated due process. *Held:* This case is vacated and remanded for reconsideration in the light of that holding.

386 F. 2d 677, vacated and remanded.

Ronald L. Carlson argued the cause and filed briefs for petitioner.

William A. Claerhout, Assistant Attorney General of Iowa, argued the cause for respondent. With him on the brief was *Richard C. Turner,* Attorney General.

PER CURIAM.

In 1934, petitioner was indicted for murdering a policeman in Burlington, Iowa. Petitioner claimed that he was innocent and that he had not been present at the scene of the crime. At the trial, several witnesses testified that petitioner had been in Des Moines, 165 miles away from Burlington, on the day that the crime was committed. The trial judge instructed the jury that for the petitioner to be entitled to an acquittal on the ground

that he was not present at the scene of the crime, the petitioner must have shown by a preponderance of the evidence that he was not present.[1] The jury found petitioner guilty of second-degree murder, and petitioner was sentenced to life imprisonment. His conviction was affirmed by the Iowa Supreme Court. *State* v. *Johnson*, 221 Iowa 8, 264 N. W. 596 (1936).[2]

In this habeas corpus proceeding, petitioner argued, among other points, that the State had denied him due process of law by placing on him the burden of proving the alibi defense. The United States District Court for the Southern District of Iowa rejected this argument and denied the petition. The United States Court of Appeals for the Eighth Circuit affirmed. 386 F. 2d 677 (1967). We granted certiorari to consider the constitutionality of the alibi instruction, along with other issues. 390 U. S. 1002 (1968).[3] After we granted certiorari, the

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[1] The instruction was as follows:

"The burden is upon the defendant to prove [the] defense [of alibi] by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

[2] See also *State* v. *Johnson*, 221 Iowa 8, 21, 267 N. W. 91 (1936), in which the Iowa Supreme Court corrected certain errors made in its original opinion.

[3] The other issues were whether the State had suppressed evidence favorable to petitioner and intentionally used false evidence at petitioner's trial, in violation of the Fourteenth Amendment.

Court of Appeals for the Eighth Circuit, sitting *en banc,* held in another case that the Iowa rule shifting to the defendant the burden of proving an alibi defense violates the Due Process Clause of the Fourteenth Amendment. *Stump* v. *Bennett,* 398 F. 2d 111 (1968).[4] In view of that holding, we vacate the decision in this case and remand to that court for reconsideration.[5]

MR. JUSTICE BLACK dissents.

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[4] The instruction in *Stump* was similar to the one in the present case. The Court of Appeals rejected the State's contention that any error was harmless because the jury was also instructed that the State had the burden of proving "the crime as a whole" beyond a reasonable doubt. The court pointed out that, in view of the instruction's inconsistency, reasonable minds could infer that the defendant retained the burden of proving nonpresence. 398 F. 2d, at 116, 121–122.

[5] In *Stump,* the Court of Appeals said:

"[W]e are not directly faced with issues of retroactivity. We recognize that a panel of this court in Johnson v. Bennett, also a habeas corpus proceeding by an Iowa state prisoner, refused relief as to a number of matters, including the alibi instruction. The *Johnson* case concededly has some factual distinctions from the present one. Also significant is the fact that in the *Stump* case, unlike *Johnson,* counsel has carefully preserved by objections throughout the trial and appellate procedures his argument as to the unconstitutionality of the instruction." (Citations omitted.) 398 F. 2d, at 122–123.

We express no opinion as to the validity of the distinctions suggested by the Court of Appeals. Instead, we deem it appropriate to remand to that court for a definite ruling on the issue.

CLARK, ATTORNEY GENERAL, ET AL. *v.* GABRIEL.

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

No. 572. Decided December 16, 1968.

Appellee's draft Board rejected his claim to classification as a conscientious objector and classified him I–A. His administrative appeals were unsuccessful and, after he was ordered to report for induction, he filed suit in the District Court to enjoin his induction and to have the rejection of his conscientious objector claim declared improper. The District Court entered a preliminary injunction preventing induction until a determination of the claim on the merits. That court held that § 10 (b) (3) of the Military Selective Service Act of 1967, which provides that there shall be no pre-induction judicial review "of the classification or processing of any registrant," if applied to bar pre-induction review of appellee's classification, was unconstitutional. *Held:* The draft Board had exercised its statutory discretion, evaluating the evidence in appellee's individual case, and had rejected his claim. Congress may constitutionally require that a registrant's challenges to such decisions be deferred until after induction, when the remedy of habeas corpus would be available, or until defense of a criminal prosecution, should he refuse to submit to induction. See *Oestereich* v. *Selective Service Bd.*, *ante*, p. 233.

287 F. Supp. 369, reversed and remanded.

Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander, and *Robert V. Zener* for appellants.

Norman Leonard for appellee.

PER CURIAM.

Appellee's draft Board rejected his claim to classification as a conscientious objector and classified him I–A. His appeals within the Selective Service System were unsuccessful. After he was ordered to report for induction he brought an action in the United States District

Court for the Northern District of California seeking to have his induction enjoined and to have the rejection of his claim to conscientious objector classification declared improper on the grounds that it had no basis in fact, that the Board had misapplied the statutory definition of conscientious objector, and that the members of the Board were improperly motivated by hostility and bias against those who claim to be conscientious objectors. The District Court entered a preliminary injunction preventing appellee's induction until after a determination of his claim on the merits.

In entering the preliminary injunction, the District Court held that it had jurisdiction to hear appellee's claim despite § 10 (b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. III), which provides:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Acknowledging that this statute if applicable would prevent pre-induction review of appellee's classification, the District Court held that, so applied, § 10 (b)(3) was unconstitutional because to provide for judicial consideration of the lawfulness of the Board's action only as a defense to a criminal prosecution would require that appellee pursue a "tortuous judicial adventure" so beset by "hazards"

and "penalties" as to result "in no review at all." The Government has appealed under 28 U. S. C. § 1252 which allows direct appeal to this Court of "an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . or any officer . . . thereof . . . is a party."

This Court has today, after full consideration, decided *Oestereich* v. *Selective Service Bd., ante,* p. 233. Because the result here is dictated by the principles enunciated in that case, it is appropriate to decide this case summarily, reversing the District Court.

In *Oestereich* the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being "sustained by the local board." 50 U. S. C. App. § 456 (j) (1964 ed., Supp. III).

Here the Board has exercised its statutory discretion to pass on a particular request for classification, "evaluating evidence and . . . determining whether a claimed exemption is deserved." *Oestereich* v. *Selective Service Bd., supra,* at 238. A Local Board must make such a decision in respect of each of the many classification claims presented to it. To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426 (report by Senator Russell on Conference Committee ac-

tion)) which Congress sought to prevent when it enacted § 10 (b)(3).

We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction. *Estep* v. *United States,* 327 U. S. 114 (1946); *Falbo* v. *United States,* 320 U. S. 549 (1944).

The motion of appellee for leave to proceed *in forma pauperis* is granted. The decision of the District Court is reversed, and the case remanded for issuance of an order dissolving the preliminary injunction and dismissing the action.

MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE concur in the judgment of the Court for the reasons stated in MR. JUSTICE STEWART's dissenting opinion in *Oestereich* v. *Selective Service Bd., ante,* p. 245, decided today.

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

MR. JUSTICE DOUGLAS, concurring.

The evidence in this case, which I have set forth in an Appendix, makes plain, as the Court states, that the question whether the registrant should be classified as a conscientious objector turns on the weight and credibility of the testimony. I therefore agree that § 10 (b)(3) of the Military Selective Service Act of 1967 precludes review of the action of the Board at this pre-induction stage.

320-583 O - 69 - 25

I would take a different view if this were a case where a registrant was moved from a CO (conscientious objector) classification to I–A because he made a speech, unpopular with the Board.

This would also be a different case if the registrant were a member of an institutionalized group,[1] such as the Quakers, whose opposition to war was well known and the registrant, though perhaps unpopular with the Board, was a bona fide member of the group. Then, too, a Board would act in a lawless way [2] if it moved a registrant from a CO classification to I–A and disregarding all the evidence denied him a CO classification.

But in my view it takes the extreme case where the Board can be said to flout the law, as it did in *Oestereich* v. *Selective Service Bd., ante,* p. 233, to warrant pre-induction review of its actions.

APPENDIX TO OPINION OF DOUGLAS, J., CONCURRING.

Charles Gabriel is 23 years old, son of a white father and Negro mother. He graduated from Berkeley High School, attended San Francisco State College for two years before being dropped; for the following year he tried to regain entrance to that College by attending its "Extension School"; but when he was denied re-admission, he spent the next year at a City College from which he graduated. He registered with the Selective Service in 1963 at the age of 18. Two years later, at the age of 20, he applied for CO status. He was denied reclassifi-

[1] Membership in a religious group is not, of course, the sole means of getting classification as a conscientious objector, as the exemption extends to anyone who has those conscientious objections, even though he is not associated with others. See *United States* v. *Seeger,* 380 U. S. 163, 172–173.

[2] See White, Processing Conscientious Objector Claims: A Constitutional Inquiry, 56 Calif. L. Rev. 652, 660–667 (1968).

cation, and his *three* requests for a "personal appearance" before the board over a nine-month period were disregarded. Finally, he was given an opportunity for a personal appearance after he complained to the State Headquarters. He was denied reclassification.

(A) *Gabriel's Letter of August 13, 1965.*

In 1965, after he obtained a copy of Form 150 by which a registrant files for conscientious objector status, Gabriel filled out the form and sent his local draft board an accompanying letter explaining his conscientious convictions:

> "As a Negro I firmly believe the United States Government has willfully let the Negro be deprived of his rights therefore the debt of forced service claimed arbitrarily from all eligible men for the purpose of fighting for the United States rights is in the Negroes case void. Because he has not been given the rights the United States fights for on its citizens behalf.
>
> . . . . .
>
> "My beliefs are superior to my human relations with the U. S. government and duties coming out of my beliefs are superior to duties stolen from me by the U. S. government.
>
> "I have voiced my opinions and beliefs freely. In Berkeley H. S. in class in fall 1962 during the Cuban crisis I made a speech against U. S. action in Cuba otherwise I haven't bothered to record all the times I said what I thought.
>
> "[listing activities]: active CORE member (1961–2) March on Wash DC 1963; Demonstrated against HUAC in Wash. D.C. 1959 I was in and helped organize the Freedom Week Play in Berkeley H. S. 1963. Demonstrated in 1960 in support of sit-ins against southern Wolworth Stores.
>
> . . . . .

"All through my life I have been in contact with people who did not believe in war or killing; who believed the U.S. government and system was unjust. My parents their friends, my friends, numerous books by liberal or leftist writers . . . have been things that make me what I am."

(B) *Gabriel's Official Summary of his Personal Appearance.*

After his personal appearance, Gabriel filed a copy of his summary of the hearing, as provided by Selective Service regulations.

"This is a summary of my personal appearance before you on Thursday, May 19, 1966. . . . The youngest, forty to forty-five years old was fairly friendly during the meeting; the oldest seemed neutral; the other three seemed fairly unfriendly. . . . The oldest man referred to my letters as 'very pointed, belligerent.' I said, jokingly, that I wrote the letters with the help of Ben Seaver and Alex Sliszka and they should share the blame. Then there was an unfriendly comment about Sliszka and Seaver. The youngest man read my statement that said I was a Negro and didn't think I had my rights. He asked if this wasn't the basis of most of my case. I said, 'No. It was only part of it.'. . . Then one man asked me if I was trying to 'beat the game.' . . . I said that there were easier ways to avoid the draft and gave some examples. . . . The man who asked me to reread my written statement said, i. e. wasn't that answer subversive. I said 'maybe so but I believe I'm right.' . . . The oldest man asked me if I'd fought in high school. I answered, 'No' and he said, 'You must have been a real good boy.' He then asked me between two and four times to 'eradicate' the thought from my mind that I had gotten unfair treatment from the local board."

(C) *Department of Justice Résumé.*

After being denied CO status, Gabriel appealed. And as is customary in such appeals, the Justice Department conducted an investigation into the sincerity of his beliefs. The following is a résumé of the investigating officer's report.

> "A representative of Berkeley High School . . . stated that he was a 'quiet rebel' but was mature for his age. . . . Another representative at Berkeley High School stated that . . . she recalls that he demonstrated a high regard for the individual . . . and was extremely conscious of the role in society of the American Negro. It was advised that the registrant's mother . . . and step-father have been politically active in such organizations as the Congress for Racial Equality. . . . A representative of the Buildings and Grounds Department, San Francisco State College, advised that the registrant . . . had a reputation of being involved in any movement which has doings with anti-war demonstrations or activities. This representative stated that he never actually witnessed the registrant in these activities but it is general knowledge among employees around the campus. . . . An official of the Magic Theatre, San Francisco, California advised that . . . the registrant is against war and against military service. It was further stated that the registrant has discussed the Vietnam war and considers it unjust. . . . One person interviewed in San Francisco, California advised that she has resided here in an apartment building for the last four or five years. She stated as she recalls, a young Negro male resided with a young woman in an apartment in this building about a year ago. She believes this individual may have been the registrant. . . . A reference stated that he has known

> the registrant since about 1963 . . . when they both were students at San Francisco State College. . . . He further stated that the registrant could well be a communist, however, they have never discussed this. He advised that he is aware that the registrant's mother and father are very much against war and they are active in movements which are against war. He further stated that the registrant is also active in these movements and organizations, however, he did not know the names of these organizations. It was also stated that the registrant has mentioned that he is active in anti-war groups and he believes he has participated in anti-war marches. . . . Another reference stated . . . that when [the registrant] went to report for his armed forces physical examination he observed an anti-draft demonstration occurring in front of the physical facilities and felt compelled to take part in the demonstration, which he did."

(D) *Department of Justice Recommendation.*

After conducting its investigation, the Department of Justice filed a "recommendation" with the local board, suggesting that Gabriel be denied CO status:

> "He said that he is definitely not a communist. . . . The registrant advised that he is, and has been, consistently nonviolent, and that he has never been a member of any aggressive anti-war demonstrations. He said that, although he was a member of the Vietnam Day Committee and the War Resistance League, and has participated in peace marches, he has always participated in a passive or peaceful manner."

HOUSEHOLD GOODS CARRIERS' BUREAU ET AL. *v.* UNITED STATES ET AL.

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

No. 615. Decided December 16, 1968.

288 F. Supp. 641, affirmed.

Homer S. Carpenter for appellants.

Alan F. Wohlstetter for Household Goods Forwarders Association of America, Inc., et al., intervening defendants below.

Solicitor General Griswold, Assistant Attorney General Zimmerman, Robert W. Ginnane, and *Betty Jo Christian* for the United States et al.

PER CURIAM.

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

OGLE *v.* HEIM, AUDITOR-CONTROLLER OF COUNTY OF ORANGE.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 617. Decided December 16, 1968.

69 Cal. 2d 7, 442 P. 2d 659, appeal dismissed.

Eric A. Rose for appellant.

Robert F. Nuttman for appellee.

PER CURIAM.

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

WILSON ET AL. *v.* KELLEY, CORRECTIONS DIRECTOR, ET AL.

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

No. 561. Decided December 16, 1968.

Affirmed.

Charles Morgan, Jr., Reber F. Boult, Jr., Howard Moore, Jr., P. Walter Jones, Arthur Kinoy, Melvin L. Wulf, and *Martin Garbus* for appellants.

Arthur K. Bolton, Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, *Marion O. Gordon, Mathew Robins,* and *W. Wheeler Bryan,* Assistant Attorneys General, and *Don L. Hartman,* Deputy Assistant Attorney General, for appellees.

PER CURIAM.

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

MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.

STANDARD OIL CO. OF CALIFORNIA *v.* CITY OF LOS ANGELES ET AL.

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

No. 609. Decided December 16, 1968.

262 Cal. App. 2d 118, 68 Cal. Rptr. 512, appeal dismissed.

Francis R. Kirkham, Francis N. Marshall, and *Marcus Mattson* for appellant.

Roger Arnebergh, Gilmore Tillman, Henry E. Kappler, and *Ellis J. Horvitz* for appellees.

PER CURIAM.

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

THORPE *v.* HOUSING AUTHORITY OF THE CITY OF DURHAM.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 20. Argued October 23, 1968.—Decided January 13, 1969.

Petitioner had a month-to-month tenancy in a federally assisted public housing project operated by respondent, the lease providing for termination by either party on 15 days' notice. She received a lease cancellation notice, with no reasons being given, the day after being elected president of a tenants' organization. Petitioner, who fruitlessly tried to determine why she was being evicted, refused to vacate. Respondent brought an eviction action, and the State Supreme Court affirmed the lower court's eviction order which held that the reasons for cancellation were immaterial, notwithstanding petitioner's contention that she was being evicted because of her organizational activities in violation of her First Amendment rights. This Court granted certiorari. Thereafter, on February 7, 1967, the Department of Housing and Urban Development (HUD) issued a circular requiring local housing authorities to give tenants the reasons for eviction and to afford them an opportunity for explanation or reply. Following this Court's remand for further proceedings in the light of the HUD circular (386 U. S. 670), the State Supreme Court upheld petitioner's eviction on the ground that the parties' rights had "matured" before issuance of the circular, which the court held applied only prospectively. The court stayed execution of its judgment pending this Court's decision. Respondent urges that the circular (1) is only advisory; (2) if mandatory, constitutes an unconstitutional impairment of respondent's contract with HUD and its lease agreement with petitioner; and (3) if constitutional, does not apply to eviction proceedings commenced before its issuance. *Held:*

1. Housing authorities of federally assisted public housing projects must follow the requirements of the February 7, 1967, HUD circular before evicting any tenant residing in such projects on the date of this Court's decision herein. Pp. 274–284.

(a) The circular, which originally supplemented and later became incorporated in HUD's Low-Rent Management Manual issued under the agency's general rule-making powers pursuant to § 8 of the United States Housing Act of 1937, was intended by HUD to be mandatory. Pp. 274–276.

(b) The simple notification procedure required by the circular, which has only nominal effect on respondent's administration of the housing project, does not violate the congressional policy set forth in the Act for local control of federally financed housing projects. Pp. 277–278.

(c) The respective obligations of HUD and respondent under the annual contributions contract between them, and the lease agreement between petitioner and respondent, remain unchanged by the circular, which therefore does not involve any impairment of contractual obligations in violation of the Due Process Clause of the Fifth Amendment. Pp. 278–280.

(d) The circular furthers the Act's remedial purpose. Pp. 280–281.

(e) The circular applies to eviction proceedings commenced before its issuance under the general rule that a court must apply the law (here that of an administrative agency acting pursuant to legislative authorization) in effect at the time it renders decision; and that rule is particularly applicable here where ascertainment of the reason for eviction is essential to enable a tenant to defend against eviction for activity claimed to be constitutionally protected. Pp. 281–283.

2. It would be premature to decide, as petitioner urges, that this Court must establish guidelines to insure that she is given not only the reasons for her eviction but also a hearing comporting with due process requirements. Pp. 283–284.

271 N. C. 468, 157 S. E. 2d 147, reversed and remanded.

James M. Nabrit III argued the cause for petitioner. With him on the briefs were *Jack Greenberg, Charles Stephen Ralston, Charles H. Jones, Jr., Anthony G. Amsterdam,* and *William Bennett Turner.*

Daniel K. Edwards argued the cause for respondent. With him on the briefs was *William Y. Manson.*

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

This case raises the question whether a tenant of a federally assisted housing project can be evicted prior to notification of the reasons for the eviction and without an opportunity to reply to those reasons, when such a

procedure is provided for in a Department of Housing and Urban Development (hereinafter HUD) circular issued after eviction proceedings have been initiated.

On November 11, 1964, petitioner and her children commenced a month-to-month tenancy in McDougald Terrace, a federally assisted, low-rent housing project owned and operated by the Housing Authority of the City of Durham, North Carolina. Under the lease, petitioner is entitled to an automatic renewal for successive one-month terms, provided that her family composition and income remain unchanged and that she does not violate the terms of the lease.[1] The lease also provides, however, that either the tenant or the Authority may terminate the tenancy by giving notice at least 15 days before the end of any monthly term.[2]

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[1] "This lease shall be automatically renewed for successive terms of one month each at the rental last entered and acknowledged below . . . . Provided, there is no change in the income or composition of the family of the tenant and no violation of the terms hereof. In the event of any change in the composition or income of the family of the tenant, rent for the premises shall automatically conform to the rental rates established in the approved current rent schedule which has been adopted by the Management for the operation of this Project . . . ."

[2] "This lease may be terminated by the Tenant by giving to Management notice in writing of such termination 15 days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. Provided, however, that this paragraph shall not be construed to prevent the termination of this lease by Management in any other method or for any other cause set forth in this lease."

The Housing Authority construes this provision to authorize termination upon the giving of the required notice even if the tenant has not violated the terms of the lease and his income and family composition have not changed. Petitioner, however, insists that since the Authority is a government agency, it may not constitutionally evict "for no reason at all, or for an unreasonable, arbitrary and capricious reason . . . ." Brief for Petitioner 27. We do not, however, reach that issue in this case. See n. 49, *infra*.

On August 10, 1965, petitioner was elected president of a McDougald Terrace tenants' organization called the Parents' Club. On the very next day, without any explanation, the executive director of the Housing Authority notified petitioner that her lease would be canceled as of August 31.[3] After receiving notice, petitioner attempted through her attorneys, by phone and by letter, to find out the reasons for her eviction.[4] Her inquiries went unanswered, and she refused to vacate.

On September 17, 1965, the Housing Authority brought an action for summary eviction in the Durham Justice of the Peace Court, which, three days later, ordered petitioner removed from her apartment. On appeal to the Superior Court of Durham County, petitioner alleged that she was being evicted because of her organizational activities in violation of her First Amendment rights. After a trial *de novo*,[5] the Superior Court affirmed the

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[3] The text of the notice is as follows:

"Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy."

[4] One of those attempts was made on September 1. In an affidavit filed with the Superior Court of Durham County, petitioner alleged that on that day members of the Housing Authority met with a Durham police detective who had been investigating petitioner's conduct. Although petitioner's attorney met with Housing Authority representatives on this same day to request a hearing, the attorney was not informed what information had been uncovered by the police investigation or whether it had any bearing on petitioner's eviction.

[5] All of the essential facts were stipulated in the Superior Court, including:

"that if Mr. C. S. Oldham, the Executive Director of the Housing Authority of the City of Durham, were present and duly sworn and were testifying, he would testify that whatever reason there may have been, if any, for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected

eviction, and the Supreme Court of North Carolina also affirmed.[6] Both appellate courts held that under the lease the Authority's reasons for terminating petitioner's tenancy were immaterial. On December 5, 1966, we granted certiorari[7] to consider whether petitioner was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons.

On February 7, 1967, while petitioner's case was pending in this Court, HUD issued a circular directing that before instituting an eviction proceeding local housing authorities operating all federally assisted projects should inform the tenant "in a private conference or other appropriate manner" of the reasons for the eviction and give him "an opportunity to make such reply or explanation as he may wish."[8] Since the application of

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president of any group organized in McDougald Terrace, and specifically it was not for the reason that she was elected president of any group organized in McDougald Terrace on August 10, 1965 . . . ."

[6] 267 N. C. 431, 148 S. E. 2d 290 (1966).

[7] 385 U. S. 967.

[8] The full text of that circular is as follows:

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
Washington, D. C. 20410

Circular
2–7–67

Office of the Assistant Secretary
For Renewal and Housing Assistance

TO: Local Housing Authorities
Assistant Regional Administrators for
Housing Assistance
HAA Division and Branch Heads

FROM: Don Hummel

SUBJECT: Terminations of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During

this directive to petitioner would render a decision on the constitutional issues she raised unnecessary, we vacated the judgment of the Supreme Court of North Carolina and remanded the case "for such further proceedings as may be appropriate in the light of the February 7 circular of the Department of Housing and Urban Development." [9]

On remand, the North Carolina Supreme Court refused to apply the February 7 HUD circular and reaffirmed its prior decision upholding petitioner's eviction. Analo-

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that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

s/ Don Hummel
Assistant Secretary for Renewal
and Housing Assistance

[9] 386 U. S. 670, 673–674 (1967).

gizing to the North Carolina rule that statutes are presumed to act prospectively only, the court held that since "[a]ll critical events" [10] had occurred prior to the date on which the circular was issued "[t]he rights of the parties had matured and had been determined before . . ." that date.[11] We again granted certiorari.[12] We reverse the judgment of the Supreme Court of North Carolina and hold that housing authorities of federally assisted public housing projects must apply the February 7, 1967, HUD circular before evicting any tenant still residing in such projects on the date of this decision.[13]

In support of the North Carolina judgment, the Housing Authority makes three arguments: (1) the HUD circular was intended to be advisory, not mandatory; (2) if the circular is mandatory, it is an unauthorized and unconstitutional impairment of both the Authority's annual contributions contract with HUD [14] and the lease agreement between the Authority and petitioner; and (3) even if the circular is mandatory, within HUD's power, and constitutional, it does not apply to eviction proceedings commenced prior to the date the circular was issued. We reject each of these contentions.

I.

Pursuant to its general rule-making power under § 8 of the United States Housing Act of 1937,[15] HUD has

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[10] 271 N. C. 468, 471, 157 S. E. 2d 147, 150 (1967).

[11] 271 N. C., at 470, 157 S. E. 2d, at 149.

[12] 390 U. S. 942 (1968).

[13] The Supreme Court of North Carolina stayed the execution of its judgment pending our decision. As a result, petitioner has not yet vacated her apartment.

[14] Under § 10 (a) of the United States Housing Act of 1937, 50 Stat. 891, as amended, 42 U. S. C. § 1410 (a) (1964 ed., Supp. III), HUD is required to enter into an annual contributions contract with the local housing authorities. In that contract, HUD guarantees to provide a certain amount of money over a certain number of years.

[15] 50 Stat. 891, as amended, 42 U. S. C. § 1408 (1964 ed., Supp. III).

issued a Low-Rent Management Manual,[16] which contains requirements that supplement the provisions of the annual contributions contract applicable to project management.[17] According to HUD, these requirements "are the minimum considered consistent with fulfilling Federal responsibilities" under the Act.[18] Changes in the manual are initially promulgated as circulars. These circulars, which have not yet been physically incorporated into the manual, are temporary additions or modifications of the manual's requirements and "have the same effect." [19] In contrast, the various "handbooks" and "booklets" issued by HUD contain mere "instructions," "technical suggestions," and "items for consideration." [20]

Despite the incorporation of the February 7 circular into the Management Manual in October 1967, the Housing Authority contends that on its face the circular purports to be only advisory. The Authority places particular emphasis on the circular's precatory statement that HUD "believes" that its notification procedure should be followed. In addition to overlooking the significance of the subsequent incorporation of the circular into the Management Manual, the Authority's argument is based upon a simple misconstruction of the language actually used. The import of that language, which characterizes the new notification procedure as "essential," becomes apparent when the February 7 circular is contrasted with the one it superseded. The earlier circular, issued on May 31, 1966, stated: "[*W*]*e strongly urge, as a matter of good social policy,* that Local Authorities in a

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[16] Housing Assistance Administration, HUD, Low-Rent Management Manual.

[17] *Id.*, § 0 (preface) (April 1962).

[18] *Ibid.*

[19] Housing Assistance Administration, HUD, Low-Rent Housing Manual § 100.2, at 2 (Sept. 1963).

[20] *Ibid.*

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private conference inform any tenants who are given . . . [termination] notices of the reasons for this action." [21] (Emphasis added.) This circular was not incorporated into the Management Manual.

That HUD intended the February 7 circular to be mandatory has been confirmed unequivocally in letters written by HUD's Assistant Secretary for Renewal and Housing Assistance [22] and by its Chief Counsel.[23] As we stated in *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 414 (1945), when construing an administrative regulation, "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." [24] Thus, when the language and HUD's treatment of the February 7 circular are contrasted with the language and treatment of the superseded circular, there can be no doubt that the more recent circular was intended to be mandatory, not merely advisory as contended by the Authority.

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[21] Circular from Commissioner Marie C. McGuire to Local Authorities, Regional Directors, and Central Office Division and Branch Heads, May 31, 1966.

[22] "[W]e intended it to be followed. . . . The circular is as binding in its present form as it will be after incorporation in the manual. . . . HUD intends to enforce the circular to the fullest extent of its ability. . . ."

Letter from Assistant Secretary Don Hummel to Mr. Charles S. Ralston of the NAACP Legal Defense and Educational Fund, Inc., July 25, 1967.

[23] HUD's Chief Counsel stated that his "views are the same as those expressed" by Assistant Secretary Hummel. Letter from Mr. Joseph Burstein to Mr. Charles S. Ralston, Aug. 7, 1967.

[24] Accord, *Udall* v. *Tallman*, 380 U. S. 1 (1965). See *Zemel* v. *Rusk*, 381 U. S. 1 (1965).

II.

Finding that the circular was intended to be mandatory does not, of course, determine the validity of the requirements it imposes.[25] In our opinion remanding this case to the Supreme Court of North Carolina to consider the HUD circular's applicability, we pointed out that the circular was issued pursuant to HUD's rule-making power under § 8 of the United States Housing Act of 1937,[26] which authorizes HUD [27] "from time to time [to] make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act." [28] The Housing Authority argues that this authorization is limited by the Act's express policy of "vest[ing] in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of . . . [HUD]), with due consideration to accomplishing the objectives of this Act while effecting economies." [29] But the HUD circular is not inconsistent with this policy. Its minimal effect upon

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[25] See *Udall* v. *Tallman, supra.*

[26] 386 U. S. 670, 673, n. 4 (1967).

[27] This rule-making power was transferred from the Public Housing Administration to HUD by § 5 (a) of the Department of Housing and Urban Development Act, 79 Stat. 669, 42 U. S. C. § 3534 (a) (1964 ed., Supp. III).

[28] 50 Stat. 891, as amended, 42 U. S. C. § 1408 (1964 ed., Supp. III). Such broad rule-making powers have been granted to numerous other federal administrative bodies in substantially the same language. See, *e. g.*, 72 Stat. 743, 49 U. S. C. § 1324 (a) (Civil Aeronautics Board); 49 Stat. 647, as amended, 42 U. S. C. § 1302 (Department of Health, Education, and Welfare); 52 Stat. 830, 15 U. S. C. § 717*o* (Federal Power Commission).

[29] Section 1 of the United States Housing Act of 1937, 50 Stat. 888, as amended by § 501 of the Housing Act of 1959, 73 Stat. 679, 42 U. S. C. § 1401.

the Authority's "responsibility in the administration" of McDougald Terrace is aptly attested to by the Authority's own description of what the circular does not require:

> "It does not . . . purport to change the terms of the lease provisions used by Housing Authorities, nor does it purport to take away from the Housing Authority its legal ability to evict by complying with the terms of the lease and the pertinent provisions of the State law relating to evictions. It does not deal with what reasons are acceptable to HUD . . . . Moreover, the Circular clearly does not say that a Housing Authority cannot terminate at the end of any term without cause as is provided in the lease." [30]

The circular imposes only one requirement: that the Authority comply with a very simple notification procedure before evicting its tenants. Given the admittedly insubstantial effect this requirement has upon the basic lease agreement under which the Authority discharges its management responsibilities, the contention that the circular violates the congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects is untenable.

The Authority also argues that under the Due Process Clause of the Fifth Amendment HUD is powerless to impose any obligations except those mutually agreed upon in the annual contributions contract.[31] If HUD's

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[30] Brief for Respondent 21, 23.

[31] Although the constitutional prohibition of the impairment of contracts, U. S. Const. Art. I, § 10, applies only to the States, we have held that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U. S. 571, 579 (1934).

power is not so limited, the Authority argues, HUD would be free to impair its contractual obligations to the Authority through unilateral action. Moreover, in this particular case, the Authority contends that HUD has not only impaired its own contract with the Authority, but it has also impaired the contract between petitioner and the Authority. The obligations of each of these contracts, however, can be impaired only "by a law which renders them invalid, or releases or extinguishes them . . . [or by a law] which without destroying [the] contracts derogate[s] from substantial contractual rights." [32] The HUD circular does neither.

The respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged. Each provision of that contract is as enforceable now as it was prior to the issuance of the circular.[33] Although the circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, that obligation is imposed under HUD's wholly independent rule-making power.

Likewise, the lease agreement between the Authority and petitioner remains inviolate. Petitioner must still pay her rent and comply with the other terms of the lease; and, as the Authority itself acknowledges, she is still subject to eviction.[34] HUD has merely provided for a particular type of notification that must precede

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[32] *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 431 (1934). The statute challenged in *Lynch* v. *United States, supra,* fell into the first of these two categories. It repealed "all laws granting or pertaining to yearly renewable [War Risk term] insurance . . . ." 292 U. S., at 575.

[33] A far different case would be presented if HUD were a party to this suit arguing that it could repudiate its obligations under the annual contributions contract because the Authority had failed to apply the circular. Cf. *Lynch* v. *United States, supra.*

[34] Cf. *Home Bldg. & Loan Assn.* v. *Blaisdell, supra,* at 425.

eviction; and "[i]n modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right." [35]

Since the Authority does not argue that the circular is proscribed by any constitutional provision other than the Due Process Clause, the only remaining inquiry is whether it is reasonably related to the purposes of the

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[35] *Penniman's Case,* 103 U. S. 714, 720 (1881). See *El Paso* v. *Simmons,* 379 U. S. 497, at 508 (1965); *Home Bldg. & Loan Assn.* v. *Blaisdell, supra.*

We have consistently upheld legislation that affects contract rights far more substantially than does the HUD circular. *E. g., El Paso* v. *Simmons, supra,* upheld a state statute that placed a time limit on the right to reinstate a claim in previously forfeited public lands; *East N. Y. Sav. Bank* v. *Hahn,* 326 U. S. 230 (1945), upheld a New York statute suspending mortgage foreclosures for the 10th year in succession; and *Blaisdell* upheld a statute that extended mortgagors' redemption time.

There is no reason why the principles that control legislation that affects contractual rights should not also control administrative rule making that affects contractual rights. Cf. *Permian Basin Area Rate Cases,* 390 U. S. 747, 779–780 (1968), which upheld a Federal Power Commission order limiting the application of "escalation clauses" in contracts for the sale of natural gas; and 24 CFR §§ 1.1–1.12 (1968), which proscribe a wide range of racially discriminatory practices by both governmental and private interests that receive any federal financial assistance whether or not pursuant to a pre-existing contract. This regulation was promulgated under § 602 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d–1, which directs each federal agency that administers federal financial assistance "by way of grant, loan, or contract other than a contract of insurance or guaranty . . . to effectuate the provisions of section 601 [which prohibits racial discrimination in the administration of any program receiving federal financial assistance] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

enabling legislation under which it was promulgated.[36] One of the specific purposes of the federal housing acts is to provide "a decent home and a suitable living environment for every American family" [37] that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal. We therefore cannot hold that the circular's requirements bear no reasonable relationship to the purposes for which HUD's rule-making power was authorized.

III.

The Housing Authority also urges that petitioner's eviction should be upheld on the theory relied upon by the Supreme Court of North Carolina: the circular does not apply to eviction proceedings commenced prior to its issuance. The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision.[38] Since the law we are concerned with in this case is embodied in a federal administrative regulation, the applicability of this general rule is necessarily

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[36] See, *e. g., FCC* v. *Schreiber,* 381 U. S. 279, 289–294 (1965); *American Trucking Assns., Inc.* v. *United States,* 344 U. S. 298 (1953).

[37] Section 2 of the Housing Act of 1949, 63 Stat. 413, 42 U. S. C. § 1441. That section further directs all agencies of the Federal Government "having powers, functions, or duties with respect to housing . . . [to] exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act . . . ." *Ibid.*

[38] "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78 (1943). Accord, *e. g., Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538 (1941); *United States* v. *Chambers,* 291 U. S. 217 (1934).

governed by federal law. Chief Justice Marshall explained the rule over 150 years ago as follows:

> "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." [39]

This same reasoning has been applied where the change was constitutional,[40] statutory,[41] or judicial.[42] Surely it applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization. Exceptions have been made to prevent manifest injustice,[43] but this is not such a case.

To the contrary, the general rule is particularly applicable here. The Housing Authority concedes that its power to evict is limited at least to the extent that it may not evict a tenant for engaging in constitutionally

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[39] *United States* v. *Schooner Peggy,* 1 Cranch 103, 110 (1801).

[40] See, *e. g., United States* v. *Chambers, supra.*

[41] See, *e. g., Carpenter* v. *Wabash R. Co.,* 309 U. S. 23 (1940).

[42] See, *e. g., Vandenbark* v. *Owens-Illinois Glass Co., supra.*

[43] See *Greene* v. *United States,* 376 U. S. 149 (1964), in which we held that the petitioner's right to recover lost pay for a wrongful discharge was "vested" as a result of our earlier decision in *Greene* v. *McElroy,* 360 U. S. 474 (1959), which we construed to have made a "final" and "favorable" determination, 376 U. S., at 159, that petitioner had been wrongfully deprived of his employment.

protected activity;[44] but a tenant would have considerable difficulty effectively defending against such an admittedly illegal eviction if the Authority were under no obligation to disclose its reasons.[45] On the other hand, requiring the Authority to apply the circular before evicting petitioner not only does not infringe upon any of its rights, but also does not even constitute an imposition. The Authority admitted during oral argument that it has already begun complying with the circular.[46] It refuses to apply it to petitioner simply because it decided to evict her before the circular was issued. Since petitioner has not yet vacated, we fail to see the significance of this distinction. We conclude, therefore, that the circular should be applied to all tenants still residing in McDougald Terrace, including petitioner, not only because it is designed to insure a fairer eviction procedure in general, but also because the prescribed notification is essential to remove a serious impediment to the successful protection of constitutional rights.

IV.

Petitioner argues that in addition to holding the HUD circular applicable to her case, we must also establish guidelines to insure that she is provided with not only

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[44] "We do not contend that, in the case of Housing Authority leases if the purpose of the notice of termination of the lease is to proscribe the exercise of a constitutional right by the tenant the notice would be effective; the notice would be invalid, and the term of the lease and its automatic renewal would not thereby be affected." Brief for Respondent 11.

[45] See generally *Thorpe* v. *Housing Authority of the City of Durham*, 386 U. S. 670, 674–681 (1967) (DOUGLAS, J., concurring).

[46] Transcript of Argument 28. Despite this admission, counsel for the Authority insisted throughout his oral argument that HUD has no power to require compliance with the circular. See *id.*, at 26–27, 28, 30–32, 48–49. He even expressly suggested that the Authority could depart from its requirements "without violating any kind of Federal law." *Id.*, at 48.

the reasons for her eviction but also a hearing that comports with the requirements of due process. We do not sit, however, "to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . ."[47] The Authority may be able to provide petitioner with reasons that justify eviction under the express terms of the lease. In that event, she may decide to vacate voluntarily without contesting the Authority's right to have her removed. And if she challenges the reasons offered, the Authority may well decide to afford her the full hearing she insists is essential.[48] Moreover, even if the Authority does not provide such a hearing, we have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts. Thus, with the case in this posture, a decision on petitioner's constitutional claims would be premature.[49]

Reversed and remanded.

MR. JUSTICE BLACK, concurring.

The Court here uses a cannon to dispose of a case that calls for no more than a popgun. The Durham Housing

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[47] *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). Cf. *Zemel* v. *Rusk*, *supra*, at 18–20; *United States* v. *Fruehauf*, 365 U. S. 146 (1961).

[48] Moreover, if the procedure followed by the Authority proves inadequate, HUD may well decide to provide for an appropriate hearing. Cf. 24 CFR §§ 1.1–1.12 (1968), which establish a detailed procedure to dispose of complaints of racial discrimination in any federally assisted program.

[49] These same considerations lead us to conclude that it would be equally premature for us to reach a decision on petitioner's contention that it would violate due process for the Authority to evict her arbitrarily. That issue can be more appropriately considered if petitioner is in fact evicted arbitrarily. See *Alabama State Federation of Labor* v. *McAdory*, *supra*.

Authority has clearly stated, both in its brief and at oral argument, that it is fully complying with the directive of the Department of Housing and Urban Development concerning notice to tenants of reasons for their eviction. The only possible issue therefore is whether the directive should apply to Mrs. Thorpe, against whom eviction proceedings were started prior to the effective date of the HUD memorandum but who is still residing in public housing, as a result of judicial stays. I agree, of course, that the directive should apply to her eviction. Nothing else need be decided.

UNITED STATES *v.* NARDELLO ET AL.

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

No. 51. Argued November 12, 1968.—
Decided January 13, 1969.

Appellees were indicted for violating 18 U. S. C. § 1952, which prohibits travel in interstate commerce with intent to carry on "extortion" in violation of the laws of the State in which committed. In Pennsylvania, where the acts were allegedly committed, the statute entitled "extortion" applies only to public officials, while other statutes prohibit various aspects of "blackmail." The "blackmail" laws, which cover appellees' alleged activities, each define the offense as an act committed with intent "to extort." The District Court, believing that the term extortion was intended "to track closely the legal understanding under state law," concluded that the offense of extortion could only be committed by public officials, and dismissed the indictment against appellees, who were not public officials. The Government appealed. *Held:* In light of the congressional purpose to assist local law enforcement officials in combating interstate activities of organized crime which violate state laws, and not merely to eliminate only those acts which a State has denominated extortion, the extortionate acts for which appellees were indicted, which were prohibited by Pennsylvania law, fall within the generic term "extortion" as used in 18 U. S. C. § 1952. Pp. 289–296.

278 F. Supp. 711, reversed and remanded.

Philip A. Lacovara argued the cause for the United States, *pro hac vice.* With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer.*

F. Emmett Fitzpatrick, Jr., argued the cause and filed a brief for appellees.

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

This appeal presents solely a question of statutory construction: whether 18 U. S. C. § 1952,[1] prohibiting travel in interstate commerce with intent to carry on "extortion" in violation of the laws of the State in which committed, applies to extortionate conduct classified as "blackmail" rather than "extortion" in the applicable state penal code. We believe that § 1952 (hereinafter "the Travel Act") is applicable and thus must reverse the court below.

Appellees were indicted under § 1952 for their alleged participation in a "shakedown" operation whereby individuals would be lured into a compromising homosexual situation and then threatened with exposure unless appellees' silence was purchased. The indictments charged that appellees traveled in interstate com-

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[1] Section 1952 provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." (1964 ed. and Supp. III.)

merce on three separate occasions, twice from New Jersey to Philadelphia and once from Chicago to Philadelphia, to promote their activities. Specifically, the indictments referred to "the unlawful activity of blackmail, in violation of the laws of the Commonwealth of Pennsylvania."

The District Court for the Eastern District of Pennsylvania dismissed the indictments, basing its decision upon Pennsylvania statutes which classify certain acts as "extortion" and others as various aspects of "blackmail." In Pennsylvania, the statute entitled "extortion" is applicable only to the conduct of public officials. Pa. Stat. Ann., Tit. 18, § 4318 (1963). Three other Pennsylvania statutes, Pa. Stat. Ann., Tit. 18, §§ 4801–4803 (1963), prohibit "blackmail," "blackmail by injury to reputation or business," and "blackmail by accusation of heinous crime." Each of these three statutes defines the prohibited offense as, *inter alia,* an act committed with an intent "to extort." The District Court believed that the term extortion as used in the Travel Act was intended "to track closely the legal understanding under state law." 278 F. Supp. 711, 712 (1968). Reasoning from this premise, the court concluded that in Pennsylvania the offense of extortion was covered only by Pa. Stat. Ann., Tit. 18, § 4318, a statute which required that the accused be a public official. Since appellees were not public officials, the indictment was therefore defective.[2] The United States appealed di-

[2] This conclusion impliedly conflicts with at least two other cases in which prosecutions of private individuals for extortion violative of the Travel Act were successfully maintained in States having a statutory structure similar to that found in Pennsylvania. See *United States* v. *Hughes,* 389 F. 2d 535 (C. A. 2d Cir. 1968); *McIntosh* v. *United States,* 385 F. 2d 274 (C. A. 8th Cir. 1967). *Hughes* involved a prosecution pursuant to North Carolina statutes, one of which prohibits extortion by a public official, N. C. Gen. Stat.

rectly to this Court pursuant to 18 U. S. C. § 3731 and probable jurisdiction was noted. 392 U. S. 923 (1968).

Although Congress directed that content should be given to the term "extortion" in § 1952 by resort to state law, it otherwise left that term undefined.[3] At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion.[4] In many States, however, the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by means of force, fear, or threats. See Cal. Penal Code § 519 (1955); N. J. Stat. Ann. § 2A:105–3, § 2A:105–4 (1953); 3 F. Wharton's Criminal Law and Procedure § 1396 (R. Anderson ed. 1957). Others, such as Pennsylvania, retain the common-law definition of extortion but prohibit conduct for which appellees were charged under other statutes.[5] At least one State does not denominate any

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§ 66–7 (1965), while a second covers blackmailing, N. C. Gen. Stat. § 14–118 (1953). Hughes was charged with involvement in a scheme identical to that in which appellees allegedly participated. *McIntosh*, involving Missouri law, was a prosecution under Mo. Rev. Stat. § 560.130 (1959), a prohibition of threats with intent to extort. However, Missouri also prohibits extortion by certain state officials. See Mo. Rev. Stat. § 29.360 (state auditor), § 30.420 (state treasurer) (1959).

[3] Cf. the Hobbs Act, 18 U. S. C. § 1951 (b)(2), which defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[4] See *United States* v. *Laudani*, 134 F. 2d 847, 851, n. 1 (C. A. 3d Cir. 1943), rev'd on other grounds, 320 U. S. 543 (1944); *United States* v. *Altmeyer*, 113 F. Supp. 854, 856 (D. C. W. D. Pa. 1953); W. Clark & W. Marshall, A Treatise on the Law of Crimes § 12.17 (6th ed. 1958).

[5] Compare Ala. Code, Tit. 14, § 160 (1959) (extortion), with Ala. Code, Tit. 14, §§ 49–50 (1959) (blackmail), and Ohio Rev. Code

specific act as extortion but prohibits appellees' type of activities under the general heading of offenses directed against property. See Ill. Rev. Stat., c. 38, § 15–5 (1967).

Faced with this diversity, appellees contend alternatively that Congress intended either that extortion was to be applied in its common-law sense or that, where a State does have a statute specifically prohibiting extortion, then that statute alone is encompassed by § 1952. The Government, on the other hand, suggests that Congress intended that extortion should refer to those acts prohibited by state law which would be generically classified as extortionate, *i. e.*, obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats.[6]

The Travel Act formed part of Attorney General Kennedy's legislative proposals to combat organized crime. See Hearings on S. 1653–1658, S. 1665 before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess. (1961). The Attorney General told the Senate Committee that the purpose of the Travel Act was to aid local law enforcement officials. In many instances the "top men" of a given criminal operation resided in one State but conducted their illegal activities in another; by creating a federal interest in limiting the interstate movement necessary to such operations, criminal conduct beyond the reach of local officials could be

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Ann. § 2919.13 (1954) (extortion), with Ohio Rev. Code Ann. § 2901.38 (1954) (blackmail).

[6] The Model Penal Code as first drafted included the offenses for which appellees are charged under the heading of "Theft by Intimidation." Model Penal Code § 206.3 (Tent. Draft No. 2, 1954). The Proposed Official Draft classifies the same offenses as "Theft by Extortion." Model Penal Code § 223.4 (Prop. Off. Draft 1962). The comments to the original draft indicate that the authors intended these sections to encompass extortionate offenses. See Model Penal Code § 206.3, Comments 1, 5 (Tent. Draft No. 2, 1954).

controlled. *Id.*, at 15–17.[7] The Attorney General's concerns were reflected in the Senate Committee Report favoring adoption of the Travel Act. The Report, after noting the Committee's belief that local law enforcement efforts would be enhanced by the Travel Act, quoted from the Attorney General's submission letter: "Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity." S. Rep. No. 644, 87th Cong., 1st Sess., 4 (1961). The measure was passed by the Senate and subsequently became § 1952.[8]

The House version of the Travel Act contained an amendment unacceptable to the Justice Department. The Senate bill defined "unlawful activity" as "any business enterprise involving gambling, liquor . . . narcotics, or prostitution offenses in violation of the laws of the State . . . or . . . extortion or bribery in violation of the laws of the States." S. Rep. No. 644, 87th Cong., 1st Sess., 2 (1961). However, the House amendment, by defining "unlawful activity" as "any business enterprise involving gambling, liquor, narcotics, or prostitution offenses or extortion or bribery in connection with such offenses in violation of the laws of the State," required that extortion be connected with a business enterprise involving the other enumerated offenses. H. R. Rep.

[7] The Attorney General characterized S. 1653, later enacted as § 1952, as "one of the most important" of his proposals.

[8] In 1965 the crime of arson was added to the definition of unlawful activity in subsection (b)(2). This addition was prompted by a suggestion from the Department of Justice that arson was often used by organized crime to collect under insurance policies and had thus become another source of revenue. See H. R. Rep. No. 264, 89th Cong., 1st Sess. (1965); S. Rep. No. 351, 89th Cong., 1st Sess. (1965).

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No. 966, 87th Cong., 1st Sess., 1 (1961). In a letter to the Chairman of the House Judiciary Committee the Justice Department objected that the House amendment eliminated from coverage of the Travel Act offenses such as "shakedown rackets," "shylocking" and labor extortion which were traditional sources of income for organized crime.[9] The House-Senate Conference Committee accepted the Senate version. See H. R. Conf. Rep. No. 1161, 87th Cong., 1st Sess. (1961).

The Travel Act, primarily designed to stem the "clandestine flow of profits" and to be of "material assistance to the States in combating pernicious undertakings which cross State lines,"[10] thus reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem. The legislative response was to be commensurate with the scope of the problem. Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was

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[9] The relevant portion of this letter, written by then Deputy Attorney General White, is reproduced in Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L. Rev. 37, 41 (1961):

"[The House amendment] eliminated from the purview of the bill extortions not related to the four above offenses but which are, and have historically been, activities which involve organized crime. Such activities are the 'shakedown racket,' 'shylocking' (where interest of 20% per week is charged and which is collected by means of force and violence, since in most states the loans are uncollectable in court) and labor extortion. It also removes from the purview of the bill bribery of state, local and federal officials by the organized criminals unless we can prove that the bribery is directly attributable to gambling, liquor, narcotics or prostitution."

[10] S. Rep. No. 644, 87th Cong., 1st Sess., 4 (1961) (quoting Attorney General); H. R. Rep. No. 966, 87th Cong., 1st Sess., 4 (1961) (quoting Attorney General).

also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, "whoever" crosses state lines or uses interstate facilities, includes private persons as well as public officials.[11]

Appellees argue that Congress' decision not to define extortion combined with its decision to prohibit only extortion in violation of state law compels the conclusion that peculiar versions of state terminology are controlling. Since in Pennsylvania a distinction is maintained between extortion and blackmail with only the latter term covering appellees' activities,[12] it follows that the Travel Act does not reach the conduct charged. The fallacy of this contention lies in its assumption that, by defining extortion with reference to state law, Congress also incorporated state labels for particular offenses. Congress' intent was to aid local law enforcement offi-

[11] The Government notes that subsection (b)(2) prohibits bribery as well as extortion. Bribery has traditionally focused upon corrupt activities by public officials. See 18 U. S. C. §§ 201–218; 3 F. Wharton's Criminal Law and Procedure §§ 1380–1391 (R. Anderson ed. 1957). Since Pennsylvania's extortion statute covers corrupt acts by public officials, the Government suggests that appellees' construction of "extortion" renders the bribery prohibition superfluous.

[12] Several cases cast some doubt upon the vitality of this distinction as they indicate that in Pennsylvania the terms extortion and blackmail are considered synonymous. See *Commonwealth* v. *Burdell,* 380 Pa. 43, 48, 110 A. 2d 193, 196 (1955); *Commonwealth* v. *Nathan,* 93 Pa. Super. 193, 197 (1928). Federal criminal statutes have also used the terms interchangeably. For example, 18 U. S. C. § 250 (1940 ed.) was entitled "Extortion by informer"; today substantially the same provision is captioned "Blackmail." See 18 U. S. C. § 873.

cials, not to eradicate only those extortionate activities which any given State denominated extortion. Indiana prohibits appellees' type of conduct under the heading of theft, Ind. Ann. Stat. § 10–3030 (Supp. 1968); Kansas terms such conduct robbery in the third degree, Kan. Stat. Ann. § 21–529 (1964); Minnesota calls it coercion, Minn. Stat. § 609.27 (1967); and Wisconsin believes that it should be classified under threats, Wis. Stat. § 943.30 (1965). States such as Massachusetts, Mass. Gen. Laws Ann., c. 265, § 25 (1959), Michigan, Mich. Comp. Laws § 750.213 (1948), Mich. Stat. Ann. § 28.410 (1962), and Oregon, Ore. Rev. Stat. § 163.480 (1968), have enacted measures covering similar activities; each of these statutes contains in its title the term extortion. Giving controlling effect to state classifications would result in coverage under § 1952 if appellees' activities were centered in Massachusetts, Michigan, or Oregon, but would deny coverage in Indiana, Kansas, Minnesota, or Wisconsin although each of these States prohibits identical criminal activities.

A striking illustration is presented by *United States* v. *Schwartz,* 398 F. 2d 464 (C. A. 7th Cir. 1968), pet. for cert. pending, *sub nom. Pyne* v. *United States,** No. 507, 1968 Term. Schwartz and a codefendant were accused of participating in a venture identical to that in which appellees allegedly participated, *i. e.,* luring a businessman into a compromising situation and then demanding a payoff. The indictment charged that Schwartz traveled to Utah to promote extortionate activities illegal under Utah Code Ann. § 76–19–1 (1953), a statute captioned extortion. Pennsylvania prohibits this conduct under its blackmail statutes. Congress intended that the Travel Act would support local law enforcement efforts by allowing the Federal Government to reach

*[Reporter's Note: Cert. denied, *post,* p. 1062.]

interstate aspects of extortion. We can discern no reason why Congress would wish to have § 1952 aid local law enforcement efforts in Utah but to deny that aid to Pennsylvania when both States have statutes covering the same offense. We therefore conclude that the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged.

Appellees do not dispute that Pennsylvania prohibits the conduct for which they were indicted. Accepting our conclusion that Congress did not intend to limit the coverage of § 1952 by reference to state classifications, appellees nevertheless insist that their activities were not extortionate. The basis for this contention is an asserted distinction between blackmail and extortion: the former involves two private parties while the latter requires the participation of a public official. As previously discussed, revenue-producing measures such as shakedown rackets and loan-sharking were called to the attention of Congress as methods utilized by organized crime to generate income. These activities are traditionally conducted between private parties whereby funds are obtained from the victim with his consent produced by the use of force, fear, or threats.[13] Prosecutions under the Travel Act for extortionate offenses involving only private individuals have been consistently maintained. See *United States* v. *Hughes,* 389 F. 2d 535 (C. A. 2d Cir. 1968); *McIntosh* v. *United States,* 385 F. 2d 274 (C. A. 8th Cir. 1967); *Marshall* v. *United States,* 355 F. 2d 999 (C. A. 9th Cir.), cert. denied, 385 U. S. 815 (1966). Appellees, according to the court below, attempted to obtain money from their

[13] Extortion is typically employed by organized crime to enforce usurious loans, infiltrate legitimate businesses, and obtain control of labor unions. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime 3–5 (1967).

victims by threats to expose alleged homosexual conduct. Although only private individuals are involved, the indictment encompasses a type of activity generally known as extortionate since money was to be obtained from the victim by virtue of fear and threats of exposure. In light of the scope of the congressional purpose we decline to give the term "extortion" an unnaturally narrow reading, cf. *United States* v. *Fabrizio*, 385 U. S. 263, 266–267 (1966), and thus conclude that the acts for which appellees have been indicted fall within the generic term extortion as used in the Travel Act.

The judgment of the United States District Court for the Eastern District of Pennsylvania is reversed and the case remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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

UNITED STATES *v.* DONRUSS CO.

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

No. 17. Argued October 22–23, 1968.—Decided January 13, 1969.

Tax imposed by §§ 531–537 of the Internal Revenue Code of 1954 on accumulated earnings of a corporation "formed or availed of for the purpose of avoiding the income tax with respect to its shareholders" *held* to apply if such tax avoidance was one of the purposes of an unreasonable accumulation of corporate earnings even though it was not the dominant, controlling, or impelling motive for the accumulation. Pp. 300–309.

384 F. 2d 292, reversed and remanded.

Assistant Attorney General Rogovin argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Harris Weinstein, Richard C. Pugh,* and *Martin T. Goldblum.*

Richard L. Braunstein argued the cause for respondent. With him on the brief was *Bernard J. Long.*

Richard E. Nolan and *John P. Carroll, Jr.,* filed a brief for the Shaw-Walker Co., as *amicus curiae,* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves the application of §§ 531–537 of the Internal Revenue Code of 1954, which impose a surtax on corporations "formed or availed of for the purpose of avoiding the income tax with respect to . . . [their] shareholders . . . by permitting earnings and profits to accumulate instead of being divided or distributed."

Respondent is a corporation engaged in the manufacture and sale of bubble gum and candy and in the operation of a farm. Since 1954, all of respondent's out-

standing stock has been owned by Don B. Wiener. In each of the tax years from 1955 to 1961, respondent operated profitably, increasing its undistributed earnings from $1,021,288.58 to $1,679,315.37. The company did not make loans to Wiener or provide him with benefits other than a salary, nor did it make investments unrelated to its business, but no dividends were declared during the entire period.

Wiener gave several reasons for respondent's accumulation policy; among them were capital and inventory requirements, increasing costs, and the risks inherent in the particular business and in the general economy. Wiener also expressed a general desire to expand and a more specific desire to invest in respondent's major distributor, the Tom Huston Peanut Company. There were no definite plans during the tax years in question, but in 1964 respondent purchased 10,000 shares in Tom Huston at a cost of $380,000.

The Commissioner of Internal Revenue assessed accumulated earnings taxes against respondent for the years 1960 and 1961. Respondent paid the tax and brought this refund suit. At the conclusion of the trial, the Government specifically requested that the jury be instructed that:

> "[I]t is not necessary that avoidance of shareholder's tax be the sole purpose for the unreasonable accumulation of earnings; it is sufficient if it is one of the purposes for the company's accumulation policy."

The instruction was refused and the court instructed the jury in the terms of the statute that tax avoidance had to be "the purpose" of the accumulations. The jury, in response to interrogatories, found that respondent had accumulated earnings beyond the reasonable needs of its business, but that it had not retained its earnings

for the purpose of avoiding income tax on Wiener. Judgment was entered for respondent and the Government appealed.

The Court of Appeals reversed and remanded for a new trial, holding that "the jury might well have been led to believe that tax avoidance must be the sole purpose behind an accumulation in order to impose the accumulated earnings tax." *Donruss Co.* v. *United States,* 384 F. 2d 292, 298 (C. A. 6th Cir. 1967). The Court of Appeals rejected the Government's proposed instruction and held that the tax applied only if tax avoidance was the "dominant, controlling, or impelling motive" for the accumulation. *Ibid.* We granted the Government's petition for certiorari to resolve a conflict among the circuits [1] over the degree of "purpose" necessary for the application of the accumulated earnings tax, and because of the importance of that question in the administration of the tax. 390 U. S. 1023 (1968).

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[1] The court below adopted the view of the First Circuit. See *Young Motor Co.* v. *Commissioner,* 281 F. 2d 488, 491 (1960); see also *Apollo Industries, Inc.* v. *Commissioner,* 358 F. 2d 867, 875–876 (1966). The Second Circuit has rejected "the view that the prevention of the imposition of surtaxes must have been shown to have been the dominant factor behind the accumulations." *Trico Prods. Corp.* v. *Commissioner,* 137 F. 2d 424, 426, cert. denied, 320 U. S. 799 (1943). See also *United States* v. *Duke Laboratories, Inc.,* 337 F. 2d 280 (1964). The Fifth Circuit has also rejected the position that tax avoidance must be the "primary or dominant" purpose of the accumulation. *Barrow Mfg. Co.* v. *Commissioner,* 294 F. 2d 79, 82 (1961), cert. denied, 369 U. S. 817 (1962). The Eighth and Tenth Circuits have taken what appears to be an intermediate position, holding that imposition of the tax is proper if tax avoidance is one of the "determinating purposes." *Kerr-Cochran, Inc.* v. *Commissioner,* 253 F. 2d 121, 123 (C. A. 8th Cir. 1958); *World Pub. Co.* v. *United States,* 169 F. 2d 186, 189 (C. A. 10th Cir. 1948), cert. denied, 335 U. S. 911 (1949). The Sixth Circuit has adhered to its view in *Shaw-Walker Co.* v. *Commissioner,* 390 F. 2d 205 (1968). A petition for certiorari in that case is now pending in this Court.

I.

The accumulated earnings tax is established by §§ 531–537 of the Internal Revenue Code of 1954. Section 531 imposes the tax.[2] Section 532 defines the corporations to which the tax shall apply. That section provides:

> "The accumulated earnings tax imposed by section 531 shall apply to every corporation . . . formed or availed of for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed." [3]

Section 533 (a) provides that:

> "For purposes of section 532, the fact that the earnings and profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the income tax with respect to shareholders, unless the corporation by the preponderance of the evidence shall prove to the contrary."

In cases before the Tax Court, § 534 allows the taxpayer in certain instances to shift to the Commissioner the burden of proving accumulation beyond the reasonable needs of the business. Section 535 defines "accu-

[2] The rates are 27½% of the accumulated taxable income (defined in § 535) not in excess of $100,000, plus 38½% of the accumulated taxable income in excess of $100,000. Internal Revenue Code of 1954, § 531.

[3] Section 532 (b) exempts personal holding companies, foreign personal holding companies, and certain tax-exempt corporations. Internal Revenue Code of 1954, § 532 (b). Both types of holding companies are taxed under other provisions of the Code. See Internal Revenue Code of 1954, §§ 541–547 (personal holding companies); Internal Revenue Code of 1954, §§ 551–558 (foreign personal holding companies).

mulated taxable income." It also provides for a credit for that portion of the earnings and profits retained for the reasonable needs of the business, with a minimum lifetime credit of $100,000. Finally, § 537 provides that "reasonable needs of the business" include "reasonably anticipated" needs.

The dispute before us is a narrow one. The Government contends that in order to rebut the presumption contained in § 533 (a), the taxpayer must establish by the preponderance of the evidence that tax avoidance with respect to shareholders was not "one of the purposes" for the accumulation of earnings beyond the reasonable needs of the business. Respondent argues that it may rebut that presumption by demonstrating that tax avoidance was not the "dominant, controlling, or impelling" reason for the accumulation. Neither party questions the trial court's instructions on the issue of whether the accumulation was beyond the reasonable needs of the business, and respondent does not challenge the jury's finding that its accumulation was indeed unreasonable. We intimate no opinion about the standards governing reasonableness of corporate accumulations.

We conclude from an examination of the language, the purpose, and the legislative history of the statute that the Government's construction is the correct one. Accordingly, we reverse the judgment of the court below and remand the case for a new trial on the issue of whether avoidance of shareholder tax was one of the purposes of respondent's accumulations.

II.

Both parties argue that the language of the statute supports their conclusion. Respondent argues that Congress could have used the article "a" in §§ 532 and 533 if it had intended to adopt the Government's test. Instead, argues respondent, Congress used the article "the"

in the operative part of the statute, thus indicating that tax avoidance must at least be the dominant motive for the accumulation.[4] The Government argues that respondent's construction gives an unduly narrow effect to the word "the." Instead, contends the Government, this Court should focus on the entire phrase "availed of for the purpose." Any language of limitation should logically modify "availed of" rather than "purpose" and no such language is present. The Government further argues that Congress has dealt with similar problems in other sections of the Code and has used terms such as "principal purpose," §§ 269 (a), 357 (b)(1), and "used principally," § 355 (a)(1)(B). Similar terms could have been used in §§ 532 (a) and 533 (a), but were not. Finally, the Government points to the fact that prior to adoption of § 102 of the Revenue Act of 1938 (52 Stat. 483) the forerunner of § 532 (a) used the words "the purpose," while the evidentiary section used the words "a purpose," thus indicating that tax avoidance need only be one purpose. Respondent replies that the change from "a" to "the" in the evidentiary section supports its conclusion. Respondent also contends that the statute before the change was consistent with its construction.

We find both parties' arguments inconclusive. The phrase "availed of for the purpose" is inherently vague, and there is no indication in the legislative history that Congress intended to attach any particular significance to the use of the article "the." Nor do we find the change in the evidentiary section from "a" to "the" at all helpful. That change came as part of a significant revision in the operation of the section, and there is no indication that it was other than a mere change in

[4] The First Circuit in *Young Motor Co.* v. *Commissioner*, 281 F. 2d 488 (1960), in part based its conclusion that tax avoidance must be the "primary or dominant purpose" on the use of "the" rather than "a."

phraseology.[5] Indeed, the Report of the Senate Finance Committee accompanying the bill that was to become the Revenue Act of 1938, insofar as it sheds any light on the question, supports the view of the Government. "The proposal is to strengthen [the evidentiary] section by requiring the taxpayer by a clear preponderance of the evidence to prove the absence of *any* purpose to avoid surtaxes upon shareholders . . . ." S. Rep. No. 1567, 75th Cong., 3d Sess., 5 (1938) (emphasis added). Since the language of the statute does not provide an answer to the question before us,[6] we have examined in detail the relevant legislative history. That history leads us to conclude that the test proposed by the Government is consistent with the intent of Congress and is necessary to effectuate the purpose of the accumulated earnings tax.

III.

The accumulated earnings tax is one congressional attempt to deter use of a corporate entity to avoid personal income taxes. The purpose of the tax "is to compel the company to distribute any profits not needed for the conduct of its business so that, when so distributed, individual stockholders will become liable" for taxes on the dividends received, *Helvering* v. *Chicago Stock Yards Co.*, 318 U. S. 693, 699 (1943). The tax originated in the Tariff Act of 1913, 38 Stat. 114, the first personal income tax statute following ratification of the Sixteenth Amendment. That Act imposed a tax on the shareholders of any corporation "formed or fraudulently

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[5] No change was made in that part of the statute providing that "[t]he fact that any corporation is a mere holding or investment company shall be prima facie evidence of *a* purpose" to avoid tax. Revenue Act of 1938, § 102 (b), 52 Stat. 483 (emphasis added).

[6] The Regulations shed no light on the problem. See Treas. Reg. §§ 1.531–1.537, 26 CFR §§ 1.531–1.537.

availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed . . . ." § II (A)(2), 38 Stat. 166. The same section provided that accumulation beyond the reasonable needs of the business "shall be prima facie evidence of a fraudulent purpose to escape such tax . . . ." 38 Stat. 167.

In its first years of operation, difficulties in proving a fraudulent purpose made the tax largely ineffective. To meet this problem, Congress deleted the word "fraudulently." Revenue Act of 1918, § 220, 40 Stat. 1072; see S. Rep. No. 617, 65th Cong., 3d Sess., 5 (1918).[7]

During the next few years, numerous complaints were made about the ineffectiveness of the accumulated earnings tax. Various attempts were made to strengthen the tax during the 1920's and 1930's, but the statute remained essentially the same until 1934. See Joint Committee on the Economic Report, The Taxation of Corporate Surplus Accumulations, 82d Cong., 2d Sess, 200–205 (Comm. Print 1952). In 1934, Congress dealt with one of the more flagrant examples of that ineffectiveness, the personal holding company. Personal holding companies were exempted from the general accumulated earnings tax and were subjected to a tax on undistributed income, regardless of the purpose of that accumulation. Revenue Act of 1934, §§ 102, 351, 48 Stat. 702, 751. The reason for the change was that, "[b]y making partial distribution of profits and by showing some need for the accumulation of the remain-

[7] Another major change was made in the Revenue Act of 1921, 42 Stat. 227. Section 220 of that Act shifted the incidence of the accumulated earnings tax from the shareholders to the corporation itself. 42 Stat. 247. The change was prompted by the decision in *Eisner* v. *Macomber*, 252 U. S. 189 (1920). See H. R. Rep. No. 350, 67th Cong., 1st Sess., 12–13 (1921).

ing profits, the taxpayer makes it difficult to prove a purpose to avoid taxes." H. R. Rep. No. 704, 73d Cong., 2d Sess., 11 (1934).

Again in 1936, Congress attempted to solve the continuing problem of undistributed corporate earnings. "The difficulty of proving such [tax avoidance] purpose . . . has rendered . . . [the accumulated earnings tax] more or less ineffective." H. R. Rep. No. 2475, 74th Cong., 2d Sess., 5 (1936). However, Congress did not change the requirement that "purpose" must be proved. Rather, it attempted the alternative method of imposing an undistributed profits surtax on most corporations. Revenue Act of 1936, § 14, 49 Stat. 1655. The tax on personal holding companies and the general accumulated earnings tax were retained.[8]

The problem continued to be acute and several proposals were made by and to Congress in 1938. The House Ways and Means Committee proposed a surtax on all closely held operating companies. Only minor changes were proposed by the Committee in the accumulated earnings tax. See H. R. Rep. No. 1860, 75th Cong., 3d Sess. (1938). The House rejected all but the changes in the accumulated earnings tax. The Senate approached the problem of retained corporate earnings in a different way. Labeling the House Committee's recommendation a "drastic" remedy, the Senate Finance Committee recommended "dealing with this problem where it should be dealt with—namely, in section 102, relating to corporations improperly accumulating surplus. The proposal is to strengthen this section by requiring the taxpayer by a

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[8] Tax avoidance and evasion were a major subject of congressional concern in 1937. See, *e. g.*, H. R. Rep. No. 1546, 75th Cong., 1st Sess. (1937). Congress addressed itself to another aspect of the problem by establishing a separate method for the taxation of foreign personal holding companies, again without regard to corporate intent. Revenue Act of 1937, § 201, 50 Stat. 818.

clear preponderance of the evidence to prove the absence of any purpose to avoid surtaxes upon shareholders after it has been determined that the earnings and profits have been unreasonably accumulated." S. Rep. No. 1567, 75th Cong., 3d Sess., 5 (1938). The change was thought to make it clear that the burden of proving intent, rather than the lesser burden of producing evidence on the question, was to be on the taxpayer. *Id.*, at 16. The Senate proposal was enacted. Revenue Act of 1938, § 102, 52 Stat. 483. The Committee felt that a "reasonable enforcement of this revised section will reduce tax avoidance . . . ." S. Rep. No. 1567, *supra,* at 5.

Only insignificant changes were made in the accumulated earnings tax from 1938 to 1954. Discussion of the problem continued, however, and numerous proposals were made to alter the tax. See, *e. g.,* Joint Committee on the Economic Report, The Taxation of Corporate Surplus Accumulations, 82d Cong., 2d Sess. (Comm. Print 1952). Congress took cognizance of these complaints and incorporated many of them in the Internal Revenue Code of 1954, but no change was made in the required degree of tax avoidance purpose.[9] Rather, the changes, which were generally favorable to the taxpayer,[10] demonstrated congressional disaffection with the effect of the tax and its emphasis on intent. Congress' reaction to the complaints was to emphasize the reasonable needs of the business as a proper purpose for corporate accumulations[11] and to make it easier for the

[9] Congress was urged to adopt a test of purpose similar to that proposed by respondent in the present case. See, *e. g.,* Hearings before the House Committee on Ways and Means Pertaining to the General Revision of the Internal Revenue Code, 83d Cong., 1st Sess., pt. 3, p. 2142 (1953).

[10] The changes were expected to decrease revenues by $10,000,000 in fiscal year 1955. See S. Rep. No. 1622, 83d Cong., 2d Sess., 72 (1954).

[11] Section 535 (c) provided a credit for such accumulations.

taxpayer to prove those needs.[12] As the House Ways and Means Committee said, "Your committee believes it is necessary to retain the penalty tax on unreasonable accumulations as a safeguard against tax avoidance. However, several amendments have been adopted to minimize the threat to corporations accumulating funds for legitimate business purposes . . . ." H. R. Rep. No. 1337, 83d Cong., 2d Sess., 52 (1954).

As this brief summary indicates, the legislative history of the accumulated earnings tax demonstrates a continuing concern with the use of the corporate form to avoid income tax on a corporation's shareholders. Numerous methods were employed to prevent this practice, all of which proved unsatisfactory in one way or another. Two conclusions can be drawn from Congress' efforts. First, Congress recognized the tremendous difficulty of ascertaining the purpose of corporate accumulations. Second, it saw that accumulation was often necessary for legitimate and reasonable business purposes. It appears clear to us that the congressional response to these facts has been to emphasize unreasonable accumulation as the most significant factor in the incidence of the tax. The reasonableness of an accumulation, while subject to honest difference of opinion, is a much more objective inquiry, and is susceptible of more effective scrutiny, than are the vagaries of corporate motive.

Respondent would have us adopt a test that requires that tax avoidance purpose need be dominant, impelling, or controlling. It seems to us that such a test would exacerbate the problems that Congress was trying to

[12] Section 534 allowed the taxpayer to shift to the Commissioner in certain instances the burden of proving unreasonable accumulation. Section 537 included anticipated needs as reasonable needs of the business. In addition to those changes, § 533 (a) omitted the requirement that the taxpayer negate the existence of tax avoidance purpose by a "clear preponderance of the evidence," and substituted a "preponderance" test.

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avoid. Rarely is there one motive, or even one dominant motive, for corporate decisions. Numerous factors contribute to the action ultimately decided upon. Respondent's test would allow taxpayers to escape the tax when it is proved that at least one other motive was equal to tax avoidance. We doubt that such a determination can be made with any accuracy, and it is certainly one which will depend almost exclusively on the interested testimony of corporate management. Respondent's test would thus go a long way toward destroying the presumption that Congress created to meet this very problem. As Judge Learned Hand said of the much weaker presumption contained in the Revenue Act of 1921, § 220, 42 Stat. 247, "[a] statute which stands on the footing of the participants' state of mind may need the support of presumption, indeed be practically unenforceable without it . . . ." *United Business Corp.* v. *Commissioner,* 62 F. 2d 754, 755 (C. A. 2d Cir. 1933). And, "[t]he utility of . . . [that] presumption . . . is well nigh destroyed if . . . [it] is saddled with requirement of proof of 'the primary or dominant purpose' of the accumulation." *Barrow Mfg. Co.* v. *Commissioner,* 294 F. 2d 79, 82 (C. A. 5th Cir. 1961), cert. denied, 369 U. S. 817 (1962).

The cases cited by respondent do not convince us to the contrary. For the most part, they lack detailed analysis of the precise problem. Perhaps the leading case for respondent's position is *Young Motor Co.* v. *Commissioner,* 281 F. 2d 488 (C. A. 1st Cir. 1960). That case relied in part upon the use of the article "the" instead of "a." We have previously rejected that argument. The case also relied, as did the court below, on certain cases from the gift and estate tax areas.[13] We find those cases inappo-

[13] *Commissioner* v. *Duberstein,* 363 U. S. 278 (1960); *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630 (1946); *City Bank Farmers Trust Co.* v. *McGowan,* 323 U. S. 594 (1945); *United States* v. *Wells,* 283 U. S. 102 (1931).

site. They deal with areas of the Code whose language, purpose, and legislative history are entirely different from those of the accumulated earnings tax. See *Commissioner* v. *Duberstein,* 363 U. S. 278, 284 (1960).

Finally, we cannot subscribe to respondent's suggestion that our holding would make purpose totally irrelevant. It still serves to isolate those cases in which tax avoidance motives did not contribute to the decision to accumulate. Obviously in such a case imposition of the tax would be futile. In addition, "purpose" means more than mere knowledge, undoubtedly present in nearly every case. It is still open to the taxpayer to show that even though knowledge of the tax consequences was present, that knowledge did not contribute to the decision to accumulate earnings.

Reversed and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

I agree with the Court that the Court of Appeals erred in framing its remand order in this case. However, I would modify the order in a different way, which I find more in harmony with the statutory scheme than the one the Court has chosen.

Section 532 of the Internal Revenue Code of 1954 states in relevant part:

> "The accumulated earnings tax imposed by section 531 shall apply to every corporation . . . formed or availed of for the purpose of avoiding the income tax with respect to its shareholders . . . , by permitting earnings and profits to accumulate instead of being divided or distributed."

Section 533 (a) provides:

> "For purposes of section 532, the fact that the earnings and profits of a corporation are permitted to

> accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the income tax with respect to shareholders, unless the corporation by the preponderance of the evidence shall prove to the contrary."

Our task is to decide what jury instruction with respect to the definition of "purpose" comports best with Congress' intent as revealed by this statutory language and the underlying legislative history.

I am in accord with much of the Court's opinion. I too find that the successive changes in the wording of the statute, even when read together with the legislative history, do not help in our inquiry. I too find that the legislative history reveals a progressive congressional intention to rely more and more heavily upon a comparatively objective criterion: whether the accumulated earnings were in excess of the corporation's reasonable business needs. Nevertheless, it is apparent from the language of § 533 (a), and from the legislative materials, that Congress chose still to give the taxpayer a "last clear chance" to prove that, despite the unreasonableness of the accumulation by business standards, the accumulation was not due to the proscribed purpose. My difficulty with the instruction approved by the Court is that in most instances it will effectively deny to the taxpayer the "last clear chance" which Congress clearly meant to afford and substitute a very fuzzy chance indeed.

I reach this conclusion on what I regard as commonsense grounds. In practice, the accumulated-earnings provisions are applied only to closely held corporations, controlled by relatively few shareholders.[1] As the Court admits, the shareholders almost always will have been advised that accumulation of corporate earnings will

[1] See S. Rep. No. 1622, 83d Cong., 2d Sess., 69 (1954); B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 213–214 (2d ed. 1966).

result in individual tax savings. That fact will be before the jury. In accord with the Court's decision, the jury will be instructed that "it is sufficient if [avoidance of shareholders' tax] is *one* of the purposes of the company's accumulation policy." (Emphasis supplied.)

Under these circumstances, the jury is very likely to believe that it must find the forbidden purpose and impose the tax whenever the Government shows that the taxpayer has accumulated earnings with knowledge of the resultant tax saving, irrespective of any contrary evidence put forward by the taxpayer. The approved instruction simply tells the jury that the taxpayer must have had a "purpose" to avoid individual taxes. In everyday speech, we commonly say that a person has a "purpose" to do something when he acts with knowledge that the thing will inevitably result. Even were the jury legally knowledgeable, it might reach the same conclusion, for, assuming that the word "purpose" as used in § 532 is synonymous with "intention," [2] there is ample authority for the proposition that an actor will be deemed to have an "intention" to cause consequences of an act if "the actor . . . believes that the consequences are substantially certain to result from [the act]." [3] To confront the taxpayer with this likelihood that its evidence of another purpose will be entirely disregarded is incon-

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[2] "Purpose" is listed as a synonym for "intention" in Black's Law Dictionary, at 948 (4th ed. 1968). Many courts have used the two words interchangeably in construing §§ 532 and 533 (a). See, *e. g.*, *Henry Van Hummell, Inc.* v. *Commissioner*, 364 F. 2d 746 (1966); *Youngs Rubber Corp.* v. *Commissioner*, 331 F. 2d 12 (1964); *Smoot Sand & Gravel Corp.* v. *Commissioner*, 241 F. 2d 197 (1957); *Harry A. Koch Co.* v. *Vinal*, 228 F. Supp. 782 (1964); *Motor Fuel Carriers, Inc.* v. *United States*, 202 F. Supp. 497 (1962), vacated on other grounds, 322 F. 2d 576 (1963).

[3] Restatement (Second), Torts § 8 A (1965). See also *id.*, Comment *b;* R. Perkins, Criminal Law 657–658 (1957); Cook, Act, Intention, and Motive in the Criminal Law, 26 Yale L. J. 645 (1917).

sistent with the provision of § 533 (a) which explicitly affords the taxpayer an opportunity to avoid the tax by showing "by the preponderance of the evidence" that it had a "contrary" purpose.

The Court, while conceding that the shareholders will know of the expected tax saving "in nearly every case," see *ante,* at 309, reasons that the taxpayer will have its opportunity because "[i]t is still open to the taxpayer to show that even though knowledge of the tax consequences was present, that knowledge did not contribute to the decision to accumulate earnings." *Ibid.* If, as appears from the Court's opinion, this exegesis is not to be a part of the jury instruction, then the Court is simply engaging in wishful thinking. If by chance the explication is to be included in the instruction, then the jury will be told to impose the tax only if it finds that a desire to avoid tax "contribute[d] to the decision to accumulate earnings." Such an instruction would at least inform the jury that the tax consequence must actually have been in the shareholders' minds when they decided to accumulate. However, once the shareholders are shown to have had knowledge of the tax saving, it still will be extraordinarily difficult for the taxpayer to convince the jury that the knowledge did not play some part, however slight, in the decision. Again, it seems to me that such an instruction would not give proper scope to the congressional intention that the taxpayer have a chance to prove "by the preponderance of the evidence" that it had a "contrary" purpose. I would therefore adopt an instruction less loaded against the taxpayer.

The Court of Appeals for the Sixth Circuit decided, and respondent argues, that the tax should apply only if the jury finds that tax avoidance was the "dominant, controlling, or impelling motive" for the accumulation. I agree with the Court that such an instruction would

be improper. It apparently would require the Government to show that tax avoidance was stronger than any other motive, and perhaps that it was stronger than all other motives put together. This would largely negate the statutory presumption of improper purpose contained in § 533 (a). In my view, it would also result in non-imposition of tax in cases where Congress meant there to be liability, for I think that Congress must at least have intended that the tax should apply whenever the taxpayer would have distributed, instead of accumulating, corporate earnings had there been no possibility of a tax saving.

These considerations suggest what I believe to be the best rule: the jury should be instructed to impose the tax if it finds that the taxpayer would not have accumulated earnings but for its knowledge that a tax saving would result. This "but for cause" test would be consistent with the statutory language. It would allow the Government to succeed if it could show, with the aid of the § 533 (a) presumption, that without the spur of tax avoidance the taxpayer would not have accumulated the earnings, thus giving effect to the presumption and fulfilling Congress' desire to penalize those with a "purpose" to avoid the tax. It would permit the taxpayer to escape the tax if it could convince the jury that for other, perhaps irrational, reasons it would have accumulated even had no tax saving been possible, thus affording the opportunity for proof of a "contrary" purpose which Congress intended to provide. In addition, I believe that this instruction would be relatively easy for a jury to understand and apply. For all of these reasons, I consider it preferable to the standard adopted by the Court.

BERGER *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 221, Misc.—Decided January 13, 1969.

The holding in *Barber* v. *Page*, 390 U. S. 719, that the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence, should be given retroactive application.

Certiorari granted; 258 Cal. App. 2d 622, 66 Cal. Rptr. 213, vacated and remanded.

Thomas C. Lynch, Attorney General of California, *William E. James,* Assistant Attorney General, and *Marvin A. Bauer,* Deputy Attorney General, for respondent.

PER CURIAM.

Petitioner was convicted of robbery and kidnaping for the purpose of robbery. The victim, one Carl Arthur Dunston, testified against petitioner at a preliminary hearing; there was evidence that at the time of the trial Dunston was in Colorado. A state investigator tried to contact Dunston on the telephone; he got through to some of Dunston's relatives and to his employer, but not to Dunston himself. Although two telegrams were received, allegedly from Dunston, no subpoena was served. At trial, the transcript of Dunston's preliminary hearing testimony was introduced into evidence. On appeal, the Court of Appeal for the Second Appellate District of California held that this procedure did not deny petitioner his Sixth Amendment right to be confronted with the witnesses against him since Dunston was absent from the State of his own free will and since petitioner's counsel had had an adequate opportunity to

cross-examine Dunston at the preliminary hearing. 258 Cal. App. 2d 622, 66 Cal. Rptr. 213 (1968). The California Supreme Court denied petitioner a hearing on April 4, 1968. Nineteen days later we held in the case of *Barber* v. *Page,* 390 U. S. 719, that the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence. The sole question in this case is whether the holding of *Barber* v. *Page* should be given retroactive application. We think that it should.

Clearly, petitioner's inability to cross-examine Dunston at trial may have had a significant effect on the "integrity of the fact-finding process." *Linkletter* v. *Walker,* 381 U. S. 618, 639 (1965); cf. *Roberts* v. *Russell,* 392 U. S. 293 (1968); *McConnell* v. *Rhay, ante,* p. 2 (1968). As we pointed out in *Barber* v. *Page,* one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses. 390 U. S., at 721. And California's claim of a significant countervailing interest based upon its reliance on previous standards, see *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), is most unpersuasive. *Barber* v. *Page* was clearly foreshadowed, if not preordained, by this Court's decision in *Pointer* v. *Texas,* 380 U. S. 400 (1965), which was handed down more than a year before petitioner's trial. Accordingly, we can see no reason why *Barber* v. *Page* should not be given fully retroactive application.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeal is vacated and the case is remanded for reconsideration in light of this Court's decision in *Barber* v. *Page,* 390 U. S. 719 (1968).

It is so ordered.

BOYD ET AL. *v.* CLARK, ATTORNEY GENERAL, ET AL.

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

No. 490. Decided January 13, 1969.

287 F. Supp. 561, affirmed.

Victor Rabinowitz and *Leonard B. Boudin* for appellants.

Solicitor General Griswold for appellees.

PER CURIAM.

The judgment is affirmed, *Clark* v. *Gabriel, ante,* p. 256, without reaching the jurisdictional question raised under 28 U. S. C. § 1331.

MARKHAM ADVERTISING CO., INC., ET AL. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 648. Decided January 13, 1969.

73 Wash. 2d 405, 439 P. 2d 248, appeal dismissed.

Alfred J. Schweppe and *Thomas R. Beierle* for appellants.

PER CURIAM.

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

FREED *v.* BALDI ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 652. Decided January 13, 1969.

— Colo. —, 443 P. 2d 716, appeal dismissed.

George Louis Creamer for appellant.

PER CURIAM.

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

BENNETT ET AL. *v.* COTTINGHAM ET AL.

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

No. 665. Decided January 13, 1969.

290 F. Supp. 759, affirmed.

Jack Greenberg, Michael Meltsner, Melvyn Zarr, Oscar W. Adams, Jr., and *Anthony G. Amsterdam* for appellants.

MacDonald Gallion, Attorney General of Alabama, *pro se,* and *Robert P. Bradley,* Assistant Attorney General, for appellees.

PER CURIAM.

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

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

ESTRIN ET AL. *v.* MOSS, COMMISSIONER OF AGRICULTURE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 684. Decided January 13, 1969.

221 Tenn. 657, 430 S. W. 2d 345, appeal dismissed.

Robert W. Healy for appellants.

George F. McCanless, Attorney General of Tennessee, and *Paul E. Jennings,* Assistant Attorney General, for appellees.

PER CURIAM.

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

WARD ET AL. *v.* JOHNSON, PRESIDENT OF THE UNITED STATES, ET AL.

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

No. 703. Decided January 13, 1969.

Appeal dismissed.

Solicitor General Griswold for appellees.

PER CURIAM.

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

WILLIAMS & CO., INC. *v.* CITY OF PITTSBURGH ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 706. Decided January 13, 1969.

430 Pa. 509, 244 A. 2d 37, appeal dismissed.

Norman J. Cowie for appellant.

Robert E. Dauer for appellees.

PER CURIAM.

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

COX ET AL. *v.* UNITED STATES ET AL.

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

No. 708. Decided January 13, 1969.

Affirmed.

Solicitor General Griswold, Assistant Attorney General Zimmerman, Howard E. Shapiro, Robert W. Ginnane, and *Fritz R. Kahn* for the United States et al.

PER CURIAM.

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

BENNETT *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 719. Decided January 13, 1969.

211 So. 2d 520, appeal dismissed and certiorari denied.

Albert Sidney Johnston, Jr., for appellant.

PER CURIAM.

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

WILLIAMS ET AL. *v.* VIRGINIA STATE BOARD OF ELECTIONS ET AL.

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

No. 733. Decided January 13, 1969.

288 F. Supp. 622, affirmed.

Howard S. Spering and *Robert L. Montague III* for appellants.

PER CURIAM.

The judgment is affirmed.

HILLIARD *v.* CITY OF GAINESVILLE.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 745. Decided January 13, 1969.

213 So. 2d 689, appeal dismissed.

Richard W. Wilson for appellant.

Osee R. Fagan for appellee.

PER CURIAM.

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

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

MID-VALLEY PIPELINE CO. *v.* KING, COMMISSIONER OF REVENUE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 756. Decided January 13, 1969.

221 Tenn. 724, 431 S. W. 2d 277, appeal dismissed.

H. Vincent E. Mitchell and *J. Martin Regan* for appellant.

George F. McCanless, Attorney General of Tennessee, and *Milton P. Rice,* Deputy Attorney General, for appellees.

PER CURIAM.

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

MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.

ADKINS TRANSFER CO., INC., ET AL. *v.* DORNBOS ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 738. Decided January 13, 1969.

Appeal dismissed.

H. Winston Hathaway for appellants.

Harold S. Sawyer for appellees Dornbos et al., and *Robert E. Plunkett* for appellee The Kroger Co.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a final judgment.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the appeal should be dismissed for want of a substantial federal question.

MR. JUSTICE STEWART is of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits.

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

BROWN *v.* COINER, WARDEN.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 871, Misc. Decided January 13, 1969.

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.

SNELL ET AL. *v.* WYMAN, COMMISSIONER OF DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL.

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

No. 191. Decided January 13, 1969.

281 F. Supp. 853, affirmed.

James J. Graham and *Martin Garbus* 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 Wyman, and *J. Lee Rankin* and *Stanley Buchsbaum* for Ginsberg, appellees.

Solicitor General Griswold, Assistant Attorney General Weisl, Peter L. Strauss, and *Morton Hollander* for the United States, as *amicus curiae,* urging affirmance.

PER CURIAM.

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

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

320-583 O - 69 - 29

GLOVER ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL.

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

No. 38. Argued November 14, 1968.—Decided January 14, 1969.

Petitioners, a group of Negroes and whites employed as carmen helpers by respondent railroad, brought this action for damages and injunctive relief against the railroad and respondent union (the bargaining agent for carmen employees), claiming that respondents acted in concert to bar Negroes from promotion wholly because of race. Upholding respondents' contention that petitioners had failed to exhaust their contractual or administrative remedies, the District Court dismissed the amended complaint, despite petitioners' allegations that a formal effort to pursue such remedies would be absolutely futile. The Court of Appeals affirmed. *Held:*

1. The federal courts have jurisdiction over this action which essentially involves a dispute between some employees, on the one hand, and union and management together, on the other, and not a dispute between employees and a carrier concerning the meaning of the terms of a collective bargaining agreement, over which the Railroad Adjustment Board would have exclusive jurisdiction under the Railway Labor Act. Pp. 328–329.

2. In this case where resort to contractual or administrative remedies would be wholly fruitless, petitioners' failure to exhaust such remedies constitutes no bar to judicial review of their claims. Pp. 329–331.

386 F. 2d 452, reversed and remanded.

William M. Acker, Jr., argued the cause and filed a brief for petitioners.

Donald W. Fisher argued the cause for respondents. On the brief for respondent St. Louis-San Francisco Railway Co. was *Paul R. Moody*. With *Mr. Fisher* on the brief for respondent Brotherhood of Railway Carmen of America were *Richard R. Lyman* and *Jerome A. Cooper*.

MR. JUSTICE BLACK delivered the opinion of the Court.

The 13 petitioners here, eight Negroes and five white men, are all employees of the respondent railroad, whose duties are to repair and maintain passenger and freight cars in the railroad's yard at Birmingham, Alabama. They brought this action in the United States District Court against the railroad and the Brotherhood of Railway Carmen of America, which is the duly selected bargaining agent for carmen employees. The complaint alleged that all of the plaintiffs were qualified by experience to do the work of carmen but that all had been classified as carmen helpers for many years and had not been promoted. The complaint went on to allege the following explanation for the railroad's refusal to promote them:

> "In order to avoid calling out Negro plaintiffs to work as Carmen and to avoid promoting Negro plaintiffs to Carmen, in accordance with a tacit understanding between defendants and a subrosa agreement between the Frisco and certain officials of the Brotherhood, defendant Frisco has for a considerable period of time used so-called 'apprentices' to do the work of Carmen instead of calling out plaintiffs to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted; and the Frisco has used this means to avoid giving plaintiffs work at Carmen wage scale and permanent jobs in the classification of Carmen. This denial to plaintiffs of work as Carmen has been contrary to previous custom and practice by defendants in regard to seniority as far as 'Upgrade Carmen' are concerned. Defendant Frisco is not calling any of plaintiffs to work as Carmen in order to avoid having to promote any Negroes to Carmen."

The complaint also claimed that each plaintiff had lost in excess of $10,000 in wages as the result of being a victim of "an invidious racial discrimination," and prayed for individual damages, for an injunction to cause the defendants to cease and desist from their discrimination against petitioners and their class and "for any further, or different relief as may be meet and proper . . . ." The respondents moved to dismiss the complaint on the ground, among others, that petitioners had not exhausted the administrative remedies provided for them by the grievance machinery in the collective bargaining agreement, in the constitution of the Brotherhood, and before the National Railroad Adjustment Board. The District Court, in an unreported opinion, sustained the motion to dismiss, and the petitioners then filed the following amendment to their complaint:

> "On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would 'investigate the situation,' nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their

time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes 'cussed,' but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called 'nigger lovers' and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company. In addition, to employ the purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Company and the Brotherhood are working 'hand-in-glove.' All of these purported administrative remedies are wholly inadequate, and to require their complete exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plaintiffs, and would amount to a denial of 'due process of law,' prohibited by the Constitution of the United States."

The District Court again sustained the motion to dismiss. The Court of Appeals affirmed the dismissal, agreeing

with the opinion of the District Court and adding several authorities to those cited by the District Court, 386 F. 2d 452 (C. A. 5th Cir. 1967), and we granted certiorari, 390 U. S. 1023 (1968). We think that none of the authorities cited in either opinion justify the dismissal and reverse and remand the case for trial in the District Court.

It is true, as the respondents here contend, that this Court has held that the Railroad Adjustment Board has exclusive jurisdiction, under § 3 First (i) of the Railway Labor Act, set out below,[1] to interpret the meaning of the terms of a collective bargaining agreement.[2] We have held, however, that § 3 First (i) by its own terms applies only to "disputes between an employee or group of employees and a carrier or carriers." *Conley* v. *Gibson,* 355 U. S. 41, 44 (1957). In *Conley,* as in the present case, the suit was one brought by the employees against their own union, claiming breach of the duty of fair representation, and we held that the jurisdiction of the federal courts was clear. In the present case, of course, the petitioners sought relief not only against their union but also against the railroad, and it might at one time have been thought that the jurisdiction of the Railroad Adjust-

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[1] In full, § 3 First (i) reads:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 48 Stat. 1191, 45 U. S. C. § 153 First (i).

[2] See, *e. g., Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239.

ment Board remains exclusive in a fair representation case, to the extent that relief is sought against the railroad for alleged discriminatory performance of an agreement validly entered into and lawful in its terms. See, *e. g., Hayes* v. *Union Pacific R. Co.,* 184 F. 2d 337 (C. A. 9th Cir. 1950), cert. denied, 340 U. S. 942 (1951). This view, however, was squarely rejected in the *Conley* case, where we said, "[F]or the reasons set forth in the text we believe [*Hayes, supra*] was decided incorrectly." 355 U. S., at 44, n. 4. In this situation no meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face. Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the "dispute" is one between some employees on the one hand and the union and management together on the other, not one "between an employee or group of employees and a carrier or carriers." Finally, the Railroad Adjustment Board has no power to order the kind of relief necessary even with respect to the railroad alone, in order to end entirely abuses of the sort alleged here. The federal courts may therefore properly exercise jurisdiction over both the union and the railroad. See also *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192 (1944).

The respondents also argue that the complaint should be dismissed because of the petitioners' failure to exhaust their remedies under the collective bargaining agreement, the union constitution, and the Railway Labor Act. They rely particularly on *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965), and *Vaca* v. *Sipes,* 386 U. S. 171 (1967). The Court has made clear, however, that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat

the overall purposes of federal labor relations policy. Thus, in *Vaca* itself the Court stressed:

> "[I]t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U. S., at 184–185.

The Court in *Vaca* went on to specify at least two situations in which suit could be brought by the employee despite his failure to exhaust fully his contractual remedies. The circumstances of the present case call into play another of the most obvious exceptions to the exhaustion requirement—the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile. In a line of cases beginning with *Steele* v. *Louisville & Nashville R. Co., supra,* the Court has rejected the contention that employees alleging racial discrimination should be required to submit their controversy to "a group which is in large part chosen by the [defendants] against whom their real complaint is made." 323 U. S., at 206. And the reasons which prompted the Court to hold as it did about the inadequacy of a remedy before the Adjustment Board apply with equal force to any remedy administered by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged

with neglecting and betraying. Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox,* is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. The allegations are that the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race. If that is true, insistence that petitioners exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled.

The judgment is reversed and the case is remanded for trial.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

I join in the Court's opinion with one addition and one reservation.

I believe that *Richardson* v. *Texas & N. O. R. Co.,* 242 F. 2d 230 (1957), decided by the Fifth Circuit some years before its decision in the present case, also supports today's holding that the federal courts may grant railroad employees ancillary relief against an employer who aids and abets their union in breaching its duty of fair representation. A contrary result would bifurcate, and needlessly proliferate, litigation.

I think it clear that footnote 4 of *Conley* v. *Gibson,* 355 U. S. 41, 44 (1957), did not—as some of the language in today's opinion, *ante,* at 328–329, might otherwise imply—address itself to the question now decided, which

is one of first impression in this Court. *Conley* was a suit against the union *only*. A careful reading of *Hayes* v. *Union Pacific R. Co.*, 184 F. 2d 337 (1950); the District Court's opinion in *Conley*, 138 F. Supp. 60 (1955), which relied on *Hayes;* and this Court's opinion in *Conley* makes it readily apparent that our disapproval of *Hayes* had nothing to do with the question of jurisdiction over an employer in a fair representation action.

UNITED STATES *v.* CONTAINER CORPORATION OF AMERICA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA.

No. 27. Argued November 18, 1968.—Decided January 14, 1969.

Appellees account for about 90% of the shipment of corrugated containers from plants in the Southeastern United States. From 1955 to 1963 the industry expanded in the Southeast (entry into the industry is easy), although capacity had exceeded demand, and the price trend had been downward. The product is fungible, demand is inelastic, and competition is based on price. Each appellee, upon request by a competitor, would furnish information as to the most recent price charged or quoted to individual customers, with the expectation of reciprocity and with the understanding that it represented the price currently being bid. This was not done on a regular basis, as often the data were available from appellees' records or from customers. The exchange of price information stabilized prices though at a downward level. The Government's civil complaint charging a price-fixing agreement in violation of § 1 of the Sherman Act was dismissed by the District Court after trial. *Held:*

1. The reciprocal exchange of price information was concerted action sufficient to establish the combination or conspiracy ingredient of § 1 of the Act. P. 335.

2. The price stabilization which resulted from the exchange of price data had an anticompetitive effect in the corrugated container industry, chilling the vigor of price competition. Pp. 336–338.

273 F. Supp. 18, reversed.

Assistant Attorney General Zimmerman argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Lawrence G. Wallace, Lewis Bernstein,* and *Wharey M. Freeze.*

Whitney North Seymour argued the cause for appellees. With him on the brief were *William J. Manning* and *James W. Harbison, Jr.*, for Container Corporation of America, *Joseph C. Carter, Jr.*, for Albemarle Paper

Manufacturing Co. et al., *W. P. Sandridge* and *W. F. Womble* for Carolina Container Co., *Helmer R. Johnson* for Continental Can Co., Inc., *Howard T. Milman* and *Robert D. Krumme* for Crown Zellerbach Corp., *David J. Mays* for Dixie Container Corp. et al., *Alan W. Boyd* and *Louis A. Highmark* for Inland Container Corp., *Lawrence E. Walsh* and *Henry L. King* for International Paper Co., *Ford W. Ekey* and *Jon M. Sebaly* for the Mead Corp., *Fred E. Fuller* and *James A. Sprunk* for Owens-Illinois Glass Co., *Richard A. Whiting* for St. Joe Paper Co., *Horace R. Lamb* and *H. Richard Wachtel* for St. Regis Paper Co., *James H. Epps, Jr.*, for Tri-State Container Corp., *James R. Withrow, Jr.*, for Union Bag-Camp Paper Co., and *E. Nobles Lowe* for West Virginia Pulp & Paper Co.

Mr. Justice Douglas delivered the opinion of the Court.

This is a civil antitrust action charging a price-fixing agreement in violation of § 1 of the Sherman Act.[1] 26 Stat. 209, as amended, 15 U. S. C. § 1. The District Court dismissed the complaint. 273 F. Supp. 18. The case is here on appeal, 15 U. S. C. § 29; and we noted probable jurisdiction. 390 U. S. 1022.

The case as proved is unlike any other price decisions we have rendered. There was here an exchange of price information but no agreement to adhere to a price schedule as in *Sugar Institute* v. *United States*, 297 U. S. 553, or *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. There was here an exchange of information concerning specific sales to identified customers, not a statistical report on the average cost to all members,

[1] Section 1 provides:

"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 hereby declared to be illegal."

without identifying the parties to specific transactions, as in *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563. While there was present here, as in *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588, an exchange of prices to specific customers, there was absent the controlling circumstance, *viz.,* that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job.

Here all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it.[2] That concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act.

There was of course freedom to withdraw from the agreement. But the fact remains that when a defendant requested and received price information, it was affirming its willingness to furnish such information in return.

There was to be sure an infrequency and irregularity of price exchanges between the defendants; and often the data were available from the records of the defendants or from the customers themselves. Yet the essence of the agreement was to furnish price information whenever requested.

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[2] This is obviously quite different from the parallel business behavior condoned in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U. S. 537.

Moreover, although the most recent price charged or quoted was sometimes fragmentary, each defendant had the manuals with which it could compute the price charged by a competitor on a specific order to a specific customer.

Further, the price quoted was the current price which a customer would need to pay in order to obtain products from the defendant furnishing the data.

The defendants account for about 90% of the shipment of corrugated containers from plants in the Southeastern United States. While containers vary as to dimensions, weight, color, and so on, they are substantially identical, no matter who produces them, when made to particular specifications. The prices paid depend on price alternatives. Suppliers when seeking new or additional business or keeping old customers, do not exceed a competitor's price. It is common for purchasers to buy from two or more suppliers concurrently. A defendant supplying a customer with containers would usually quote the same price on additional orders, unless costs had changed. Yet where a competitor was charging a particular price, a defendant would normally quote the same price or even a lower price.

The exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit. Capacity has exceeded the demand from 1955 to 1963, the period covered by the complaint, and the trend of corrugated container prices has been downward. Yet despite this excess capacity and the downward trend of prices, the industry has expanded in the Southeast from 30 manufacturers with 49 plants to 51 manufacturers with 98 plants. An abundance of raw materials and machinery makes entry into the industry easy with an investment of $50,000 to $75,000.

The result of this reciprocal exchange of prices was to stabilize prices though at a downward level. Knowl-

edge of a competitor's price usually meant matching that price. The continuation of some price competition is not fatal to the Government's case. The limitation or reduction of price competition brings the case within the ban, for as we held in *United States* v. *Socony-Vacuum Oil Co., supra,* at 224, n. 59, interference with the setting of price by free market forces is unlawful *per se.* Price information exchanged in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers place orders only for immediate, short-run needs. The exchange of price data tends toward price uniformity. For a lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return. Stabilizing prices as well as raising them is within the ban of § 1 of the Sherman Act. As we said in *United States* v. *Socony-Vacuum Oil Co., supra,* at 223, "in terms of market operations stabilization is but one form of manipulation." The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition. The agreement in the present case, though somewhat casual, is analogous to those in *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, and *United States* v. *American Linseed Oil Co.,* 262 U. S. 371.[3]

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[3] The *American Column* case was a sophisticated and well-supervised plan for the exchange of price information between competitors with the idea of keeping prices reasonably stable and of putting an end to cutthroat competition. There were no sanctions except financial interest and business honor. But the purpose of the plan being to increase prices, it was held to fall within the ban of the Sherman Act.

Another elaborate plan for the exchange of price data among competitors was involved in *American Linseed Oil;* and informal

Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.[4]

Reversed.

MR. JUSTICE FORTAS, concurring.

I join in the judgment and opinion of the Court. I do not understand the Court's opinion to hold that the exchange of specific information among sellers as to prices

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sanctions were used to establish "modern co-operative business methods." The arrangement was declared illegal because its "necessary tendency" was to suppress competition. 262 U. S., at 389.

[4] Thorstein Veblen in The Theory of Business Enterprise (1904) makes clear how the overabundance of a commodity creates a business appetite to regulate or control prices or output or both. Measures short of monopoly may have "a salutary effect," as for example a degree of control or supervision over prices not obtainable while the parties "stood on their old footing of severalty." But that relief is apt to be "only transient," for as the costs of production decline and growth of the industry "catches up with the gain in economy," the need for further controls or restraints increases. And so the restless, never-ending search for price control and other types of restraint.

We held in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, that all forms of price-fixing are *per se* violations of the Sherman Act.

"The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." 310 U. S., at 220–221.

charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act.

Absent *per se* violation, proof is essential that the practice resulted in an unreasonable restraint of trade. There is no single test to determine when the record adequately shows an "unreasonable restraint of trade"; but a practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers, inevitably suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions. Cf. *Sugar Institute* v. *United States,* 297 U. S. 553 (1936); *American Column & Lumber Co.* v. *United States,* 257 U. S. 377 (1921).

Theoretical probability, however, is not enough unless we are to regard mere exchange of current price information as so akin to price-fixing by combination or conspiracy as to deserve the *per se* classification. I am not prepared to do this, nor is it necessary here. In this case, the probability that the exchange of specific price information led to an unlawful effect upon prices is adequately buttressed by evidence in the record. This evidence, although not overwhelming, is sufficient in the special circumstances of this case to show an actual effect on pricing and to compel us to hold that the court below erred in dismissing the Government's complaint.

In summary, the record shows that the defendants sought and obtained from competitors who were part of the arrangement information about the competitors' prices to specific customers. "[I]n the majority of instances," the District Court found, 273 F. Supp. 18, 27, that once a defendant had this information he quoted substantially the same price as the competitor, although a higher or lower price would "occasionally" be quoted. Thus the exchange of prices made it possible for indi-

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vidual defendants confidently to name a price equal to that which their competitors were asking. The obvious effect was to "stabilize" prices by joint arrangement—at least to limit any price cuts to the minimum necessary to meet competition. In addition, there was evidence that, in some instances, during periods when various defendants ceased exchanging prices exceptionally sharp and vigorous price reductions resulted.

On this record, taking into account the specially sensitive function of the price term in the antitrust equation, I cannot see that we would be justified in reaching any conclusion other than that defendants' tacit agreement to exchange information about current prices to specific customers did in fact substantially limit the amount of price competition in the industry. That being so, there is no need to consider the possibility of a *per se* violation.

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

I agree with the Court's holding that there existed an agreement among the defendants to exchange price information whenever requested. However, I cannot agree that that agreement should be condemned, either as illegal *per se,* or as having had the purpose or effect of restricting price competition in the corrugated container industry in the Southeastern United States.

Under the antitrust laws, numerous practices have been held to be illegal *per se* without regard to their precise purpose or harm. As this Court said in *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Among these practices are price-

fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223 (1940); division of markets, *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (C. A. 6th Cir. 1898), aff'd, 175 U. S. 211 (1899); group boycotts, *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457 (1941); and tying arrangements, *International Salt Co.* v. *United States*, 332 U. S. 392 (1947). We have recently added to this list certain sales-commission systems for the marketing of tires, batteries, and accessories by service stations affiliated with major oil companies. *FTC* v. *Texaco Inc., ante*, p. 223 (1968). This Court has refused to apply a *per se* rule to exchanges of price and market information in the past. See *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921); *United States* v. *American Linseed Oil Co.*, 262 U. S. 371 (1923); *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588 (1925). I believe we should follow the same course in the present case.

Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

I do not believe that the agreement in the present case is so devoid of potential benefit or so inherently harmful that we are justified in condemning it without proof that it was entered into for the purpose of restraining price competition or that it actually had that effect. The agreement in this case was to supply, when re-

quested, price data for identified customers. Each defendant supplied the necessary information on the expectation that the favor would be returned. The nature of the exchanged information varied from case to case. In most cases, the price obtained was the price of the last sale to the particular customer; in some cases, the price was a current quotation to the customer. In all cases, the information obtained was sufficient to inform the defendants of the price they would have to beat in order to obtain a particular sale.

Complete market knowledge is certainly not an evil in perfectly competitive markets. This is not, however, such a market, and there is admittedly some danger that price information will be used for anticompetitive purposes, particularly the maintenance of prices at a high level. If the danger that price information will be so used is particularly high in a given situation, then perhaps exchange of information should be condemned.

I do not think the danger is sufficiently high in the present case. Defendants are only 18 of the 51 producers of corrugated containers in the Southeastern United States. Together, they do make up 90% of the market and the six largest defendants do control 60% of the market. But entry is easy; an investment of $50,000 to $75,000 is ordinarily all that is necessary. In fact, the number of sellers has increased from 30 to the present 51 in the eight-year period covered by the complaint. The size of the market has almost doubled because of increased demand for corrugated containers. Nevertheless, some excess capacity is present. The products produced by defendants are undifferentiated. Industry demand is inelastic, so that price changes will not, up to a certain point, affect the total amount purchased. The only effect of price changes will be to reallocate market shares among sellers.

In a competitive situation, each seller will cut his price in order to increase his share of the market, and prices will ultimately stabilize at a competitive level—*i. e.*, price will equal cost, including a reasonable return on capital. Obviously, it would be to a seller's benefit to avoid such price competition and maintain prices at a higher level, with a corresponding increase in profit. In a market with very few sellers, and detailed knowledge of each other's price, such action is possible. However, I do not think it can be concluded that this particular market is sufficiently oligopolistic, especially in light of the ease of entry, to justify the inference that price information will necessarily be used to stabilize prices. Nor do I think that the danger of such a result is sufficiently high to justify imposing a *per se* rule without actual proof.

In this market, we have a few sellers presently controlling a substantial share of the market. We have a large number competing for the remainder of the market, also quite substantial. And total demand is increasing. In such a case, I think it just as logical to assume that the sellers, especially the smaller and newer ones,[1] will desire to capture a larger market share by cutting prices as it is that they will acquiesce in oligopolistic behavior. The likelihood that prices will be cut and that those lower prices will have to be met acts as a deterrent to setting prices at an artificially high level in the first place. Given the uncertainty about the probable effect of an exchange of price information in this context, I would require that the Government prove that the exchange was entered into for the purpose of, or that it had the effect of, restraining price competition.

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[1] The record does not indicate whether all manufacturers engaged in exchange of price information, or whether the practice was limited to defendants. There is no indication that other manufacturers would not have been given price information had they requested it.

I do not find the inference that the exchange of price information has had an anticompetitive effect as "irresistible" as does the Court. Like my Brother FORTAS, I would prefer that a finding of anticompetitive effect be supported by "evidence in the record." I cannot agree that the evidence in this case was sufficient to prove such an effect. The Government has simply not proved its case.

The Court does not hold that the agreement in the present case was a deliberate attempt to stabilize prices. The evidence in the case, largely the result of stipulation, would not support such a holding. The Government points to a few isolated statements found in the depositions of industry witnesses, but I find these few fragmentary references totally insufficient. The weight of the evidence in the present case indicates that the price information was employed by each defendant on an individual basis, and was used by that defendant to set its prices for a specific customer; ultimately each seller wanted to obtain all or part of that customer's business at the expense of a competitor. The District Court found that there was no explicit agreement among defendants to stabilize prices and I do not believe that the desire of a few industry witnesses to use the information to minimize price cuts supports the conclusion that such an agreement was implicit. On the contrary, the evidence establishes that the information was used by defendants as each pleased and was actually employed for the purpose of engaging in active price competition.

Nor do I believe that the Government has proved that the exchange of price information has in this case had the necessary effect of restraining price competition.[2] In

[2] Here it is relevant to note again that the evidence was largely the result of stipulation, with the Government admittedly introducing very little evidence on the actual effect of the allegedly illegal practice.

its brief before this Court, the Government relies very largely on one finding of the District Court and upon economic theory. The Government has presented a convincing argument in theoretical terms. However, the evidence simply does not square with that theory. And, this is not a case in which it would be unduly difficult to demonstrate anticompetitive effects.

The record indicates that defendants have offered voluminous evidence concerning price trends and competitive behavior in the corrugated container market. Their exhibits indicate a downward trend in prices, with substantial price variations among defendants and among their different plants. There was also a great deal of shifting of accounts. The District Court specifically found that the corrugated container market was highly competitive and that each defendant engaged in active price competition. The Government would have us ignore this evidence and these findings, and assume that because we are dealing with an industry with overcapacity and yet continued entry, the new entrants must have been attracted by high profits. The Government then argues that high profits can only result from stabilization of prices at an unduly high level. Yet, the Government did not introduce any evidence about the level of profits in this industry, and no evidence about price levels. Not one customer was called, although the Government surely had ample access to defendants' customers. The Government admits that the price trend was down, but asks the Court to assume that the trend would have been accelerated with less informed, and hence more vigorous, price competition.[3] In the absence of any proof what-

[3] There was no effort to demonstrate that the price behavior of those manufacturers who did not exchange price information, if any, varied significantly from the price behavior of those who did. In fact, several of the District Court's findings indicate that when cer-

soever, I cannot make such an assumption. It is just as likely that price competition was furthered by the exchange as it is that it was depressed.

Finally, the Government focuses on the finding of the District Court that in a majority of instances a defendant, when it received what it considered reliable price information, would quote or charge substantially the same price.[4] The Court and my Brother FORTAS also focus on this finding. Such an approach ignores, however, the remainder of the District Court's findings. The trial judge found that price decisions were individual decisions, and that defendants frequently did cut prices in order to obtain a particular order.[5] And, the absence of any price parallelism or price uniformity and the downward trend in the industry undercut the conclusion that price information was used to stabilize prices.[6]

The Government is ultimately forced to fall back on the theoretical argument that prices would have been more unstable and would have fallen faster without price information. As I said earlier, I cannot make this assumption on the basis of the evidence in this record. The findings of the Court below simply do not indicate that the exchange of information had a significant anti-

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tain defendants stopped exchanging price information, their price behavior remained essentially the same, and, in some cases, prices actually increased.

[4] It should be noted that, in most cases, this information was obtained from a customer rather than a competitor, a practice the Government does not condemn.

[5] Immediately following the particular sentence emphasized by the Government, there appears the finding that "[i]n many instances, however, depending upon particular circumstances, each defendant quoted lower or higher prices, and in all instances the determination as to the price to be charged or quoted was its individual decision." Other findings of fact are to the same effect.

[6] As mentioned above, no evidence was introduced that would indicate that more than minimal price cuts were economically feasible.

competitive effect; if we rely on these findings, at worst all we can assume is that the exchange was a neutral factor in the market.[7] As this Court said in *Maple Flooring, supra,* at 585: "We realize that such information, gathered and disseminated among the members of a trade or business, may be the basis of agreement or concerted action to . . . raise prices beyond the levels . . . which would prevail if no such agreement or concerted action ensued and those engaged in commerce were left free to base individual initiative on full information of the essential elements of their business." However, here, as in *Maple Flooring,* the Government has not proved that the information was so used. Rather, the record indicates that, while each defendant occasionally received price information from a competitor, that information was used in the same manner as other reliable market information—*i. e.,* to reach an individual price decision based upon all available information. The District Court's findings that this was a competitive industry, lacking any price parallelism or uniformity, effectively refute the Government's assertion that the result of those decisions was to maintain or tend to maintain prices at other than a competitive level. Accordingly, I would affirm the decision of the court below.

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[7] See n. 3, *supra.*

UNITED STATES *v.* AUGENBLICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 45. Argued November 21, 1968.—Decided January 14, 1969.

Even if it is assumed, *arguendo,* despite the enactment of Article 76 of the Uniform Code of Military Justice (which provides that military review of court-martial convictions shall be "final and conclusive" and "binding upon all . . . courts . . . of the United States") that collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a "constitutional" defect in the military decision, the claims herein, which involve a rule of evidence concerning accomplice testimony, and the possible application of the Jencks Act, do not on their facts rise to the constitutional level. Pp. 349–356.

180 Ct. Cl. 131, 377 F. 2d 586; 181 Ct. Cl. 210, 383 F. 2d 1009, reversed.

Assistant Attorney General Weisl argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, John C. Eldridge,* and *Robert V. Zener.*

Joseph H. Sharlitt argued the cause for respondent Augenblick. With him on the brief was *Steven R. Rivkin. Francis J. Steiner, Jr.,* argued the cause and filed a brief for respondent Juhl.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents, who had been convicted by courts-martial, brought these suits for back pay. Augenblick, though charged with sodomy, was convicted of a lesser offense, an indecent act, and Juhl was convicted of selling overseas merchandise of an Air Force Exchange. Augenblick was sentenced to dismissal from the service; Juhl was sentenced to reduction in rank, partial forfeiture of pay, and confinement for six months. Each exhausted

the remedies available to him [1] and, not having obtained relief, brought suit in the Court of Claims to recover back pay,[2] on the ground that the court-martial infringed on his constitutional rights. The Court of Claims undertook to review the judgments of the courts-martial for constitutional defects and rendered judgments for respondents. 180 Ct. Cl. 131, 377 F. 2d 586; 181 Ct. Cl. 210, 383 F. 2d 1009. The case is here on petition for writs of certiorari which we granted because of the importance of the question concerning the jurisdiction of the Court of Claims to review judgments of courts-martial. 390 U. S. 1038.

Article 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876, provides that military review of court-martial convictions shall be "final and conclusive" and "binding upon all . . . courts . . . of the United States." The legislative history of the provision makes clear that

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[1] Augenblick's conviction was reviewed by a Navy Board of Review and affirmed, one member dissenting. The Court of Military Appeals denied a petition for review without opinion January 11, 1963. The Secretary of the Navy declined review on January 30, 1963. See 10 U. S. C. § 871.

Augenblick was dismissed February 5, 1963. On November 14, 1964, the Board for Correction of Records denied relief.

His suit in the Court of Claims was filed October 22, 1964.

Juhl's conviction was reviewed by the Staff Judge Advocate. The Air Force Board for Correction of Military Records also denied relief. His suit in the Court of Claims was filed October 12, 1965.

[2] Back-pay suits are brought under 28 U. S. C. § 1491 which provides that the Court of Claims has jurisdiction to render judgment against the United States on any claim "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." See *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 606, 372 F. 2d 1002, 1008. See Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed. B. J. 179, 190–191 (1961).

relief by way of habeas corpus [3] was an implied exception to that finality clause (S. Rep. No. 486, 81st Cong., 1st Sess., 32; H. R. Rep. No. 491, 81st Cong., 1st Sess., 35)—an exception not available to respondent Augenblick because he was discharged from the service, not imprisoned, and a remedy apparently not invoked by respondent Juhl during his short period of detention.

An additional remedy, apparently now available but not clearly known at the time of these court-martial convictions, is review by the Court of Military Appeals. In *United States* v. *Bevilacqua,* 18 U. S. C. M. A. 10, 11–12, 39 C. M. R. 10, 11–12, decided November 8, 1968, that court held that it has jurisdiction "to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." [4]

Prior to the enactment of Article 76, the Court of Claims had entertained suits for back pay brought by servicemen who had been convicted by courts-martial. See, *e. g., Keyes* v. *United States,* 109 U. S. 336; *Runkle* v. *United States,* 122 U. S. 543; *Swaim* v. *United States,* 165 U. S. 553; *United States* v. *Brown,* 206 U. S. 240. These decisions, it is argued, were based on the theory that the Court of Claims had jurisdiction over back-pay suits where the courts-martial lacked "jurisdiction" in the traditional sense, *viz.,* where "there is no law author-

[3] Habeas corpus has been the conventional way of obtaining here collateral review of conviction by military tribunals. See *Reid* v. *Covert,* 354 U. S. 1; *Burns* v. *Wilson,* 346 U. S. 137; *Whelchel* v. *McDonald,* 340 U. S. 122; *Gusik* v. *Schilder,* 340 U. S. 128.

[4] As we have noted, n. 1, *supra,* Augenblick sought and was denied review by the Court of Military Appeals; and Juhl in his petition to the Court of Claims alleged that "[n]o appeal was possible under law to the United States Court of Military Appeals," an allegation admitted by the Government in its answer.

izing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed." *Keyes* v. *United States, supra,* at 340. From this premise it is urged that when, in review of state convictions by way of federal habeas corpus, the concept of "jurisdiction" was broadened to include deprivation by the trial tribunal of the constitutional rights of a defendant (*Moore* v. *Dempsey,* 261 U. S. 86; *Johnson* v. *Zerbst,* 304 U. S. 458), the scope of collateral review of court-martial convictions was also broadened. That is the position of the Court of Claims which rejected the view that the adoption of Article 76 introduced a new regime and that 10 U. S. C. § 1552 which provides a remedy to correct a military record in order to "remove an injustice," [5] see *Ashe* v. *McNamara,* 355 F. 2d 277, is, apart from habeas corpus, the exclusive remedy.[6]

On that issue there have been a variety of views expressed in this Court. See *Burns* v. *Wilson,* 346 U. S. 137, 149, 152–153. There is likewise unresolved the question whether, if the view of the Court of Claims is correct, the District Courts might have a like jurisdiction over suits not exceeding $10,000 under the Tucker Act, 28 U. S. C. § 1346 (a)(2).[7] After hearing argument and studying the record of these cases we do not reach those questions. For we conclude that, even if we assume, *arguendo,* that a collateral attack on a court-martial judgment may be made in the Court of Claims

[5] Section 1552 (a) of 10 U. S. C. provides in part:

"The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice."

[6] 180 Ct. Cl., at 140–143, 377 F. 2d, at 591–593.

[7] For a discussion of Tucker Act jurisdiction over back-pay suits see H. R. Rep. No. 1604, 88th Cong., 2d Sess., 2.

through a back-pay suit alleging a "constitutional" defect in the military decision, these present cases on their facts do not rise to that level.

The Court of Claims gave relief to Juhl because of the provision in paragraph 153 (a) of the Manual for Courts-Martial which states that the court-martial "cannot" base a conviction "upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable."

We do not stop to review the evidence which bears on this issue and which the Court of Claims sets forth in detail. See 181 Ct. Cl., at 215–225, 383 F. 2d, at 1012–1017.

The Manual was prescribed by the President pursuant to Article 36 of the Uniform Code, 10 U. S. C. § 836. It is a guidebook that summarizes the rules of evidence applied by court-martial review boards. See *Levy* v. *Resor,* 17 U. S. C. M. A. 135, 37 C. M. R. 399. The paragraph regarding accomplice testimony is a statutory rule of evidence. Such rules do not customarily involve constitutional questions. See *Humphrey* v. *Smith,* 336 U. S. 695; *Whelchel* v. *McDonald,* 340 U. S. 122. The *Whelchel* case involved various paragraphs of the Manual dealing with the defense of insanity. We did not sanction review of those paragraphs in a collateral remedy but held that only a denial of the opportunity for the military to consider the defense of insanity "goes to the question of jurisdiction"; and we added that, "[a]ny error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts." 340 U. S., at 124.

Rules of evidence are designed in the interest of fair trials. But unfairness in result is no sure measure of unconstitutionality. When we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions.

Of course, if knowing use of its perjured character were linked with *any* testimony (*Mooney* v. *Holohan,* 294 U. S. 103; *Brady* v. *Maryland,* 373 U. S. 83), we would have a problem of different dimensions. But nothing of the kind is involved here.

Augenblick's claim of constitutional defect in his court-martial concerns a phase in the discovery of evidence. He and a young airman, Hodges, were apprehended late at night in a parked car. The civilian police who arrested them turned them over to the Armed Forces Police who questioned them separately at a naval station in Washington, D. C. Hodges was then taken to an Air Force base in Maryland where he swore to a five-page written statement.

Augenblick was questioned at the naval station after Hodges. During this questioning of both men, Agent James made a tape recording of the conversations. Agent Mendelson either took some notes or wrote up some notes later.

Hodges apparently started out by denying that anything happened in the parked car and later maintained that sodomy had taken place, though, as we have said, Augenblick's conviction was for an indecent act, not for sodomy. Hodges later received an honorable discharge; and it was the theory of the defense that he may have been induced to change his testimony on a promise that one would be given. It is indeed heavily impressed on us that Hodges was kept available for some months and left in good standing, in spite of his reprehensible conduct, and given an honorable discharge only after Augenblick was convicted.

The defense moved for the production of the notes which Mendelson had taken—or later typed up—and of the tape which James had made. As to the notes, the law officer, without examining them *in camera* or otherwise, denied the request. As to the tapes, the law

officer ordered that they be produced or that the Government produce witnesses at an out-of-court hearing who could explain their nonexistence. The tapes were not produced; but each agent who had had contact with the recording was called, except Mendelson who was in Norfolk. James testified that there was a tape but no one knew where it was or what had happened to it. The defense urged that Mendelson, to whom the tapes had apparently once been delivered, be called; but the law officer after reading the record of Mendelson's testimony on the tape recording at a pretrial investigation, refused.

The question of the production of Mendelson's "notes" as well as the question of the production of the tapes bring into focus the Jencks Act, 18 U. S. C. § 3500. This Act, enacted after our decision in *Jencks* v. *United States,* 353 U. S. 657, provides that when a witness testifies for the United States the Government may be required to produce "any statement" of the witness which relates to his testimony. § 3500 (b). The term "statement" is defined in subsection (e) as:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

There is considerable doubt if Mendelson's "notes" fall within the definition of subsection (e). He testified at the court of inquiry that he made "rough pencil notes"; and he said at the pretrial investigation, "I did jot down a couple of rough notes." Both the law officer and the Board of Review concluded that these "notes" were not a

"substantially verbatim" statement producible under the Jencks Act.

It is difficult to tell from this record the precise nature of Mendelson's "notes," whether they recorded part of Hodges' interview or whether they were merely a memorandum giving names, places, and hours. Certainly they were not a statement covering the entire interview; and if they were a truncated version, they would pose the question reserved in *Palermo* v. *United States,* 360 U. S. 343. Since on examination of the record we are left in doubt as to the precise nature of the "notes," we cannot say that the command of the Jencks Act was disobeyed when they were not ordered to be produced.

Moreover, we said in *Palermo* v. *United States, supra,* at 353, that the administration of the Jencks Act must be entrusted to the "good sense and experience" of the trial judges subject to "appropriately limited review of appellate courts." We cannot conclude that when it came to the "rough notes" of Mendelson, the law officer and Board of Review abused their discretion in holding that they need not be produced under the Jencks Act.

The same is true of the rulings concerning production of the tapes. There is no doubt but that the tapes were covered by the Jencks Act; and an earnest effort was made to locate them. Their nature and existence were the subject of detailed interrogation at the pretrial hearing convened at the request of the defense. Four government agents testified concerning the interrogation of Hodges, the recording facilities used, the Navy's routine in handling and using such recordings, and the fate of the tape containing Hodges' testimony. The ground was covered once again at the court-martial. The tapes were not produced; the record indeed shows that they were not found; and their ultimate fate remains a mystery. The law officer properly ruled that the Government bore

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the burden of producing them or explaining why it could not do so.

The record is devoid of credible evidence that they were suppressed. Whether Mendelson should have been recalled is a matter of debate and perhaps doubt. But questions of that character do not rise to a constitutional level. Indeed our *Jencks* decision and the Jencks Act were not cast in constitutional terms. *Palermo* v. *United States, supra,* at 345, 362. They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right. There is, for example, the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. *Palermo* v. *United States, supra,* at 362 (BRENNAN, J., concurring in result). But certain it is that this case is not a worthy candidate for consideration at the constitutional level.

The Court of Claims, in a conscientious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which "seriously impeded his right to a fair trial" a violation "of the Due Process Clause of the Constitution." 180 Ct. Cl., at 166, 377 F. 2d, at 606–607. But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore* v. *Dempsey, supra,* that the proceeding is more a spectacle (*Rideau* v. *Louisiana,* 373 U. S. 723, 726) or trial by ordeal (*Brown* v. *Mississippi,* 297 U. S. 278, 285) than a disciplined contest.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* STRONG, DBA STRONG ROOFING & INSULATING CO.

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

No. 61. Argued December 10, 1968.—Decided January 15, 1969.

A multiple employer bargaining association of which respondent was then a member made a contract with a union fixing compensation levels for the member firms' employees. Respondent thereafter sought to withdraw from the association and refused to sign the contract. The union filed charges with the National Labor Relations Board (NLRB), which found that respondent's refusal to sign the contract constituted unfair labor practices in violation of §§ 8 (a)(5) and (1) of the National Labor Relations Act and ordered respondent to sign the contract, cease and desist from unfair labor practices, and pay any fringe benefits provided for by contract. The Court of Appeals enforced the NLRB's order except as it provided for the payment of fringe benefits, which it held to be "an order to respondent to carry out provisions of the contract" and thus beyond the NLRB's powers. *Held:* The NLRB's authority under the Act to remedy the unfair labor practice which occurred when respondent refused to sign the collective bargaining agreement negotiated on his behalf included the power to require payment of the fringe benefits under the NLRB's remedial authority to take "affirmative action including reinstatement of employees with or without back pay," § 10 (c), which is not "affected by any other means of adjustment . . . established by agreement, law, or otherwise . . . ," § 10 (a). Pp. 358–362.

386 F. 2d 929, reversed.

Harris Weinstein argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come.*

Charles G. Bakaly, Jr., argued the cause for respondent. With him on the brief was *William B. Carman.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Roofing Contractors Association of Southern California, of which respondent was then a member, negotiated a collective bargaining contract with the Roofers Union [1] effective August 15, 1963, establishing compensation levels for the employees of member firms for the next four years. On August 20, 1963, respondent sought to withdraw from the multiple employer bargaining association which had negotiated this agreement. He then refused repeated demands from the union that he sign the contract. At length, the union filed unfair labor practice charges with the National Labor Relations Board, which found that respondent's refusal to sign the contract which had been negotiated on his behalf by the Association was a violation of §§ 8 (a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140–141, as amended, 29 U. S. C. §§ 158(a)(5) and (1). The Board ordered respondent to sign the contract, cease and desist from unfair labor practices, post notices, and "[p]ay to the appropriate source any fringe benefits provided for in the above-described contract." 152 N. L. R. B. 9, 14 (1965). The Court of Appeals enforced the Board's order except as it required the payment of fringe benefits. That part of the order, the Court of Appeals said, "is an order to respondent to carry out provisions of the contract and is beyond the power of the Board." 386 F. 2d 929, 933 (1967). The Government sought and we granted certiorari as to this holding. 391 U. S. 933 (1968).

Believing the remedy provided by the Board was well within its powers, we reverse the judgment of the Court of Appeals. Section 10 (c) of the Act empowers the Board when it adjudicates an unfair labor practice to issue "an order requiring such person to cease and desist

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[1] Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association.

from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 61 Stat. 147, 29 U. S. C. § 160 (c). This grant of remedial power is a broad one. It does not authorize punitive measures, but "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 197 (1941). Back pay is one of the simpler and more explicitly authorized remedies utilized to attain this end.[2]

Here the unfair labor practice was the failure of the employer to sign and acknowledge the existence of a collective bargaining agreement which had been negotiated and concluded on his behalf. There is no dispute that respondent withdrew from the Roofing Contractors Association too late to escape the binding force of the agreement it had negotiated for him, supplanting previous agreements which had been negotiated in the same way.[3] Nor, in light of the obligation of an employer bargaining in good faith to sign a contract reducing agreed terms to writing, *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514, 524–526 (1941), is it argued that respondent's failure to sign the agreement was not an unfair labor practice. The judgment of the Board in these respects is not now challenged. The remedy ordered by the Board included a direction to pay the fringe benefits which would have been paid had the employer signed the agreement and thereby recognized his legal obligations which had

[2] See generally *Nathanson* v. *NLRB,* 344 U. S. 25, 29–30 (1952); Note, A Survey of Labor Remedies, 54 Va. L. Rev. 38, 41–95 (1968).

[3] Respondent is a past president of the Association, and thus was familiar with its bylaw that a "labor contract negotiated by the Committee shall be binding upon the Regular Members of this Association separately and collectively . . . ."

matured during the collective bargaining process. This is no more than the Act and cases like *Phelps Dodge* plainly authorize.

The challenge of the employer, in brief, is that ordering the payment of fringe benefits reserved in the contract inserts the Board into the enforcement of the collective bargaining agreement, contrary to the policy and scheme of the statute.[4] Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally enforced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts. But the business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." § 10 (a), 61 Stat. 146, 29 U. S. C. § 160 (a). Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. *NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421 (1967); *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 268 (1964); *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197–198 (1962); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 101, n. 9 (1962). Arbitrators and courts are still the principal

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[4] The fact that the payments in question here did not constitute direct pay to the employees is irrelevant in our view of this case. Whether the payments were made to the employees, who then contributed them to union trust funds in the form of higher union dues, or whether as here they passed straight from the employer to the trust funds, the final result is the same. And it is just as much in the interest of "effectuat[ing] the policies of this Act," and of making the employees whole, to require the payments in either case.

sources of contract interpretation,[5] but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197–198 (1962). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. *NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421 (1967).

Bearing more precisely on this case, the Board is expressly invited by the Act to determine whether an employer has refused to bargain in good faith and thereby violated § 8 (a)(5) by resisting "the execution of a written contract incorporating any agreement reached if requested by either party . . . ." § 8 (d), 61 Stat. 142, 29 U. S. C. § 158 (d); *H. J. Heinz Co.* v. *NLRB*, 311 U. S. 514, 524–526 (1941). The Board is not trespassing on forbidden territory when it inquires whether negotiations have produced a bargain which the employer has refused to sign and honor, particularly when the employer has refused to recognize the very existence of the contract providing for the arbitration on which he now insists. To this extent the collective contract is the Board's affair, and an effective remedy for refusal to sign is its proper business.

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[5] *Steelworkers Trilogy*, 363 U. S. 564, 574, 593 (1960). Congress established the judicial remedy of § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, in lieu of a proposal to make breach of a collective bargaining agreement itself an unfair labor practice. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41–42. The House Conference Report asserts that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board," *id.*, at 42. See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 452 (1957). Cf. LMRA § 201, 61 Stat. 152, 29 U. S. C. § 171.

Firing an employee for union membership may be a breach of contract open to arbitration, but whether it is or not, it is also an unfair labor practice which may be remedied by reinstatement with back pay under § 10 (c) even though the Board's order mandates the very compensation reserved by the contract. Cf. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967); *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956); *Wallace Corp.* v. *NLRB*, 323 U. S. 248 (1944).

The case before us is little, if any, different. The act of refusing to sign the collective bargaining agreement may not have been a breach of contract, but it was an unfair practice. Once adjudicated, it could be remedied by a Board order requiring payment of those fringe benefits which would have been paid had the employer signed and acknowledged the contract which had been duly negotiated on his behalf. The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE BLACK concurs in the reversal of the Court of Appeals' judgment, but he would direct that the cause be remanded to the Board for it to determine whether to submit the case to arbitration in accord with the contract.

MR. JUSTICE DOUGLAS, dissenting.

There is a surface logic in what the Court does today: If the Board may award back pay (which is computed from the collective bargaining agreement), it should be allowed to award fringe benefits, whose character and amount are also determined by the collective bargaining agreement. An award of back pay, however, is an express part of the legislative grant of authority,[1] while the

[1] Sec. 10 (c) of the Act authorizes the Board, when it finds an unfair labor practice, to issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such

award of fringe benefits is not. That is, of course, not a complete answer, for Congress did not make an exhaustive catalogue of devices used to thwart the Act, but largely left to the Board "the relation of remedy to policy." See *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 194.

What distinguishes the present case is the fact that fringe benefits are not products of a computer but of an arbitral process to which Congress has given strong support.[2] See *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448.

The provision for arbitration is in a sense competitive with the provision empowering the Board to remedy an unfair labor practice. It is indeed an integral part of the collective agreement providing a procedure *sui generis* for resolving grievances that arise.

There were proposals, as we noted in *Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 510–511, to make a breach of a collective bargaining agreement an unfair labor practice subject to the jurisdiction of the National Labor Relations Board. But those proposals never gained the necessary support, Congress deciding that "[o]nce par-

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affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

[2] See, *e. g.,* Aaron, "On First Looking into the Lincoln Mills Decision," in Arbitration and the Law (Proceedings, National Academy of Arbitrators) (J. McKelvey ed. 1959); Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957); Bunn, Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements, 43 Va. L. Rev. 1247 (1957); Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482 (1959); Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958); Feinsinger, Enforcement of Labor Agreements—A New Era In Collective Bargaining, 43 Va. L. Rev. 1261 (1957); Gregory, The Law of the Collective Agreement, 57 Mich. L. Rev. 635 (1959); Jenkins, The Impact of Lincoln Mills on the National Labor Relations Board, 6 U. C. L. A. L. Rev. 355 (1959).

ties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 42, quoted in *Dowd Box Co.* v. *Courtney, supra,* at 511. It is that policy that is reflected in § 301 of the Labor Management Relations Act, 1947, which was before us in *Lincoln Mills,* 353 U. S., at 452. That policy was to exchange an agreement to arbitrate grievance disputes for a no-strike agreement. *Id.,* at 455.

Arbitration is not a process which the Board is either equipped or qualified to follow. Those who are arbiters have special qualifications in a particular industry and come to know the common law of the shop.[3]

The jurisdiction of any agency or branch of government has a built-in impetus for growth and expansion. Seldom does a department restrict its powers narrowly and assume a self-denying attitude. The tendency is to construe express powers broadly. The organism grows by subtle and little-noticed extensions of authority. To students of government this phenomenon is as predictable as the operation of other so-called "laws."[4]

Courts are no exception; and part of their tendency to find easy extensions of their authority was seen in their early contest with administrative agencies. See *United States* v. *Morgan,* 307 U. S. 183, 191. Recent examples

[3] See, *e. g.,* Christensen, Arbitration, Section 301, and the National Labor Relations Act, 37 N. Y. U. L. Rev. 411 (1962); Kovarsky, Labor Arbitration and Federal Pre-emption: The Overruling of Black v. Cutter Laboratories, 47 Minn. L. Rev. 531 (1963); Smith & Jones, The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties, 52 Va. L. Rev. 831 (1966); Smith & Jones, The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law, 63 Mich. L. Rev. 751 (1965); Comment, Common Law of Grievance Arbitration: New Wine in Old Bottles?, 58 Nw. U. L. Rev. 494 (1963).

[4] C. N. Parkinson, Parkinson's Law (1957).

exist in this very field of arbitration with which we are concerned here. We noted in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, how some courts were being enticed to construe arbitration clauses as permitting or not permitting arbitration of certain kinds of disputes and then becoming entangled in the arbitral process, though it was for the arbiters, not for them. *Id.*, at 585. We relegated the courts to their narrow field, leaving arbitration to the new expertise.[5]

An arbiter is not of course free "to dispense his own brand of industrial justice" but is admonished "to reach a fair solution of a problem" within the letter and spirit of the collective bargaining agreement. *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 597. The past practices of the parties, as well as the contractual provisions themselves, are the guidelines.[6] *Local 77* v. *Philadelphia Orchestra*, 252 F. Supp. 787. The agreement to arbitrate is, moreover, more than a contract; it is a generalized

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[5] See Aaron, Arbitration in the Federal Courts: Aftermath of the Trilogy, 9 U. C. L. A. L. Rev. 360 (1962); Davey, The Supreme Court and Arbitration: The Musings of an Arbitrator, 36 Notre Dame Law. 138 (1961); Fleming, Some Observations on Contract Grievances Before Courts and Arbitrators, 15 Stan. L. Rev. 595 (1963); Gregory, Enforcement of Collective Agreements by Arbitration, 48 Va. L. Rev. 883 (1962); Jones, The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 Texas L. Rev. 865 (1968); Mayer, Labor Relations, 1961: The Steelworkers Cases Re-examined, 13 Lab. L. J. 213 (1962); Meltzer, The Supreme Court, Arbitrability and Collective Bargaining, 28 U. Chi. L. Rev. 464 (1961); Jones & Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments, 62 Mich. L. Rev. 1115 (1964).

[6] See Treece, Past Practice and Its Relationship to Specific Contract Language in the Arbitration of Grievance Disputes, 40 U. Colo. L. Rev. 358, 360 *et seq.* (1968). Domke, Arbitration, 36 N. Y. U. L. Rev. 545 (1961); Fleming, Reflections on the Nature of Labor Arbitration, 61 Mich. L. Rev. 1245 (1963).

code that is understood only in light of the " 'common law of the shop which implements and furnishes the context of the agreement.' " *Steelworkers* v. *Warrior & Gulf Co., supra,* at 580. It is sometimes called "a cooperative effort by the parties and the arbitrator to develop a workable solution to the problem." [7] There is a more jaundiced view. Judge Hays, who has had considerable experience in the field, has stated:

> "A proportion of arbitration awards . . . are decided not on the basis of the evidence or of the contract or other proper considerations, but in a way which in the arbitrator's opinion makes it likely that he will be hired for other arbitration cases." P. Hays, Labor Arbitration: A Dissenting View 112 (1966).[8]

Whatever view of the process may be taken, it is clear that determining fringe benefits under a collective bargaining agreement is no job for a computer. But it can be hardly more than that when the Labor Board makes its computations for insertion in the remedial order.

What the "common law" of the shop would show covering these fringe benefits, what "past practices" might reflect on the amount of an award, what "a fair solution" of the problem might seem to be in an arbitration frame of reference, no one knows. These are matters for arbiters, chosen by the parties under the collective bargaining agreement, not for the Board, an alien to the system envisioned by *Lincoln Mills.*

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[7] Aaron, Judicial Intervention in Labor Arbitration, 20 Stan. L. Rev. 41, 55 (1967).

[8] But see Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, 34 U. Chi. L. Rev. 545 (1967).

GARDNER *v.* CALIFORNIA.

CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO.

No. 73. Argued November 20, 1968.—Decided January 20, 1969.

Petitioner, a California state prisoner, filed a request for habeas corpus relief, which the Superior Court denied. Under California law he has no right of appeal but may file a new petition for habeas corpus in the intermediate Court of Appeal or the Supreme Court. Petitioner desired to file a new petition and asked for a free transcript of the evidentiary hearing before the Superior Court, which was denied. *Held:* Under this system of repeated hearings, where transcripts are readily available to judicial and prosecuting officials of the State, and where no suggestion is made that there is any adequate substitute therefor, they may not be furnished to those who can afford them and denied to those who are paupers. *Griffin* v. *Illinois,* 351 U. S. 12; *Long* v. *District Court,* 385 U. S. 192. Pp. 368–371.

Reversed.

Charles E. Rickershauser, Jr., by appointment of the Court, 391 U. S. 911, argued the cause and filed a brief for petitioner.

Jack K. Weber, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, and *William E. James,* Assistant Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner is a California state prisoner who filed *pro se* various papers with the State Superior Court alleging state action that interfered with his access to the courts for determination of his claims. The Superior Court, which granted a hearing and designated the Public Defender's office to represent petitioner at that hearing, treated the papers as requests for habeas corpus relief. After hearing, it made findings and held that the State

had not impaired petitioner's rights of access to the courts.

Under California law, while the State has an appeal from an order discharging a prisoner in a habeas corpus proceeding,[1] the prisoner has no appeal where his petition is denied. See *Loustalot* v. *Superior Court,* 30 Cal. 2d 905, 913, 186 P. 2d 673, 677–678. But he may file a petition for habeas corpus either in the intermediate Court of Appeal or in the Supreme Court.[2] As petitioner in the instant case desired to pursue his remedy in the higher courts, he asked for a free transcript of the evidentiary hearing before the Superior Court. His motion was denied and he sought review of that denial by certiorari to the District Court of Appeal. It was denied, as was a timely petition for a hearing in the Supreme Court. We granted the petition for a writ of certiorari, 391 U. S. 902, to consider whether the rulings below squared with our decisions in *Griffin* v. *Illinois,* 351 U. S. 12, and *Long* v. *District Court,* 385 U. S. 192.

We reverse the judgment below. If this involved an appeal from the Superior Court's denial of habeas corpus, the rule of the *Griffin* case would prevent California from not allowing petitioner, an indigent, access to the record which makes any appellate review meaningful, while according full review to all who have the money to pay their own way. This, however, is not an appeal but the drafting of a new original petition for habeas corpus to the higher court. That new petition must reflect what had transpired in the Superior Court. The statute provides: [3]

> "Every application for a writ of habeas corpus must be verified, and shall state whether any prior

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[1] Calif. Penal Code § 1506.

[2] See Calif. Const., Art. 6, § 10; Calif. Penal Code § 1475; Rules 50 and 190, Calif. Rules of Court.

[3] Calif. Penal Code § 1475.

> application or applications have been made for a writ in regard to the same detention or restraint complained of in the application, and if any such prior application or applications have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise."

It is argued that since petitioner attended the hearing in the Superior Court, he can draw on his memory in preparing his application to the appellate court. And that court, if troubled, can always obtain the transcript from the lower court.[4] But we deal with an adversary system where the initiative rests with the moving party. Without a transcript the petitioner, as he prepared his application to the appellate court, would have only his own lay memory [5] of what transpired before the Superior Court. For an effective presentation of his case he would need the findings of the Superior Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save perhaps for the unusual and exceptional case. The lawyer, having lost below, would be con-

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[4] Rule 60, Calif. Rules of Court, provides:

"When a petition for a writ of habeas corpus is filed in a reviewing court, seeking the release from custody of one who is confined under the process of any court of this State, and the court, before passing on the petition, desires to obtain information concerning any matter of record pertaining to the case of such person, it may order the custodian of the record to produce the same or a certified copy thereof to be filed with the clerk of the reviewing court."

See also S. Weigel & L. Burke, State-Federal Post Conviction Problems, 1 Federal Judicial Center Report 101 (1968).

[5] While petitioner had assigned counsel at the hearing before the Superior Court, that assignment did not cover the preparation of papers in further pursuit of relief.

scious of the skepticism that prevails above when a second hearing is sought and would as sorely need the transcript in petitioning for a hearing before the appellate court as he would if the merits of an appeal were at stake. A layman hence needs the transcript even more.

It is said that the appellate court may send for the transcript and deduce from it whether there is merit in this new application for another hearing. That philosophy would make the appellate tribunal *parens patriae* of the indigent habeas corpus litigant. If that would suffice for appellate hearings in habeas corpus, why not in review of cases on appeal? Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing. The State can hardly contend that a transcript is irrelevant to the second hearing, where it specifically provides one, upon request, to the appellate court and the State attorney. So long as this system of repeated hearings exists and so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished those who can afford them and denied those who are paupers.

There is no suggestion that in the present case there is any adequate substitute [6] for a full stenographic transcript. We conclude that in the context of California's habeas corpus procedure denial of a transcript to an indigent marks the same invidious discrimination which we held impermissible in the *Griffin* and *Long* cases where

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[6] Cf. *Griffin* v. *Illinois*, 351 U. S. 12, 20.

a State granted appeals in criminal cases but in practical effect denied effective appellate review to indigents.

Reversed.

MR. JUSTICE BLACK concurs in the judgment of reversal and all of the Court's opinion except the statement at 370 that a full stenographic transcript is required here. He is of the opinion that, as stated in *Griffin* v. *Illinois,* 351 U. S. 12, there may be no necessity for a full stenographic transcript in state habeas corpus cases, and for that reason he would not automatically require the State to supply one in cases like this case.

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

The Court holds today that petitioner, whose application for a writ of habeas corpus was denied in the California Superior Court, is automatically entitled to a free transcript of that proceeding, to aid him in "preparing" and "presenting" an entirely new application in the State Supreme Court. In so holding, the Court not only misconceives the nature of California's post-conviction procedure, but it imposes on the State a financial burden which is not offset by any appreciable benefit to the petitioner.

Under § 1475 of the California Penal Code, an applicant denied habeas corpus relief in a lower state court may file an application *de novo* in a higher court. As the Superior Court below noted, the petition is self-contained and independent of the prior proceeding. (Appendix 43.) The applicant is neither required nor requested to assign errors, or refer to testimony, in the prior proceeding. He must only inform the court that such a proceeding took place and supply collateral data, such

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as the court in which it was held, the disposition, etc.[1] The initial question for the second court—as it is for any court examining an application for post-conviction relief—is whether, taking the factual allegations as proved, the application states a claim upon which relief can be granted. If the court determines that a claim is stated, it will order a referee to conduct an independent evidentiary hearing.[2]

Certainly there can be no constitutional requirement that a court hear, or review the transcript of, testimony in support of factual allegations which, even if proved, would not constitute grounds for relief.[3] Cf. *Draper* v. *Washington,* 372 U. S. 487, 495–496 (1963). Nor will a transcript of a prior habeas corpus hearing materially aid the applicant in framing the allegations in a subsequent petition. To be sure, a transcript of the prior hearing may be an incidental convenience—so, too, would a daily transcript at a criminal trial—but the Fourteenth Amendment does not require a State to furnish an indigent with every luxury that a wealthy litigant might conceivably choose to purchase. Cf. *id.,* at 496.

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[1] See Form for Petition for Release from or Modification of Custody, as amended effective January 1, 1966, approved by the Judicial Council of California for use under Rules 56.5 and 201 (f) of the California Rules of Court.

[2] Under Rule 60 of the California Rules of Court, *ante,* at 369, n. 4, the court may also order the transcript of the earlier proceeding.

[3] In this connection, it is worth noting that petitioner's affidavit in support of his motion for a free transcript stated that the Superior Court ruled against him, "not on the facts of his claims, but as to the interpretation of rights secured by the Fourteenth Amendment." (Appendix 41–42.) The State Supreme Court apparently reached the same conclusion as the lower court, and denied petitioner's subsequent application for a writ of habeas corpus on the merits. I express no view on the merits of petitioner's claims, which are the subject of petitions for certiorari pending this Term in *Gardner* v. *California,* No. 7, Misc., and *Gardner* v. *California,* No. 10, Misc.

Neither *Long* v. *District Court,* 385 U. S. 192 (1966), nor any other decision of this Court, suggests that California's procedure is constitutionally defective. The State in *Long* simply made "no provision [on an appeal from the denial of habeas corpus] . . . for the furnishing of a transcript without the payment of fee . . . ," or for an independent evidentiary hearing at the appellate level. For all practical purposes, an indigent could not effectively obtain review.[4] In contradistinction, the California indigent who alleges facts which entitle him to relief is afforded the same opportunity as any other applicant to prove those facts.

In purpose and effect, California's procedure is not dissimilar to the federal rule whereby an indigent appealing the denial of an application for collateral relief is provided a transcript only if "the trial judge or a circuit judge certifies that the . . . appeal is not frivolous and that the transcript is needed to decide the issue presented by the . . . appeal." 28 U. S. C. § 753 (f) (1964 ed., Supp. III). Both the state and federal procedures are responsive to the immense volume of frivolous habeas corpus applications and appeals filed in the respective systems. Both procedures are sensible and practical. Both are equitable and fair.

I would affirm.

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[4] Similarly, *Smith* v. *Bennett,* 365 U. S. 708 (1961), held it impermissible for a State to condition docketing of a habeas corpus application or allowance of an appeal on the payment of a filing fee; and *Lane* v. *Brown,* 372 U. S. 477 (1963), held invalid a procedure under which an appeal from the denial of *coram nobis* could be perfected only by filing a transcript in the appellate court, when it was within the public defender's exclusive discretion whether or not to request that a free transcript be prepared. The distinctions between these cases and the instant one are too obvious to merit discussion.

SMITH *v.* HOOEY, JUDGE.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 198. Argued December 11, 1968.—Decided January 20, 1969.

Petitioner was indicted in 1960 on a Texas criminal charge. He was then, and still is, a prisoner in a federal penitentiary. For the next six years he vainly sought to gain a speedy trial in respondent's court. In 1967 he filed in that court a motion, which has not been acted on, to dismiss the charge for want of prosecution. Petitioner then filed a mandamus petition requesting an order to show cause why the charge should not be dismissed. The Texas Supreme Court denied the petition on the basis of a previous decision acknowledging that a state prisoner would have been entitled to be brought to trial but holding that a different rule applies "when two separate sovereignties are involved," since "[t]he true test should be the power and authority of the state unaided by any waiver, permission or act of grace of any other authority." *Held:* Under the Sixth Amendment as made applicable to the States by the Fourteenth the State, on petitioner's demand, was required to make a diligent, good-faith effort to bring petitioner to trial in respondent's court. Pp. 377–383.

Vacated and remanded.

Charles Alan Wright, by appointment of the Court, *post,* p. 813, argued the cause and filed a brief for petitioner.

Joe S. Moss argued the cause for respondent. With him on the brief were *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, *Robert C. Flowers* and *Gilbert J. Pena,* Assistant Attorneys General, and *Carol S. Vance.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Klopfer* v. *North Carolina,* 386 U. S. 213, this Court held that, by virtue of the Fourteenth Amendment, the

Sixth Amendment right to a speedy trial [1] is enforceable against the States as "one of the most basic rights preserved by our Constitution." *Id.*, at 226. The case before us involves the nature and extent of the obligation imposed upon a State by that constitutional guarantee, when the person under the state criminal charge is serving a prison sentence imposed by another jurisdiction.

In 1960 the petitioner was indicted in Harris County, Texas, upon a charge of theft. He was then, and still is, a prisoner in the federal penitentiary at Leavenworth, Kansas.[2] Shortly after the state charge was filed against him, the petitioner mailed a letter to the Texas trial court requesting a speedy trial. In reply, he was notified that "he would be afforded a trial within two weeks of any date [he] might specify at which he could be present." [3] Thereafter, for the next six years, the petitioner, "by various letters, and more formal so-called 'motions,' " continued periodically to ask that he be brought to trial. Beyond the response already alluded to, the State took no steps to obtain the petitioner's appearance in the Harris County trial court. Finally, in 1967, the petitioner filed in that court a verified motion to dismiss the charge against him for want of prosecution. No action was taken on the motion.

The petitioner then brought a mandamus proceeding in the Supreme Court of Texas, asking for an order to show cause why the pending charge should not be dismissed. Mandamus was refused in an informal and unreported order of the Texas Supreme Court. The petitioner then sought certiorari in this Court. After invit-

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[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U. S. Const., Amdt. VI.

[2] On May 5, 1960, the sheriff of Harris County notified the warden at Leavenworth that a warrant for the petitioner's arrest was outstanding, and asked for notice of "the minimum release date." That date is apparently January 6, 1970.

[3] Most of the facts have been stipulated.

ing and receiving a memorandum from the Solicitor General of the United States, 390 U. S. 937, we granted certiorari to consider the constitutional questions this case presents. 392 U. S. 925.

In refusing to issue a writ of mandamus, the Supreme Court of Texas relied upon and reaffirmed its decision of a year earlier in *Cooper* v. *State*, 400 S. W. 2d 890.[4] In that case, as in the present one, a state criminal charge was pending against a man who was an inmate of a federal prison. He filed a petition for a writ of habeas corpus *ad prosequendum* in the Texas trial court, praying that he be brought before the court for trial, or that the charge against him be dismissed. Upon denial of that motion, he applied to the Supreme Court of Texas for a writ of mandamus. In denying the application, the court acknowledged that an inmate of a *Texas* prison would have been clearly entitled to the relief sought as a matter of constitutional right,[5] but held that "a differ-

[4] See also *Lawrence* v. *State*, 412 S. W. 2d 40.

[5] For this proposition the court cited its 40-year-old decision in *Moreau* v. *Bond*, 114 Tex. 468, 271 S. W. 379. The court in that case said:

"Those rights, fundamental in their nature, which have been guaranteed by the Bill of Rights cannot be the subject of judicial discretion. Judicial discretion is a legal discretion and not a personal discretion; a legal discretion to be exercised in conformity to the Constitution and the laws of the land. It is only in the absence of positive law or fixed rule that the judge may decide by his view of expediency or of the demands of justice or equity. The Bill of Rights, Section 10 of Article I of the Constitution, provides: 'In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury' . . . .

"None of the reasons suggested, either in the order overruling relator's motion for trial or in the answer to the petition for mandamus here, are good or have any foundation in law or justice. Certainly, under our Constitution and our laws, the relator is entitled to a trial on the charge against him." 114 Tex., at 470, 271 S. W., at 379–380.

The basis of the decision thus appears to have been the speedy-trial guarantee contained in the state constitution.

ent rule is applicable when two separate sovereignties are involved." 400 S. W. 2d, at 891. The court viewed the difference as "one of power and authority." *Id.*, at 892. While acknowledging that if the state authorities were "ordered to proceed with the prosecution . . . and comply with certain conditions specified by the federal prison authorities, the relator would be produced for trial in the state court," *id.*, at 891, it nonetheless denied relief, because it thought "[t]he true test should be the power and authority of the state unaided by any waiver, permission or act of grace of any other authority." *Id.*, at 892. Four Justices dissented, expressing their belief that "where the state has the power to afford the accused a speedy trial it is under a duty to do so." *Id.*, at 893.

There can be no doubt that if the petitioner in the present case had been at large for a six-year period following his indictment, and had repeatedly demanded that he be brought to trial, the State would have been under a constitutional duty to try him. *Klopfer* v. *North Carolina, supra,* at 219. And Texas concedes that if during that period he had been confined in a Texas prison for some other state offense, its obligation would have been no less. But the Texas Supreme Court has held that because petitioner is, in fact, confined in a federal prison, the State is totally absolved from any duty at all under the constitutional guarantee. We cannot agree.

The historic origins of the Sixth Amendment right to a speedy trial were traced in some detail by THE CHIEF JUSTICE in his opinion for the Court in *Klopfer, supra,* at 223–226, and we need not review that history again here. Suffice it to remember that this constitutional guarantee has universally [6] been thought essential to pro-

[6] "Today, each of the 50 States guarantees the right to a speedy trial to its citizens." *Klopfer* v. *North Carolina, supra,* at 226; see Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 847 (1957); cf. Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587 (1965).

tect at least three basic demands of criminal justice in the Anglo-American legal system: "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell,* 383 U. S. 116, 120. These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction.

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.[7] Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.[8]

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[7] See Schindler, Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179, 182–183 (1966).

[8] See, *e. g., Evans* v. *Mitchell,* 200 Kan. 290, 436 P. 2d 408 (holding that Kansas had no duty to bring to trial a person serving a 15-year sentence in a Washington prison, although the pendency of the Kansas charge prevented any possibility of clemency or conditional pardon in Washington and made it impossible for the prisoner to take part in certain rehabilitation programs or to become a trusty in the Washington prison). The existence of an outstanding criminal charge no longer automatically makes a prisoner ineligible for parole in the federal prison system. 28 CFR § 2.9 (1968); see Rules of the United States Board of Parole 17–18 (1965). But as

And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large. Cf. *Klopfer* v. *North Carolina, supra,* at 221–222. In the opinion of the former Director of the Federal Bureau of Prisons,

> "[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement." [9]

Finally, it is self-evident that "the possibilities that long delay will impair the ability of an accused to defend himself" are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to

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late as 1959 the Director of the Federal Bureau of Prisons wrote: "Today the prisoners with detainers are evaluated individually but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner." Bennett, "The Last Full Ounce," 23 Fed. Prob. No. 2, p. 20, at 21 (1959). See also Note, Detainers and the Correctional Process, 1966 Wash. U. L. Q. 417, 418–423.

[9] Bennett, *supra,* n. 8, at 21; see Walther, Detainer Warrants and the Speedy Trial Provision, 46 Marq. L. Rev. 423, 427–428 (1963).

keep track of their whereabouts, is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective," [10] a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

Despite all these considerations, the Texas Supreme Court has said that the State is under no duty even to attempt to bring a man in the petitioner's position to trial, because "[t]he question is one of power and authority and is in no way dependent upon how or in what manner the federal sovereignty may proceed in a discretionary way under the doctrine of comity." [11] Yet Texas concedes that if it did make an effort to secure a federal prisoner's appearance, he would, in fact, "be pro-

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[10] Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 Yale L. J. 767, 769 (1968).

[11] *Cooper* v. *State*, 400 S. W. 2d 890, 892. The only other basis suggested by the Texas Supreme Court for its denial of relief in *Cooper* was the expense that would be involved in bringing a federal prisoner to trial, the court noting that a directive of the Federal Bureau of Prisons provided that "satisfactory arrangements for payment of expenses [must be] made before the prisoner is actually removed to the place of trial." *Id.*, at 891. But the expense involved in effectuating an occasional writ of habeas corpus *ad prosequendum* would hardly be comparable to what is required to implement other constitutional rights, *e. g.*, the appointment of counsel for every indigent defendant. *Gideon* v. *Wainwright*, 372 U. S. 335. And custodial as well as transportation expenses would also be incurred if the State brought the petitioner to trial after his federal sentence had run. If the petitioner is, as the State maintains, not an indigent, there is nothing to prevent a fair assessment of necessary expenses against him. Finally, the short and perhaps the best answer to any objection based upon expense was given by the Supreme Court of Wisconsin in a case much like the present one: "We will not put a price tag upon constitutional rights." *State ex rel. Fredenberg* v. *Byrne*, 20 Wis. 2d 504, 512, 123 N. W. 2d 305, 310.

duced for trial in the state court." [12] This is fully confirmed by the memorandum that the Solicitor General has filed in the present case:

> "[T]he Bureau of Prisons would doubtless have made the prisoner available if a writ of habeas corpus *ad prosequendum* had been issued by the state court. It does not appear, however, that the State at any point sought to initiate that procedure in this case." [13]

In view of these realities, we think the Texas court was mistaken in allowing doctrinaire concepts of "power" and "authority" to submerge the practical demands of the constitutional right to a speedy trial. Indeed, the rationale upon which the Texas Supreme Court based its denial of relief in this case was wholly undercut last Term in *Barber* v. *Page,* 390 U. S. 719. In that case we dealt

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[12] *Cooper* v. *State, supra,* at 891.

[13] That memorandum also states:

"It is the policy of the United States Bureau of Prisons to encourage the expeditious disposition of prosecutions in state courts against federal prisoners. The normal procedure under which production is effected is pursuant to a writ *ad prosequendum* from the state court. Almost invariably, the United States has complied with such writs and extended its cooperation to the state authorities. The Bureau of Prisons informs us that removals are normally made by United States marshals, with the expenses borne by the state authorities. In some instances, to mitigate the cost to the State, the Bureau of Prisons has removed an inmate to a federal facility close to the site of prosecution. In a relatively small number of instances, prisoners have been produced pursuant to 18 U. S. C. § 4085, which provides in part:

" 'Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such a person, prior to his release, to be transferred to a penal or correctional institution within such State or District.' "

with another Sixth Amendment guarantee—the right of confrontation. In holding that Oklahoma could not excuse its failure to produce a prosecution witness simply because he was in a federal prison outside the State, we said:

> "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 and commentators 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).
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> "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. . . .
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> ". . . 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 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." 390 U. S., at 723–725 (footnotes omitted).

By a parity of reasoning we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial.

The order of the Supreme Court of Texas is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the opinion and judgment of the Court, but he would make it absolutely clear to the Supreme Court of Texas that so far as the federal constitutional question is concerned its judgment is set aside only for the purpose of giving the petitioner a trial, and that if a trial is given the case should not be dismissed.

Separate opinion of MR. JUSTICE HARLAN.

I agree that a State may not ignore a criminal accused's request to be brought to trial, merely because he is incarcerated in another jurisdiction, but that it must make a reasonable effort to secure his presence for trial. This much is required by the Due Process Clause of the Fourteenth Amendment, and I would rest decision of this case on that ground, and not on "incorporation" of the Sixth Amendment's speedy-trial provision into the Four-

teenth. See my opinion concurring in the result in *Klopfer* v. *North Carolina,* 386 U. S. 213, 226 (1967).

I believe, however, that the State is entitled to more explicitness from us as to what is to be expected of it on remand than what is conveyed merely by the requirement that further proceedings not be "inconsistent with this opinion." Must the charges against petitioner be dismissed? Or may Texas now secure his presence and proceed to try him? If petitioner contends that he has been prejudiced by the nine-year delay, how is this claim to be adjudicated?

This case is one of first impression for us, and decides a question on which the state and lower federal courts have been divided. Under these particular circumstances, I do not believe that Texas should automatically forfeit the right to try petitioner. If the State still desires to bring him to trial, it should do so forthwith. At trial, if petitioner makes a *prima facie* showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary.

MR. JUSTICE WHITE, concurring.

I join the opinion of the Court, understanding its remand of the cause "for further proceedings not inconsistent with this opinion" to leave open the ultimate question whether Texas must dismiss the criminal proceedings against the petitioner. The Texas court's erroneous reliance on the fact of incarceration elsewhere prevented it from reaching the other facets of this question, which may now be adjudicated in the manner permitted by Texas procedure.

HUNTER *v.* ERICKSON, MAYOR OF AKRON, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 63. Argued November 13, 1968.—Decided January 20, 1969.

The Akron City Council enacted a fair housing ordinance which established a Commission on Equal Opportunity in Housing to enforce the antidiscrimination sections through conciliation or persuasion, if possible, or, if not, through orders judicially enforceable. Thereafter, a proposal for an amendment to the city charter, which had been placed on the ballot by petition, was passed. It provided that any ordinance (including any in effect) which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease, or financing of real property on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the voters before becoming effective. The trial court denied appellant's housing discrimination complaint, holding that the fair housing ordinance was rendered ineffective by the charter amendment, and the Ohio Supreme Court affirmed, finding that the amendment was not repugnant to the Equal Protection Clause. *Held:*

1. The case is not moot. Neither the 1968 Civil Rights Act (which specifically preserves local fair housing laws), nor the 1866 Civil Rights Act, was intended to pre-empt local housing ordinances; the Ohio Act of October 30, 1965 (which concerns "commercial" housing), does not apply to this case; and the Akron ordinance provides an enforcement mechanism unmatched by either state or federal legislation. Pp. 388–389.

2. The charter amendment contains an explicitly racial classification treating racial housing matters differently from other racial and housing matters and places special burdens on racial and religious minorities within the governmental process by making it more difficult for them to secure legislation on their behalf. Pp. 389–391.

3. Racial classifications "bear a heavier burden of justification" than other classifications, and here Akron has not justified its discrimination against minorities, which constitutes a denial of the equal protection of the laws. Pp. 391–393.

12 Ohio St. 2d 116, 233 N. E. 2d 129, reversed.

Robert L. Carter argued the cause for appellant. With him on the brief were *Norman Purnell, Bernard R. Roetzel,* and *Lewis M. Steel.*

Alvin C. Vinopal argued the cause for appellees. With him on the brief was *William R. Baird.*

Louis F. Claiborne argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Pollak, Francis X. Beytagh, Jr.,* and *Nathan Lewin.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the City of Akron, Ohio, has denied a Negro citizen, Nellie Hunter, the equal protection of its laws by amending the city charter to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron.

The Akron City Council in 1964 enacted a fair housing ordinance premised on a recognition of the social and economic losses to society which flow from substandard, ghetto housing and its tendency to breed discrimination and segregation contrary to the policy of the city to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin." Akron Ordinance No. 873–1964 § 1. A Commission on Equal Opportunity in Housing was established by the ordinance in the office of the Mayor to enforce the antidiscrimination sections of the ordinance through conciliation or persuasion if possible, but, if not, then through "such order as the facts warrant," based upon a hearing at which witnesses may be subpoenaed, and entitled to enforcement in the courts. Akron Ordinance No. 873–1964, as amended by Akron Ordinance No. 926–1964.

Seeking to invoke this machinery which had been established by the city for her benefit, Nellie Hunter addressed a complaint to the Commission asserting that a real estate agent had come to show her a list of houses for sale, but that on meeting Mrs. Hunter the agent "stated that she could not show me any of the houses on the list she had prepared for me because all of the owners had specified they did not wish their houses shown to negroes." Mrs. Hunter's affidavit met with the reply that the fair housing ordinance was unavailable to her because the city charter had been amended to provide:

> "Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein." Akron City Charter § 137.

The proposal for the charter amendment had been placed on the ballot at a general election upon petition of more than 10% of Akron's voters, and the amendment had been duly passed by a majority.

Appellant then brought an action in the Ohio courts on behalf of the municipality, herself, and all others similarly situated, to obtain a writ of mandamus requiring the Mayor to convene the Commission and to require the Commission and the Director of Law to enforce the fair housing ordinance and process her complaint. The trial court initially held the enforcement provisions of the fair housing ordinance invalid under state law, but the Supreme Court of Ohio reversed, *State ex rel. Hunter*

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v. *Erickson,* 6 Ohio St. 2d 130, 216 N. E. 2d 371 (1966). On remand, the trial court held that the fair housing ordinance was rendered ineffective by the charter amendment, and the Supreme Court of Ohio affirmed, holding that the charter amendment was not repugnant to the Equal Protection Clause of the Constitution.

Akron contends that this case has been rendered moot by the passage of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73, the decision of this Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968), and the passage of an Ohio Act effective October 30, 1965, Ohio Rev. Code Ann., Tit. 41, c. 4112. It is true that each of these events is related to open housing, but none of the legislation involved was intended to pre-empt local housing ordinances or provide rights and remedies which are effective substitutes for the Akron law.

The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws,[1] and the 1866 Civil Rights Act [2] considered in *Jones* should be read together with the later statute on the same subject, *United States* v. *Stewart,* 311 U. S. 60, 64–65 (1940); *Talbot* v. *Seeman,* 1 Cranch 1, 34–35 (1801), so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves. If the Ohio statute mooted the case, surely the Ohio Supreme Court would have so held when the validity of the Akron ordinance was twice before it after the Ohio statute was passed. Moreover, the sections of the Ohio law which are crucial here apply only to "commercial housing," and on any reading

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[1] Nothing in the federal statute is to be construed "to invalidate or limit any law of a State or political subdivision of a State" giving similar housing rights, and deference is to be given to local enforcement. Civil Rights Act of 1968, Tit. VIII, §§ 815, 810 (c), 82 Stat. 89, 86.

[2] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." § 1, 14 Stat. 27, as amended, 42 U. S. C. § 1982.

we can imagine do not apply to Mrs. Hunter's case,[3] though the Akron ordinance does. Finally, the case cannot be considered moot since the Akron ordinance provides an enforcement mechanism unmatched by either state or federal legislation. Unlike state or federal programs, the Akron ordinance brings local people together for conciliation and persuasion by and before a local tribunal. It is precisely this sort of very localized solution to which Congress meant to defer. We therefore reject the contention that this case is moot.

Akron argues that this case is unlike *Reitman* v. *Mulkey,* 387 U. S. 369 (1967) in that here the city charter declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances. But we need not rest on *Reitman* to decide this case. Here, unlike *Reitman,* there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.

By adding § 137 to its Charter the City of Akron, which unquestionably wields state power,[4] not only sus-

[3] The Ohio statute makes it unlawful for "any person" to "[r]efuse to sell . . . or otherwise deny or withhold *commercial* housing from any person because of the race [or] color" of the prospective owner. Ohio Rev. Code Ann. §§ 4112.02 (H) and 4112.02 (H) (1) (Supp. 1967) (emphasis added). "Commercial housing" is defined to exclude "any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee." Ohio Rev. Code Ann. § 4112.01 (K) (Supp. 1967). The statute makes it unlawful to "[p]rint, publish, or circulate any statement or advertisement relating to the sale [of a] . . . personal residence . . . which indicates any preference, limitation, specification, or discrimination based upon race . . . ." Ohio Rev. Code Ann. § 4112.02 (H) (6) (Supp. 1967). Since Mrs. Hunter does not seek commercial housing, or complain of the affront to her sensibilities of hearing a "circulated" statement (if the Ohio statute goes that far) she cannot obtain the relief she seeks under the Ohio statute.

[4] See, *e. g., Evans* v. *Newton,* 382 U. S. 296 (1966); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

pended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect.[5] Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective 30 days after passage by the City Council, or immediately if passed as an emergency measure, and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition.[6] Passage by the Council sufficed unless the electors themselves invoked the general referendum provisions of the city charter. But for those who sought protection against racial bias, the approval of the City Council was not enough. A referendum was required by charter at a general or regular election, without any provision for use of the expedited special election ordinarily available. The Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to § 137.

Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run § 137's gantlet. It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137

[5] Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.

[6] Ordinances may be initiated through a petition signed by 7% of the voters, and the city charter may be amended or measures enacted by the council repealed through a referendum which may be obtained on petition of 10% of the voters.

nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson* v. *Martin,* 375 U. S. 399 (1964), § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. Cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Avery* v. *Midland County,* 390 U. S. 474 (1968). The preamble to the open housing ordinance which was suspended by § 137 recited that the population of Akron consists of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by § 137 must be assessed.

Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter-House Cases,* 16

Wall. 36, 71 (1873); *Strauder* v. *West Virgina,* 100 U. S. 303, 307–308 (1880); *Ex parte Virginia,* 100 U. S. 339, 344–345 (1880); *McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964); *Loving* v. *Virginia,* 388 U. S. 1, 10 (1967), racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954), and subject to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944). They "bear a far heavier burden of justification" than other classifications, *McLaughlin* v. *Florida,* 379 U. S. 184, 194 (1964).

We are unimpressed with any of Akron's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of § 137, but does not justify it. The amendment was unnecessary either to implement a decision to go slowly, or to allow the people of Akron to participate in that decision.[7] Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 736–737 (1964). The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so,

[7] The people of Akron had the power to initiate legislation, or to review council decisions, even before § 137. See n. 6, *supra.* The procedural prerequisites for this popular action are perfectly reasonable, as the gathering of 10% of the voters' signatures in the course of passing § 137 illustrates.

the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. Cf. *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Avery* v. *Midland County,* 390 U. S. 474 (1968).

We hold that § 137 discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

At the outset, I think it well to sketch my constitutional approach to state statutes which structure the internal governmental process and which are challenged under the Equal Protection Clause of the Fourteenth Amendment. For equal protection purposes, I believe that laws which define the powers of political institutions fall into two classes. First, a statute may have the clear purpose of making it more difficult for racial and religious minorities to further their political aims. Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind. *McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964).

Most laws which define the structure of political institutions, however, fall into a second class. They are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents. Consider, for example, Akron's procedure which requires that almost any ordinance be submitted to a general referendum if 10% of the

electorate signs an appropriate petition.* This rule obviously does not have the purpose of protecting one particular group to the detriment of all others. It will sometimes operate in favor of one faction; sometimes in favor of another. Akron has adopted the referendum system because its citizens believe that whenever an action of the City Council raises the emotional opposition of *any* significant group in the community, the people should have a right to decide the matter directly. Statutes of this type, which are grounded upon general democratic principle, do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage Negro political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If the Council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.

This same analysis applies to other institutions of government which are even more solidly rooted in our history than is the referendum. The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it

*Section 25 of Akron's city charter exempts the following ordinances from the referendum procedure:

"(a) Annual appropriation ordinances. (b) Ordinances or resolutions providing for the approval or disapproval of appointments or removals and appointments or removals made by Council. (c) Actions by Council on the approval of official bonds. (d) Ordinances or resolutions providing for the submission of any proposition to the vote of the electors. (e) Ordinances providing for street improvements petitioned for by owners of a majority of the feet front of the property benefited and to be specially assessed for the cost thereof."

It is not suggested that any of these exceptions were made with the purpose of disadvantaging Negro political interests.

relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a fair housing law is made part of the constitution, or they may lose if the constitution adopts a position of strict neutrality on the question. See *Reitman* v. *Mulkey,* 387 U. S. 369, 389 (1967) (dissenting opinion of HARLAN, J.). But even if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

In the case before us, however, the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest. Since the charter amendment is discriminatory on its face, Akron must "bear a far heavier burden of justification" than is required in the normal case. *McLaughlin* v. *Florida,* 379 U. S. 184, 194 (1964). And Akron has failed to sustain this burden. The city's principal argument in support of the charter amendment relies on the undisputed fact that fair housing legislation may often be expected to raise the passions of the community to their highest pitch. It was not necessary, however, to pass this amendment in order to assure that particularly sensitive issues will ultimately be decided by the general electorate. Akron has already provided a procedure, which is grounded in neutral principle, that requires a general referendum on this issue if 10% of the voters insist. If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say. Consequently, the charter amendment

will have its real impact only when fair housing does *not* arouse extraordinary controversy. This being the case, I can perceive no legitimate state interest which in any degree vindicates the action taken by the City here.

As I read the Court's opinion to be entirely consistent with the basic principles which I believe control this case, I join in it.

MR. JUSTICE BLACK, dissenting.

Section 10, Art. I, of the Constitution provides, among other things, that: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." But there is no constitutional provision anywhere which bars any State from repealing any law on any subject at any time it pleases. Although the Court denies the fact, I read its opinion as holding that a city that "wields state power" is barred from repealing an existing ordinance that forbids discrimination in the sale, lease, or financing of real property "on the basis of race, color, religion, national origin or ancestry . . . ." The result of what the Court does is precisely as though it had commanded the State by mandamus or injunction to keep on its books and enforce what the Court favors as a fair housing law.

The Court purports to find its power to forbid the city to repeal its laws in the provision of the Fourteenth Amendment forbidding a State to "deny to any person within its jurisdiction the equal protection of the laws." For some time I have been filing my protests against the Court's use of the Due Process Clause to strike down state laws that shock the Court's conscience or offend the Court's sense of what it considers to be "fair" or "fundamental" or "arbitrary" or "contrary to the beliefs of the English-speaking people." I now protest just as vigorously against use of the Equal Protection Clause to bar States from repealing laws that the Court wants the

States to retain. Of course the Court under the ruling of *Marbury* v. *Madison,* 1 Cranch 137 (1803), has power to invalidate state laws that discriminate on account of race. But it does not have power to put roadblocks to prevent States from repealing these laws. Here, I think the Court needs to control itself, and not, as it is doing, encroach on a State's powers to repeal its old laws when it decides to do so.

Another argument used by the Court supposedly to support its holding is that we have in a number of our cases supported the right to vote without discrimination. And we have. But in no one of them have we held that a State is without power to repeal its own laws when convinced by experience that a law is not serving a useful purpose. Moreover, it is the Court's opinion here that casts aspersions upon the right of citizens to vote. I say that for this reason. Akron's repealing law here held unconstitutional, provides that an ordinance in the fair housing field in Akron "must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." The Court uses this granted right of the people to vote on this important legislation as a key argument for holding that the repealer denies equal protection to Negroes. Just consider that for a moment. In this Government, which we boast is "of the people, by the people, and for the people," conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court! There may have been other state laws held unconstitutional in the past on grounds that are equally as fallacious and undemocratic as those the Court relies on today, but if so I do not recall such cases at the moment. It is time, I think, to recall that the Equal Protection Clause does not empower this Court to decide what ordinances or laws a State may repeal. I would not strike down this repealing ordinance.

GORUN ET AL. *v.* FALL ET AL.

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

No. 496. Decided January 20, 1969.

287 F. Supp. 725, affirmed.

John R. Vintilla and *Novak N. Marku* for appellants.

Forrest H. Anderson, Attorney General of Montana, and *N. A. Rotering,* Special Assistant Attorney General, for appellees Fall et al. Appellee Union Bank & Trust Co. filed a brief.

PER CURIAM.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE FORTAS concur.

Appellants are nonresident aliens living in Romania who were named as beneficiaries of an estate being probated in Montana. It has been assumed for the purpose of this appeal that they will receive from that estate unless prevented by the Montana reciprocal inheritance statute (Mont. Rev. Codes Ann. § 91–520) which would condition their distribution upon a showing that Romania similarly allows citizens of this country to receive, and to enjoy here, property bequeathed in Romania. While the estate was being administered in the state courts of Montana, appellants filed this complaint to have the three-judge court declare the statute unconstitutional and to enjoin its application. After issue was joined, they moved for summary judgment on the authority of *Zschernig* v. *Miller,* 389 U. S. 429, in which we struck down the Oregon reciprocal inheritance statute as an

impermissible interference with federal power over foreign affairs.

Federal policy permits the free flow of funds to Romania. On March 30, 1960, the United States entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See 25 Fed. Reg. 3458.

At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR § 211.2. As our opinion in *Zschernig* makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that federal policy.

The three-judge court dismissed the complaint, saying: "[T]he Montana court now advised by *Zschernig* of the boundaries of the constitutional power of the state . . . should be free to fashion a procedure for applying R. C. M. 1947, § 91–520, in a manner not offensive to the Federal Constitution." 287 F. Supp. 725, 728.

While the four of us have no objection to summary disposition of this appeal, dismissal seems singularly inappropriate in light of our recent decisions saying over and over again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal. See *Zwickler* v. *Koota*, 389 U. S. 241, 250–252. In spite of our aversion to abstention, see *id.*, at 248–249; *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487, it would be better judicial administration to hold the federal case, pending resolution of the state proceeding, than to dismiss it in the face of clear-cut federal policy in favor of the claim of appellants. Cf. *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U. S. 593.

ALABAMA STATE TEACHERS ASSN. ET AL. *v.* ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY ET AL.

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

No. 731. Decided January 20, 1969.

289 F. Supp. 784, affirmed.

Jack Greenberg, James M. Nabrit III, Melvin Zarr, and *Fred D. Gray* for appellants.

MacDonald Gallion, Attorney General of Alabama, and *Gordon Madison,* Assistant Attorney General, for Alabama Public School and College Authority, and *James J. Carter* for Members of the Board and the Board of Trustees of Auburn University, appellees.

PER CURIAM.

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

MR. JUSTICE DOUGLAS, dissenting.

If my Brother HARLAN is correct and this is a local, as distinguished from a state-wide, law, a question not requiring a three-judge court (*Moody* v. *Flowers,* 387 U. S. 97), then we have been woefully wrong in other school integration cases. For they have almost always involved a single public school, which usually is wholly local in its operation. But in those other three-judge court cases we dealt with the operation of a state-wide racial segregation regime. The present Act (Ala. Acts 1967, No. 403) regulates a state agency, the Alabama Public School and College Authority, which issues and sells bonds. And these bonds, so the case tells us, are

sold to construct what threatens to become an all-white university.[1]

Can we say in 1969 that a State has no duty to disestablish a dual system of higher education based upon race? The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on one hand and colleges and universities on the other. The inference is that if this were an elementary school, the result would be different.[2]

The problem is in effect a phase of "freedom of choice" which was before us in another aspect in *Green* v. *County School Board,* 391 U. S. 430.[3]

I would note probable jurisdiction and set the case for argument.

MR. JUSTICE HARLAN, dissenting.

Only two years ago, *Moody* v. *Flowers,* 387 U. S. 97, 101 (1967), made it clear that a three-judge court need not be convoked whenever "a state statute is involved but only when a state statute of general and statewide application is sought to be enjoined." Although this holding was solidly grounded in precedent and in policy, the Court today abandons *Moody* without explanation by taking jurisdiction to affirm this judgment summarily.

The case before us does not involve a statute of "general and statewide application." Appellants are simply trying to prevent the construction of a single public college to be located in the City of Montgomery. Ap-

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[1] The counterpart of this new predominantly all-white university is Alabama State College, predominantly Negro.

[2] This is on its face an amazing statement, as the forerunners of *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294, were cases involving higher education. See *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

[3] And see *Raney* v. *Board of Education,* 391 U. S. 443; *Monroe* v. *Board of Commissioners,* 391 U. S. 450.

pellants merely attack a statute which "authorize[s] the Alabama public school and college authority . . . to issue . . . additional bonds in the . . . amount of $5,000,000 for the purpose of constructing . . . a four-year college at Montgomery under the supervision and control of the board of trustees of Auburn University." Ala. Acts, No. 403 (1967).[1] The fate of this one school, like the fate of a county-wide reapportionment plan, *Moody* v. *Flowers, supra,* or the affairs of a regional drainage district, *Rorick* v. *Commissioners,* 307 U. S. 208 (1939), is not to be decided by a special three-judge court. As *Moody* and *Rorick* teach, the bare fact that a state statute is involved is not enough to trigger 28 U. S. C. § 2281.[2]

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[1] Although the appellants' original complaint also contained a challenge to the constitutionality of the Alabama statute creating the State's Public School and College Authority, Ala. Acts, No. 243 (1965), this challenge was abandoned at the hearing on the merits. See 289 F. Supp. 784, 785, n. 1 (1968).

[2] While my Brother DOUGLAS is quite right in noting that *Brown* v. *Board of Education* and two of its companion cases, 347 U. S. 483 (1954), were heard on appeal from three-judge District Courts, he fails to recognize that in each of those cases, appellants had sought to enjoin the operation of a state statute or constitutional provision of general application that either required or authorized racial segregation in public and secondary schools. *Id.,* at 486, n. 1. See also, *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). In contrast, our "freedom-of-choice" decisions of last Term, *Green* v. *County School Board,* 391 U. S. 430 (1968); *Raney* v. *Board of Education,* 391 U. S. 443 (1968); *Monroe* v. *Board of Commissioners,* 391 U. S. 450 (1968), came to us on certiorari from the Fourth, Eighth, and Sixth Circuits respectively, precisely because the plans promulgated by the school boards in those cases were not of state-wide scope. See also *Cooper* v. *Aaron,* 358 U. S. 1 (1958) (on certiorari to the Eighth Circuit); *Griffin* v. *School Board,* 377 U. S. 218 (1964) (on certiorari to the Fourth Circuit); *Bradley* v. *School Board,* 382 U. S. 103 (1965) (on certiorari to the Fourth Circuit); *Rogers* v. *Paul,* 382 U. S. 198 (1965) (on certiorari to the Eighth Circuit); cf. *Watson* v. *Memphis,* 373 U. S. 526 (1963) (on certiorari to the Sixth Circuit).

Indeed, even when there is an attack on a state-wide statute which

We do not deal here with a state statute which "embodies a policy of statewide concern," *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89, 94 (1935), but one which expresses a judgment that more educational facilities are needed in a particular locality. Indeed, appellants' constitutional attack on the statute is entirely based on the peculiar local situation existing in Montgomery. At present, there are two state-supported institutions of higher learning in the city. Alabama State is a four-year college which has traditionally been attended by Negroes. Alabama Extension Center, on the other hand, has a predominantly white enrollment, but does not at present grant degrees, offering its students a set of "extension" courses. The Extension Center, however, will be enlarged to create Montgomery's new four-year college, while Negro Alabama State has been entirely ignored in the planning. Appellants contend that, at a minimum, the State's College Authority was constitutionally obliged to consider the possibility of coordinating the new college's operations with those of Alabama State before the Authority could properly embark on its present course.

This brief outline of the facts demonstrates that we are dealing with an essentially local dispute which could properly be heard first by a single District Judge and then by the Court of Appeals before it came to us on certiorari.[3]

I would dismiss this appeal for want of jurisdiction.

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requires racial discrimination on its face, a three-judge court need not be convoked if the statute is clearly invalid under pre-existing case law. *Bailey* v. *Patterson,* 369 U. S. 31 (1962).

[3] Appellants themselves seem to have recognized that this Court's jurisdiction is questionable. They filed a protective appeal with the Court of Appeals for the Fifth Circuit on August 23, 1968. That court is holding the appeal in abeyance pending our decision in this case. See Jurisdictional Statement 2, n. 1.

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SUTTON *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 726. Decided January 20, 1969.

212 So. 2d 1, appeal dismissed.

Milton E. Grusmark for appellant.

Earl Faircloth, Attorney General of Florida, *pro se,* and *Robert A. Chastain* and *Wilson W. Wright,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

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

BACKER *v.* ROCKEFELLER, GOVERNOR OF NEW YORK.

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

No. 852. Decided January 20, 1969.

292 F. Supp. 851, affirmed.

Jerome M. Kay for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for appellee.

PER CURIAM.

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

ALASKA ET AL. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL–CIO, ET AL.

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

No. 734. Decided January 20, 1969.

287 F. Supp. 589, affirmed.

G. Kent Edwards, Attorney General of Alaska, and *Edgar Paul Boyko* for appellants.

J. Duane Vance for the International Union of Operating Engineers et al., and *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for the National Labor Relations Board, appellees.

PER CURIAM.

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

VALENTI *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

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

No. 773. Decided January 20, 1969.

292 F. Supp. 851, affirmed.

John Manning Regan for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for appellees.

PER CURIAM.

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

STANDARD FRUIT & STEAMSHIP CO. *v.* UNITED FRUIT CO. ET AL.

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

No. 740. Decided January 20, 1969.

Appeal dismissed.

Eberhard P. Deutsch, Robert M. Moore, and *René H. Himel, Jr.,* for appellant.

Hugh B. Cox and *James H. McGlothlin* for United Fruit Co., and *Solicitor General Griswold* for the United States, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors & Publishers,* 375 U. S. 39.

PHILLIPS ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

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

No. 854. Decided January 20, 1969.

292 F. Supp. 851, affirmed.

Robert L. Bobrick for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for appellees.

PER CURIAM.

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

STAMLER ET AL. *v.* WILLIS ET AL.

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

No. 478. Decided January 20, 1969.*

Rehearing denied; *ante,* p. 217, vacated; 287 F. Supp. 734, vacated and remanded.

Albert E. Jenner, Jr., Thomas P. Sullivan, and *Arthur Kinoy* for appellants in No. 478 on the petition for rehearing and motion to amend.

PER CURIAM.

The petition for a rehearing is denied. The motion to amend the judgment entered on November 25, 1968, dismissing the appeals is granted. The judgment dismissing the appeals is vacated and a new judgment will issue providing that the judgment below be vacated and the cases be remanded to the District Court so that it may enter a fresh decree from which timely appeals may be taken to the Court of Appeals.

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

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* Together with No. 479, *Cohen* v. *Willis et al.,* also on appeal from the same court.

DAHL ET AL. *v.* REPUBLICAN STATE COMMITTEE ET AL.

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

No. 596. Decided January 20, 1969.

Vacated and remanded.

Alfred J. Schweppe for appellants.

Bradley T. Jones for appellees.

PER CURIAM.

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

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE HARLAN, believing that jurisdiction lies in this Court, would affirm the judgment below.

DICKINSON, COMPTROLLER OF FLORIDA *v.* FIRST NATIONAL BANK OF HOMESTEAD ET AL.

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

No. 741. Decided January 20, 1969.

Affirmed.

Earl Faircloth, Attorney General of Florida, and *Fred M. Burns* and *Larry Levy,* Assistant Attorneys General, for appellant.

O. Ralph Matousek for appellee First National Bank of Homestead.

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.

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

SPINELLI *v.* UNITED STATES.

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

No. 8. Argued October 16–17, 1968.—Decided January 27, 1969.

Petitioner was convicted of illegal interstate gambling activities despite his claim that the Commissioner's warrant authorizing the FBI search that uncovered evidence used at his trial violated the Fourth Amendment. He argued that the FBI agent's supporting affidavit did not afford probable cause for issuance of the warrant. The affidavit alleged that: the FBI had followed petitioner on five days, on four of which he had been seen crossing one of two bridges leading from Illinois to St. Louis, Missouri, and had been seen parking his car at a St. Louis apartment house parking lot; he was seen one day to enter a particular apartment; the apartment contained two telephones with specified numbers; petitioner was known to affiant as a gambler and associate of gamblers; and the FBI had "been informed by a confidential reliable informant" that petitioner was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones" which had been assigned the specified numbers. Viewing the information in the affidavit in its totality the Court of Appeals deemed the principles of *Aguilar* v. *Texas*, 378 U. S. 108, satisfied and upheld the conviction. *Held:* The informant's tip, an essential part of the affidavit in this case, was not sufficient (even as corroborated by other allegations) to provide the basis for a finding of probable cause that a crime was being committed. Pp. 412–420.

(a) The tip was inadequate under the standards of *Aguilar*, *supra*, since it did not set forth any reason to support the conclusion that the informant was "reliable" and did not sufficiently state the underlying circumstances from which the informant had concluded that petitioner was running a bookmaking operation or sufficiently detail his activities to enable the Commissioner to know that he was relying on more than casual rumor or general reputation. Cf. *Draper* v. *United States*, 358 U. S. 307. Pp. 415–417.

(b) Nor was the tip's reliability sufficiently enhanced by the FBI's corroboration of certain limited aspects of the informant's report through the use of independent sources. Pp. 417–418.

(c) The FBI's surveillance of petitioner and its investigation of the telephone company records do not independently suggest criminal conduct when taken by themselves. P. 418.

382 F. 2d 871, reversed and remanded.

Irl B. Baris argued the cause and filed a brief for petitioner.

Joseph J. Connolly argued the cause for the United States, *pro hac vice.* With him on the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

William Spinelli was convicted under 18 U. S. C. § 1952[1] of traveling to St. Louis, Missouri, from a nearby Illinois suburb with the intention of conducting gambling activities proscribed by Missouri law. See Mo. Rev. Stat. § 563.360 (1959). At every appropriate stage in the proceedings in the lower courts, the petitioner challenged the constitutionality of the warrant which authorized the FBI search that uncovered the evidence necessary for his conviction. At each stage, Spinelli's challenge was treated in a different way. At a pretrial suppression hearing, the United States District Court for the Eastern District of Missouri held that Spinelli

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[1] The relevant portion of the statute reads:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate . . . commerce . . . with intent to—

. . . . . .

"(3) otherwise promote, manage, establish, carry on . . . any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States . . . ."

lacked standing to raise a Fourth Amendment objection. A unanimous panel of the Court of Appeals for the Eighth Circuit rejected the District Court's ground, a majority holding further that the warrant was issued without probable cause. After an *en banc* rehearing, the Court of Appeals sustained the warrant and affirmed the conviction by a vote of six to two. 382 F. 2d 871. Both the majority and dissenting *en banc* opinions reflect a most conscientious effort to apply the principles we announced in *Aguilar* v. *Texas,* 378 U. S. 108 (1964), to a factual situation whose basic characteristics have not been at all uncommon in recent search warrant cases. Believing it desirable that the principles of *Aguilar* should be further explicated, we granted certiorari, 390 U. S. 942, our writ being later limited to the question of the constitutional validity of the search and seizure.[2] 391 U. S. 933. For reasons that follow we reverse.

In *Aguilar,* a search warrant had issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, this Court held the

[2] We agree with the Court of Appeals that Spinelli has standing to raise his Fourth Amendment claim. The issue arises because at the time the FBI searched the apartment in which Spinelli was alleged to be conducting his bookmaking operation, the petitioner was not on the premises. Instead, the agents did not execute their search warrant until Spinelli was seen to leave the apartment, lock the door, and enter the hallway. At that point, petitioner was arrested, the key to the apartment was demanded of him, and the search commenced. Since petitioner would plainly have standing if he had been arrested inside the apartment, *Jones* v. *United States,* 362 U. S. 257, 267 (1960), it cannot matter that the agents preferred to delay the arrest until petitioner stepped into the hallway—especially when the FBI only managed to gain entry into the apartment by requiring petitioner to surrender his key.

affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was " 'credible' or his information 'reliable.' " The Government is, however, quite right in saying that the FBI affidavit in the present case is more ample than that in *Aguilar*. Not only does it contain a report from an anonymous informant, but it also contains a report of an independent FBI investigation which is said to corroborate the informant's tip. We are, then, required to delineate the manner in which *Aguilar*'s two-pronged test should be applied in these circumstances.

In essence, the affidavit, reproduced in full in the Appendix to this opinion, contained the following allegations: [3]

1. The FBI had kept track of Spinelli's movements on five days during the month of August 1965. On four of these occasions, Spinelli was seen crossing one of two bridges leading from Illinois into St. Louis, Missouri, between 11 a. m. and 12:15 p. m. On four of the five days, Spinelli was also seen parking his car in a lot used by residents of an apartment house at 1108 Indian Circle Drive in St. Louis, between 3:30 p. m. and 4:45 p. m.[4]

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[3] It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." *Aguilar* v. *Texas*, 378 U. S. 108, 109, n. 1 (emphasis in original). Since the Government does not argue that whatever additional information the agents may have possessed was sufficient to provide probable cause for the arrest, thereby justifying the resultant search as well, we need not consider that question.

[4] No report was made as to Spinelli's movements during the period between his arrival in St. Louis at noon and his arrival at the parking

On one day, Spinelli was followed further and seen to enter a particular apartment in the building.

2. An FBI check with the telephone company revealed that this apartment contained two telephones listed under the name of Grace P. Hagen, and carrying the numbers WYdown 4–0029 and WYdown 4–0136.

3. The application stated that "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

4. Finally, it was stated that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4–0029 and WYdown 4–0136."

There can be no question that the last item mentioned, detailing the informant's tip, has a fundamental place in this warrant application. Without it, probable cause could not be established. The first two items reflect only innocent-seeming activity and data. Spinelli's travels to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones. Many a householder indulges himself in this petty luxury. Finally, the allegation that Spinelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. *Nathanson* v. *United States,* 290 U. S. 41, 46 (1933).

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lot in the late afternoon. In fact, the evidence at trial indicated that Spinelli frequented the offices of his stockbroker during this period.

So much indeed the Government does not deny. Rather, following the reasoning of the Court of Appeals, the Government claims that the informant's tip gives a suspicious color to the FBI's reports detailing Spinelli's innocent-seeming conduct and that, conversely, the FBI's surveillance corroborates the informant's tip, thereby entitling it to more weight. It is true, of course, that the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit. *United States* v. *Ventresca,* 380 U. S. 102, 108 (1965). We believe, however, that the "totality of circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.

The informer's report must first be measured against *Aguilar*'s standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a "neutral and detached magistrate," and not by "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even

when partially corroborated—is not as reliable as one which passes *Aguilar*'s requirements when standing alone.

Applying these principles to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar*'s other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Cf. *Jaben* v. *United States,* 381 U. S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The detail provided by the informant in *Draper* v. *United States,* 358 U. S. 307 (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover,

Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.[5] Such an inference cannot be made in the present case. Here, the only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar.

Nor do we believe that the patent doubts *Aguilar* raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. At most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way. Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant. There, the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been

[5] While *Draper* involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue.

obtained in a reliable way, it was perfectly clear that probable cause had been established.

We conclude, then, that in the present case the informant's tip—even when corroborated to the extent indicated—was not sufficient to provide the basis for a finding of probable cause. This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip. Nor do we find that the FBI's reports take on a sinister color when read in light of common knowledge that bookmaking is often carried on over the telephone and from premises ostensibly used by others for perfectly normal purposes. Such an argument would carry weight in a situation in which the premises contain an unusual number of telephones or abnormal activity is observed, cf. *McCray* v. *Illinois,* 386 U. S. 300, 302 (1967), but it does not fit this case where neither of these factors is present.[6] All that remains to be considered is the flat statement that Spinelli was "known" to the FBI and others as a gambler. But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give

[6] A box containing three uninstalled telephones was found in the apartment, but only after execution of the search warrant.

additional weight to allegations that would otherwise be insufficient.

The affidavit, then, falls short of the standards set forth in *Aguilar, Draper,* and our other decisions that give content to the notion of probable cause.[7] In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois,* 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca,* 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States,* 362 U. S. 257, 270–271 (1960). But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry.[8]

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[7] In those cases in which this Court has found probable cause established, the showing made was much more substantial than the one made here. Thus, in *United States* v. *Ventresca,* 380 U. S. 102, 104 (1965), FBI agents observed repeated deliveries of loads of sugar in 60-pound bags, smelled the odor of fermenting mash, and heard " 'sounds similar to that of a motor or a pump coming from the direction of' Ventresca's house." Again, in *McCray* v. *Illinois,* 386 U. S. 300, 303–304 (1967), the informant reported that McCray " 'was selling narcotics and had narcotics on his person now in the vicinity of 47th and Calumet.' " When the police arrived at the intersection, they observed McCray engaging in various suspicious activities. 386 U. S., at 302.

[8] In the view we have taken of this case, it becomes unnecessary to decide whether the search warrant was properly executed, or whether it sufficiently described the things that were seized.

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The judgment of the Court of Appeals is reversed and the case is 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 this case.

APPENDIX TO OPINION OF THE COURT.

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT.

I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures.

That on August 6, 1965, at approximately 11:44 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3–649, onto the Eastern approach of the Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

That on August 11, 1965, at approximately 11:16 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3–649, onto the Eastern approach of the Eads Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

Further, at approximately 11:18 a. m. on August 11, 1965, I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, at approximately 4:40 p. m. on August 11, 1965, I observed the aforesaid Ford convertible, bearing Missouri license HC3–649, parked in a parking lot used by residents of The Chieftain Manor Apartments, approximately one block east of 1108 Indian Circle Drive.

On August 12, 1965, at approximately 12:07 p. m.,

William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid 1964 Ford convertible onto the Eastern approach of the Veterans Bridge from East St. Louis, Illinois, in the direction of St. Louis, Missouri.

Further, on August 12, 1965, at approximately 3:46 p. m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, on August 12, 1965, at approximately 3:49 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the front entrance of the two-story apartment building located at 1108 Indian Circle Drive, this building being one of The Chieftain Manor Apartments.

On August 13, 1965, at approximately 11:08 a. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid Ford convertible onto the Eastern approach of the Eads Bridge from East St. Louis, Illinois, heading towards St. Louis, Missouri.

Further, on August 13, 1965, at approximately 11:11 a. m., I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, on August 13, 1965, at approximately 3:45 p. m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking area used by residents of The Chieftain Manor Apartments, said parking area being approximately one block from 1108 Indian Circle Drive.

Further, on August 13, 1965, at approximately 3:55 p. m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the corner apartment located on the second floor in the southwest corner, known as Apartment F, of the two-story

apartment building known and numbered as 1108 Indian Circle Drive.

On August 16, 1965, at approximately 3:22 p. m., I observed William Spinelli driving the aforesaid Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, an Agent of the F. B. I. observed William Spinelli alight from the aforesaid Ford convertible and walk toward the apartment building located at 1108 Indian Circle Drive.

The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4–0029 and WYdown 4–0136.

William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4–0029 and WYdown 4–0136.

/s/ Robert L. Bender,
Robert L. Bender,
Special Agent, Federal Bureau
of Investigation.

Subscribed and sworn to before me this 18th day of August, 1965, at St. Louis, Missouri.

/s/ William R. O'Toole.

MR. JUSTICE WHITE, concurring.

An investigator's affidavit that he has seen gambling equipment being moved into a house at a specified address will support the issuance of a search warrant. The oath affirms the honesty of the statement and negatives the lie or imagination. Personal observation attests to the facts asserted—that there is gambling equipment on the premises at the named address.

But if the officer simply avers, without more, that there is gambling paraphernalia on certain premises, the warrant should not issue, even though the belief of the officer is an honest one, as evidenced by his oath, and even though the magistrate knows him to be an experienced, intelligent officer who has been reliable in the past. This much was settled in *Nathanson* v. *United States,* 290 U. S. 41 (1933), where the Court held insufficient an officer's affidavit swearing he had cause to believe that there was illegal liquor on the premises for which the warrant was sought. The unsupported assertion or belief of the officer does not satisfy the requirement of probable cause. *Jones* v. *United States,* 362 U. S. 257, 269 (1960); *Grau* v. *United States,* 287 U. S. 124 (1932); *Byars* v. *United States,* 273 U. S. 28, 29 (1927).

What is missing in *Nathanson* and like cases is a statement of the basis for the affiant's believing the facts contained in the affidavit—the good "cause" which the officer in *Nathanson* said he had. If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the

officer, who is to judge the existence of probable cause. *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Giordenello* v. *United States,* 357 U. S. 480, 486 (1958); *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay. Because an affidavit asserting, without more, the location of gambling equipment at a particular address does not claim personal observation of any of the facts by the officer, and because of the likelihood that the information came from an unidentified third party, affidavits of this type are unacceptable.

Neither should the warrant issue if the officer states that there is gambling equipment in a particular apartment and that his information comes from an informant, named or unnamed, since the honesty of the informant and the basis for his report are unknown. Nor would the missing elements be completely supplied by the officer's oath that the informant has often furnished reliable information in the past. This attests to the honesty of the informant, but *Aguilar* v. *Texas, supra,* requires something more—did the information come from observation, or did the informant in turn receive it from another? Absent additional facts for believing the informant's report, his assertion stands no better than the oath of the officer to the same effect. Indeed, if the affidavit of an officer, known by the magistrate to be honest and experienced, stating that gambling equipment is located in a certain building is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause. A strong argument can be made that both should be acceptable under the Fourth Amendment, but under our cases neither is. The past reliability of the informant can no more furnish probable cause for believing his

current report than can previous experience with the officer himself.

If the affidavit rests on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information. The first presents few problems: since the report, although hearsay, purports to be first-hand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant. The other basis for accepting the informant's report is more complicated. But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient.

I am inclined to agree with the majority that there are limited special circumstances in which an "honest" informant's report, if sufficiently detailed, will in effect verify itself—that is, the magistrate when confronted with such detail could reasonably infer that the informant had gained his information in a reliable way. See *ante,* at 417. Detailed information may sometimes imply that the informant himself has observed the facts. Suppose an informant with whom an officer has had satisfactory experience states that there is gambling equipment in the living room of a specified apartment and describes in detail not only the equipment itself but also the appointments and furnishings in the apartment. Detail like this, if true at all, must rest on personal observation either of the informant or of someone else. If the latter, we know nothing of the third person's honesty or

sources; he may be making a wholly false report. But it is arguable that on these facts it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual, day-to-day conversation. Because the informant is honest and it is probable that he has viewed the facts, there is probable cause for the issuance of a warrant.

So too in the special circumstances of *Draper* v. *United States*, 358 U. S. 307 (1959), the kind of information related by the informant is not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him. The informant, posited as honest, somehow had the reported facts, very likely from one of the actors in the plan, or as one of them himself. The majority's suggestion is that a warrant could have been obtained based only on the informer's report. I am inclined to agree, although it seems quite plain that if it may be so easily inferred from the affidavit that the informant has himself observed the facts or has them from an actor in the event, no possible harm could come from requiring a statement to that effect, thereby removing the difficult and recurring questions which arise in such situations.

Of course, *Draper* itself did not proceed on this basis. Instead, the Court pointed out that when the officer saw a person getting off the train at the specified time, dressed and conducting himself precisely as the informant had predicted, all but the critical fact with respect to possessing narcotics had then been verified and for that reason the officer had "reasonable grounds" to believe also that Draper was carrying narcotics. Unquestionably, verification of arrival time, dress, and gait reinforced the honesty of the informant—he had not reported a made-up story. But if what *Draper* stands for is that the existence of the tenth and critical fact

is made sufficiently probable to justify the issuance of a warrant by verifying nine other facts coming from the same source, I have my doubts about that case.

In the first place, the proposition is not that the tenth fact may be logically inferred from the other nine or that the tenth fact is usually found in conjunction with the other nine. No one would suggest that just anyone getting off the 10:30 train dressed as Draper was, with a brisk walk and carrying a zipper bag, should be arrested for carrying narcotics. The thrust of *Draper* is not that the verified facts have independent significance with respect to proof of the tenth. The argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.

But the Court's cases have already rejected for Fourth Amendment purposes the notion that the past reliability of an officer is sufficient reason for believing his current assertions. Nor would it suffice, I suppose, if a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607. But what if he states that there are narcotics locked in a safe in Apartment 300, which is described in detail, and the apartment manager verifies everything but the contents of the safe? I doubt that the report about the narcotics is made appreciably more believable by the verification. The informant could still have gotten his information concerning the safe from others about whom nothing is known or could have inferred the presence of narcotics from circumstances which a magistrate would find unacceptable.

The tension between *Draper* and the *Nathanson-Aguilar* line of cases is evident from the course followed

by the majority opinion. First, it is held that the report from a reliable informant that Spinelli is using two telephones with specified numbers to conduct a gambling business plus Spinelli's reputation in police circles as a gambler does not add up to probable cause. This is wholly consistent with *Aguilar* and *Nathanson:* the informant did not reveal whether he had personally observed the facts or heard them from another and, if the latter, no basis for crediting the hearsay was presented. Nor were the facts, as MR. JUSTICE HARLAN says, of such a nature that they normally would be obtainable only by the personal observation of the informant himself. The police, however, did not stop with the informant's report. Independently, they established the existence of two phones having the given numbers and located them in an apartment house which Spinelli was regularly frequenting away from his home. There remained little question but that Spinelli was using the phones, and it was a fair inference that the use was not for domestic but for business purposes. The informant had claimed the business involved gambling. Since his specific information about Spinelli using two phones with particular numbers had been verified, did not his allegation about gambling thereby become sufficiently more believable if the *Draper* principle is to be given any scope at all? I would think so, particularly since the information from the informant which was verified was not neutral, irrelevant information but was material to proving the gambling allegation: two phones with different numbers in an apartment used away from home indicates a business use in an operation, like bookmaking, where multiple phones are needed. The *Draper* approach would reasonably justify the issuance of a warrant in this case, particularly since the police had some awareness of Spinelli's past activities. The majority, how-

ever, while seemingly embracing *Draper,* confines that case to its own facts. Pending full-scale reconsideration of that case, on the one hand, or of the *Nathanson-Aguilar* cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court.

MR. JUSTICE BLACK, dissenting.

In my view, this Court's decision in *Aguilar* v. *Texas,* 378 U. S. 108 (1964), was bad enough. That decision went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial, where witnesses must be brought forward to attest personally to all the facts alleged. But not content with this, the Court today expands *Aguilar* to almost unbelievable proportions. Of course, it would strengthen the probable-cause presentation if eyewitnesses could testify that they saw the defendant commit the crime. It would be stronger still if these witnesses could explain in detail the nature of the sensual perceptions on which they based their "conclusion" that the person they had seen was the defendant and that he was responsible for the events they observed. Nothing in our Constitution, however, requires that the facts be established with that degree of certainty and with such elaborate specificity before a policeman can be authorized by a disinterested magistrate to conduct a carefully limited search.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In this case a search warrant was issued supported by an oath and particularly describing the place to be searched and the things to be seized. The supporting oath was

three printed pages and the full text of it is included in an Appendix to the Court's opinion. The magistrate, I think properly, held the information set forth sufficient facts to show "probable cause" that the defendant was violating the law. Six members of the Court of Appeals also agreed that the affidavit was sufficient to show probable cause. A majority of this Court today holds, however, that the magistrate and all of these judges were wrong. In doing so, they substitute their own opinion for that of the local magistrate and the circuit judges, and reject the *en banc* factual conclusion of the Eighth Circuit and reverse the judgment based upon that factual conclusion. I cannot join in any such disposition of an issue so vital to the administration of justice, and dissent as vigorously as I can.

I repeat my belief that the affidavit given the magistrate was more than ample to show probable cause of the petitioner's guilt. The affidavit meticulously set out facts sufficient to show the following:

1. The petitioner had been shown going to and coming from a room in an apartment which contained two telephones listed under the name of another person. Nothing in the record indicates that the apartment was of that large and luxurious type which could only be occupied by a person to whom it would be a "petty luxury" to have two separate telephones, with different numbers, both listed under the name of a person who did not live there.

2. The petitioner's car had been observed parked in the apartment's parking lot. This fact was, of course, highly relevant in showing that the petitioner was extremely interested in some enterprise which was located in the apartment.

3. The FBI had been informed by a reliable informant that the petitioner was accepting wagering information by telephones—the particular telephones located in the

apartment the defendant had been repeatedly visiting. Unless the Court, going beyond the requirements of the Fourth Amendment, wishes to require magistrates to hold trials before issuing warrants, it is not necessary—as the Court holds—to have the affiant explain "the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation." *Ante,* at 416.

4. The petitioner was known by federal and local law enforcement agents as a bookmaker and an associate of gamblers. I cannot agree with the Court that this knowledge was only a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Ante,* at 414. Although the statement is hearsay that might not be admissible in a regular trial, everyone knows, unless he shuts his eyes to the realities of life, that this is a relevant fact which, together with other circumstances, might indicate a factual probability that gambling is taking place.

The foregoing facts should be enough to constitute probable cause for anyone who does not believe that the only way to obtain a search warrant is to prove beyond a reasonable doubt that a defendant is guilty. Even *Aguilar,* on which the Court relies, cannot support the contrary result, at least as that decision was written before today's massive escalation of it. In *Aguilar* the Court dealt with an affidavit that stated only:

> "Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." 378 U. S., at 109.

The Court held, over the dissent of Mr. Justice Clark, MR. JUSTICE STEWART, and myself, that this unsupported conclusion of an unidentified informant provided no basis

for the magistrate to make an independent judgment as to the persuasiveness of the facts relied upon to show probable cause. Here, of course, we have much more, and the Court in *Aguilar* was careful to point out that additional information of the kind presented in the affidavit before us now would be highly relevant:

> "If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case." 378 U. S., at 109, n. 1.

In the present case even the two-judge minority of the court below recognized, as this Court seems to recognize today, that this additional information took the case beyond the rule of *Aguilar*. Six of the other circuit judges disagreed with the two dissenting judges, finding that all the circumstances considered together could support a reasonable judgment that gambling probably was taking place. I fully agree with this carefully considered opinion of the court below.

I regret to say I consider today's decision an indefensible departure from the principles of our former cases. Less than four years ago we reaffirmed these principles in *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965):

> "If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."

See also *Husty* v. *United States*, 282 U. S. 694, 700–701 (1931).

Departures of this kind are responsible for considerable uneasiness in our lower courts, and I must say I

am deeply troubled by the statements of Judge Gibson in the court below:

> "I am, indeed, disturbed by decision after decision of our courts which place increasingly technical burdens upon law enforcement officials. I am disturbed by these decisions that appear to relentlessly chip away at the ever narrowing area of effective police operation. I believe the holdings in *Aguilar,* and *Rugendorf* v. *United States,* 376 U. S. 528 (1964) are sufficient to protect the privacy of individuals from hastily conceived intrusions, and I do not think the limitations and requirements on the issuance of search warrants should be expanded by setting up over-technical requirements approaching the now discarded pitfalls of common law pleadings. Moreover, if we become increasingly technical and rigid in our demands upon police officers, I fear we make it increasingly easy for criminals to operate, detected but unpunished. I feel the significant movement of the law beyond its present state is unwarranted, unneeded, and dangerous to law enforcement efficiency." (Dissenting from panel opinion.)

The Court of Appeals in this case took a sensible view of the Fourth Amendment, and I would wholeheartedly affirm its decision.

Mapp v. *Ohio,* 367 U. S. 643, decided in 1961, held for the first time that the Fourth Amendment and the exclusionary rule of *Weeks* v. *United States,* 232 U. S. 383 (1914) are now applicable to the States. That Amendment provides that search warrants shall not be issued without probable cause. The existence of probable cause is a factual matter that calls for the determination of a factual question. While no statistics are immediately available, questions of probable cause to issue search

warrants and to make arrests are doubtless involved in many thousands of cases in state courts. All of those probable-cause state cases are now potentially reviewable by this Court. It is, of course, physically impossible for this Court to review the evidence in all or even a substantial percentage of those cases. Consequently, whether desirable or not, we must inevitably accept most of the fact findings of the state courts, particularly when, as here in a federal case, both the trial and appellate courts have decided the facts the same way. It cannot be said that the trial judge and six members of the Court of Appeals committed flagrant error in finding from evidence that the magistrate had probable cause to issue the search warrant here. It seems to me that this Court would best serve itself and the administration of justice by accepting the judgment of the two courts below. After all, they too are lawyers and judges, and much closer to the practical, everyday affairs of life than we are.

Notwithstanding the Court's belief to the contrary, I think that in holding as it does, the Court does:

> "retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois,* 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca,* 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States,* 362 U. S. 257, 270–271 (1960)." *Ante,* at 419.

In fact, I believe the Court is moving rapidly, through complex analyses and obfuscatory language, toward the holding that no magistrate can issue a warrant unless according to some unknown standard of proof he can be persuaded that the suspect defendant is actually guilty of a crime. I would affirm this conviction.

MR. JUSTICE FORTAS, dissenting.

My Brother HARLAN's opinion for the Court is animated by a conviction which I share that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949).

We may well insist upon a sympathetic and even an indulgent view of the latitude which must be accorded to the police for performance of their vital task; but only a foolish or careless people will deduce from this that the public welfare requires or permits the police to disregard the restraints on their actions which historic struggles for freedom have developed for the protection of liberty and dignity of citizens against arbitrary state power.

As Justice Jackson (dissenting) stated in *Brinegar* v. *United States,* 338 U. S. 160, 180–181 (1949):

> "[The provisions of the Fourth Amendment] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the

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human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

History [1] teaches us that this protection requires that the judgment of a judicial officer be interposed between the police, hot in pursuit of their appointed target, and the citizen;[2] that the judicial officer must judge and not merely rubber-stamp; and that his judgment must be based upon judicially reliable facts adequate to demonstrate that the search is justified by the probability that it will yield the fruits or instruments of crime—or, as this Court has only recently ruled, tangible evidence of its commission.[3] The exceptions to the requirement of a search warrant have always been narrowly restricted [4] because of this Court's long-standing awareness of the fundamental role of the magistrate's judgment in the preservation of a proper balance between individual freedom and state power. See *Trupiano* v. *United States,* 334 U. S. 699, 700 (1948).

Today's decision deals, not with the necessity of obtaining a warrant prior to search, but with the difficult problem of the nature of the showing that must be made

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[1] "The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." *Wolf* v. *Colorado,* 338 U. S. 25, 28 (1949). See *United States* v. *Rabinowitz,* 339 U. S. 56, 69–70 (1950) (Frankfurter, J., dissenting). See generally with respect to the history of the Fourth Amendment N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937).

[2] See *Johnson* v. *United States,* 333 U. S. 10, 13–14 (1948).

[3] *Warden* v. *Hayden,* 387 U. S. 294 (1967).

[4] See *Jones* v. *United States,* 357 U. S. 493, 499 (1958); *Warden* v. *Hayden,* 387 U. S. 294, 311 (1967) (concurring opinion).

before the magistrate to justify his issuance of a search warrant. While I do not subscribe to the criticism of the majority expressed by my Brother BLACK in dissent, I believe—with all respect—that the majority is in error in holding that the affidavit supporting the warrant in this case is constitutionally inadequate.

The affidavit is unusually long and detailed. In fact, it recites so many minute and detailed facts developed in the course of the investigation of Spinelli that its substance is somewhat obscured. It is paradoxical that this very fullness of the affidavit may be the source of the constitutional infirmity that the majority finds. Stated in language more direct and less circumstantial than that used by the FBI agent who executed the affidavit, it sets forth that the FBI has been informed that Spinelli is accepting wagers by means of telephones numbered WY 4–0029 and WY 4–0136; that Spinelli is known to the affiant agent and to law enforcement agencies as a bookmaker; that telephones numbered WY 4–0029 and WY 4–0136 are located in a certain apartment; that Spinelli was placed under surveillance and his observed movements were such as to show his use of that apartment and to indicate that he frequented the apartment on a regular basis.

Aguilar v. *Texas*, 378 U. S. 108 (1964), holds that the reference in an affidavit to information described only as received from "a confidential reliable informant," standing alone, is not an adequate basis for issuance of a search warrant. The majority agrees that the "FBI affidavit in the present case is more ample than that in *Aguilar*," but concludes that it is nevertheless constitutionally inadequate. The majority states that the present affidavit fails to meet the "two-pronged test" of *Aguilar* because (a) it does not set forth the basis for the assertion that the informer is "reliable" and (b) it fails to state the "underlying circumstances" upon which the

informant based his conclusion that Spinelli was engaged in bookmaking.

The majority acknowledges, however, that its reference to a "two-pronged test" should not be understood as meaning that an affidavit deficient in these respects is necessarily inadequate to support a search warrant. Other facts and circumstances may be attested which will supply the evidence of probable cause needed to support the search warrant. On this general statement we are agreed. Our difference is that I believe such facts and circumstances are present in this case, and the majority arrives at the opposite conclusion.

Aguilar expressly recognized that if, in that case, the affidavit's conclusory report of the informant's story had been supplemented by "the fact and results of . . . a surveillance . . . this would, of course, present an entirely different case." 378 U. S., at 109, n. 1. In the present case, as I view it, the affidavit showed not only relevant surveillance, entitled to some probative weight for purposes of the issuance of a search warrant, but also additional, specific facts of significance and adequate reliability: that Spinelli was using two telephone numbers, identified by an "informant" as being used for bookmaking, in his illegal operations; that these telephones were in an identified apartment; and that Spinelli, a known bookmaker,[5] frequented the apartment. Certainly, this is enough.

A policeman's affidavit should not be judged as an entry in an essay contest. It is not "abracadabra." [6]

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[5] Although Spinelli's reputation standing alone would not, of course, justify the search, this Court has held that such a reputation may make the informer's report "much less subject to scepticism than would be such a charge against one without such a history." *Jones* v. *United States,* 362 U. S. 257, 271 (1960).

[6] See *Time, Inc.* v. *Hill,* 385 U. S. 374, 418 (1967) (dissent) (relating to jury instructions).

As the majority recognizes, a policeman's affidavit is entitled to common-sense evaluation. So viewed, I conclude that the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

MR. JUSTICE STEWART, dissenting.

For substantially the reasons stated by my Brothers BLACK and FORTAS, I believe the warrant in this case was supported by a sufficient showing of probable cause. I would therefore affirm the judgment.

PRESBYTERIAN CHURCH IN THE UNITED STATES ET AL. *v.* MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 71. Argued December 9–10, 1968.—Decided January 27, 1969.

Respondents, two local churches, voted to withdraw from petitioner general church with which they had had a doctrinal dispute and to reconstitute themselves as an autonomous religious organization. A church tribunal proceeded to take over respondents' property on behalf of the general church. Respondents, without appealing to higher church tribunals, sued in the Georgia state court to enjoin the general church from trespassing on the disputed property. The general church moved to dismiss and cross-claimed for injunctive relief on the ground that civil courts had no power to determine whether the general church had departed from its tenets of faith and practice. The motion to dismiss was denied and the case was submitted to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on condition that the general church adhere to doctrinal tenets existing at the time of affiliation by the local churches. The jury, having been instructed to determine whether the general church's actions were a substantial abandonment of its original doctrines, returned a verdict for respondents; the trial judge issued an injunction against the general church; and the Georgia Supreme Court affirmed. *Held:* Civil courts cannot, consistently with First Amendment principles, determine ecclesiastical questions in resolving property disputes; and since the departure-from-doctrine element of Georgia's implied trust theory requires civil courts to weigh the significance and meaning of religious doctrines, it can play *no* role in judicial proceedings. Pp. 445–452.

224 Ga. 61, 159 S. E. 2d 690, reversed and remanded.

Charles L. Gowen argued the cause for petitioners. With him on the brief were *Robert B. Troutman* and *Frank S. Cheatham, Jr.*

Owen H. Page argued the cause for respondents and filed a brief for respondents Eastern Heights Presbyterian Church et al. *Richard T. Cowan, Frank B. Zeigler,* and *James Edward McAleer* filed a brief for respondent Mary Elizabeth Blue Hull Memorial Presbyterian Church.

Briefs of *amici curiae,* urging reversal, were filed by *George Wilson McKeag* for Thompson, Stated Clerk of the General Assembly of the United Presbyterian Church in the United States et al., and by *Jackson A. Dykman* and *Harry G. Hill, Jr.,* for the Right Rev. John E. Hines, Presiding Bishop of the Protestant Episcopal Church in the United States.

Briefs of *amici curiae,* urging affirmance, were filed by *William J. McLeod, Jr.,* and *W. J. Williamson, pro se,* for Williamson, Secretary of Concerned Presbyterians, Inc., and by *Alfred J. Schweppe* for Laurelhurst United Presbyterian Church, Inc., et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a church property dispute which arose when two local churches withdrew from a hierarchical general church organization. Under Georgia law the right to the property previously used by the local churches was made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it. The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine.

Petitioner, Presbyterian Church in the United States, is an association of local Presbyterian churches governed

by a hierarchical structure of tribunals which consists of, in ascending order, (1) the Church Session, composed of the elders of the local church; (2) the Presbytery, composed of several churches in a geographical area; (3) the Synod, generally composed of all Presbyteries within a State; and (4) the General Assembly, the highest governing body.

A dispute arose between petitioner, the general church, and two local churches in Savannah, Georgia—the respondents, Hull Memorial Presbyterian Church and Eastern Heights Presbyterian Church—over control of the properties used until then by the local churches. In 1966, the membership of the local churches, in the belief that certain actions and pronouncements of the general church were violations of that organization's constitution and departures from the doctrine and practice in force at the time of affiliation,[1] voted to withdraw from the general church and to reconstitute the local churches as an autonomous Presbyterian organization. The ministers of the two churches renounced the general church's

[1] The opinion of the Supreme Court of Georgia summarizes the claimed violations and departures from petitioner's original tenets of faith and practice as including the following: "ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated named practices, such as the subverting of parental authority, civil disobedience and intermeddling in civil affairs"; also "that the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated publications denying the Holy Trinity and violating the moral and ethical standards of the faith." 224 Ga. 61, 62–63, 159 S. E. 2d 690, 692 (1968).

jurisdiction and authority over them, as did all but two of the ruling elders. In response, the general church, through the Presbytery of Savannah, established an Administrative Commission to seek a conciliation. The dissident local churchmen remained steadfast; consequently, the Commission acknowledged the withdrawal of the local leadership and proceeded to take over the local churches' property on behalf of the general church until new local leadership could be appointed.

The local churchmen made no effort to appeal the Commission's action to higher church tribunals—the Synod of Georgia or the General Assembly. Instead, the churches filed separate suits in the Superior Court of Chatham County to enjoin the general church from trespassing on the disputed property, title to which was in the local churches. The cases were consolidated for trial. The general church moved to dismiss the actions and cross-claimed for injunctive relief in its own behalf on the ground that civil courts were without power to determine whether the general church had departed from its tenets of faith and practice. The motion to dismiss was denied, and the case was submitted to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches.[2] Thus, the jury was instructed to determine whether the actions of the general church "amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general

[2] This theory derives from principles fashioned by English courts. See, *e. g.*, *Craigdallie* v. *Aikman*, 1 Dow 1, 3 Eng. Rep. 601 (H. L. 1813) (Scot.); *Attorney General ex rel. Mander* v. *Pearson*, 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817). For the subsequent development of the implied trust theory in English courts, see Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv. L. Rev. 1142, 1148–1149 (1962).

church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded." The jury returned a verdict for the local churches, and the trial judge thereupon declared that the implied trust had terminated and enjoined the general church from interfering with the use of the property in question. The Supreme Court of Georgia affirmed, 224 Ga. 61, 159 S. E. 2d 690 (1968). We granted certiorari to consider the First Amendment questions raised.[3] 392 U. S. 903 (1968). We reverse.

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[3] We reject the contention of respondent local churches that no First Amendment issues were raised or decided in the state courts. Petitioner's answer and cross-claim in each case included an express allegation that the action of respondents in appropriating the church property to their use was "in violation of the laws of Georgia, *the United States of America,* and the Southern Presbyterian Church." (Italics supplied.) At trial, petitioners' counsel objected to the admission of all testimony "pertaining to [the] alleged deviation from the faith and practice of the Presbyterian Church in the United States" because that question was "exclusively within the right of the Presbyterian Church in the United States through its proper judicial body to determine." On appeal, petitioners again contended "that questions of an ecclesiastical nature concerning whether or not a church has abandoned its tenents [*sic*] and doctrines, or some of them, are exclusively within the jurisdiction of the church courts and should not be submitted to a jury for determination as this would destroy the doctrine of separation of church and state." Petitioners thus clearly raised claims under the First Amendment as applied to the States by the Fourteenth Amendment. *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 116, 119 (1952). The Georgia Supreme Court considered and decided these claims. "In considering this contention [that the petitions raise ecclesiastical questions which are exclusively within the jurisdiction of the church, not of civil courts, and therefore that respondents could not maintain their action]," the court said, "we are mindful that 'The traditional American doctrine of freedom of religion and separation of church and state carries with it freedom of the church from having its doctrines or beliefs defined, interpreted, or censored by civil courts.' " 224 Ga., at 68, 159 S. E. 2d, at 695. The court concluded, however, that the trial court did not violate the doctrine. Citing Georgia Code Ann. § 22–408, which pro-

It is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution. Special problems arise, however, when these disputes implicate controversies over church doctrine and practice. The approach of this Court in such cases was originally developed in *Watson* v. *Jones,* 13 Wall. 679 (1872), a pre-*Erie R. Co.* v. *Tompkins* diversity decision decided before the application of the First Amendment to the States but nonetheless informed by First Amendment considerations.[4] There, as here, civil courts were asked to resolve a property dispute between a national Presbyterian organization and local churches of that organization. There, as here, the disputes arose out of a controversy over church doctrine. There, as here, the Court was asked to decree the termination of an implied trust because of departures from doctrine by the national organization. The *Watson* Court refused, pointing out that it was wholly inconsistent with the American concept of the re-

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vides: "Courts are reluctant to interpose in questions affecting the management of the temporalities of a church; but when property is devoted to a specific doctrine or purpose, the courts will prevent it from being diverted from the trust," the court held that "a trust [in favor of the general church] is conditioned upon the general church's adherence to its tenets of faith and practice existing when the local church affiliated with it and . . . an abandonment of, or departure from, such tenets is a diversion from the trust, which the civil courts will prevent." 224 Ga., at 68, 159 S. E. 2d, at 695.

[4] "*Watson* v. *Jones,* although it contains a reference to the relations of church and state under our system of laws, was decided without depending upon prohibition of state interference with the free exercise of religion. It was decided in 1871 [*sic*], before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action. It long antedated the 1938 decisions of *Erie R. Co.* v. *Tompkins* and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 64 and 202, and, therefore, even though federal jurisdiction in the case depended solely on diversity, the holding was based on general law rather than Kentucky law." *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 115–116 (1952).

lationship between church and state to permit civil courts to determine ecclesiastical questions. In language which has a clear constitutional ring, the Court said

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [*sic*] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." 13 Wall., at 728–729.[5]

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[5] Accord, see, *e. g.*, decisions involving Presbyterian churches, *Trustees of Pencader Presbyterian Church* v. *Gibson*, 26 Del. Ch. 375, 22 A. 2d 782 (1941); *Bramlett* v. *Young*, 229 S. C. 519, 93 S. E. 2d 873 (1956); *St. John's Presbytery* v. *Central Presbyterian Church of St. Petersburg*, 102 So. 2d 714 (Fla. 1958); see also *Northside Bible Church* v. *Goodson*, 387 F. 2d 534 (C. A. 5th Cir. 1967). See generally for an examination of the development and growth of the rules for settling church property disputes, Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv. L. Rev. 1142 (1962); 54 Va. L. Rev. 1451 (1968); Duesenberg, Jurisdiction of Civil Courts Over Religious Issues, 20 Ohio St. L. J. 508 (1959); Comment, Judicial Intervention in Church Property Disputes—Some Constitutional Considerations, 74 Yale L. J. 1113 (1965).

The logic of this language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes.

Later cases, however, also decided on nonconstitutional grounds, recognized that there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate.[6] The scope of this review was delineated in *Gonzalez* v. *Archbishop,* 280 U. S. 1 (1929). There, Gonzalez claimed the right to be appointed to a chaplaincy in the Roman Catholic Church under a will which provided that a member of his family receive that appointment. The Roman Catholic Archbishop of Manila, Philippine Islands, refused to appoint Gonzalez on the ground that he did not satisfy the qualifications established by Canon Law for that office. Gonzalez brought suit in the Court of First Instance of Manila for a judgment directing the Archbishop, among other things, to appoint him chaplain. The trial court entered such an order, but the Supreme Court of the Philippine Islands reversed and "absolved the Archbishop from the complaint." This Court affirmed. Mr. Justice Brandeis, speaking for the Court, defined the civil court role in the following words: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." 280 U. S., at 16.

In *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94 (1952), the Court converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule. *Kedroff* grew out of a dispute between the Moscow-based general Russian Orthodox Church and the Russian Orthodox

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[6] See, *e. g., Bouldin* v. *Alexander,* 15 Wall. 131 (1872); *Brundage* v. *Deardorf,* 55 F. 839 (C. C. N. D. Ohio 1893).

churches located in North America over an appointment to St. Nicholas Cathedral in New York City. The North American churches declared their independence from the general church, and the New York Legislature enacted a statute recognizing their administrative autonomy. The New York courts sustained the constitutionality of the statute and held that the North American churches' elected hierarch had the right to use the cathedral. This Court reversed, finding that the Moscow church had not acknowledged the schism, and holding the statute unconstitutional. The Court said, 344 U. S., at 116:

> "The opinion [in *Watson* v. *Jones*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.*" (Italics supplied.)

And, speaking of the New York statute, the Court said further, *id.*, at 119:

> "By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. *It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.*" (Italics supplied.)

This holding invalidating legislative action was extended to judicial action in *Kreshik* v. *St. Nicholas Cathedral*, 363 U. S. 190 (1960), where the Court held that the constitutional guarantees of religious liberty required the

reversal of a judgment of the New York courts which transferred control of St. Nicholas Cathedral from the central governing authority of the Russian Orthodox Church to the independent Russian Church of America.

Thus, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.

The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied

requires the civil judiciary to determine whether actions of the general church constitute such a "substantial departure" from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Since the Georgia courts on remand may undertake to determine whether petitioner is entitled to relief on its cross-claims, we find it appropriate to remark that the departure-from-doctrine element of Georgia's implied trust theory can play *no* role in any future judicial proceedings. The departure-from-doctrine approach is not susceptible of the marginal judicial involvement contemplated in *Gonzalez*.[7] Gonzalez' rights under a will

[7] We have no occasion in this case to define or discuss the precise limits of review for "fraud, collusion, or arbitrariness" within the meaning of *Gonzalez*.

turned on a church decision, the Archbishop's, as to church law, the qualifications for the chaplaincy. It was the archbishopric, not the civil courts, which had the task of analyzing and interpreting church law in order to determine the validity of Gonzalez' claim to a chaplaincy. Thus, the civil courts could adjudicate the rights under the will without interpreting or weighing church doctrine but simply by engaging in the narrowest kind of review of a specific church decision—*i. e.*, whether that decision resulted from fraud, collusion, or arbitrariness. Such review does not inject the civil courts into substantive ecclesiastical matters. In contrast, under Georgia's departure-from-doctrine approach, it is not possible for the civil courts to play so limited a role. Under this approach, property rights do not turn on a church decision as to church doctrine. The standard of departure-from-doctrine, though it calls for resolution of ecclesiastical questions, is a creation of state, not church, law. Nothing in the record suggests that this state standard has been interpreted and applied in a decision of the general church. Any decisions which have been made by the general church about the local churches' withdrawal have at most a tangential relationship to the state-fashioned departure-from-doctrine standard. A determination whether such decisions are fraudulent, collusive, or arbitrary would therefore not answer the questions posed by the state standard. To reach those questions would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine. Even if the general church had attempted to apply the state standard, the civil courts could not review and enforce the church decision without violating the Constitution. The First Amendment prohibits a State from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards. See *Abington School District*

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v. *Schempp, supra.* Thus, a civil court may no more review a church decision applying a state departure-from-doctrine standard than it may apply that standard itself.

The judgment of the Supreme Court of Georgia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. JUSTICE HARLAN, concurring.

I am in entire agreement with the Court's rejection of the "departure-from-doctrine" approach taken by the Georgia courts, as that approach necessarily requires the civilian courts to weigh the significance and the meaning of disputed religious doctrine. I do not, however, read the Court's opinion to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted. If, for example, the donor expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder, see *ante,* at 442, n. 1, or never amend certain specified articles of the Confession of Faith, he is entitled to his money back if the condition is not fulfilled. In such a case, the church should not be permitted to keep the property simply because church authorities have determined that the doctrinal innovation is justified by the faith's basic principles. Cf. *Watson* v. *Jones,* 13 Wall. 679, 722–724 (1872).

On this understanding, I join the Court's opinion.

Syllabus.

SECURITIES AND EXCHANGE COMMISSION *v.* NATIONAL SECURITIES, INC., ET AL.

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

No. 41. Argued November 18–19, 1968.—Decided January 27, 1969.

The Securities and Exchange Commission (SEC) brought suit against respondent National Securities and persons associated with it, alleging violations of § 10 (b) of the Securities Exchange Act and of SEC's Rule 10b–5, arising out of misrepresentations and omissions of material facts in communications sent to shareholders of Producers Life Insurance Co., in an attempt to secure approval of a merger between that company and an insurance firm controlled by National Securities. SEC's request for temporary relief was denied and thereafter Producers' stockholders approved the merger and the Arizona Director of Insurance found the merger not "[i]nequitable to the stockholders of any domestic insurer," and not otherwise "contrary to law," as he was required to do under the state insurance laws. The merger was consummated and the SEC then amended its complaint to seek additional relief, including unwinding the merger. The trial court dismissed the complaint, and the Court of Appeals affirmed on the basis that § 2 (b) of the McCarran-Ferguson Act barred relief. That section provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." *Held:*

1. Arizona's statutory regulation, insofar as it applies to the relationship between insurance companies and their shareholders, does not come within the scope of the McCarran-Ferguson Act and does not render the federal securities laws inapplicable. Pp. 457–461.

(a) The Act did not purport to make the States supreme in regulating all the activities of insurance *companies*, but was concerned with laws regulating the *business* of insurance and focused on the insurance company-policyholder relationship. Pp. 459–460.

(b) Arizona is attempting here to regulate the company-stockholder relationship, which is securities regulation and not within the purview of the Act. P. 460.

(c) State regulation of insurance company securities does not pre-empt federal regulation. P. 461.

2. The Act does not bar the remedies, including return to the *status quo ante*, which the SEC is seeking, as the complaint is based on fraudulent misrepresentations and not on the illegality of the merger; any "impairment" of the state insurance laws is very indirect; and the paramount federal interest in protecting shareholders is perfectly compatible with the paramount state interest in protecting policyholders. Pp. 461–464.

3. The deception alleged here has affected stockholders' decisions in a way not unlike that involved in a typical cash sale or share exchange, and in light of the broad antifraud purposes of § 10 (b) of the Securities Exchange Act and SEC Rule 10b–5, which apply "in connection with the purchase or sale of any security," exchanges by Producers' shareholders of their old stock for shares in the new company are "purchases" within the meaning of that statutory language. Pp. 465–468.

4. The fact that § 14 of the Securities Exchange Act and the rules issued thereunder, which apply to proxy situations, may overlap the coverage of § 10 (b) and Rule 10b–5, does not bar the application of Rule 10b–5 which is concerned with misrepresentations in the purchase and sale of any security and includes misstatements in proxy materials. Pp. 468–469.

387 F. 2d 25, reversed and remanded.

Solicitor General Griswold argued the cause for petitioner. With him on the briefs were *Lawrence G. Wallace, Philip A. Loomis, Jr., David Ferber, Edward B. Wagner,* and *Frank N. Fleischer.*

John P. Frank argued the cause for respondents. With him on the brief was *A. Gordon Olsen.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises some complex questions about the Securities and Exchange Commission's power to regulate

the activities of insurance companies and of persons engaged in the insurance business. The Commission originally brought suit in the United States District Court for the District of Arizona, pursuant to § 21 (e) of the Securities Exchange Act of 1934, 48 Stat. 900, as amended, 15 U. S. C. § 78u (e). It alleged violations of § 10 (b) of the Act, 48 Stat. 891, 15 U. S. C. § 78j (b), and of the Commission's Rule 10b–5, 17 CFR § 240.10b–5 (1968). According to the amended complaint, National Securities and various persons associated with it had contrived a fraudulent scheme centering on a contemplated merger between National Life & Casualty Insurance Co. (National Life), a firm controlled by National Securities, and Producers Life Insurance Co. (Producers). The details of the alleged scheme are not important here. The Commission contended that National Securities purchased a controlling interest in Producers, partly from Producers' directors and partly in the form of treasury stock held by Producers. After taking control of Producers' board, respondents sought to obtain shareholder approval of the merger by sending communications to Producers' 14,000 stockholders. These communications, according to the Commission, contained misrepresentations of material facts and omitted to state material facts necessary to make the statements which were made not misleading. Among other things, respondents allegedly failed to disclose their plan for the surviving company to assume certain obligations which National Securities had undertaken as part of the consideration for its purchases of Producers' stock. In plain language, Producers' shareholders were not told that they were going to pay part of the cost of National Securities' acquisition of control in their company.

The Commission was denied temporary relief, and shortly thereafter Producers' shareholders and the Arizona Director of Insurance approved the merger. The

two companies were formally consolidated into National Producers Life Insurance Co. on July 9, 1965. Thereafter, the Commission amended its complaint to seek additional relief; the previously sought injunction forbidding further violations of Rule 10b–5 was to be supplemented by court orders unwinding the merger and returning the situation to the *status quo ante,* requiring respondents to make an accounting of their unlawful gains, and readjusting the equities of the various respondents in whatever companies survived the decree. The Commission also requested whatever further relief the court might deem just, equitable, and necessary. Respondents moved for judgment on the pleadings, and the trial court dismissed the complaint for failure to state a claim upon which relief could be granted. The court ruled that the relief requested was either barred by §2 (b) of the McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U. S. C. § 1012 (b),[1] or was beyond the scope of § 21 (e) of the Securities Exchange Act. 252 F. Supp. 623 (1966). The Ninth Circuit affirmed, relying on the McCarran-Ferguson Act. 387 F. 2d 25 (1967). Upon application by the Commission, we granted certiorari because of the importance of the questions raised to the administration of the securities laws. 390 U. S. 1023 (1968).

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[1] "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

I.

Insofar as it is relevant to this case, § 2 (b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." Respondents contend that this Act bars the present suit since the Arizona Director of Insurance found that the merger was not "[i]nequitable to the stockholders of any domestic insurer" and not otherwise "contrary to law," as he was required to do under the state insurance laws. Ariz. Rev. Stat. Ann. § 20–731 (Supp. 1969). If the Securities Exchange Act were applied, respondents argue, these laws would be "superseded." The SEC sees no conflict between state and federal law; it contends that the applicable Arizona statutes did not give the State Insurance Director the power to determine whether respondents had made full disclosure in connection with the solicitation of proxies.[2] Although respondents disagree, we do not find it necessary to inquire into this state-law dispute. The first question posed by this case is whether the relevant Arizona statute is a "law enacted . . . for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act. Even accepting respondents' view of Arizona law, we do not believe that a state statute aimed at protecting the interests of those who own stock in insurance companies comes within the sweep of the McCarran-Ferguson Act. Such a statute is not a state attempt to regulate "the business of insurance," as that phrase was used in the Act.

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[2] In 1966 Arizona law was amended to give him this power. See Ariz. Rev. Stat. Ann. § 20–143 (Supp. 1969). This statute was passed in response to the 1964 amendments to the Securities Exchange Act. Pub. L. 88–467, 78 Stat. 565.

The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. Congress reacted quickly. Even before the opinion was announced, the House had passed a bill exempting the insurance industry from the antitrust laws. 90 Cong. Rec. 6565 (1944). Objection in the Senate killed the bill, 90 Cong. Rec. 8054 (1944), but Congress clearly remained concerned about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first section; Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 59 Stat. 33 (1945), 15 U. S. C. § 1011. As this Court said shortly afterward, "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 429 (1946).

The question here is whether state laws aimed at protecting the interests of those who own securities in insurance companies are the type of laws referred to in the 1945 enactment. The legislative history of the McCarran-Ferguson Act offers no real assistance. Congress was mainly concerned with the relationship be-

tween insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies. See, *e. g.,* 91 Cong. Rec. 1087–1088 (remarks of Congressmen Hancock and Celler). The debates centered on these issues, and the Committee reports shed little light on the meaning of the words "business of insurance." See S. Rep. No. 20, 79th Cong., 1st Sess. (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945). In context, however, it is relatively clear what problems Congress was dealing with. Under the regime of *Paul* v. *Virginia, supra,* States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

Given this history, the language of the statute takes on a different coloration. The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they

are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC* v. *National Casualty Co.*, 357 U. S. 560 (1958), and the licensing of companies and their agents, cf. *Robertson* v. *California*, 328 U. S. 440 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

In this case, Arizona is concerning itself with a markedly different set of problems. It is attempting to regulate not the "insurance" relationship, but the relationship between a stockholder and the company in which he owns stock. This is not insurance regulation, but securities regulation. It is true that the state statute applies only to insurance companies. But mere matters of form need not detain us. The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act.

This reading of the Act is implicit in this Court's past decisions. Less than two years ago the Court approved the application of the registration requirements of the Securities Act of 1933, § 5, 48 Stat. 77, 15 U. S. C. § 77e, to certain annuity contracts issued by insurance companies. *SEC* v. *United Benefit Life Insurance Co.*, 387 U. S. 202 (1967). The Court explicitly rejected arguments based on the McCarran-Ferguson Act in a similar case of slightly earlier vintage. *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65, 67–68 (1959). Although the securities laws contain a number of exemptions relating to insurance and insurance companies,[3] the Commission has traditionally regulated a number of activities related to insurance securities.[4] Of course, under the securities laws state regulation may co-exist with that offered under the federal securities laws. See, *e. g.*, Securities Act of 1933, § 18, 48 Stat. 85, 15 U. S. C. § 77r; Securities Exchange Act of 1934, § 28 (a), 48 Stat. 903, 15 U. S. C. § 78bb (a). But it has never been held that state regulation of insurance securities pre-empts federal regulation, on the theory that the federal securities laws would be "superseding" state laws regulating the "business of insurance." The fact that Arizona purports to protect the interests of insurance company stockholders does not, therefore, by itself render the federal securities laws inapplicable.

II.

The fact remains, however, that the State of Arizona has approved a merger between two insurance companies

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[3] *E. g.*, Securities Act of 1933, § 3 (a)(8), 48 Stat. 76, 15 U. S. C. § 77c (a)(8); Securities Exchange Act of 1934, § 12 (g)(2)(G), added by Pub. L. 88–467, 78 Stat. 567 (1964), 15 U. S. C. § 78*l* (g)(2)(G).

[4] The Commision lists a large number of examples of its activities in its brief. Brief for Petitioner 16–17.

which, as a matter of remedies, the Securities and Exchange Commission seeks to unwind. Moreover, Arizona has approved the merger not only under its laws relating to insurance securities but also in its capacity as licensor of insurers within the State. The applicable statute requires the State Director of Insurance to find that the proposed merger would not "substantially reduce the security of and service to be rendered to policyholders" before he gives his approval. Ariz. Rev. Stat. Ann. § 20–731B 3 (Supp. 1969). This section of the statute clearly relates to the "business of insurance." The question is, then, whether the McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation. In the circumstances of this particular case, we do not think it does; without intimating any opinion about what remedies would be appropriate should a violation be found after a trial on the merits, we hold that the McCarran-Ferguson Act furnishes no reason for refusing the remedies the Commission is seeking.[5]

The Commission alleged that approval of the merger was obtained through the use of various fraudulent misrepresentations. It did not ask the trial court to pass directly upon a merger which the State Director of Insurance had approved. No question of the legality or illegality of the merger, standing alone, was raised. The gravamen of the complaint was the misrepresentation, not the merger. The merger became relevant only insofar as it was necessary to attack it in order to undo the harm caused by the alleged deception. Presumably, full

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[5] Although the District Court held that some of the relief requested was beyond that properly allowable under § 21 (e) of the 1934 Act, 48 Stat. 900, as amended, 15 U. S. C. § 78u (e), no such question has been argued by either party here. Accordingly, we express no opinion about the proper construction of that section. See Note, Ancillary Relief in SEC Injunction Suits for Violation of Rule 10b–5, 79 Harv. L. Rev. 656 (1966).

disclosure would have avoided the particular Rule 10b–5 violations alleged in the complaint. Nevertheless, respondents contend that any attempt to interfere with a merger approved by state insurance officials would "invalidate, impair, or supersede" the state insurance laws made paramount by the McCarran-Ferguson Act. We cannot accept this overly broad restriction on federal power.

It is clear that any "impairment" in this case is a most indirect one. The Federal Government is attempting to protect security holders from fraudulent misrepresentations; Arizona, insofar as its activities are protected by the McCarran-Ferguson Act from the normal operations of the Supremacy Clause, is attempting to protect the interests of the policyholders. Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so. In this context, all the Securities and Exchange Commission is asking is that insurance companies speak the truth when talking to their shareholders. The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policyholders. And the remedy the Commission seeks does not affect a matter predominantly of concern to policyholders alone; the merger is at least as important to those owning the companies' stock as it is to those holding their policies. In these circumstances, we simply cannot see the conflict. Different questions would, of course, arise if the Federal Government were attempting to regulate in the sphere reserved primarily to the States by the McCarran-Ferguson Act. But that is not this case. In these circumstances, there is no reason to emasculate the securities laws by forbidding remedies which might prove to be essential. Cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964). On remand,

the trial court may order a return to the *status quo ante* if it finds that course of action desirable, necessary, and otherwise lawful.

III.

Respondents argue that there are alternative grounds on which the lower courts' action in granting judgment on the pleadings can be sustained. They contend that the complaint fails to allege a "purchase or sale" of securities within the meaning of § 10 (b) and the Commission's Rule 10b–5, and that in any case Rule 10b–5 does not apply to misrepresentations in connection with the solicitation of proxies.[6] Since this case is here in the context of an appeal from the pretrial dismissal of a complaint, a simple remand would leave the lower

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[6] Section 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j (b), provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b–5, 17 CFR § 240.10b–5 (1968), provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

courts with nothing more on which to base a decision than the record presently before this Court. In addition, further delays in resolving this controversy might increase the difficulty of fashioning effective relief. Accordingly, we think it desirable to dispose of these two issues before remanding the case so that the trial court may go forward with further proceedings without undue delay.

Although § 10 (b) and Rule 10b–5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them. We enter this virgin territory cautiously. The questions presented are narrow ones. They arise in an area where glib generalizations and unthinking abstractions are major occupational hazards. Accordingly, in deciding this particular case, remembering what is not involved is as important as determining what is. With this in mind, we turn to respondents' particular contentions.

Respondents argue that the complaint fails to allege any misstatements "in connection with the purchase or sale of any security," as is required by both the statute and the rule. They rely upon the so-called "no-sale doctrine" presently set forth in the Commission's Rule 133 under the Securities Act of 1933, 17 CFR § 230.133 (1968).[7] That rule, promulgated under the Commission's authority to define "accounting, technical, and trade terms" used in the 1933 Act, § 19 (a), 48 Stat. 85, as amended, 15 U. S. C. § 77s, sets forth various situations involving statutory mergers and other types of corporate reorganizations, and declares that no "sale" or "offer" shall be deemed to be involved. But whatever may be the validity or effect of this rule—and we intimate

[7] For the history of this doctrine, see 1 L. Loss, Securities Regulation 518–542 (1961).

absolutely no opinion on these questions—it certainly does not determine the result here. The rule is specifically made applicable only to cases involving § 5 of the 1933 Act; this case arises under § 10 (b) of the 1934 Act. Although the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen, ordinary rules of statutory construction still apply. The meaning of particular phrases must be determined in context, *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–351 (1943). Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws; both the 1933 and the 1934 Acts preface their lists of general definitions with the phrase "unless the context otherwise requires." 1933 Act, § 2, 48 Stat. 74, 15 U. S. C. § 77b; 1934 Act, § 3, 48 Stat. 882, 15 U. S. C. § 78c. We must therefore address ourselves to the meaning of the words "purchase or sale" in the context of § 10 (b). Whatever these or similar words may mean in the numerous other contexts in which they appear in the securities laws, only this one narrow question is presented here.

Section 10 (b) and Rule 10b–5 together constitute one of the several broad antifraud provisions contained in the securities laws. In the context of this case, the Commission seeks to apply them to prevent the shareholders of Producers from being defrauded as a result of misstatements made by respondents. For the statute and the rule to apply, the allegedly proscribed conduct must have been "in connection with the purchase or sale of any security." The relevant definitional sections of the 1934 Act are for the most part unhelpful; they only declare generally that the terms "purchase" and "sale" shall include contracts to purchase or sell. §§ 3 (a)(13), (14), 48 Stat. 884, 15

U. S. C. §§ 78c (a)(13), (14).[8] Consequently, we must ask whether respondents' alleged conduct is the type of fraudulent behavior which was meant to be forbidden by the statute and the rule.

According to the amended complaint, Producers' shareholders were misled in various material respects prior to their approval of a merger. The deception furthered a scheme which resulted in their losing their status as shareholders in Producers and becoming shareholders in a new company. Moreover, by voting in favor of the merger, each approving shareholder individually lost any right under Arizona law to obtain an appraisal of his stock and payment for it in cash. Ariz. Rev. Stat. Ann. § 10–347 (1956). Whatever the terms "purchase" and "sale" may mean in other contexts, here an alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange. The broad antifraud purposes of the statute and the rule would clearly be furthered by their application to this type of situation. Therefore we conclude that Producers' shareholders "purchased" shares in the new company by exchanging them for their old stock.[9] As the Court of Appeals for the Seventh Circuit has said, "This view does no violence to the statutory language, and is the

[8] These sections do indicate the breadth of the statutory terms by using the definitional word "include" and by including within the definitions contracts "to buy, purchase, or otherwise acquire" and "to sell or otherwise dispose of" securities.

[9] This case presents none of the complications which may arise in determining who, if anyone, may bring private actions under § 10 (b) and Rule 10b–5. Cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). This is a suit brought by the Commission; the terms "purchase" and "sale" are relevant only to the question of statutory coverage. Therefore there are no "standing" problems lurking in the case. Cf. Lowenfels, The Demise of the *Birnbaum* Doctrine: A New Era for Rule 10b–5, 54 Va. L. Rev. 268 (1968).

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present interpretation of the body which is responsible for the administration of the acts." *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262, 269 (opinion of Fairchild and Cummings, JJ.), cert. denied, *sub nom. Bard* v. *Dasho*, 389 U. S. 977 (1967); see *Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627 (C. A. 2d Cir.), cert. denied, 389 U. S. 970 (1967); cf. *Ruckle* v. *Roto American Corp.*, 339 F. 2d 24 (C. A. 2d Cir. 1964).

Respondents' alternative argument that Rule 10b–5 does not cover misrepresentations which occur in connection with proxy solicitations can be dismissed rather quickly. Section 14 of the 1934 Act, 48 Stat. 895, 15 U. S. C. § 78n, and the rules adopted pursuant to that section, 17 CFR §§ 240.14a–1 to 240.14a–103 (1968), set up a complex regulatory scheme covering proxy solicitations. At the time of the conduct charged in the complaint, these provisions did not apply to respondents; the 1964 amendments to the Securities Exchange Act would have made them applicable later if certain conditions relating to state regulation had not been met. 78 Stat. 567, 15 U. S. C. § 78*l* (g)(2)(G). But the existence or nonexistence of regulation under § 14 would not affect the scope of § 10 (b) and Rule 10b–5. The two sections of the Act apply to different sets of situations. Section 10 (b) applies to all proscribed conduct in connection with a purchase or sale of any security; § 14 applies to all proxy solicitations, whether or not in connection with a purchase or sale. The fact that there may well be some overlap is neither unusual nor unfortunate. Nor does it help respondents that insurance companies may often be exempt from federal proxy regulation under the 1964 amendments. The securities laws' exemptions for insurance companies and insurance activities are carefully limited. None is applicable to the Rule 10b–5 situation with which we are confronted, and we do not have the power to create one. Congress

may well have concluded that the Commission's general antifraud powers over purchases and sales of securities should continue to apply to insurance securities, even though the more detailed regulation of proxy solicitations—which may often be conducted in connection with the managerial activities of insurance companies—was left to the States. Accordingly, we find no bar to the application of Rule 10b–5 to respondents' misstatements in their proxy materials.

Since the McCarran-Ferguson Act does not prohibit the relief sought, and since neither of the alternative grounds for dismissal which have been raised here is meritorious, we reverse the judgment of the Court of Appeals and remand the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, believing that the United States Court of Appeals for the Ninth Circuit correctly analyzed the issues in this case and that its judgment is right, dissents from this Court's reversal of the judgment.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I concur entirely in Parts I and II of the Court's opinion construing the McCarran-Ferguson Act. But I am at a loss to understand why the Court finds it necessary to go further and construe Rule 10b–5 promulgated under § 10 (b) of the Securities Exchange Act of 1934. The Court of Appeals did not reach this question since it believed that the McCarran-Ferguson Act entirely exempted the transaction involved here from the commands of the federal securities laws. The Government's petition for certiorari is similarly limited. The only issue it raises is "[w]hether the McCarran-Ferguson Act . . . precludes the application of the anti-fraud provisions of

the Securities Exchange Act of 1934. . . ." See Petition for Certiorari 2. When the respondents' brief on the merits argued that Rule 10b–5 did not apply to the present case, the Solicitor General did not even attempt to present the Government's position on that score because he quite properly believed that "the question is not appropriately before this Court for decision." Government's Reply Brief 2.

Despite the fact that we have not heard the views of the Securities and Exchange Commission, the Court chooses this case as a vehicle to construe for the first time one of the most important and elusive provisions of the securities laws. Moreover, the decision has far-reaching radiations, despite the fact that the precise issue presented is a narrow one. Courts and commentators have long debated whether Rule 10b–5 should be read as a sweeping prohibition against fraud in the securities industry when this results in rendering nullities of the other antifraud provisions of more limited scope which can be found in the statute books. See, *e. g.*, §§ 11(a), 12 (2), and 13 of the Securities Act of 1933; § 18 of the Securities and Exchange Act of 1934. The late Judge Jerome Frank,[1] Professor Louis Loss,[2] and Milton Cohen,[3]—to mention only three of those particularly eminent in this field—have warned that Rule 10b–5 should not be construed to supersede the special statutory schemes which Congress has devised to assure fair dealing in various aspects of the securities business. But see A. Bromberg, Securities Law § 2.5 (1967); *Ellis* v. *Carter*, 291 F. 2d 270 (1961). Even those who take an extremely broad view of the scope of the Rule have recognized that it could well be argued that the courts should

[1] *Fischman* v. *Raytheon Manufacturing Co.*, 188 F. 2d 783 (1951).

[2] 3 Securities Regulation 1787–1791 (1961).

[3] "Truth in Securities" Revisited, 79 Harv. L. Rev. 1340, 1370 n. 89 (1966).

not rush in to apply § 10 (b) to regulate proxy solicitations where Congress has refused to permit the Commission to intervene under § 14. See Bromberg, *supra,* § 6.5 (2), n. 93.1. Indeed, at one time the SEC itself was of the opinion that the Rule did not apply in cases of this sort. *National Supply Co.* v. *Leland Stanford University,* 134 F. 2d 689, 694 (1943). Nevertheless, the majority believes it can answer this question "rather quickly," *ante,* at 468, without any real recognition of the basic principles which hang in the balance.

In addition, the Court has chosen to adopt a very loose construction of the requirement, first enunciated by Judge Augustus Hand in *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (1951), cert. denied 343 U. S. 956 (1952), that a transaction must involve a "purchase" or "sale" of securities before it may be found to violate Rule 10b–5. While some commentators have welcomed the erosion of this doctrine, see Lowenfels, The Demise of the *Birnbaum* Doctrine: A New Era for Rule 10b–5, 54 Va. L. Rev. 268 (1968), especially in injunction actions initiated by the SEC, Note, The Purchaser-Seller Limitation to SEC Rule 10b–5, 53 Cornell L. Rev. 684, 694–697 (1968), others believe that "*Birnbaum* seems basically correct." 3 L. Loss, Securities Regulation 1469. As recently as 1964, the Second Circuit rendered a decision which has been commonly understood to have reaffirmed the vitality of the *Birnbaum* doctrine, with my Brother MARSHALL casting the deciding vote. *O'Neill* v. *Maytag,* 339 F. 2d 764, 768 (1964);[4] see Lowenfels, *supra,* at 270.

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[4] Both *O'Neill* and *Birnbaum* were of course private actions, and I do not mean to suggest that my Brother MARSHALL is flatly inconsistent in now ruling that the "purchase" and "sale" requirement has been met in this case involving the SEC's request for an injunction. Nevertheless, both private and public actions arise under the same Rule, and the legal problems involved in the two situations, while not identical, are closely related.

I am unwilling to decide these fundamental matters without full-dress argument. Indeed, if the courts of appeals are not to be permitted to develop the law in this area on a case-by-case basis, I think it much wiser for us to consider the basic issues in a case which squarely raises them rather than in one which is of marginal importance.

SKINNER ET AL. *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 44. Argued December 10, 1968.—Decided January 27, 1969.

251 La. 300, 204 So. 2d 370, certiorari dismissed.

George M. Leppert argued the cause for petitioners. With him on the brief were *G. Wray Gill, Sr.*, and *Robert S. Link, Jr.*

Louise Korns argued the cause for respondent. With her on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Jim Garrison.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE MARSHALL, with whom MR. CHIEF JUSTICE WARREN and MR. JUSTICE DOUGLAS join, dissenting.

Petitioners were convicted of the possession and sale of marihuana and given lengthy prison terms. The Louisiana Supreme Court affirmed. *State* v. *Skinner,* 251 La. 300, 204 So. 2d 370 (1967). We granted certiorari to consider several alleged errors occurring during the course of the state court proceedings. *Skinner* v. *Louisiana,* 391 U. S. 963 (1968).

Petitioners argued before this Court that they were denied due process of law because the trial court refused to declare a recess, but instead allowed the trial to continue until nearly 3 a. m.[1] The principal basis for this claim is that Mr. Gill, counsel for Skinner and Gueldner,

[1] The other alleged errors were the absence of one petitioner at hearings on certain pre-trial motions, the arraignment of one petitioner without counsel, and the giving of a conspiracy charge when no conspiracy was charged in the information.

had become ineffective due to illness. I believe that the failure of the court to recess the trial when requested to do so by Gill effectively deprived petitioners Skinner and Gueldner of the right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

The facts are relatively simple. After several continuances, some granted because of Gill's illness, trial of the case commenced on the morning of March 21, 1966. The morning was consumed by selection of the jury and the trial proper did not commence until 2:45 p. m. The court recessed from 6:15 to 8 p. m. for dinner and at 11:40 p. m., the State rested. At that time, the following colloquy took place between court and counsel:

> "By MR. GILL. Before asking for a recess, I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.
>
> "By THE COURT. You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight. Go to work and see if we can't finish the case tonight.
>
> "By MR. GILL. I'll do what Your Honor says.
>
> "By THE COURT. I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . . .
>
> "By MR. GILL. I want to say one thing, Your Honor. I have a severe case of diabetes.
>
> "By THE COURT. I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this

> case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.
>
> "By MR. GILL. May I further say this. I tested myself for sugar. . . .
>
> "By THE COURT. We will take a recess for three minutes.
>
> "By MR. GILL. If Your Honor please, I respectfully request Your Honor declare a mistrial."

Thereafter, the court recessed for 35 minutes and reconvened at 12:25 a. m. The defense then presented its case. At 3 a. m., the court declared a recess until 9:30 the next morning. When the court reconvened, both parties presented their arguments to the jury.

In their motion for a new trial, petitioners alleged that the court erred in not declaring a recess after the State had rested. The trial court held a hearing on this issue, including the question of whether any of the jurors had been asleep during the trial.[2] Gill and his physician testified at that hearing. Gill testified that by the time the State had concluded its case he was "just about dead on [his] feet" and that he did not, either that evening or the next morning, present the type of defense to which petitioners were entitled. He failed to ask for a mistrial after he had noticed a juror sleeping and had not called two possible witnesses. He had been in the hospital the week before and had just finished trying a case shortly before the present one began. During that earlier trial, he had found it necessary to go to bed by 7 p. m. His physical condition continued to deteriorate and he

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[2] All three petitioners allege that at least two jurors were observed to have been sleeping during the trial and assign this allegation as further support for the argument that the length of the trial session deprived them of due process. The trial court, after a hearing on the motion for a new trial, found that none of the jurors had been asleep.

entered the hospital for two weeks shortly after the trial.

Gill's doctor then testified as to his condition three days after the trial and to his probable condition on the day of the trial. He testified that Gill was suffering from an acidotic condition due to diabetes and from nervous exhaustion. The doctor testified that Gill's efficiency at the trial would have been about two-thirds of normal and, after midnight, he "would be practically ineffective."

The court sympathized with Gill but pointed out that the docket had to be cleared up and that the only way to do that is to "force lawyers to try cases." The motion for a new trial was denied.

The Louisiana Supreme Court held that the record indicated that Gill had conducted a vigorous defense, reserving bills of exception and engaging in colloquy with the court. The testimony of the doctor was discounted because it was not supported by the record and because the doctor was not in court at the time of the trial. Accordingly, the court found no prejudice.

The State argues that granting of recesses is in the discretion of the trial court and that no abuse of that discretion has been demonstrated here. This Court has frequently indicated that the granting of continuances and recesses is within the discretion of the trial court. See, *e. g., Ungar* v. *Sarafite,* 376 U. S. 575, 589 (1964). Nevertheless, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ibid.* It is clear to me that in the present case the trial judge's concern with the state of his docket has resulted in depriving petitioners of their right to effective assistance of counsel.

Gill made it clear to the court that he was suffering from diabetes and that the length of the day's trial and

the lateness of the hour had exhausted him. And the court was familiar with the history of Gill's health problems. Yet, before Gill could even tell the court the level of his blood sugar, the court denied his request for a recess. I think it clear that the record establishes that Gill was seriously ill, to the knowledge of the court. I think it irrelevant that he was able to continue and present a credible defense; we should not be required to speculate when counsel is performing up to his capacity. Nor do I think it relevant that Gill did not take more affirmative action to establish the state of his health or to secure a recess or a continuance the next morning. As Gill himself testified, and his doctor confirmed, his efficiency at the time was practically nil. I find it hard to believe that court calendars are so congested that diabetic counsel must be forced to work until the early morning hours to clear them up. Accordingly, I would reverse the convictions of petitioners Skinner and Gueldner.

COMMISSIONER OF INTERNAL REVENUE *v.* SHAW-WALKER CO.

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

No. 95. Decided January 27, 1969.

Certiorari granted; 390 F. 2d 205, vacated and remanded.

Solicitor General Griswold for petitioner.

Richard E. Nolan and *John P. Carroll, Jr.,* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Court of Appeals for further consideration in light of *United States* v. *Donruss Co., ante,* p. 297.

INTERSTATE INVESTORS, INC. *v.* UNITED STATES ET AL.

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

No. 755. Decided January 27, 1969.

287 F. Supp. 374, affirmed.

Frederick W. P. Lorenzen and *William R. Burt* for appellant.

Solicitor General Griswold, Assistant Attorney General Zimmerman, Howard E. Shapiro, Robert W. Ginnane, and *Jerome Nelson* for the United States et al., and *Thomas F. Daly, John W. Castles III,* and *Warren A. Goff* for Transcontinental Bus System, Inc., appellees.

PER CURIAM.

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

PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO *v.* UNITED STATES ET AL.

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

No. 790. Decided January 27, 1969.

282 F. Supp. 819, affirmed.

Louis Waldman and *Seymour M. Waldman* for appellant.

Solicitor General Griswold and *Assistant Attorney General Zimmerman* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *United Mine Workers of America* v. *Pennington,* 381 U. S. 657; *American Federation of Musicians* v. *Carroll,* 391 U. S. 99; and *Los Angeles Meat Drivers Union* v. *United States,* 371 U. S. 94.

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

LOCUST CLUB OF ROCHESTER ET AL. *v.* CITY OF ROCHESTER ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 799. Decided January 27, 1969.

22 N. Y. 2d 802, 239 N. E. 2d 646, appeal dismissed.

Ronald J. Buttarazzi for appellants.

Sterling L. Weaver and *Ruth B. Rosenberg* for appellees.

PER CURIAM.

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

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.

STEWART *v.* CHICAGO HOUSING AUTHORITY.

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

No. 752, Misc. Decided January 27, 1969.

Certiorari granted; 40 Ill. 2d 23, 237 N. E. 2d 463, vacated and remanded.

Marshall Patner for petitioner.

Henry F. Jankowicz for respondent.

Peter S. Smith, Joseph A. Matera, Kenneth F. Phillips, and *Robert J. Spangenberg* for the National Project on Urban Housing Law et al., as *amici curiae,* in support of the petition.

PER CURIAM.

The motion for leave to proceed *in forma pauperis,* the motion of the National Project on Urban Housing Law et al., for leave to file a brief, as *amici curiae,* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for further consideration in light of *Thorpe* v. *Housing Authority of the City of Durham, ante,* p. 268.

JOHNSON *v.* AVERY, COMMISSIONER OF CORRECTION, ET AL.

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

No. 40. Argued November 14, 1968.—Decided February 24, 1969.

Petitioner, a Tennessee prisoner, was disciplined for violating a prison regulation which prohibited inmates from assisting other prisoners in preparing writs. The District Court held the regulation void because it had the effect of barring illiterate prisoners from access to federal habeas corpus and conflicted with 28 U. S. C. § 2242. The Court of Appeals reversed, finding that the State's interest in preserving prison discipline and limiting the practice of law to attorneys justified any burden the regulation might place on access to federal habeas corpus. *Held:* In the absence of some provision by the State of Tennessee for a reasonable alternative to assist illiterate or poorly educated inmates in preparing petitions for post-conviction relief, the State may not validly enforce a regulation which absolutely bars inmates from furnishing such assistance to other prisoners. Pp. 485–490.

382 F. 2d 353, reversed and remanded.

Karl P. Warden argued the cause for petitioner. With him on the brief was *Pierce Winningham.*

Thomas E. Fox, Deputy Attorney General of Tennessee, argued the cause for respondents. With him on the brief were *George F. McCanless,* Attorney General, and *David W. McMackin,* Assistant Attorney General.

Melvin L. Wulf filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci* and *George R. Nock,* Deputy Attorneys General, filed a brief for the State of California, as *amicus curiae,* urging affirmance.

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MR. JUSTICE FORTAS delivered the opinion of the Court.

I.

Petitioner is serving a life sentence in the Tennessee State Penitentiary. In February 1965 he was transferred to the maximum security building in the prison for violation of a prison regulation which provides:

> "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."

In July 1965 petitioner filed in the United States District Court for the Middle District of Tennessee a "motion for law books and a typewriter," in which he sought relief from his confinement in the maximum security building. The District Court treated this motion as a petition for a writ of habeas corpus and, after a hearing, ordered him released from disciplinary confinement and restored to the status of an ordinary prisoner. The District Court held that the regulation was void because it in effect barred illiterate prisoners from access to federal habeas corpus and conflicted with 28 U. S. C. § 2242.[1] 252 F. Supp. 783.

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[1] 28 U. S. C. § 2242 provides in part: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

By the time the District Court order was entered, petitioner had been transferred from the maximum security building, but he had been put in a disciplinary cell block in which he was entitled to fewer privileges than were given ordinary prisoners. Only when he promised to refrain from assistance to other inmates was he restored to regular prison conditions and privileges. At a second hearing, held in March 1966, the District Court explored these issues concerning the compliance of the prison officials with its initial order. After the hearing, it reaffirmed its earlier order.

The State appealed. The Court of Appeals for the Sixth Circuit reversed, concluding that the regulation did not unlawfully conflict with the federal right of habeas corpus. According to the Sixth Circuit, the interest of the State in preserving prison discipline and in limiting the practice of law to licensed attorneys justified whatever burden the regulation might place on access to federal habeas corpus. 382 F. 2d 353.

II.

This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme,[2] and the Congress has demonstrated its solicitude for the vigor of the Great Writ.[3] The Court has steadfastly insisted that "there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston,* 306 U. S. 19, 26 (1939).

Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. For example, the Court has held that a State may not validly make the writ available

[2] *E. g., Fay* v. *Noia,* 372 U. S. 391 (1963).

[3] 28 U. S. C. §§ 2241–2255.

only to prisoners who could pay a $4 filing fee. *Smith* v. *Bennett,* 365 U. S. 708 (1961). And it has insisted that, for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality. For instance, the State is obligated to furnish prisoners not otherwise able to obtain it, with a transcript or equivalent recordation of prior habeas corpus hearings for use in further proceedings. *Long* v. *District Court,* 385 U. S. 192 (1966). Cf. *Griffin* v. *Illinois,* 351 U. S. 12 (1956).

Tennessee urges, however, that the contested regulation in this case is justified as a part of the State's disciplinary administration of the prisons. There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

For example, in *Lee* v. *Washington,* 390 U. S. 333 (1968), the practice of racial segregation of prisoners was justified by the State as necessary to maintain good order and discipline. We held, however, that the practice was constitutionally prohibited, although we were careful to point out that the order of the District Court, which we affirmed, made allowance for "the necessities of prison security and discipline." *Id.,* at 334. And in *Ex parte Hull,* 312 U. S. 546 (1941), this Court invalidated a state regulation which required that habeas corpus petitions first be submitted to prison authorities and then approved by the "legal investigator" to the parole board as "properly drawn" before being transmitted to the court. Here again, the State urged that the requirement was necessary to maintain prison discipline. But this Court held that the regulation violated the principle that "the state and its officers may not

abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U. S., at 549. Cf. *Cochran* v. *Kansas,* 316 U. S. 255, 257 (1942).

There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that "[f]or all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court." 252 F. Supp., at 784. The record supports this conclusion.

Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.[4] This appears to be equally true of Tennessee's prison facilities.[5]

In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing. *E. g., Taylor* v. *Pegelow,* 335 F. 2d 147 (C. A. 4th Cir. 1964); *United States ex rel. Marshall* v. *Wilkins,* 338 F. 2d 404 (C. A. 2d Cir. 1964). See 28 U. S. C. § 1915 (d); R. Sokol, A Handbook of Federal Habeas Corpus 71–73 (1965).[6]

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[4] See Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L. J. 343, 347–348, 360–361.

[5] Tennessee Department of Correction, Departmental Report: Fiscal Years 1965–1966, 1966–1967.

[6] Tennessee's post-conviction procedure provides for appointment of counsel "if necessary." Tenn. Code Ann. §§ 40–3821, 40–2019 (Supp. 1967).

It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. See, *e. g., Barker* v. *Ohio,* 330 F. 2d 594 (C. A. 6th Cir. 1964). Accordingly, the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system. In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available.

It is indisputable that prison "writ writers" like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them.[7] But, as this Court held in *Ex parte Hull, supra,* in declaring invalid a state prison regulation which required that prisoners' legal pleadings be screened by state officials:

> "The considerations that prompted [the regulation's] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U. S., at 549.

Tennessee does not provide an available alternative to the assistance provided by other inmates. The warden of the prison in which petitioner was confined stated that the prison provided free notarization of prisoners' petitions. That obviously meets only a formal requirement. He also indicated that he sometimes allowed prisoners to examine the listing of attorneys in the Nashville telephone directory so they could select one to write to in an effort to interest him in taking the case, and

[7] See, *e. g.,* Spector, A Prison Librarian Looks at Writ-Writing, 56 Calif. L. Rev. 365 (1968).

that "on several occasions" he had contacted the public defender at the request of an inmate. There is no contention, however, that there is any regular system of assistance by public defenders. In its brief the State contends that "[t]here is absolutely no reason to believe that prison officials would fail to notify the court should an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf," but there is no contention that they have in fact ever done so.

This is obviously far short of the showing required to demonstrate that, in depriving prisoners of the assistance of fellow inmates, Tennessee has not, in substance, deprived those unable themselves, with reasonable adequacy, to prepare their petitions, of access to the constitutionally and statutorily protected availability of the writ of habeas corpus. By contrast, in several States,[8] the public defender system supplies trained attorneys, paid from public funds, who are available to consult with prisoners regarding their habeas corpus petitions. At least one State employs senior law students to interview and advise inmates in state prisons.[9] Another State has a voluntary program whereby members of the local bar association make periodic visits to the prison to consult with prisoners concerning their cases.[10] We express no judgment concerning these plans,

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[8] Note, *supra*, n. 4, at 349, n. 27, and 359. See also Rossmoore & Koenigsberg, Habeas Corpus and the Indigent Prisoner, 11 Rutgers L. Rev. 611, 619–622 (1957).

[9] At the time of the second hearing in petitioner's case, the warden testified, the State was considering setting up a program under which senior law students from Vanderbilt Law School would assist prisoners in the preparation of post-conviction relief applications. For whatever it may be worth, petitioner testified that he would stop helping other inmates if such a system were in existence.

[10] One State has designated an inmate as the official prison writ-writer. See Note, *supra*, n. 4, at 359.

but their existence indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates.

Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities. Cf. *Hatfield* v. *Bailleaux,* 290 F. 2d 632 (C. A. 9th Cir. 1961) (sustaining as reasonable regulations on the time and location of prisoner work on their own petitions). But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.[11]

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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[11] In reversing the District Court, the Court of Appeals relied on the power of the State to restrict the practice of law to licensed attorneys as a source of authority for the prison regulation. The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights. *NAACP* v. *Button,* 371 U. S. 415 (1963); *Sperry* v. *Florida,* 373 U. S. 379 (1963). In any event, the type of activity involved here—preparation of petitions for post-conviction relief—though historically and traditionally one which may benefit from the services of a trained and dedicated lawyer, is a function often, perhaps generally, performed by laymen. Title 28 U. S. C. § 2242 apparently contemplates that in many situations petitions for federal habeas corpus relief will be prepared by laymen.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words in emphasis of the important thesis of the case.

The increasing complexities of our governmental apparatus at both the local and the federal levels have made it difficult for a person to process a claim or even to make a complaint. Social security is a virtual maze; the hierarchy that governs urban housing is often so intricate that it takes an expert to know what agency has jurisdiction over a particular complaint; the office to call or official to see for noise abatement, for a broken sewer line, or a fallen tree is a mystery to many in our metropolitan areas.

A person who has a claim assertable in faraway Washington, D. C., is even more helpless, as evidenced by the increasing tendency of constituents to rely on their congressional delegation to identify, press, and process their claims.

We think of claims as grist for the mill of the lawyers. But it is becoming abundantly clear that more and more of the effort in ferreting out the basis of claims and the agencies responsible for them and in preparing the almost endless paperwork for their prosecution is work for laymen. There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent. Yet there is a closed-shop philosophy in the legal profession that cuts down drastically active roles for laymen. It was expressed by a New York court in denying an application from the Neighborhood Legal Services for permission to offer a broad legal-aid type of service to indigents:

> "[I]n any legal assistance corporation, supported by Federal antipoverty funds, the executive staff, and those with the responsibility to hire and discharge staff from the very top to the lowest lay

> echelon must be lawyers." *Matter of Action for Legal Services,* 26 App. Div. 2d 354, 360, 274 N. Y. S. 2d 779, 787 (1966).

That traditional, closed-shop attitude is utterly out of place in the modern world [1] where claims pile high and much of the work of tracing and pursuing them requires the patience and wisdom of a layman rather than the legal skills of a member of the bar.

> "If poverty lawyers are overworked, some of the work can be delegated to sub-professionals. New York law permits senior law students to practice law under certain supervised conditions. Approval must first be granted by the appellate division. A rung or two lower on the legal profession's ladder are laymen legal technicians, comparable to nurses and lab assistants in the medical profession. Large law firms employ them, and there seems to be no reason why they cannot be used in legal services programs to relieve attorneys for more professional tasks." Samore, Legal Services for the Poor, 32 Albany L. Rev. 509, 515–516 (1968).

And see Sparer, Thorkelson, & Weiss, The Lay Advocate, 43 U. Det. L. J. 493, 510–514 (1966).

The plight of a man in prison may in these respects be even more acute than the plight of a person on the outside. He may need collateral proceedings to test the legality of his detention [2] or relief against management

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[1] The New York program that is funded by the Office of Economic Opportunity (OEO) and which as noted was first rejected by the New York courts, is called Community Action for Legal Services. It was finally approved by the New York courts with a board of directors of 20 lawyers and 10 laymen. 158 N. Y. L. J. No. 72, pp. 1, 5 (1967).

[2] Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960).

of the parole system [3] or against defective detainers lodged against him which create burdens in the nature of his incarcerated status.[4] He may have grievances of a civil nature against those outside the prison. His imprisonment may give his wife grounds for divorce and be a factor in determining the custody of his children; and he may have pressing social security, workmen's compensation, or veterans' claims.[5]

While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost nonexistent. Even for criminal proceedings, it is sparse.[6] While a few States have post-conviction statutes providing such counsel,[7] most States do not.[8] Some States like California do appoint counsel to represent the indigent prisoner in his collateral hearings, once he succeeds in making out a prima facie case.[9] But as a result, counsel

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[3] Hubanks & Linde, Legal Services to the Indigent Imprisoned, 23 Legal Aid Briefcase 214 (1965).

[4] Temin, Report on Postconviction Services to the County Prison, 25 Legal Aid Briefcase 18 (1966).

[5] Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L. J. 343.

[6] L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts: A Preliminary Summary (Amer. Bar Foundation 1964); Note, Legal Services for the Poor, 49 Mass. L. Q. 293 (1964); O. E. O. and Legal Services—A Symposium, 14 Catholic Law. 92–174 (1968); Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514; Uelmen, Post-Conviction Relief for Federal Prisoners Under 28 U. S. C. § 2255: A Survey and a Suggestion, 69 W. Va. L. Rev. 277 (1967).

[7] Ill. Rev. Stat., c. 38, § 122–4 (1967); Ore. Rev. Stat. § 138.590 (1967).

[8] Comment, Right to Counsel in Criminal Post-Conviction Review Proceedings, 51 Calif. L. Rev. 970 (1963).

[9] See, *e. g.*, *People* v. *Shipman*, 62 Cal. 2d 226, 397 P. 2d 993 (1965). Note, Indigent's Right to Counsel in Post-Conviction Collateral Proceedings in California: *People v. Shipman*, 13 U. C. L. A. L. Rev. 446 (1966).

is not on hand for preparation of the papers or for the initial decision that the prisoner's claim has substance.

Many think that the prisoner needs help at an early stage to weed out frivolous claims.[10] Some States have Legal Aid Societies, sponsored in part by the National Legal Aid and Defender Association, that provide post-conviction counsel to prisoners.[11] Most legal aid offices, however, have so many pressing obligations of a civil and criminal nature in their own communities and among freemen, as not to be able to provide any satisfactory assistance to prisoners.[12] The same thing is true of OEO-sponsored Neighborhood Legal Services offices, which see their function as providing legal counsel for a particular community, which a member leaves as soon

[10] "Lawyers generally require at least a fifty dollar fee to travel to the prisons to consult with a prisoner. The ones not able to pay this sum must resort to the next best course of action—act as their own lawyers. The disadvantages to the prisoner are obvious. A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks—that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs." Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 345–346 (1968).

[11] Note, Legal Services for the Poor, 49 Mass. L. Q. 293 (1964).

[12] Note, Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579 (1963); Note, Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems, 13 Stan. L. Rev. 522 (1961); Gardiner, Defects in Present Legal Aid Service and the Remedies, 22 Tenn. L. Rev. 505 (1952); Note, Prisoner Assistance on Federal Habeas Corpus Petitions, 19 Stan. L. Rev. 887 (1967).

as he is taken to prison.[13] In some cases, state public defenders will represent a man even after he passes beyond prison walls. But more often, the public defender has no general authorization to process post-conviction matters.[14]

Some States have experimented with programs designed especially for the prison community. The Bureau of Prisons led the way with a program of allowing senior law students to service the federal penitentiary at Leavenworth, Kansas. Since then, it has encouraged similar programs at Lewisburg (University of Pennsylvania Law School) and elsewhere. Emory University School of Law provides free legal assistance to the inmates of Atlanta Federal Penitentiary. The program of the law school at the University of California at Los Angeles is now about to reach inside federal prisons. In describing the University of Kansas Law School program at Leavenworth, legal counsel for the Bureau of Prisons has said:

> "The experience at Leavenworth has shown that there have been very few attacks upon the [prison] administration; that prospective frivolous litigation has been screened out and that where the law school felt the prisoner had a good cause of action relief was granted in a great percentage of cases. A large part of the activity was disposing of long outstanding detainers lodged against the inmates. In addition, the program handles civil matters such as domestic relations problems and compensation claims. Even where there has been no tangible success, the fact that the inmate had someone on the outside listen to him and analyze his problems had a most beneficial effect. . . . We think that these

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[13] O. E. O. and Legal Services—A Symposium, 14 Catholic Law. 92–174 (1968).

[14] E. Mancuso, The Public Defender System in the State of California 5 (1959).

programs have been beneficial not only to the inmates but to the students, the staff and the courts." [15]

The difficulty with an *ad hoc* program resting on a shifting law school population is that, worthy though it be, it often cannot meet the daily prison demands.[16] In desperation, at least one State has allowed a selected inmate to act as "jailhouse" counsel for the remaining inmates.[17] The service of legal aid, public defenders, and assigned counsel has been spread too thinly to serve prisons adequately.[18] Some federal courts have begun to provide prisons with standardized habeas corpus forms, in the hope that they can be used by laymen.[19] But the prison population has not found that satisfactory.[20]

Where government fails to provide the prison with the legal counsel it demands, the prison generates its own. In a community where illiteracy and mental deficiency is notoriously high, it is not enough to ask the prisoner to be his own lawyer.[21] Without the assistance of fellow prisoners, some meritorious claims would never see the light of a courtroom. In cases

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[15] Barkin, Impact of Changing Law Upon Prison Policy, 47 Prison J. 3, 8 (1969). And see *Matter of Cornell Legal Aid Clinic*, 26 App. Div. 2d 790, 273 N. Y. S. 2d 444.

[16] Wilson, Legal Assistance Project at Leavenworth, 24 Legal Aid Briefcase 254 (1966).

[17] Note, *supra*, n. 5, at 359.

[18] Note, Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579 (1963); Note, Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems, 13 Stan. L. Rev. 522 (1961).

[19] R. Sokol, A Handbook of Federal Habeas Corpus 53–54, 192–200 (1965).

[20] Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 353 (1968).

[21] Note, *supra*, n. 5, at 348–349.

where that assistance succeeds, it speaks for itself. And even in cases where it fails, it may provide a necessary medium of expression: [22]

> "It is not unusual, then, in a subculture created by the criminal law, wherein prisoners exist as creatures of the law, that they should use the law to try to reclaim their previously enjoyed status in society. The upheavals occurring in the American social structure are reflected within the prison environment. Prisoners, having real or imagined grievances, cannot demonstrate in protest against them. The right peaceably to assemble is denied to them. The only avenue open to prisoners is taking their case to court. Prison writ-writers would compare themselves to the dissenters outside prison . . . .
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> . . . . . .
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> "Many writ-writers have said that they would be able to make positive plans for the future if they knew when their [indeterminate] sentences would end. They seem to feel that they are living in a vacuum where their fates are determined arbitrarily rather than by rule of law. One writ-writer very aptly summed up the majority's view with these words: 'When I arrived at the prison and discovered that no one, including the prison officials, knew how long my sentence was, I had to resort to fighting my case to keep my sanity.' . . . Psychologically, the writ-writer, in seeking relief from the courts, is pursuing a course of action which relieves the tensions and anxieties created by the [indeterminate] sentence system." [23]

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[22] Freund, Remarks, Symposium, Habeas Corpus—Proposals for Reform, 9 Utah L. Rev. 18, 30 (1964).

[23] Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 347–348 (1968).

In that view, which many share, the preparation of these endless petitions within the prisons is a useful form of therapy. Apart from that, their preparation must never be considered the exclusive prerogative of the lawyer. Laymen—in and out of prison—should be allowed to act as "next friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.

The cooperation and help of laymen, as well as of lawyers, is necessary if the right of "[r]easonable access to the courts" [24] is to be available to the indigents among us.

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

It is true, as the majority says, that habeas corpus is the Great Writ, and that access through it to the courts cannot be denied simply because a man is indigent or illiterate. It is also true that the illiterate or poorly educated and inexperienced indigent cannot adequately help himself and that unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief.

Having in mind these matters, which seem too clear for argument, the Court rules that unless the State provides a reasonably adequate alternative, it may not

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[24] "Reasonable access to the courts is . . . a right [secured by the Constitution and laws of the United States], being guaranteed as against state action by the due process clause of the fourteenth amendment. In so far as access by state prisoners to federal courts is concerned, this right was recognized in Ex parte Hull, 312 U. S. 546, 549. . . . The right of access by state prisoners to state courts was recognized in White v. Ragen, 324 U. S. 760, 762, n. [1]." *Hatfield* v. *Bailleaux,* 290 F. 2d 632, 636 (C. A. 9th Cir. 1961).

enforce its rule against inmates furnishing help to others in preparing post-conviction petitions. The Court does not say so in so many words, but apparently the extent of the State's duty is not to interfere with indigents seeking advice from other prisoners. It seems to me, however, that unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all. It may be that those who could help effectively refuse to do so because the indigent cannot pay, that there is actually no fellow inmate who is competent to help, or that the realities of prison life leave the indigent to the mercies of those who should not be advising others at all. In this event the problem of the incompetent needing help is only exacerbated as is the difficulty of the courts in dealing with a mounting flow of inadequate and misconceived petitions.

The majority admits that it "is indisputable" that jailhouse lawyers like petitioner "are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them." That is putting it mildly. The disciplinary problems are severe, the burden on the courts serious, and the disadvantages to prisoner clients of the jailhouse lawyer are unacceptable.

Although some jailhouse lawyers are no doubt very capable, it is not necessarily the best amateur legal minds which are devoted to jailhouse lawyering. Rather, the most aggressive and domineering personalities may predominate. And it may not be those with the best claims to relief who are served as clients, but those who are weaker and more gullible. Many assert that the aim of the jailhouse lawyer is not the service of truth and justice, but rather self-aggrandizement, profit, and power. According to prison officials, whose expertise in

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such matters should be given some consideration, the jailhouse lawyer often succeeds in establishing his own power structure, quite apart from the formal system of warden, guards, and trusties which the prison seeks to maintain. Those whom the jailhouse lawyer serves may come morally under his sway as the one hope of their release, and repay him not only with obedience but with what minor gifts and other favors are available to them. When a client refuses to pay, violence may result, in which the jailhouse lawyer may be aided by his other clients.*

It cannot be expected that the petitions which emerge from such a process will be of the highest quality. Codes of ethics, champerty, and maintenance, frequently have little meaning to the jailhouse lawyer, who solicits business as vigorously as he can. In the petition itself, outright lies may serve the jailhouse lawyer's purpose since by procuring for a prisoner client a short trip out of jail for a hearing on his contentions the petition writer's credibility with the other convicts is improved.

Habeas corpus petitions, as the majority notes, are relatively easy to prepare: they need only set out the facts giving rise to a claim for relief and the judge will apply the law, appointing a lawyer for the prisoner and giving him a hearing when appropriate. This fact does not buttress the unregulated jailhouse lawyer system, but undermines it. To the extent that it is easy to state a claim, any prisoner can do it, and need not submit to the mercies of a jailhouse lawyer. To the extent that it is difficult—

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*Krause, A Lawyer Looks at Writ-Writing, 56 Calif. L. Rev. 371 (1968); Spector, A Prison Librarian Looks at Writ-Writing, 56 Calif. L. Rev. 365 (1968); Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L. J. 343, 345–347; Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514, 520–522; Note, Prisoner Assistance on Federal Habeas Corpus Petitions, 19 Stan. L. Rev. 887, 891, n. 31 (1967).

and it is necessary to understand what one's rights are before it is possible to set out in a petition the facts which support them—there may be no fellow prisoner adequate to the task. There are some well informed and articulate prisoners and some (not necessarily the same) who give advice and aid out of altruism. When the two qualities are combined in one man, as they sometimes are, he can be a perfectly adequate source of help. But the jails are not characteristically populated with the intelligent or the benign, and capable altruists must be rare indeed. On the other hand, some jailhouse clients are illiterate; and whether illiterate or not, there are others who are unable to prepare their own petitions. They need help, but I doubt that the problem of the indigent convict will be solved by subjecting him to the false hopes, dominance, and inept representation of the average unsupervised jailhouse lawyer.

I cannot say, therefore, that petitioner Johnson, who is a convicted rapist serving a life sentence and whose prison conduct the State has wide discretion in regulating, cannot be disciplined for violating a prison rule against aiding other prisoners in seeking post-conviction relief, particularly when there is no showing that any prisoner in the Tennessee State Penitentiary has been denied access to the courts, that Johnson has confined his services to those who need it, or that Johnson is himself competent to give the advice which he offers. No prisoner testified that Johnson was the only person available who would write out a writ for him or that guards or other prison functionaries would not furnish the necessary help. And it is really the prisoner client's rights, not the jailhouse lawyer's, which are most in need of protection.

If the problem of the indigent and ignorant convict in seeking post-conviction relief is substantial, which I think it is, the better course is not in effect to sanction

and encourage spontaneous jailhouse lawyer systems but to decide the matter directly in the case of a man who himself needs help and in that case to rule that the State must provide access to the courts by ensuring that those who cannot help themselves have reasonably adequate assistance in preparing their post-conviction papers. Ideally, perhaps professional help should be furnished and prisoners encouraged to seek it so that any possible claims receive early and complete examination. But I am inclined to agree with MR. JUSTICE DOUGLAS that it is neither practical nor necessary to require the help of lawyers. As the opinions in this case indicate, the alternatives are various and the burden on the States would not be impossible to discharge. This requirement might even be met by the establishment of a system of regulated trusties of the prison who would advise prisoners of their legal rights. Selection of the jailhouse lawyers by the prison officials for scholarship and character might assure that the inmate client received advice which would actually help him, and regulation of the "practice" by the authorities would reduce the likelihood of coerced fees or blackmail. The same legislative judgment which should be sustained in concluding that the evils of jailhouse lawyering justify its proscription might also support a legislative conclusion that jailhouse lawyering under carefully controlled conditions satisfies the prisoner's constitutional right to help.

Regretfully, therefore, I dissent.

TINKER ET AL. *v.* DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT ET AL.

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

No. 21. Argued November 12, 1968.—Decided February 24, 1969.

Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the Government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting *en banc*, affirmed by an equally divided court. *Held:*

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Pp. 505–506.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment. Pp. 506–507.

3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments. Pp. 507–514.

383 F. 2d 988, reversed and remanded.

Dan L. Johnston argued the cause for petitioners. With him on the brief were *Melvin L. Wulf* and *David N. Ellenhorn.*

Allan A. Herrick argued the cause for respondents. With him on the brief were *Herschel G. Langdon* and *David W. Belin.*

Charles Morgan, Jr., filed a brief for the United States National Student Association, as *amicus curiae,* urging reversal.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It up-

held the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F. Supp. 971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside* v. *Byars,* 363 F. 2d 744, 749 (1966).[1]

On appeal, the Court of Appeals for the Eighth Circuit considered the case *en banc.* The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion. 383 F. 2d 988 (1967). We granted certiorari. 390 U. S. 942 (1968).

I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *Stromberg* v. *California,* 283 U. S. 359 (1931). Cf. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Brown* v. *Louisiana,* 383 U. S. 131 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech"

[1] In *Burnside,* the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." It is instructive that in *Blackwell* v. *Issaquena County Board of Education,* 363 F. 2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them and created much disturbance.

which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), and *Bartels* v. *Iowa,* 262 U. S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.[2] See also *Pierce* v. *Society of Sisters,* 268

[2] *Hamilton* v. *Regents of Univ. of Cal.,* 293 U. S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military "science" could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, *e. g., West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (C. A. 5th Cir. 1961); *Knight* v. *State Board of Education,* 200 F. Supp. 174 (D. C. M. D. Tenn. 1961); *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (D. C. M. D. Ala. 1967). See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Note, Academic Freedom, 81 Harv. L. Rev. 1045 (1968).

U. S. 510 (1925); *West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Wieman* v. *Updegraff,* 344 U. S. 183, 195 (1952) (concurring opinion); *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957); *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Engel* v. *Vitale,* 370 U. S. 421 (1962); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967); *Epperson* v. *Arkansas, ante,* p. 97 (1968).

In *West Virginia* v. *Barnette, supra,* this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U. S., at 637.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See *Epperson* v. *Arkansas, supra,* at 104; *Meyer* v. *Nebraska, supra,* at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of cloth-

ing, to hair style, or deportment. Cf. *Ferrell* v. *Dallas Independent School District,* 392 F. 2d 697 (1968); *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is

the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside* v. *Byars, supra,* at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.[3]

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[3] The only suggestions of fear of disorder in the report are these:

"A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control."

"Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed."

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and if the students "didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools."

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.[4] It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.[5])

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement

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[4] The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that "[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D. C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views." 258 F. Supp., at 972–973.

[5] After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that "we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."

in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." *Burnside* v. *Byars, supra,* at 749.

In *Meyer* v. *Nebraska, supra,* at 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a

> State without doing violence to both letter and spirit of the Constitution."

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603, MR. JUSTICE BRENNAN, speaking for the Court, said:

> " 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker,* [364 U. S. 479,] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.[6] This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on

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[6] In *Hammond* v. *South Carolina State College,* 272 F. Supp. 947 (D. C. S. C. 1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Brown* v. *Louisiana,* 383 U. S. 131 (1966).

the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside* v. *Byars, supra,* at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. *Blackwell* v. *Issaquena County Board of Education,* 363 F. 2d 749 (C. A. 5th Cir. 1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. *Ham-*

mond v. *South Carolina State College,* 272 F. Supp. 947 (D. C. S. C. 1967) (orderly protest meeting on state college campus); *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (D. C. M. D. Ala. 1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I

cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg* v. *New York,* 390 U. S. 629. I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.,* at 649–650 (concurring in result). Cf. *Prince* v. *Massachusetts,* 321 U. S. 158.

MR. JUSTICE WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside* v. *Byars,* 363 F. 2d 744, 748 (C. A. 5th Cir. 1966), a case relied upon by the Court in the matter now before us.

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court.[1] The Court brought

[1] The petition for certiorari here presented this single question: "Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum."

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this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to 'pure speech' " and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school func-

tions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., *e. g., Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstra-

tion." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.[2]

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F. Supp. 971. Holding that the protest was akin to speech, which is protected by the First

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[2] The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A–2, col. 1:

"BELLINGHAM, Mass. (AP)—Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election.

" 'I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that if he is elected any legal contract entered into by the park commissioner would be void because he is a juvenile.'

"Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record."

and Fourteenth Amendments, that court held that the school order was "reasonable" and hence constitutional. There was at one time a line of cases holding "reasonableness" as the court saw it to be the test of a "due process" violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), and *Bartels* v. *Iowa,* 262 U. S. 404 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the "reasonableness" constitutional test dead on the battlefield, so much so that this Court in *Ferguson* v. *Skrupa,* 372 U. S. 726, 729, 730, after a thorough review of the old cases, was able to conclude in 1963:

> "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.
>
> . . . . . .
>
> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."

The *Ferguson* case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience" or that they are

"unreasonable," "arbitrary," "irrational," "contrary to fundamental 'decency,' " or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept. Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. *West Virginia* v. *Barnette,* 319 U. S. 624, clearly rejecting the "reasonableness" test, held that the Fourteenth Amendment made the First applicable to the States, and that the two forbade a State to *compel* little schoolchildren to salute the United States flag when they had religious scruples against doing so.[3] Neither *Thornhill* v. *Alabama,* 310 U. S. 88; *Stromberg* v. *California,* 283 U. S. 359; *Edwards*

[3] In *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940), this Court said:

"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

v. *South Carolina,* 372 U. S. 229; nor *Brown* v. *Louisiana,* 383 U. S. 131, related to schoolchildren at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and *Thornhill, Edwards,* and *Brown* relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. *Cox* v. *Louisiana,* 379 U. S. 536, 555, and *Adderley* v. *Florida,* 385 U. S. 39, cited by the Court as a "compare," indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the *Meyer* and *Bartels* "reasonableness-due process-McReynolds" constitutional test.

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable" and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it or in legal jargon that it "shocked the Court's conscience," "offended its sense of justice," or was "contrary to fundamental concepts of the English-speaking world," as the Court has sometimes said. See, *e. g., Rochin* v. *California,* 342 U. S. 165, and *Irvine* v. *California,* 347 U. S. 128. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of

speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, *e. g.*, *Cox* v. *Louisiana,* 379 U. S. 536, 555; *Adderley* v. *Florida,* 385 U. S. 39.

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in *Meyer* v. *Nebraska, supra,* certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

The true principles on this whole subject were in my judgment spoken by Mr. Justice McKenna for the Court in *Waugh* v. *Mississippi University* in 237 U. S. 589, 596–597. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's

freedom of assembly clause. The law was attacked as violative of due process and of the privileges and immunities clause and as a deprivation of property and of liberty, under the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and order. This Court rejected all the "fervid" pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments. The Court in its next to the last paragraph made this statement which has complete relevance for us today:

> "It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that *membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions.* It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity." (Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by "sym-

bolic" speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war "distracted from that singleness of purpose which the State [here Iowa] desired to exist in its public educational institutions." Here the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and sum-

marily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school

systems [4] in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

MR. JUSTICE HARLAN, dissenting.

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

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[4] Statistical Abstract of the United States (1968), Table No. 578, p. 406.

SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON *v.* KELEMEN ET AL.

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

No. 91. Decided February 24, 1969.

Certiorari granted; vacated and remanded.

Bernard R. Roetzel and *Bernard J. Roetzel* for petitioner.

Frederick H. Gillen and *Don R. Miller* for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted, judgment is vacated, and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, ante,* p. 440.

CORDREY *v.* CORDREY.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 859. Decided February 24, 1969.

Appeal dismissed and certiorari denied.

Robert Scott Kaufman for appellant.

William H. Allen and *John E. Vanderstar* 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.

MARYLAND & VIRGINIA ELDERSHIP OF THE CHURCHES OF GOD ET AL. *v.* CHURCH OF GOD AT SHARPSBURG, INC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 357. Decided February 24, 1969.

249 Md. 650, 241 A. 2d 691, vacated and remanded.

James H. Booser, Alfred L. Scanlan, and *Martin J. Flynn* for appellants.

Leo Pfeffer for the General Eldership of the Churches of God in North America, as *amicus curiae,* in support of appellants.

PER CURIAM.

The judgment is vacated and the case is remanded to the Court of Appeals of Maryland for further consideration in light of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, ante,* p. 440.

BECKER *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 431. Decided February 24, 1969.

Appeal dismissed and certiorari denied.

Garland M. Layton for appellant.

Andre Evans and *Joseph L. Lyle, Jr.,* for appellee.

PER CURIAM.

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

MORGAN ET AL. *v.* BOARD OF FORESTRY OF OREGON ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 632. Decided February 24, 1969.

250 Ore. 460, 443 P. 2d 236, appeal dismissed and certiorari denied.

Ervin W. Potter for appellants.

Robert Y. Thornton, Attorney General of Oregon, and *Thomas C. Stacer,* Assistant Attorney General, for appellees.

PER CURIAM.

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

FORAN *v.* WEINHOFF ET AL.

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

No. 870. Decided February 24, 1969.

291 F. Supp. 498, appeal dismissed.

Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander, and *Robert V. Zener* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

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

BAKER NATIONAL BANK *v.* HENDERSON, ADMINISTRATRIX.

APPEAL FROM THE SUPREME COURT OF MONTANA.

No. 883. Decided February 24, 1969.

151 Mont. 526, 445 P. 2d 574, appeal dismissed.

Thomas E. Towe for appellant.

PER CURIAM.

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

MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

ACCIDENT INDEX BUREAU, INC., ET AL. *v.* MALE, COMMISSIONER, DEPARTMENT OF LABOR & INDUSTRY, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 889. Decided February 24, 1969.

51 N. J. 107, 237 A. 2d 880, appeal dismissed.

Edward B. Meredith for appellants.

PER CURIAM.

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

KOHLER ET AL. *v.* TUGWELL, TREASURER OF LOUISIANA, ET AL.

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

No. 933. Decided February 24, 1969.

292 F. Supp. 978, affirmed.

Donald V. Organ for appellants.

Dorothy Wolbrette and *William P. Curry,* Assistant Attorneys General of Louisiana, for appellees.

PER CURIAM.

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

MEEKS *v.* FLOURNEY, SHERIFF, ET AL.

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

No. 81, Misc. Decided February 24, 1969.

Certiorari granted; vacated and remanded.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers, Lonny F. Zwiener,* and *Gilbert J. Pena,* Assistant Attorneys General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Texas for further consideration in light of *Smith* v. *Hooey, ante,* p. 374.

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McCRORY *v.* MISSISSIPPI.

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

No. 153, Misc. Decided February 24, 1969.

Certiorari granted; vacated and remanded.

W. S. Moore for petitioner.

Joe T. Patterson, Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Mississippi for further consideration in light of *Smith* v. *Hooey, ante,* p. 374.

BUSH *v.* UNITED STATES.

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

No. 857, Misc. Decided February 24, 1969.

Appeal dismissed.

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

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

DUNCAN *v.* INDIANA.

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

No. 110, Misc. Decided February 24, 1969.

Certiorari granted; vacated and remanded.

John J. Dillon, Attorney General of Indiana, and *Richard V. Bennett,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Indiana for further consideration in light of *Smith* v. *Hooey, ante,* p. 374.

TRIPLETT *v.* FLOYD CIRCUIT COURT ET AL.

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

No. 57, Misc. Decided February 24, 1969.

Certiorari granted; vacated and remanded.

John J. Dillon, Attorney General of Indiana, and *Richard V. Bennett,* Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Indiana for further consideration in light of *Smith* v. *Hooey, ante,* p. 374.

SERTA ASSOCIATES, INC. *v.* UNITED STATES.

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

No. 878. Decided February 24, 1969.

Affirmed.

Sigmund Timberg, Lionel G. Gross, and *David V. Kahn* for appellant.

Solicitor General Griswold, Acting Assistant Attorney General Hammond, and *William R. Weissman* for the United States.

PER CURIAM.

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

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

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

NATIONAL INDUSTRIAL TRAFFIC LEAGUE ET AL. *v.* UNITED STATES ET AL.

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

No. 898. Decided February 24, 1969.

287 F. Supp. 129, affirmed.

John F. Donelan, John M. Cleary, Arthur A. Arsham, and *John J. C. Martin* for appellants.

Solicitor General Griswold, Acting Assistant Attorney General Hammond, Howard E. Shapiro, Robert W. Ginnane, and *Raymond M. Zimmet* for the United States et al., *LeGrand A. Carlston, Z. L. Pearson, Jr.,* and *Bryce Rea, Jr.,* for Rocky Mountain Motor Tariff Bureau, Inc., and *Mr. Rea* for Pacific Inland Tariff Bureau, Inc., appellees.

PER CURIAM.

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

NEW YORK CENTRAL RAILROAD CO. ET AL. *v.* LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 914. Decided February 24, 1969.

23 N. Y. 2d 1, 241 N. E. 2d 730, appeal dismissed.

John A. Wells, Gerald E. Dwyer, and *Victor F. Condello* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *pro se, Ruth Kessler Toch,* Solicitor General, and *Joseph A. Romano,* Assistant Attorney General, for appellee Lefkowitz, and *Thomas A. Shaw, Jr.,* and *Harold C. Heiss* for appellees Brotherhood of Locomotive Firemen & Enginemen et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

DUNBAR-STANLEY STUDIOS, INC. *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 376. Argued January 16, 1969.—Decided February 25, 1969.

Appellant, a photography firm incorporated and having its principal office and its processing plant in North Carolina, was under contract with the J. C. Penney Co. to send appellant's photographers (nonresidents of Alabama) to the Penney stores in eight cities in Alabama for a few days several times a year to photograph children. Each store advertised the service, took orders, provided studio space, arranged for sittings, collected the money, and delivered the pictures. Appellant, which received a percentage of the receipts, took the pictures, processed them in North Carolina, and mailed the photographs to the Penney stores. Alabama imposes a license tax on a photographer for each county, town, or city where he operates. In the case of a photographer or a gallery "at a fixed location" the maximum tax is $25 per year in the largest cities. The tax is $5 per week for a transient photographer. Appellant sought declaratory relief in the Alabama courts, alleging that the Commerce Clause of the Constitution barred imposition of the transient photographer's tax on its activities. The lower court upheld the tax and the Alabama Supreme Court affirmed. *Held:*

1. Appellant was engaged in the essentially local activity of taking pictures. Appellant could constitutionally be made subject to local taxation for engaging in that local activity. Pp. 539–541.

2. Alabama's tax does not discriminate against interstate commerce, since it is levied equally on interstate and intrastate transient photographers and on the record here the tax on out-of-state photographers is not so disproportionate to the tax on fixed-location photographers as to come within the condemnation of the Constitution. P. 542.

282 Ala. 221, 210 So. 2d 696, affirmed.

J. Edward Thornton argued the cause for appellant. With him on the briefs was *Glen B. Hardymon.*

William H. Burton, Assistant Attorney General of Alabama, argued the cause for appellee. With him on the brief were *MacDonald Gallion,* Attorney General, and *Willard W. Livingston,* Assistant Attorney General.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Alabama levies a tax upon photograph galleries and persons engaged in photography. If the business is conducted "at a fixed location," the tax in the large cities [1] is $25 a year for each such location. For each "transient or traveling photographer," the tax is $5 per week for each county, town, or city in which he plies his trade.[2]

This case involves state assessments of the transient photographers tax against appellant and its predecessor partnership.[3] Appellant sought a declaration from the state courts that the assessment was improper, claiming that the tax was levied upon interstate commerce, in conflict with the Commerce Clause of the Constitution. The Supreme Court of Alabama sustained the tax. 282 Ala. 221, 210 So. 2d 696 (1968). We affirm.

Appellant is a photography firm specializing in selling photographs of children. It is organized as a North Carolina corporation and its principal office and process-

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[1] For smaller towns, the rate is stepped down. The lowest rate is $3 a year for localities with fewer than 1,000 inhabitants.

[2] Title 51, Code of Alabama § 569, prior to its amendment in 1967, read as follows:

"Photographers and photograph galleries. Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, twenty-five dollars; in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants, fifteen dollars; in cities and towns of less than forty thousand and not less than seven thousand inhabitants, ten dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, five dollars; in all other places whether incorporated or not, three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, five dollars per week."

[3] No point has been made as to the identity of the taxpayer or its liability for the tax if it may be constitutionally levied.

ing plant are in Charlotte, North Carolina. It has no office or place of business in Alabama, nor does it maintain an inventory there. Its activities in that State stem from a contract between appellant and J. C. Penney Co. Penney operates department stores in eight cities in Alabama, as well as elsewhere in the Nation. By the terms of the contract, as summarized in the complaint, appellant's photographers, nonresidents of Alabama, "were at the disposal of the local Penney stores. The local store manager requested Appellant to send representatives for picture taking on specified dates." During the period for which the tax has been assessed, appellant's photographers were sent to J. C. Penney stores in eight Alabama cities. According to the complaint, each visit lasted two to five days, and each city was visited from one to five times a year.

The Penney stores advertised the photographic service, inviting parents to bring their children to be photographed during the visit by appellant's photographer. Each store took the order for the photographs, arranged the time for the sitting, provided a place in the store for the temporary studio, collected the money, and delivered the pictures to the customer when completed. Appellant was paid a percentage of the receipts from the Penney stores.

Appellant's activities were limited to taking the pictures, transmitting the exposed film to its office in North Carolina where it was developed, printed, and finished, and mailing the finished prints to the Penney stores in Alabama.

It is clear from the taxing statute itself and from the decisions of the Supreme Court of Alabama that the tax is laid upon the distinctive business of the photographer, not upon the soliciting of orders or the processing of film. *Graves* v. *State,* 258 Ala. 359, 62 So. 2d 446 (1952); *Haden* v. *Olan Mills, Inc.,* 273 Ala. 129, 135 So. 2d 388

(1961). Appellant argues that since each of its photographers came into Alabama from North Carolina to ply his trade, bringing his equipment with him, and since he merely exposed his film in Alabama, the developing, printing, and finishing operation being conducted in North Carolina, his activities in Alabama are an inseparable part of interstate commerce and cannot constitutionally be subject to the Alabama license tax. Appellant relies upon familiar cases decided by this Court holding that the Commerce Clause precludes a state-imposed flat sum privilege tax on an interstate enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State. *West Point Wholesale Grocery Co.* v. *Opelika,* 354 U. S. 390 (1957); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389 (1952); *Nippert* v. *City of Richmond,* 327 U. S. 416 (1946). Such taxes have a substantial inhibitory effect on commerce which is essentially interstate.

But these cases are not applicable to the present facts. In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the nominal subject of the tax is "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 166 (1954). If, for example, a license tax were imposed on the acts of engaging in soliciting orders or making deliveries, conflict with the Commerce Clause would be evident because these are minimal activities within a State without which there can be no interstate commerce. But in the present case, the "taxable event," as defined by the State's courts, is "pursu[ing] the art of photography in Alabama." *Graves* v. *State,* 258 Ala. 359, 362, 62 So. 2d 446, 448. When appellant's photographers set up their equipment

in the local stores, posed the children brought to them to be photographed, and operated their cameras, they were engaged in an essentially local activity: the business of providing photographers' services. The essentially local character of the activity is emphasized by the intimate connection between appellant's photographers and the local stores in which they set up their temporary studios. Engaging in such local business may constitutionally be made subject to local taxation. *E. g., Alaska* v. *Arctic Maid,* 366 U. S. 199 (1961).

It could hardly be suggested that if J. C. Penney had set up its own resident or transient photography studios, using its own employees, such a photography business would have been exempt from state licensing merely because it chose to send the exposed film out of the State for processing. The extraction of a natural resource within a State is not immunized from state taxation merely because, once extracted, the product will immediately be shipped out of the State for processing and sale to consumers. *Alaska* v. *Arctic Maid, supra,* at 203–204; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, 177–179 (1923). Cf. *Toomer* v. *Witsell,* 334 U. S. 385, 394–395 (1948). *A fortiori,* the fact that an intermediate processing stage takes place outside the State before the pictures are returned to the State for final delivery does not make the taking of the pictures—the activity on which the tax was imposed—so inseparable a part of the flow of interstate commerce as to be immune from state license taxation. The mere substitution for J. C. Penney's own employees of a transient photographer who comes into Alabama from North Carolina does not convert the essentially local activity of photographing the subjects into an interstate activity immune from the state privilege tax. Cf. *Caskey Baking Co.* v. *Virginia,* 313 U. S. 117 (1941); *Wagner* v. *City of Covington,* 251 U. S. 95 (1919).

Nor is the tax invalid as a discrimination against interstate commerce. Alabama's tax is levied equally upon all transient or traveling photographers whether their travel is interstate or entirely within the State. On the record before us, there is no basis for concluding that the $5 per week tax on transient out-of-state photographers is so disproportionate to the tax imposed on photographers with a fixed location [4] as to bear unfairly on the former. Cf. *West Point Wholesale Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957); *Best & Co.* v. *Maxwell*, 311 U. S. 454 (1940). In none of the cities for which appellant's complaint gives the details of its activities would the transient tax imposed on it have exceeded that which a fixed-location photographer would have had to pay to operate in the city.[5] For example, in 1965, five visits are listed to Mobile, resulting in an assessed tax of $25. This is equal to the flat rate tax which a photographer permanently located in the city would have had to pay. Since, according to the complaint, the maximum tax on appellant in any year for any city would be $25,[6] the burden could hardly be prohibitive.

Affirmed.

MR. JUSTICE WHITE, concurring.

Alabama taxes its transient photographers on a different, and often more burdensome, basis than those not

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[4] See n. 1, *supra*.

[5] Appellant asserts in its brief—but not in the complaint—that the taxes assessed for its operations in Birmingham were almost twice what a fixed-location photographer would have had to pay for the same period. Even assuming that to be true, we are not prepared to say that this relative burden is improper, given the differences between the two ways of carrying on the business.

[6] Allegedly, there were up to five visits per year to each city, each visit extending from two to five days. The tax rate for a transient photographer was $5 for each week of operation in a locality.

in that category. If firms operating precisely as appellant does, and mailing their film to a central point within the State for development, are taxed as transient photographers then there is no unconstitutional discrimination against interstate commerce. But if appellant is taxed as a transient photographer because its films are sent for development across a state line, then there is discrimination against interstate commerce. Although appellant contends that it is because of the interstate shipment of films that the transient tax was applied, and although the decision in *Haden* v. *Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961), arguably supports that view, I do not think that a sufficient showing has been made in this record that Alabama has so applied its tax. Since the burden of proof is on the appellant here, I join the Court despite the uncertainty of the record on this score.

ALLEN ET AL. *v.* STATE BOARD OF ELECTIONS ET AL.

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

No. 3. Argued October 15, 1968.—Decided March 3, 1969.*

Pursuant to § 4 (b) of the Voting Rights Act of 1965 the provisions of § 4 (a), suspending all "tests or devices" for five years, were made applicable to certain States, including Mississippi and Virginia. As a result, those States were prohibited by § 5 from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting the change to the U. S. Attorney General and obtaining his consent or securing a favorable declaratory judgment from the District Court for the District of Columbia. In Nos. 25, 26, and 36, appellants sought declaratory judgments in the District Court for the Southern District of Mississippi that certain amendments to the Mississippi Code were subject to the provisions of § 5 and thus not enforceable until the State complied with the approval requirements. In No. 25 the amendment provided for at-large election of county supervisors instead of election by districts. In No. 26 the amendment eliminated the option of electing or appointing superintendents of education in 11 counties and provided that they shall be appointed. The amendment in No. 36 changed the requirements for independent candidates running in general elections. In all three cases the three-judge District Court ruled that the amendments did not come within the purview of § 5 and dismissed the complaints. No. 3 concerned a bulletin issued by the Virginia Board of Elections instructing election judges to assist qualified, illiterate voters who request assistance in marking ballots. Appellants sought a declaratory judgment in the District Court for the Eastern District of

*Together with No. 25, *Fairley et al.* v. *Patterson, Attorney General of Mississippi, et al.*, No. 26, *Bunton et al.* v. *Patterson, Attorney General of Mississippi, et al.*, and No. 36, *Whitley et al.* v. *Williams, Governor of Mississippi, et al.*, on appeal from the United States District Court for the Southern District of Mississippi, argued on October 16, 1968.

Virginia that the statute providing for handwritten write-in votes and the modifying bulletin violated the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act. In the 1966 election appellants attempted to use labels for write-in candidates, but the election officials refused to count appellants' ballots. Appellants sought only prospective relief, as the election outcome would not have been changed if the ballots had been counted. In the District Court they did not argue that § 5 precluded enforcement of the procedure set out in the bulletin but that § 4 suspended the write-in requirement. The three-judge court dismissed the complaint. *Held:*

1. Since the Virginia legislation was generally attacked as inconsistent with the Voting Rights Act, and there is no factual dispute, the Court may, in the interests of judicial economy, determine the applicability in No. 3 of § 5 of the Act, even though that section was not argued below. P. 554.

2. Private litigants may invoke the jurisdiction of the district courts to obtain relief under § 5, to insure the Act's guarantee that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to that section. Pp. 554–557.

3. The restriction of § 14 (b) of the Act, which provides that "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this subchapter," does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to § 5's approval requirements, and these actions may be brought in the local district courts. Pp. 557–560.

4. In light of the extraordinary nature of the Act and its effect on federal-state relationships, and the unique approval requirements of § 5, which also provides that "[a]ny action under this section shall be heard and determined by a court of three judges," disputes involving the coverage of § 5 should be determined by three-judge courts. Pp. 560–563.

5. The state statutes involved in these cases are subject to the approval requirements of § 5. Pp. 563–571.

(a) The Act, which gives a broad interpretation to the right to vote and recognizes that voting includes "all action necessary

to make a vote effective," was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of race. Pp. 565–566.

(b) The legislative history lends support to the view that Congress intended to reach any enactment which altered the election law of a covered State in even a minor way. Pp. 566–569.

(c) There is no direct conflict between the Court's interpretation of this Act and the principles established by the reapportionment cases, and consideration of any possible conflict should await a concrete case. P. 569.

(d) The enactment in each of these cases constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5. Pp. 569–571.

6. The Act requires that the State must in some unambiguous and recordable manner submit any legislation or regulation to the Attorney General with a request for his consideration pursuant to the Act, and there is no "submission" when the Attorney General merely becomes aware of the legislation or when briefs are served on him. P. 571.

7. In view of the complexity of these issues of first impression, the lack of deliberate defiance of the Act resulting from the States' failure to submit the enactments for approval, and the fact that the discriminatory purpose or effect of these statutes, if any, has not been judicially determined, this decision has prospective effect only. The States remain subject to the continuing strictures of § 5 until they obtain from the District Court for the District of Columbia a declaratory judgment that for at least five years they have not used the "tests or devices" proscribed by § 4. Pp. 571–572.

No. 3, 268 F. Supp. 218, vacated and remanded. No. 25, 282 F. Supp. 164; No. 26, 281 F. Supp. 918; and No. 36, each reversed and remanded.

Norman C. Amaker argued the cause for appellants in No. 3. With him on the brief were *Jack Greenberg, James M. Nabrit III, Oliver W. Hill, S. W. Tucker, Henry L. Marsh III,* and *Anthony G. Amsterdam. Armand Derfner* and *Elliott C. Lichtman* argued the cause for appellants in Nos. 25, 26, and 36. *Lawrence*

Aschenbrenner was on the brief for appellants in Nos. 25 and 26. With *Mr. Derfner* on the brief for appellants in No. 36 were *Alvin J. Bronstein* and *Richard B. Sobol.*

R. D. McIlwaine III, First Assistant Attorney General of Virginia, argued the cause for appellees in No. 3. With him on the brief were *Robert Y. Button,* Attorney General, *William R. Blandford,* and *William C. Carter. William A. Allain* and *Will S. Wells,* Assistant Attorneys General of Mississippi, argued the cause for appellees in Nos. 25, 26, and 36. With *Mr. Allain* on the brief for appellees in No. 25 were *Joe T. Patterson,* Attorney General, and *Dudley W. Conner.* With *Mr. Wells* on the briefs for appellees in Nos. 26 and 36 was *Mr. Patterson.*

Assistant Attorney General Pollak argued the cause for the United States, as *amicus curiae,* urging reversal in Nos. 25, 26, and 36. With him on the brief were *Solicitor General Griswold, Louis F. Claiborne, Francis X. Beytagh, Jr.,* and *Nathan Lewin.*

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

These four cases, three from Mississippi and one from Virginia, involve the application of the Voting Rights Act of 1965 [1] to state election laws and regulations. The Mississippi cases were consolidated on appeal and argued together in this Court. Because of the grounds on which we decide all four cases, the appeal in the Virginia case is also disposed of by this opinion.[2]

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[1] 79 Stat. 437, 42 U. S. C. § 1973 *et seq.* (1964 ed., Supp. I).

[2] In all four cases a three-judge court was convened. Nos. 25, 26, and 36 are direct appeals from the United States District Court for the Southern District of Mississippi. No. 3 is a direct appeal from the United States District Court for the Eastern District of Virginia.

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In *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), we held the provisions of the Act involved in these cases to be constitutional. These cases merely require us to determine whether the various state enactments involved are subject to the requirements of the Act.

We gave detailed treatment to the history and purposes of the Voting Rights Act in *South Carolina* v. *Katzenbach, supra.* Briefly, the Act implemented Congress' firm intention to rid the country of racial discrimination in voting. It provided stringent new remedies against those practices which have most frequently denied citizens the right to vote on the basis of their race. Thus, in States covered by the Act,[3] literacy tests and similar voting qualifications were suspended for a period of five years from the last occurrence of substantial voting discrimination. However, Congress apparently feared that the mere suspension of existing tests would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect.[4] Not underestimating the ingenuity of those bent on preventing Negroes from voting, Congress therefore enacted § 5, the focal point of these cases.

Under § 5, if a State covered by the Act passes any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," no person can be deprived of his right to vote "for failure to comply with" the new enactment "unless and until" the State seeks and receives a declaratory judgment in the United States District Court for the District of

[3] Both States involved in these cases have been determined to be covered by the Act. 30 Fed. Reg. 9897 (August 6, 1965).

[4] See H. R. Rep. No. 439, 89th Cong., 1st Sess., 10–11; S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 8, 12.

Columbia that the new enactment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. I). See Appendix, *infra.*

However, § 5 does not necessitate that a covered State obtain a declaratory judgment action before it can enforce any change in its election laws. It provides that a State may enforce a new enactment if the State submits the new provision to the Attorney General of the United States and, within 60 days of the submission, the Attorney General does not formally object to the new statute or regulation. The Attorney General does not act as a court in approving or disapproving the state legislation. If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia. Also, the State is not required to first submit the new enactment to the Attorney General as it may go directly to the District Court for the District of Columbia. The provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable.[5] Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional

[5] At the oral argument in the Mississippi cases, Assistant Attorney General Pollak stated that the Department of Justice had received 251 submissions from the States under § 5. He further stated that the Department withheld consent in only one case, and that was where the change was contrary to a prior court decision on the same issue. He said that in two other instances the State inadvertently incorporated by reference another section of state law that contained a prohibited test or device. Transcript of Argument 63.

suits attacking its constitutionality; there is no further remedy provided by § 5.

In these four cases, the States have passed new laws or issued new regulations. The central issue is whether these provisions fall within the prohibition of § 5 that prevents the enforcement of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless the State first complies with one of the section's approval procedures.

No. 25, *Fairley* v. *Patterson,* involves a 1966 amendment to § 2870 of the Mississippi Code of 1942.[6] The amendment provides that the board of supervisors of each county may adopt an order providing that board members be elected at large by all qualified electors of the county. Prior to the 1966 amendment, all counties by law were divided into five districts; each district elected one member of the board of supervisors. After the amendment, Adams and Forrest Counties adopted the authorized orders, specifying that each candidate must run at large, but also requiring that each candidate be a resident of the county district he seeks to represent.

The appellants are qualified electors and potential candidates in the two counties. They sought a declaratory judgment in the United States District Court for the Southern District of Mississippi that the amendment to § 2870 was subject to the provisions of § 5 of the Act and hence could not be enforced until the State complied with the approval requirements of § 5.[7]

No. 26, *Bunton* v. *Patterson,* concerns a 1966 amendment to § 6271–08 of the Mississippi Code.[8] The amend-

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[6] See Appendix, *infra.*

[7] In all three cases from Mississippi the original complaint contained other grounds for relief; however, before hearing in the District Court, the parties stipulated that the only issue for decision was whether § 5 applied.

[8] See Appendix, *infra.*

ment provides that in 11 specified counties, the county superintendent of education shall be appointed by the board of education. Before the enactment of this amendment, all these counties had the option of electing or appointing the superintendent. Appellants are qualified electors and potential candidates for the position of county superintendent of education in three of the counties covered by the 1966 amendment. They sought a declaratory judgment that the amendment was subject to § 5, and thus unenforceable unless the State complied with the § 5 approval requirements.

No. 36, *Whitley* v. *Williams*, involves a 1966 amendment to § 3260 of the Mississippi Code, which changed the requirements for independent candidates running in general elections.[9] The amendment makes four revisions: (1) it establishes a new rule that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election; (2) the time for filing a petition as an independent candidate is changed to 60 days before the primary election from the previous 40 days before the general election; (3) the number of signatures of qualified electors needed for the independent qualifying petition is increased substantially; and (4) a new provision is added that each qualified elector who signs the independent qualifying petition must personally sign the petition and must include his polling precinct and county. Appellants are potential candidates whose nominating petitions for independent listing on the ballot were rejected for failure to comply with one or more of the amended provisions.[10]

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[9] See Appendix, *infra*.

[10] The suit was first brought in 1966. Pending a decision on the merits, a three-judge District Court ordered appellants placed on the 1966 general election ballot. *Whitley* v. *Johnson*, 260 F. Supp. 630 (D. C. S. D. Miss. 1966). Later, other members of the class

In all three of these cases, the three-judge District Court ruled that the amendments to the Mississippi Code did not come within the purview of and are not covered by § 5, and dismissed the complaints.[11] Appellants brought direct appeals to this Court.[12] We consolidated the cases and postponed consideration of jurisdiction to a hearing on the merits. 392 U. S. 902 (1968).

No. 3, *Allen* v. *State Board of Elections*, concerns a bulletin issued by the Virginia Board of Elections to all election judges. The bulletin was an attempt to modify the provisions of § 24–252 of the Code of Virginia of 1950 which provides, *inter alia*, that "any voter [may] place on the official ballot the name of any person *in his own handwriting* . . . ." [13] The Virginia Code (§ 24–251) further provides that voters with a physical incapacity may be assisted in preparing their ballots. For example, one who is blind may be aided in the preparation of his ballot by a person of his choice. Those unable to mark their ballots due to any other physical disability may be assisted by one of the election judges. However, no statutory provision is made for assistance to those who wish to write in a name, but who are unable to do so because of illiteracy. When Virginia was brought under the coverage of the Voting Rights Act of 1965, Virginia election officials apparently thought that the provision in § 24–252, requiring a voter to cast a write-in vote in the voter's own handwriting, was incompatible with the provisions of § 4 (a) of the Act suspending the

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which appellants represent were denied places on the ballot for the 1967 general election for failing to comply with the amendment's requirements.

[11] No. 25, 282 F. Supp. 164, 165 (D. C. S. D. Miss. 1967); No. 26, 281 F. Supp. 918 (D. C. S. D. Miss. 1967).

[12] Appellants assert that this Court has jurisdiction on direct appeal under 28 U. S. C. § 1253 and 42 U. S. C. § 1973c (1964 ed., Supp. I).

[13] Emphasis added. See Appendix, *infra*.

enforcement of any test or device as a prerequisite to voting.[14] Therefore, the Board of Elections issued a bulletin to all election judges, instructing that the election judge could aid any qualified voter in the preparation of his ballot, if the voter so requests and if the voter is unable to mark his ballot due to illiteracy.[15]

Appellants are functionally illiterate registered voters from the Fourth Congressional District of Virginia. They brought a declaratory judgment action in the United States District Court for the Eastern District of Virginia, claiming that § 24–252 and the modifying bulletin violate the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965. A three-judge court was convened and the complaint dismissed.[16] A direct appeal was brought to this Court and we postponed consideration of jurisdiction to a hearing on the merits. 392 U. S. 902 (1968).

In the 1966 elections, appellants attempted to vote for a write-in candidate by sticking labels, printed with the name of their candidate, on the ballot. The election officials refused to count appellants' ballots, claiming that the Virginia election law did not authorize marking ballots with labels. As the election outcome would not have been changed had the disputed ballots been counted, appellants sought only prospective relief. In the District Court, appellants did not assert that § 5 precluded en-

[14] 79 Stat. 438, 42 U. S. C. § 1973b (a) (1964 ed., Supp. I). The Act defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter . . . ." 79 Stat. 438, 42 U. S. C. § 1973b (c) (1964 ed., Supp. I).

[15] See Appendix, *infra*.

[16] *Allen* v. *State Board of Elections*, 268 F. Supp. 218 (D. C. E. D. Va. 1967). The District Court ruled that the requirement that write-in votes be in the voter's own handwriting was not unconstitutional; the court further ruled that § 24–252 was not suspended by § 4 of the Voting Rights Act as it was not a "test or device" as defined by the Act.

forcement of the procedure prescribed by the bulletin. Rather, they argued § 4 suspended altogether the requirement of § 24–252 that the voter write the name of his choice in the voter's own handwriting. Appellants first raised the applicability of § 5 in their jurisdictional statement filed with this Court. We are not precluded from considering the applicability of § 5, however. The Virginia legislation was generally attacked on the ground that it was inconsistent with the Voting Rights Act. Where all the facts are undisputed, this Court may, in the interests of judicial economy, determine the applicability of the provisions of that Act, even though some specific sections were not argued below.[17]

We postponed consideration of our jurisdiction in these cases to a hearing on the merits. Therefore, before reaching the merits, we first determine whether these cases are properly before us on direct appeal from the district courts.

I.

These suits were instituted by private citizens; an initial question is whether private litigants may invoke the jurisdiction of the district courts to obtain the relief requested in these suits. 28 U. S. C. § 1343 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Clearly, if § 5 authorizes appellants to secure the relief sought, the district courts had jurisdiction over these suits.

The Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judg-

[17] See *Boynton* v. *Virginia*, 364 U. S. 454, 457 (1960); cf. *Bell* v. *Maryland*, 378 U. S. 226, 237–242 (1964); *Silver* v. *United States*, 370 U. S. 717, 718 (1962).

ment that a State has failed to comply with the provisions of the Act.[18] However, § 5 does provide that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]." Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5. Further, after proving that the State has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to § 5.[19]

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[18] Section 12 (f) of the Act, 79 Stat. 444, 42 U. S. C. § 1973j (f) (1964 ed., Supp. I), provides: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether *a person* asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added.)

Appellants have argued this section necessarily implies that private parties may bring suit under the Act, relying on the language "a person." While this argument has some force, the question is not free from doubt, since the specific references throughout the other subsections of § 12 are to the Attorney General. *E. g.*, §§ 12 (d) and 12 (e). However, we find merit in the argument that the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as "private" rights. See *United States* v. *Raines*, 362 U. S. 17, 27 (1960).

In any event, there is certainly no specific exclusion of private actions. Section 12 (f) is at least compatible with 28 U. S. C. § 1343 and might be viewed as authorizing private actions.

[19] It is important to distinguish the instant cases from those brought by a State seeking a declaratory judgment that its new voting laws do not have a discriminatory purpose or effect. Cf. *Apache County* v. *United States*, 256 F. Supp. 903 (D. C. D. C. 1966). In the latter type of cases the substantive questions necessary for approval (*i. e.*, discriminatory purpose or effect) are liti-

The Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens. *South Carolina* v. *Katzenbach, supra,* at 308, 309. Congress realized that existing remedies were inadequate to accomplish this purpose and drafted an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws.[20]

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.[21] For example, the provisions of the Act extend to States and the *subdivisions thereof.* The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government.[22]

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gated, while in the cases here decided the only question is whether the new legislation must be submitted for approval.

[20] Appellees argue that § 5 only conferred a new "remedy" on the Attorney General of the United States. They argue that it gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant.

[21] The enforcement provisions provide that the Attorney General "*may* institute . . . an action" or "*may* . . . file . . . an application for an order." 79 Stat. 443, 42 U. S. C. §§ 1973j (d), (e) (1964 ed., Supp. I) (emphasis added).

Of course the private litigant could always bring suit under the Fifteenth Amendment. But it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act. *South Carolina* v. *Katzenbach, supra,* at 309.

[22] As of January 1968, the Attorney General had brought only one action to force a State to comply with § 5. United States Commission on Civil Rights, Political Participation 164–165 (1968).

It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action. In *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964), we were called upon to consider § 14 (a) of the Securities Exchange Act of 1934. 48 Stat. 895, 15 U. S. C. § 78n (a). That section provides that it shall be "unlawful for any person . . . [to violate] such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." We held that "[w]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U. S., at 432.

A similar analysis is applicable here. The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.[23]

II.

Another question involving the jurisdiction of the district courts is presented by § 14 (b) of the Act. It provides that "[n]o court other than the District Court

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[23] It is significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits. Memorandum of the United States as *Amicus Curiae* 8, n. 7.

for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act . . . ." 79 Stat. 445, 42 U. S. C. § 1973*l* (b) (1964 ed., Supp. I). The appellants sought declaratory judgments that the state enactments were subject to § 5 of the Act; appellees thus argue that these actions could be initiated only in the District Court for the District of Columbia.

Section 14 (b) must be read with the Act's other enforcement provisions. Section 12 (f) provides that the district courts shall have jurisdiction over actions brought pursuant to § 12 (d) to enjoin a person from acting when "there are reasonable grounds to believe that [such person] is about to engage in any act or practice prohibited by [§ 5]." [24] These § 12 (f) injunctive actions are distinguishable from the actions mentioned in § 14 (b). The § 14 (b) injunctive action is one aimed at prohibiting enforcement of the provisions of the Voting Rights Act, and would involve an attack on the constitutionality of the Act itself. See *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). On the other hand, the § 12 (f) action is aimed at prohibiting the enforcement of a state enactment that is for some reason violative of the Act. Cf. *United States* v. *Ward,* 352 F. 2d 329 (C. A. 5th Cir. 1965); *Perez* v. *Rhiddlehoover,* 247 F. Supp. 65 (D. C. E. D. La. 1965).

A similar distinction is possible with respect to declaratory judgments. A declaratory judgment brought by the *State* pursuant to § 5 requires an adjudication that a new enactment does not have the purpose or effect of racial discrimination. However, a declaratory judgment action brought by a *private litigant* does not require the Court to reach this difficult substantive issue. The only

[24] 79 Stat. 444, 42 U. S. C. §§ 1973j (d), (f) (1964 ed., Supp. I).

issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement. The difference in the magnitude of these two issues suggests that Congress did not intend that both can be decided only by the District of Columbia District Court. Indeed, the specific grant of jurisdiction to the district courts in § 12 (f) indicates Congress intended to treat "coverage" questions differently from "substantive discrimination" questions. See *Perez* v. *Rhiddlehoover, supra,* at 72.

Moreover, as we indicated in *South Carolina* v. *Katzenbach, supra,* the power of Congress to require suits to be brought only in the District of Columbia District Court is grounded in Congress' power, under Art. III, § 1, to "ordain and establish" inferior federal tribunals. We further noted Congress did not exceed constitutional bounds in imposing limitations on "*litigation against the Federal Government. . . .*" 383 U. S., at 332 (emphasis added). Of course, in declaratory judgment actions brought by private litigants, the United States will not be a party. This distinction further suggests interpreting § 14 (b) as applying only to declaratory judgment actions brought by the State.

There are strong reasons for adoption of this interpretation. Requiring that declaratory judgment actions be brought in the District of Columbia places a burden on the plaintiff. The enormity of the burden, of course, will vary with the size of the plaintiff's resources. Admittedly, it would be easier for States to bring § 5 actions in the district courts in their own States. However, the State has sufficient resources to prosecute the actions easily in the Nation's Capital; and, Congress has power to regulate which federal court shall hear suits against the Federal Government. On the other hand, the individual litigant will often not have sufficient resources

to maintain an action easily outside the district in which he resides, especially in cases where the individual litigant is attacking a local city or county regulation. Thus, for the individual litigant, the District of Columbia burden may be sufficient to preclude him from bringing suit.

We hold that the restriction of § 14 (b) does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to the approval requirements of § 5, and that these actions may be brought in the local district court pursuant to 28 U. S. C. § 1343 (4).

III.

A final jurisdictional question remains. These actions were all heard before three-judge district courts. We have jurisdiction over an appeal brought directly from the three-judge court only if the three-judge court was properly convened. *Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281 (1965); *Zemel* v. *Rusk*, 381 U. S. 1, 5 (1965); see 28 U. S. C. § 1253. Appellants initially claimed that the statutes and regulations in question violated the Fifteenth Amendment. However, by stipulation these claims were removed from the cases prior to a hearing in the District Court and the cases were submitted solely on the question of the applicability of § 5.[25] We held in *Swift & Co.* v. *Wickham*, 382 U. S. 111, 127 (1965), that a three-judge court is not required under 28 U. S. C. § 2281 if the state statute is attacked on the grounds that it is in conflict with a federal statute and consequently violates the Supremacy Clause. These suits involve such an attack

[25] This jurisdictional question does not apply to No. 3, however. In No. 3, the three-judge court also considered and ruled on appellants' claims that the Virginia statute and regulations were in conflict with the Constitution. 268 F. Supp. 218, 220 (D. C. E. D. Va. 1967). Thus, No. 3 is properly before this Court on direct appeal. 28 U. S. C. § 1253.

and, in the absence of a statute authorizing a three-judge court, would not be proper before a district court of three judges.

Appellants maintain that § 5 authorizes a three-judge court in suits brought by private litigants to enforce the approval requirements of the section. The final sentence of § 5 provides that "[a]ny action *under this section* shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court." 42 U. S. C. § 1973c (1964 ed., Supp. I) (emphasis added). Appellees argue that this sentence refers only to the action specifically mentioned in the first sentence of § 5 (*i. e.*, declaratory judgment suits brought by the State) and does not apply to suits brought by the private litigant.

As we have interpreted § 5, suits involving the section may be brought in at least three ways. First, of course, the State may institute a declaratory judgment action. Second, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny. Third, the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under § 5. All these suits may be viewed as being brought "under" § 5. The issue is whether the language "under this section" should be interpreted as authorizing a three-judge action in these suits.

We have long held that congressional enactments providing for the convening of three-judge courts must be strictly construed. *Phillips* v. *United States,* 312 U. S. 246 (1941). Convening a three-judge court places a burden on our federal court system, and may often result in a delay in a matter needing swift initial adjudication. See *Swift & Co.* v. *Wickham, supra,* at 128. Also, a

direct appeal may be taken from a three-judge court to this Court, thus depriving us of the wise and often crucial adjudications of the courts of appeals. Thus we have been reluctant to extend the range of cases necessitating the convening of three-judge courts. *Ibid.*

However, we have not been unaware of the legitimate reasons that prompted Congress to enact three-judge-court legislation. See *Swift & Co.* v. *Wickham, supra,* at 116–119. Notwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration.[26] The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.

In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5. The result of both

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[26] See, *e. g.,* 42 Stat. 168, 7 U. S. C. § 217 (suits to restrain enforcement of orders of the Secretary of Agriculture); 28 U. S. C. § 2282 (suits to enjoin enforcement of federal statute); 63 Stat. 479, 49 U. S. C. § 305 (g) (suits to review negative orders of the ICC).

suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.

Other provisions of the Act indicate that Congress was well aware of the extraordinary effect the Act might have on federal-state relationships and the orderly operation of state government. For example, § 10, which prohibits the collection of poll taxes as a prerequisite to voting, contains a provision authorizing a three-judge court when the Attorney General brings an action "against the enforcement of any requirement of the payment of a poll tax as a precondition to voting . . . ." 79 Stat. 442, 42 U. S. C. §§ 1973h (a)–(c) (1964 ed., Supp. I). See also 42 U. S. C. § 1973b (a) (1964 ed., Supp. I).

We conclude that in light of the extraordinary nature of the Act in general, and the unique approval requirements of § 5, Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.

IV.

Finding that these cases are properly before us, we turn to a consideration of whether these state enactments are subject to the approval requirements of § 5. These requirements apply to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ." 42 U. S. C. § 1973c (1964 ed., Supp. I). The Act further provides that the term "voting" "shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing . . . or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public

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or party office and propositions for which votes are received in an election." § 14 (c)(1), 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1) (1964 ed., Supp. I). See Appendix, *infra*. Appellees in the Mississippi cases maintain that § 5 covers only those state enactments which prescribe who may register to vote. While accepting that the Act is broad enough to insure that the votes of all citizens should be cast, appellees urge that § 5 does not cover state rules relating to the qualification of candidates or to state decisions as to which offices shall be elective.

Appellees rely on the legislative history of the Act to support their view, citing the testimony of former Assistant Attorney General Burke Marshall before a subcommittee of the House Committee on the Judiciary:

> "Mr. CORMAN. We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> "Mr. MARSHALL. The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill." [27]

Appellees in No. 25 also argue that § 5 was not intended to apply to a change from district to at-large voting, because application of § 5 would cause a conflict in the administration of reapportionment legislation.

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[27] Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 74 (hereinafter House Hearings).

They contend that under such a broad reading of § 5, enforcement of a reapportionment plan could be enjoined for failure to meet the § 5 approval requirements, even though the plan had been approved by a federal court.[28] Appellees urge that Congress could not have intended to force the States to submit a reapportionment plan to two different courts.[29]

We must reject a narrow construction that appellees would give to § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.[30] Moreover, compatible with the decisions of this Court, the Act gives a broad inter-

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[28] For example, appellees argue that even though a redistricting plan had been approved by a federal district court, under a broad interpretation of § 5, the Attorney General might bring suit under § 12 (d) (79 Stat. 444, 42 U. S. C. § 1973j (d) (1964 ed., Supp. I)) seeking an injunction because the State had failed to comply with the approval requirements of § 5.

[29] Appellees in No. 3 also argue that § 5 does not apply to the regulation in their case, because that regulation was issued in an attempt to comply with the provisions of the Voting Rights Act. They argue that if § 5 applies to the Virginia regulation, covered States would be prohibited from quickly complying with the Act. We cannot accept this argument, however. A State is not exempted from the coverage of § 5 merely because its legislation is passed in an attempt to comply with the provisions of the Act. To hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from § 5 coverage—even though it would have the effect of racial discrimination. It is precisely this situation Congress sought to avoid in passing § 5.

[30] "Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335 (1966).

pretation to the right to vote, recognizing that voting includes "all action necessary to make a vote effective." 79 Stat. 445, 42 U. S. C. § 1973*l*(c)(1) (1964 ed., Supp. I). See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements.

The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way. For example, § 2 of the Act, as originally drafted, included a prohibition against any "qualification or procedure." During the Senate hearings on the bill, Senator Fong expressed concern that the word "procedure" was not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote. In response, the Attorney General said he had no objection to expanding the language of the section, as the word "procedure" "was intended to be all-inclusive of any kind of practice." [31] Indicative of an intention

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[31] Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, pp. 191–192 (hereinafter Senate Hearings):

"Senator FONG. . . . Mr. Attorney General, turning to section 2 of the bill, which reads as follows:

" 'No voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color—' there is no definition of the word 'procedure' here. I am a little afraid that there may be certain practices that you may not be able to include in the word 'procedure.'

"For example, if there should be a certain statute in a State that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure.' Could you?

"Attorney General KATZENBACH. I would suppose that you could if it had that purpose. I had thought of the word 'procedure' as

to give the Act the broadest possible scope, Congress expanded the language in the final version of § 2 to include any "voting qualifications or prerequisite to voting, or standard, practice, or procedure." 42 U. S. C. § 1973 (1964 ed., Supp. I).

Similarly, in the House hearings, it was emphasized that § 5 was to have a broad scope:

> "Mr. KATZENBACH. The justification for [the approval requirements] is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. . . . [A]s the Chairman may recall . . . at the time of the initial school desegregation, . . . the legislature passed I

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including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color.

"Senator FONG. The way it is now written, do you think there may be a possibility that the Court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

"Attorney General KATZENBACH. I do not believe so, Senator, although the committee might consider that. The language was used in the 1964 act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

"Senator FONG. You would have no objection to expanding the word 'procedure'?

"Attorney General KATZENBACH. No; it was intended to be all-inclusive of any kind of practice.

"Senator FONG. I know that in section 3 (a) you have very much in detail spelled out the words 'test or device.'

"Attorney General KATZENBACH. Yes.

"Senator FONG. But you have not spelled out the word 'procedure.' I think that the word 'procedure' should be spelled out a little more.

"Attorney General KATZENBACH. I think that is a good suggestion, Senator."

> don't know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature . . . passed a law to frustrate that decree.
>
> "If I recollect correctly, the school board was ordered to do something and the legislature immediately took away all authority of the school boards. They withdrew all funds from them to accomplish the purposes of the act." House Hearings 60.

Also, the remarks of both opponents and proponents during the debate over passage of the Act demonstrate that Congress was well aware of another admonition of the Attorney General.[32] He had stated in the House hearings that two or three types of changes in state election law (such as changing from paper ballots to voting machines) could be specifically excluded from § 5 without undermining the purpose of the section. He emphasized, however, that there were "precious few" changes that could be excluded "because there are an awful lot of things that could be started for purposes of evading the 15th amendment if there is the desire to do so." House Hearings 95. It is significant that Congress chose not to include even these minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny.

In light of the mass of legislative history to the contrary, especially the Attorney General's clear indication that the section was to have a broad scope and Congress' refusal to engraft even minor exceptions, the single remark of Assistant Attorney General Burke Marshall cannot be given determinative weight. Indeed, in any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can

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[32] *E. g.*, 111 Cong. Rec. 10727 (remarks of Senator Tydings); 111 Cong. Rec. 10725 (remarks of Senator Talmadge); 111 Cong. Rec. 8303 (remarks of Senator Hart).

be conclusive.[33] Also, the question of whether § 5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principles involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict.

The weight of the legislative history and an analysis of the basic purposes of the Act indicate that the enactment in each of these cases constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5.

No. 25 involves a change from district to at-large voting for county supervisors. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964). Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

In No. 26 an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after

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[33] "The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308–309 (1966).

the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

The changes in No. 36 appear aimed at increasing the difficulty for an independent candidate to gain a position on the general election ballot. These changes might also undermine the effectiveness of voters who wish to elect independent candidates. One change involved in No. 36 deserves special note. The amendment provides that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election. This is a "procedure with respect to voting" with substantial impact. One must forgo his right to vote in his party primary if he thinks he might later wish to become an independent candidate.

The bulletin in No. 3 outlines new procedures for casting write-in votes. As in all these cases, we do not consider whether this change has a discriminatory purpose or effect. It is clear, however, that the new procedure with respect to voting is different from the procedure in effect when the State became subject to the Act; therefore, the enactment must meet the approval requirements of § 5 in order to be enforceable.

In these cases, as in so many others that come before us, we are called upon to determine the applicability of a statute where the language of the statute does not make crystal clear its intended scope. In all such cases we are compelled to resort to the legislative history to determine whether, in light of the articulated purposes of the legislation, Congress intended that the statute apply to the particular cases in question. We are of the opinion that, with the exception of the statement of Assistant Attorney General Burke Marshall, the balance of legislative history (including the statements of the Attorney General and congressional action expanding the

language) indicates that § 5 applies to these cases. In saying this, we of course express no view on the merit of these enactments; we also emphasize that our decision indicates no opinion concerning their constitutionality.

V.

Appellees in the Mississippi cases argue that even if these state enactments are covered by § 5, they may now be enforced, since the State submitted them to the Attorney General and he has failed to object. While appellees admit that they have made no "formal" submission to the Attorney General, they argue that no formality is required. They say that once the Attorney General has become aware of the state enactment, the enactment has been "submitted" for purposes of § 5. Appellees contend that the Attorney General became aware of the enactments when served with a copy of appellees' briefs in these cases.

We reject this argument. While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a "submission." A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

VI.

Appellants in the Mississippi cases have asked this Court to set aside the elections conducted pursuant to these enactments and order that new elections be held under the pre-amendment laws. The Solicitor General has also urged us to order new elections if the State does not promptly institute § 5 approval proceedings. We de-

cline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these States are concerned. They remain subject to the continuing strictures of § 5 until they obtain from the United States District Court for the District of Columbia a declaratory judgment that for at least five years they have not used the "tests or devices" prohibited by § 4. 42 U. S. C. § 1973b (a) (1964 ed., Supp. I).

In No. 3 the judgment of the District Court is vacated; in Nos. 25, 26, and 36 the judgments of the District Court are reversed. All four cases are remanded to the District Courts with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

Changes in the Mississippi statutes are indicated as follows: material added by amendment is italicized and material deleted by amendment is underscored. Portions of the statutes unchanged by amendment are printed in plain roman.

Section 5 of the Voting Rights Act of 1965:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) [42 U. S. C. § 1973b (a)] are in effect shall enact or seek

to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court." 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. I).

The Act further provides:

"The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot,

and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1) (1964 ed., Supp. I).

Section 2870 of the Mississippi Code:

"Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one (1) member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

"The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

"Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per

cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

"Provided further, however, that in any county in the state bordering on the Gulf of Mexico or Mississippi Sound and having a population in excess of eighty thousand (80,000) according to the last federal census, the issue of the election heretofore provided for shall be determined by a majority of the qualified electors of the county, and if such majority fail to vote affirmatively, no new petition shall be considered for four (4) years. Each such election shall be based upon a petition of twenty-five per cent (25%) of the qualified electors of the county, and to which petition shall be attached a map or plat defining the boundaries of each beat as proposed by said map or plat, and the election thereon shall be on such proposal.

"And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition, shall at its first meeting thereafter establish said proposed districts by order on its minutes, to be effective on the first day of January following; and in default thereof, may be commanded to do so by writ of mandamus.

"When the districts are changed, by the qualified electors in an election as aforesaid, the board, of its own motion, shall not change or alter said districts within four (4) years thereafter.

"*The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resi-*

dent of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

"If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of boards of supervisors shall so be held. If not, members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired.

"This act shall not be construed to affect any supervisor now holding office until the expiration and end of his present term of office."

Section 6271–08 of the Mississippi Code:

. . . . . .

"(b) Notwithstanding the provisions of subsection (a) hereof, the office of county superintendent of education may be made appointive in any county in the manner herein provided. Upon the filing of a petition signed

by not less than twenty per cent (20%) of the qualified electors of such county, it shall be the duty of the board of supervisors of such county, within sixty (60) days after the filing of such petition, to call a special election at which there shall be submitted to the qualified electors of such county the question of whether the office of county superintendent of education of said county shall continue to be elective or shall be filled by appointment by the county board of education of said county. Provided, however, that where a Class Three county having an area in excess of eight hundred twenty-five (825) square miles has a county unit school system comprising less than an entire county, the petition shall only be signed by electors residing within the county unit school district and only electors of said district shall vote on the proposition of appointing the county superintendent of education. The order calling such special election shall designate the date upon which same shall be held and a notice of such election, signed by the clerk of the board of supervisors, shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election and the last publication shall be made not more than seven (7) days prior to such date. If no newspaper is published in such county then such notice shall be given by publication of same for the required time in some newspaper having a general circulation in such county and, in addition, by posting a copy of such notice for at least twenty-one (21) days next preceding such election at three (3) public places in such county, one (1) of which shall be at the door of the county courthouse in each judicial district. Said election shall be held, as far as is practicable, in the same manner as other elections are held in such county and all qualified electors

of the county may vote therein. If a majority of such qualified electors who vote in such election shall vote in favor of the appointment of the county superintendent of education by the county board of education then, at the expiration of the term of the county superintendent of education then in office, the county superintendent of education of said county shall not be elected but shall thereafter be appointed by the county board of education for a term of not more than four (4) years; otherwise, said office shall remain elective. No special election shall be held in any county under the provisions of this subsection more often than once in every four (4) years, and no change from the elective to the appointive method of the selection of the county superintendent of education shall become effective except at the expiration of the term of the county superintendent of education in office at the time such election is held.

"In any county of the first class lying wholly within a levee district and within which there is situated a city of more than forty thousand (40,000) population according to the last decennial federal census the county superintendent of education shall hereafter be appointed by the county board of education as above provided.

"In any county of the second class wherein Interstate Highway 55 and State Highway 22 intersect and which is also traversed in whole or in part by U. S. Highways 49 and 51, and State Highways 16, 17 and 43 and the Natchez Trace; in any Class Four county having a population in excess of twenty-five thousand (25,000) according to the 1960 Federal census, traversed by U. S. Interstate Highway 55 and wherein Mississippi Highways 12 and 17 intersect; in any county created after 1916 through which the Yazoo River flows; in any Class Four county having a land area of six hundred ninety-five (695) square miles, bordering on the State of Alabama, wherein the Treaty of Dancing Rabbit was signed and

wherein U. S. Highway 45 and Mississippi Highway 14 intersect; in any county bordering on the Mississippi River wherein lies the campus of a land-grant institution or lands contiguous thereto owned by the institution; in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River, and having a county seat with a population in excess of twenty-one thousand (21,000) according to the Federal census of 1960; in any county having a population of twenty-six thousand seven hundred fifty-nine (26,759) according to the 1960 Federal census, and wherein U. S. Highway 51 and U. S. Highway 84 and the Illinois Central Railroad and the Mississippi Central Railroad intersect; in any Class Three county wherein is partially located a national forest and wherein U. S. Highway 51 and Mississippi Highway 28 intersect, with a 1960 Federal census of twenty-seven thousand fifty-one (27,051) and a 1963 assessed valuation of $16,692,304.00; the county superintendent of education hereafter shall be appointed by the county board of education.

"In any county bordering on the Gulf of Mexico or Mississippi Sound, having therein a test facility operated by the National Aeronautics and Space Administration, the county superintendent of education shall be appointed by the county board of education beginning January 1, 1972."

. . . . .

Section 3260 of the Mississippi Code:

"The ballot shall contain the names of all candidates who have been put in nomination, not less than forty (40) days previous to the day of the election, by the primary election of any political party. There shall be printed on the ballots the names of all persons so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who

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will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. *No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election; any independent candidate must qualify on or before the time established by statute for qualification of candidates seeking nominations in primary elections.* The commissioner shall also have printed on the ballot in any general or special election the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office *as an independent candidate* by a petition filed *on or before the statutory time* with said commissioner not less than forty (40) days prior to the election, and signed by not less than the following number of qualified electors:

"(a) For an office elected by the state at large, not less than one thousand (1,000) *ten thousand (10,000)* qualified electors.

"(b) For an office elected by the qualified electors of a supreme court district, not less than three hundred (300) *three thousand five hundred (3,500)* qualified electors.

"(c) For an office elected by the qualified electors of a congressional district, not less than two hundred (200) *two thousand (2,000)* qualified electors.

"(d) For an office elected by the qualified electors of a circuit or chancery court district, not less than one hundred (100) *one thousand (1,000)* qualified electors.

"(e) For an office elected by the qualified electors of a county, a senatorial *district,* or floatorial [*sic*] district, *a supervisors district,* or a municipality having a population of one thousand (1,000) or more, not less than *ten per cent (10%) of the qualified electors of said county, senatorial district, supervisors district, or municipality,*

or not less than five hundred (500), fifty (50) qualified electors, *whichever is the lesser.*

"(f) For an office elected by the qualified electors of a supervisors district or a municipality having a population of less than one thousand (1,000), not less than fifteen (15) *ten per cent (10%) of the* qualified electors *of said supervisors district or municipality.*

"Each elector shall personally sign said petition which signature shall not be counted unless same includes his polling precinct and county.

"There shall be attached to each petition above provided for upon the time of filing with said commission, a certificate from the appropriate registrar or registrars showing the number of qualified electors appearing upon each such petition which the registrar shall furnish to the petitioner upon request.

"Unless the petition required above shall be filed not less than forty (40) days prior to the election, *Unless the petition required above shall be filed not later than the time required for primary elections,* the name of the person requested to be a candidate, unless nominated by a political party, shall not be placed upon the ballot. The ballot shall contain the names of each candidate for each office, and such names shall be listed under the name of the political party such candidate represents."

Section 24–252 of the Code of Virginia of 1950:

"Insertion of names on ballots.—At all elections except primary elections it shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon [*sic*] and to vote for such other person for any office for which he may desire to vote and mark the same by a check (√) or cross (× or +) mark or a line (—) immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24–251 of the Code of Virginia. No ballot, with a name or names placed

thereon in violation of this section, shall be counted for such person."

The Bulletin issued by the State Board of Elections:

"On August 6, 1965, the 'Voting Rights Act of 1965' enacted by the Congress of the United States became effective and is now in force in Virginia. Under the provisions of this Act, any person qualified to vote in the General Election to be held November 2, 1965, who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy (in addition to any of the reasons set forth in Section 24–251 of the Virginia Code) shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter. The judge of election shall assist the voter, upon his request, in the preparation of his ballot in accordance with the voter's instructions, and shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote.

"These instructions also apply to precincts in which voting machines are used."

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

The Court's opinion seeks to do justice by granting each side half of what it requests. The majority first grants appellants all they could hope for, by adopting an overly broad construction of § 5 of the Voting Rights Act. As if to compensate for its generosity, the Court then denies some of the same appellants the relief that they deserve. Section 5 is thereby reduced to a dead letter in a very substantial number of situations in which it was intended to have its full effect.[1]

[1] I concur in the Court's disposition of the complex jurisdictional issues these cases present. While I consider the question whether § 5 authorizes a three-judge court a close one, it is clear to me

I.

I shall first consider the Court's extremely broad construction of § 5. It is best to begin by delineating the precise area of difference between the position the majority adopts and the one which I consider represents the better view of the statute. We are in agreement that in requiring federal review of changes in any "standard, practice, or procedure with respect to voting," Congress intended to include all state laws that changed the process by which voters were registered and had their ballots counted. The Court, however, goes further to hold that a State covered by the Act must submit for federal approval all those laws that could arguably have an impact on Negro voting power, even though the manner in which the election is conducted remains unchanged. I believe that this reading of the statute should be rejected on several grounds. It ignores the place of § 5 in the larger structure of the Act; it is untrue to the statute's language; and it is unsupported by the legislative history.

A.

First, and most important, the Court's construction ignores the structure of the complex regulatory scheme

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that we would not avoid very many three-judge courts whatever we decide. I would suspect that generally a plaintiff attacking a state statute because it has not been federally approved under § 5 could also make at least a substantial constitutional claim that the state statute is discriminatory in its purpose or effect. Consequently, in the usual case a three-judge court would always be convened under 28 U. S. C. § 2281. Once convened, the Court would, of course, first consider the plaintiff's § 5 argument in the name of avoiding a constitutional question. Therefore, it appears to me that there is no good reason to invoke the normal rule that three-judge court statutes should be construed as narrowly as possible. As the Court suggests, the more natural reading of the statute confers jurisdiction on three-judge courts even in an action brought by private parties.

created by the Voting Rights Act. The Court's opinion assumes that § 5 may be considered apart from the rest of the Act. In fact, however, the provision is clearly designed to march in lock-step with § 4—the two sections cannot be understood apart from one another. Section 4 is one of the Act's central provisions, suspending the operation of all literacy tests and similar "devices" [2] for at least five years in States whose low voter turnout indicated that these "tests" and "devices" had been used to exclude Negroes from the suffrage in the past. Section 5, moreover, reveals that it was not designed to implement new substantive policies but that it was structured to assure the effectiveness of the dramatic step that Congress had taken in § 4. The federal approval procedure found in § 5 only applies to those States whose literacy tests or similar "devices" have been suspended by § 4. As soon as a State regains the right to apply a literacy test or similar "device" under § 4, it also escapes the commands of § 5.

The statutory scheme contains even more striking characteristics which indicate that § 5's federal review procedure is ancillary to § 4's substantive commands. A State may escape § 5, *even though it has consistently violated this provision,* so long as it has complied with § 4, and has suspended the operation of literacy tests and other "devices" for five years. On the other hand, no matter how faithfully a State complies with § 5, it

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[2] Section 4 (c) reads:

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

remains subject to its commands so long as it has not consistently obeyed § 4.[3]

As soon as it is recognized that § 5 was designed solely to implement the policies of § 4, it becomes apparent that the Court's decision today permits the tail to wag the dog. For the Court has now construed § 5 to require a revolutionary innovation in American government that goes far beyond that which was accomplished by § 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. But the action taken by Congress in § 4 proceeded on the premise that once Negroes had gained free access to the ballot box, state governments would then be suitably responsive to their voice, and federal intervention would not be justified. In moving against "tests and devices" in § 4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads § 5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by § 4, despite the fact that the two pro-

[3] The Solicitor General expressly adopts this construction of the statute in his supplemental *amicus* brief. In any event, the Act is clear: § 4 (a) permits a State to free itself from § 4 by proving to a District Court in the District of Columbia that no *"test or device* has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." (Emphasis supplied.) As already noted, see n. 2, *supra*, the phrase "test or device" is a term of art including a class of statutes much narrower than those included under § 5. However, since § 5 applies by its own terms only to "a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect," a State that escapes from § 4, escapes from § 5 as well, even though it has not complied with that section.

visions were designed simply to interlock. The District Court for the District of Columbia is no longer limited to examining any new state statute that may tend to deny Negroes their right to vote, as the "tests and devices" suspended by § 4 had done. The decision today also requires the special District Court to determine whether various systems of representation favor or disfavor the Negro voter—an area well beyond the scope of § 4. Section 4, for example, does not apply to States and localities which have in the past permitted Negroes to vote freely, but which arguably have limited minority voting power by adopting a system in which various legislative bodies are elected on an at-large basis. And yet, in *Fairley* v. *Patterson,* No. 25, the Court holds that a statute permitting the at-large election of county boards of supervisors must be reviewed by federal authorities under § 5. Moreover, it is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers. If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task.

The Court's construction of § 5 is even more surprising in light of the Act's regional application. For the statute, as the Court now construes it, deals with a problem that is national in scope. I find it especially difficult to believe that Congress would single out a handful of States as requiring stricter federal supervision concerning their treatment of a problem that may well be just as serious in parts of the North as it is in the South.[4]

[4] Indeed, I would have very substantial constitutional difficulties with the statute if I were to accept such a construction.

The difficulties with the Court's construction increase even further when the language of the statute is considered closely. When standing alone, the statutory formula requiring federal approval for changes in any "standard, practice, or procedure with respect to voting" can be read to support either the broad construction adopted by the majority or the one which I have advanced. But the critical formula does not stand alone. Immediately following the statute's description of the federal approval procedure, § 5 proceeds to describe the type of relief an aggrieved voter may obtain if a State enforces a new statute without obtaining the consent of the appropriate federal authorities: "no person shall be denied the right to vote *for failure to comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis supplied.) This remedy serves to delimit the meaning of the formula in question. Congress was clearly concerned with changes in procedure with which voters could *comply*. But a law, like that in *Fairley* v. *Patterson,* No. 25, which permits all members of the County Board of Supervisors to run in the entire county and not in smaller districts, does not require a voter *to comply* with anything at all, and so does not come within the scope of the language used by Congress. While the Court's opinion entirely ignores the obvious implications of this portion of the statute, the Solicitor General's *amicus* brief candidly admits that this provision is flatly inconsistent with the broad reading the Government has advanced and this Court has adopted. The Government's brief simply suggests that Congress' choice of the verb "comply" was merely the result of an oversight. I cannot accept such a suggestion, however, when Congress' choice of language seems to me to be consistent with the general statutory framework as I understand it.

B.

While the Court's opinion does not confront the factors I have just canvassed, it does attempt to justify its holding on the basis of its understanding "of the legislative history and an analysis of the basic purposes of the Act." *Ante,* at 569. Turning first to consider the Act's basic purposes, the Court suggests that Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and protect Negroes against a dilution of their voting power. See *ante,* at 565–566, 569. It is clear, of course, that the Court's reapportionment decisions do not apply of their own force to the problem before us. This is a statute we are interpreting, not a broad constitutional provision whose contours must be defined by this Court. The States are required to submit certain kinds of legislation for federal approval only if Congress, acting within its powers, so provided. And the fact is that Congress consciously *refused* to base § 5 of the Voting Rights Act on its powers under the Fourteenth Amendment, upon which the reapportionment cases are grounded. The Act's preamble states that it is intended "[t]o enforce the fifteenth amendment to the Constitution of the United States, and for other purposes." When Senator Fong of Hawaii suggested that the preamble include a citation to the Fourteenth Amendment as well, the Attorney General explained that he "would have quite a strong preference not to," because "I believe that S. 1564 as drafted can be squarely based on the 15th amendment." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 193. Attorney General Katzenbach's position was restated repeatedly,[5] and any men-

[5] See, *e. g.,* Senate Hearings, *supra,* at 35, 141; Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 102.

tion of the Fourteenth Amendment is absent from this portion of the statute.[6]

As the reapportionment cases rest upon the Equal Protection Clause, they cannot be cited to support the claim that Congress, in passing this Act, intended to proceed against state statutes regulating the nature of the constituencies legislators could properly represent. If Congress intended, as it clearly did, to ground § 5 on the Fifteenth Amendment, the leading voting case is not *Reynolds* v. *Sims,* but *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). While that case establishes the proposition that redistricting done with the purpose of excluding Negroes from a municipality violates the Fifteenth Amendment, it also maintains the distinction between an attempt to exclude Negroes totally from the relevant constituency, and a statute that permits Negroes to vote but which uses the gerrymander to contain the impact of Negro suffrage.

It is unnecessary, of course, to decide whether *Gomillion* v. *Lightfoot* marks the limit of the Fifteenth Amendment. It is enough to recognize that Congress did not in any way adopt the reapportionment cases' expansive concept of voting when it enacted the Voting Rights Act of 1965. Once it is determined that *Reynolds* v. *Sims* holds no magic key to the "basic purposes" of this statute, one is obliged to determine the Act's purposes in more traditional ways. And it is here where the Court's opinion fails to convince. As I have already suggested, the Act's structure assigns to § 5 a role that is a good deal more modest than the one which the majority gives it.[7]

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[6] When, in § 10 of the Act, Congress moved against the imposition of poll taxes, it expressly invoked the Fourteenth Amendment as providing an additional basis for its action in this specific area. See § 10 (b).

[7] The Court seeks to strengthen its case by looking to the language of one of the definitional sections of the Act. *Ante,* at 565–566. Section 14 (c)(1) defines the term "vote" or "voting" to "include

The majority is left, then, relying on its understanding of the legislative history. With all deference, I find that the history the Court has garnered undermines its case, insofar as it is entitled to any weight at all. I refer not only to the unequivocal statement of Assistant Attorney General Burke Marshall, *ante*, at 564, which the Court concedes to be diametrically opposed to the construction it adopts. For the lengthy testimony of Attorney General Katzenbach, upon which the Court seems to rely, actually provides little more support for its position. Mr. Katzenbach, unlike his principal assistant, was never directly confronted with the question raised here, and we are left to guess as to his views. If guesses are to be made, however, surely it is important to note that though the Attorney General used many examples to illustrate the operation of § 5, each of them concerned statutes that had an immediate impact on voter qualifications or which altered the manner in which the election was conducted.[8] One would imagine that if the

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all action necessary to make a vote *effective* in any primary, special, or general election, *including, but not limited to,* registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." (Emphasis supplied.) All of the aspects of voting that are enumerated in this definition concern the procedures by which voters are processed. When the statute cautions that its enumeration of stages in the election process is not exclusive, it merely indicates that the change of any other procedure that prevents the voter from having his ballot finally counted is also included within the range of the Act's concern. Surely the Court is entirely ignoring the textual context when it seeks to read the italicized phrases as embracing all electoral laws that affect the amount of political power Negroes will derive from the exercise of the franchise, even when the way in which voters are processed remains unchanged.

[8] The examples given by the Attorney General concerned changes in a State's voting age, residence, or property requirements; changes

Attorney General believed that § 5 had the remarkable sweep the majority has now given it, one of his hypotheticals would have betrayed that fact.[9]

C.

Section 5, then, should properly be read to require federal approval only of those state laws that change either voter qualifications or the manner in which elections are conducted. This does not mean, however, that

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in the frequency that registrars' offices are open; and changes from paper ballots to machines or vice versa. See House Hearings, *supra*, n. 5, at 60–62, 95; Senate Hearings, *supra*, at 191–192, 237.

[9] The Court emphasizes three specific colloquies in which Mr. Katzenbach participated to support its understanding of the legislative history. In the most important one, see *ante*, at 566–567, n. 31, Senator Fong expressed concern that § 5, which at that time merely required federal review of changes in state "procedures," would not encompass a state regulation which would radically limit the hours during which new voters could register. The Attorney General agreed that the statute should be elaborated to more clearly include such a change. Since such a law alters the manner in which voters are processed, I fail to see how this colloquy undermines my construction of the section—which clearly requires federal review in cases of the sort Mr. Katzenbach and Senator Fong were discussing. Similarly, a second extract highlighted by the Court, *ante*, at 567–568, is one in which the Attorney General emphasizes that § 5 is intended to prevent the States from evading the requirements of § 4—a point I believe to count strongly in favor of the interpretation I deem the correct one. Finally, it is quite true that the Attorney General opposed carving out exceptions from § 5 that would permit the State to switch from paper ballots to voting machines without federal approval. See *ante*, at 568. But this fact hardly indicates that he or anyone else was of the opinion that the section required review of statutes that did not concern themselves with voting procedures. In fact, on the one occasion that Mr. Katzenbach discussed the reapportionment cases in connection with § 5, he indicated no awareness whatever that § 5 could be construed to apply to cases involving laws that change the voting power of various groups. See House Hearings, *supra*, at 93–94.

the District Courts in the four cases before us were right in unanimously concluding that the Voting Rights Act did not apply. Rather, it seems to me that only the judgment in *Fairley* v. *Patterson,* No. 25, should be affirmed, as that case involves a state statute which simply gives each county the right to elect its Board of Supervisors on an at-large basis.

In *Whitley* v. *Williams,* No. 36, however, Mississippi's new statute both imposes new qualifications on independent voters who wish to nominate a candidate by petition and alters the manner in which such nominations are made.[10] Since the Voting Rights Act explicitly covers "primary" elections, see § 14 (c)(1), the only significant question presented is whether a petitioning procedure should be considered a "primary" within the meaning of the Act. As the nominating petition is the functional equivalent of the political primary, I can perceive no good reason why it should not be included within the ambit of the Act.

The statute involved in *Bunton* v. *Patterson,* No. 26, raises a somewhat more difficult problem of statutory interpretation. If one looks to its impact on the voters, the State's law making the office of school superintendent appointive enacts a "voting qualification" of the most drastic kind. While under the old regime all registered voters could cast a ballot, now none are qualified. On the other hand, one can argue that the concept of a "voting qualification" presupposes that there will be a vote. On balance, I would hold that the statute comes

[10] The statute requires supporters of a candidate to write their own names on the nominating petition, together with their polling district. Moreover, petitions must be filed by an earlier date and must contain many more signatures. The Act also imposes a "voting qualification" on those who wish to vote in a party primary, by providing that they may not subsequently compete with the primary victor by running as an independent candidate.

within § 5. Cf. *Gomillion* v. *Lightfoot, supra.* Such a holding would not, of course, disable the State from adopting an appointive system after the force of § 5 has spent itself.

Finally, Virginia has quite obviously altered the manner in which an election is conducted when for the first time it has been obliged to issue regulations concerning the way in which illiterate voters shall be processed at the polls. Consequently, I would reverse the lower court's decision in the *Allen* case, No. 3.

II.

After straining to expand the scope of § 5 beyond its proper limits, the majority surprisingly refuses to grant appellants in the Mississippi cases [11] the only relief that will effectively implement the Act's purposes. As the Court recognizes, *ante,* at 572, the Voting Rights Act only applies to the States for a limited period of time—Mississippi may free itself from § 5's requirements in 1970.[12] And yet the Court affords appellants in the Mississippi cases only declaratory relief, permitting state

[11] In the *Allen* case, coming from Virginia, the term of the Congressman who gained his seat under procedures that have not been approved under § 5 has already expired. Consequently, only a grant of declaratory relief is appropriate in this case, as the appellants themselves recognize.

[12] Since the Voting Rights Act became effective in Mississippi in August 1965, the State will be able to escape the requirements of § 5 in 1970 by proving that it has not imposed a "test or device" in violation of § 4 for a five-year period. See text, at n. 3, *supra.* Section 5 will only continue to apply after 1970 if Mississippi is found to have continued imposing "tests or devices" after 1965. The Court's decision today, however, does not consider whether any of the statutes involved in these cases impose a "test" or "device" within the meaning of § 4, see n. 2, *supra.* It simply holds that the statutes fall into the much broader class of laws that modify a "standard, practice, or procedure with respect to voting" under § 5.

officials selected in violation of § 5 to hold office until their four-year terms expire in 1971.[13] An election for these offices may never be held in compliance with Congress' commands. And of course, the Court's decision respecting relief does not only control these particular cases. There may have been hundreds of officials throughout the South who began serving long terms in office this November under procedures that have not been federally approved. As a result of this part of the Court's decision, the Voting Rights Act may never play the full role that Congress intended for it.

It seems clear to me that we should issue a conditional injunction in the Mississippi cases along the lines suggested by the Solicitor General, except of course in the *Fairley* case which I think should be affirmed. Unless Mississippi promptly submits its laws to either the Attorney General or the District Court for the District of Columbia, new elections under the pre-existing law should be ordered. Of course, if the laws are promptly submitted for approval, a new election should be required only if the District Court determines that the statute in question is discriminatory either in its purpose or in its effect.

MR. JUSTICE MARSHALL, whom MR. JUSTICE DOUGLAS joins, concurring and dissenting.

I join Parts I through V of the Court's opinion. However, largely for the reasons stated in Part II of my

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[13] The state senator, state representative, county supervisor, justice of the peace, and constable involved in *Whitley* v. *Williams,* No. 36, were all elected for four-year terms ending in 1971. See Mississippi Code § 3238 (1942). Similarly, the affected county superintendents of education in *Bunton* v. *Patterson,* No. 26, were appointed to four-year terms, expiring in 1971.

While I would affirm in *Fairley* v. *Patterson,* No. 25, the incumbents in that case also will serve until 1971.

Brother HARLAN's opinion, I believe the relief suggested by the Solicitor General should be ordered in the Mississippi cases. Accordingly, I dissent from Part VI of the Court's opinion.

MR. JUSTICE BLACK, dissenting.

Assuming the validity of the Voting Rights Act of 1965, as the Court does, I would agree with its careful interpretation of the Act, and would further agree with its holding as to jurisdiction and with its disposition of the four cases now before us. But I am still of the opinion that for reasons stated in my separate opinion in *South Carolina* v. *Katzenbach,* 383 U. S. 301, 355–362 (1966), a part of § 5 violates the United States Constitution. Section 5 provides that several Southern States cannot effectively amend either their constitutions or laws relating to voting without persuading the United States Attorney General or the United States District Court for the District of Columbia that the proposed changes in state laws do not have the purpose and will not have the effect of denying to citizens the right to vote on account of race or color. This is reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did. The Southern States were at that time deprived of their right to pass laws on the premise that they were not then a part of the Union and therefore could be treated with all the harshness meted out to conquered provinces. The constitutionality of that doctrine was certainly not clear at that time. And whether the doctrine was constitutional or not, I had thought that the whole Nation had long since repented of the application of this "conquered province" concept, even as to the time immediately following the bitter Civil War. I doubt that any of the 13 Colonies would have agreed to our Constitution

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if they had dreamed that the time might come when they would have to go to a United States Attorney General or a District of Columbia court with hat in hand begging for permission to change their laws. Still less would any of these Colonies have been willing to agree to a Constitution that gave the Federal Government power to force one Colony to go through such an onerous procedure while all the other former Colonies, now supposedly its sister States, were allowed to retain their full sovereignty. While *Marbury* v. *Madison,* 1 Cranch 137 (1803), held that courts can pass on the constitutionality of state laws already enacted, it certainly did not decide to permit federal courts or federal executive officers to hold up the passage of state laws until federal courts or federal agencies in Washington could pass on them. Proposals to give judges a part in enacting or vetoing legislation before it passed were made and rejected in the Constitutional Convention; another proposal was made and rejected to permit the Chief Justice of this Court "from time to time [to] recommend such alterations of and additions to the laws of the U. S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union . . . ." See my dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 515, n. 6 (1965).

It seems to me it would be wise for us to pause now and then and reflect on the fact that the separate Colonies were passing laws in their legislative bodies before they themselves created this Union, that history emphatically proves that in creating the Union the Colonies intended to retain their original independent power to pass laws, and that no justification can properly be found in the Constitution they created or in any amendment to it for degrading these States to the extent that

they cannot even initiate an amendment to their constitutions or their laws without first asking the permission of a federal court in the District of Columbia or a United States governmental agency. I would hold § 5 of the 1965 Voting Rights Act unconstitutional insofar as it commands certain selected States to leave their laws in any field unchanged until they get the consent of federal agencies to pass new ones.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 597 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1967, THROUGH MARCH 3, 1969.

Cases Dismissed In Vacation.

No. 137. Irving et al. *v.* Capehart, Trustee in Reorganization. C. A. 7th Cir. Petition for writ of certiorari dismissed July 12, 1968, pursuant to Rule 60 of the Rules of this Court. *Donald A. Schabel* for petitioners. *H. Earl Capehart, Jr.,* for respondent. Reported below: 394 F. 2d 900.

No. 4, Misc. Hobson et al. *v.* Hansen, Superintendent of Schools of the District of Columbia, et al. Appeal from D. C. D. C. Appeal dismissed July 19, 1968, pursuant to Rule 60 of the Rules of this Court. *William Kunstler* for appellants. *Solicitor General Griswold* for appellees. Reported below: 265 F. Supp. 902.

No. 103, Misc. Davis *v.* Illinois. Sup. Ct. Ill. Petition for writ of certiorari dismissed August 8, 1968, pursuant to Rule 60 of the Rules of this Court. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for respondent.

No. 4. Paul H. Aschkar & Co. *v.* Kamen & Co. et al. C. A. 9th Cir. Writ of certiorari dismissed September 3, 1968, pursuant to Rule 60 of the Rules of this Court. *Allen E. Susman* for petitioner. *Jacob Shearer* for respondents. Reported below: 382 F. 2d 689. [For earlier order herein, see 390 U. S. 942.]

No. 457. Sims et al. *v.* Banks. C. A. 5th Cir. Petition for writ of certiorari dismissed September 23, 1968, pursuant to Rule 60 of the Rules of this Court. *John B. Miller* for petitioners. Reported below: 397 F. 2d 798.

No. 79, Misc. COLANGELO *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed September 25, 1968, pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold* for the United States. Reported below: 390 F. 2d 874.

OCTOBER 7, 1968.

Miscellaneous Orders.

No. —. HAWTHORNE *v.* HARDAWAY, SECRETARY, BOARD OF ELECTIONS, ET AL. Sup. Ct. App. Va. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *Flavius B. Walker, Jr.*, and *Jay J. Levit* for applicant. *R. D. McIlwaine III*, Assistant Attorney General of Virginia, for respondents in opposition.

No. —. MORSE ET AL. *v.* BOSWELL ET AL.;
No. —. BERKE ET AL. *v.* MACLAUGHLIN ET AL.;
No. —. MIAZGA ET AL. *v.* MACLAUGHLIN ET AL.;
No. —. FELBERBAUM ET AL. *v.* MACLAUGHLIN ET AL.; and
No. —. LOONEY ET AL. *v.* MACLAUGHLIN ET AL. C. A. 4th Cir. Applications for stays presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied. *Elsbeth Levy Bothe* for Morse et al.; *Francis V. Lowden, Jr.*, for Berke et al.; *Mrs. Bothe* for Miazga et al.; *Philip J. Hirschkop* and *Michael J. Kunstler* for Felberbaum et al.; and *Mr. Lowden* for Looney et al. *Solicitor General Griswold* in opposition.

MR. JUSTICE DOUGLAS, dissenting.

On April 10, 1968, the President delegated to the Secretary of Defense power to activate units of the Ready Reserve.[1] On the following day, after receiving

[1] Exec. Order No. 11406, 33 Fed. Reg. 5735 (1968).

a similar delegation of authority to activate such units from the Secretary of Defense,[2] the Secretary of the Army called several units of the Ready Reserve and their members to active duty.[3] Applicants, who are members of those units, are challenging that call to active duty on the ground that it exceeds the authority of the Secretary of the Army, and is a violation of their enlistment contracts. After unsuccessfully seeking release from active duty by writ of habeas corpus, and before being able to petition this Court for certiorari, applicants were prepared for immediate shipment to Vietnam. To preserve their avenues of review they sought and I granted interim stays pending submission of the stay applications to the full Court.[4] The question now before the Court, therefore, is whether these stays should continue pending our consideration of their petitions for certiorari.

Questions underlying the merits, which have already produced some judicial disagreement,[5] are twofold:[6] first, an alleged usurpation by the Secretary of the

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[2] Memorandum for Secretaries of the Military Departments, April 11, 1968, as cited in Brief for Appellants 5, *Morse* v. *Boswell,* 401 F. 2d 544.

[3] Joint Message form DA 859314, April 11, 1968, as cited in Brief for Appellants, *ibid.*

[4] Applicant in *Winters* v. *United States,* 390 U. S. 993, had been called to duty as an individual rather than as part of a unit; and unlike applicants in these cases, apparently did not challenge the authority of the Secretary of the Army to call him for a full 24 months of active duty irrespective of time already served on active duty.

[5] Compare *Winters* v. *United States,* 281 F. Supp. 289 (D. C. E. D. N. Y.), aff'd per curiam, 390 F. 2d 879 (C. A. 2d Cir. 1968), with *Gion* v. *McNamara,* Civ. No. 67–1563 (D. C. C. D. Calif., January 9, 1968).

[6] Applicants have also raised other questions which I consider too unsubstantial to discuss.

Army of the limited authority delegated him; second, a purported conflict between the conditions of enlistment under which applicants entered the reserves and the subsequent Act of Congress calling them to active duty.

I.

First. Applicants argue that the Secretary of the Army improperly called them to active duty for a full period of 24 months, without giving them credit for time already served on active duty. They claim that, in doing so, he exceeded the power granted him. To substantiate their claim, applicants rely on the specific language of delegation, on the treatment of other reservists similarly situated, and on the original intent of Congress.

The language of delegation is in § 101 (e) of Pub. L. 89–687, Title I, October 15, 1966, 80 Stat. 981, 10 U. S. C. § 263 n. (1964 ed., Supp. III), under which applicants were called. Congress authorized the President to activate "any *unit* of the Ready Reserve of an armed force for a period of not to exceed twenty-four months." (Emphasis added.) The President, in turn, delegated his authority under subsection (e) to the Secretary of Defense to activate "any *unit* in the Ready Reserve . . . for a period of not to exceed 24 months." [7] The Secretary of Defense then delegated his authority by that same language to the Secretary of the Army.[8] The Secretary of the Army, however, called "[t]he above *units and* [*individual*] *members thereof* . . . to active duty for 24 consecutive months . . . ." [9] Thus, instead, of calling the above units to active duty and granting their individual members credit for time already served on active duty, he ordered the individuals themselves to active duty for 24 consecutive months, irrespective of any time

[7] *Supra,* n. 1 (emphasis added).

[8] *Supra,* n. 2.

[9] *Supra,* n. 3 (emphasis added).

they may have already served on active duty. In doing so, he seems to have gone beyond the above language of delegation which referred exclusively to *units*. Moreover, he seems to have violated the organic language of Pub. L. 89–687, Title I, § 101 (c), October 15, 1966, 80 Stat. 981, which provides that:

> "A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals twenty-four months."

To uphold the Secretary's order would seem to discriminate against these applicants called to active duty *as part of units* under § 101 (e) in favor of those reservists called to active duty as *individuals* under §§ 101 (a) and (b), by withholding from the former credit which is concededly accorded the latter.[10]

Congress authorized the President to recall the Ready Reserve for two stated purposes: first, to free the President to mobilize those men without forcing him to declare a national emergency; [11] second, and more relevant to

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[10] In enacting Pub. L. 89–687, § 101, Congress made a distinction between reservists called as individuals and reservists called as units. That distinction, however, related only to its desire to keep reserve units as much intact as possible; consequently, it only authorized the call of those individual reservists who were not attached to such units, who had not been participating satisfactorily in their present units, or who had had less than 120 days of active duty experience. The distinction between individuals and units would seem to have nothing to do with the question whether reservists called as part of units should be credited for time already served on active duty. In making permanent the President's temporary authority to activate for 24 months those individuals not participating satisfactorily in their reserve units, Congress reaffirmed its intention to credit them for time already served on active duty. Pub. L. 90–40, June 30, 1967, § 6, 81 Stat. 105.

[11] 112 Cong. Rec. 19718 (1966) (remarks of Senator Russell, Chairman of Senate Armed Services Committee, and cosponsor of the amendment, which became Pub. L. 89–687).

this inquiry, to make the active duty obligation of those who enlist in the reserves commensurate with that of those who are drafted. It was felt that young men were enlisting in the reserves "to escape active military service in South Vietnam";[12] that Congress had allowed "the 6-month [reserve] training program to become 'an umbrella' for avoiding active service at a time when we are daily inducting large numbers of men into the active forces to fight in Vietnam";[13] and, therefore, that "it was only fair that these reservists be put on the *same basis for service* in Vietnam as new enlistees and draftees."[14] Thus, it seems that Congress intended to subject reservists to the same obligation for two years' active duty as is borne by draftees. To do so, it allowed the President to call them for the balance between the time they had already served on active duty and the outer time limit of 24 months.

The President and the Secretary of Defense apparently read the Act of October 15, 1966, as I do; for each of them activated only units of the reserve for 24 months. And a unit, of course, can serve 24 months even though its original members, having already served some time, are sooner discharged. The Secretary of the Army, on the other hand, has subjected these reservists to an additional obligation of 24 months over and above time already served.

II.

Second. The question just discussed covers, so far as I can tell from the fragmentary pleadings and findings, all of the applicants. The second question reaches

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[12] 112 Cong. Rec. 19724 (1966) (remarks of Senator Lausche).

[13] 112 Cong. Rec. 19720 (1966) (remarks of Senator Symington, member of Senate Armed Services Committee).

[14] 112 Cong. Rec. 19500 (1966) (remarks of Senator Saltonstall, ranking minority member of the Senate Armed Services Committee and cosponsor of the amendment) (emphasis added).

some of the applicants, but just how many I do not know. The record is not very revealing. But on oral argument, various attorneys stated that the contracts of enlistment vary. According to these informants, some provide for the rendering of active duty "in the event of a mobilization or emergency." Others provide for active duty in "time of war or of national emergency declared by Congress" as provided in 10 U. S. C. § 672. It should not lightly be concluded that a contract has been unilaterally changed by one party,[15] or that the United States as a party will breach its contract. Cf. *Smyth* v. *United States*, 302 U. S. 329.

Where the enlistment contract provides for service in the event of "a mobilization or emergency," I would assume that a wide variety of events might encompass each term. Indeed the very summoning of reserves to active duty might itself be sufficient to constitute the condition subsequent. But where the enlistment contract contains a provision that active duty is only required in "time of war or of national emergency declared by Congress," I would, if possible, read the Act of October 15, 1966, to preserve that promise solemnly made to the reservists and not to cover those who were specifically required by contract to serve only in "time of war or of national emergency declared by Congress."

I assume that it is within the power of Congress to change existing law and no type of estoppel interferes with its law-making power. See Stone, J., concurring, in *Perry* v. *United States*, 294 U. S. 330, 359. The disappointment realized by those who relied only on general law but did not have that explicit promise from their government in contract form is disappointment of the kind shared by all citizens in a society of shifting law.

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[15] Cf. *Bell* v. *United States*, 366 U. S. 393; *Perry* v. *United States*, 294 U. S. 330; *In re Grimley*, 137 U. S. 147, 150.

Where a reservist, however, has counted on a declaration of war or of an emergency before he is called up and has a contract calling for reserve duty on those precise terms, I would, if possible, read subsequent legislation so as to preserve the promise made in that enlistment contract. Cf. *Woods* v. *Stone*, 333 U. S. 472, 481 (dissenting opinion). 10 U. S. C. § 673 subjects reservists to call "[i]n time of national emergency declared by the President after January 1, 1953, *or when otherwise authorized by law.*" The Congress has not yet declared either war or national emergency within the meaning of § 672; nor has the President declared a national emergency within the meaning of § 673. As stated by Senator Russell: [16]

> "Mr. President, I cannot see how any realistic answer can be raised against this amendment [calling up the reserves]. They say, 'You can call up the units.' In the first place, it cannot be done, because the President of the United States has to declare a national emergency, and very naturally he does not want to declare a national emergency at this time after we have gone this far without it. . . . [A] declaration of a national emergency would make us look ridiculous in the eyes of the world—to declare a state of emergency in regard to a third-rate power like North Vietnam."

Thus, the only other provision which §§ 672–673 include as a condition prescribed by law for activating the reserves under the second type of enlistment contract described above lies in the phrase "or when otherwise authorized by law."

The phrase in § 673 "when otherwise authorized by law" is not without meaning. It plainly refers to those additional conditions—other than war or national emer-

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[16] 112 Cong. Rec. 19726 (1966) (Chairman of Senate Armed Services Committee).

gency—under which members of the reserve can be called to active duty.[17]

One more issue remains. It has been suggested that 10 U. S. C. § 263 gives Congress the power to call the reserves not just in time of war or national emergency, but "[w]henever . . . needed for the national security." No one, however, disputes that power. For the issue is not the plenary power of Congress under the Constitution, but how legislation shall be read in order, if possible, to avoid creating a "credibility gap" between the people and their government.

III.

"The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations." *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156. For that reason, this Court will exercise jurisdiction to review criminal adjudication by the military of civilian (*Reid* v. *Covert*, 354 U. S. 1) and military (*Burns* v. *Wilson*, 346 U. S. 137) personnel alike and to review administrative action by the military. Thus, in *Orloff* v. *Willoughby*, 345 U. S. 83, where a doctor inductee complained that the Secretary of the Army had wrongfully denied him medical detail, we were unanimous in agreeing that we had jurisdiction to review the power of the Secretary; that he had no power to deny petitioner such medical assignments; and that we were prepared to prevent him from doing so. Similarly here, where the Secretary purportedly has no power to recall reservists whom he promised to activate only

[17] Under 10 U. S. C. § 672 (b), a reservist may be called to active duty at any time for a period of 15 days. Pursuant to 10 U. S. C. § 679 a reservist may sign an active duty agreement by which he obligates himself to serve at any time on active duty that he is called; furthermore, that obligation may be extended beyond the expiration date of the agreement in times of war or national emergency. 10 U. S. C. § 672 (d).

in war or national emergency, we have jurisdiction to prevent him from doing so, at least where Congress has not precluded such jurisdiction. See *Harmon* v. *Brucker*, 355 U. S. 579, 581–583.

I would continue the stays until the merits of this important controversy can be resolved.

Certiorari Denied.

No. 606. CLEAVER ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Charles A. Barrett,* Assistant Attorney General, and *Jefferson Frazier,* Deputy Attorney General, for respondent.

OCTOBER 8, 1968.

Dismissal Under Rule 60.

No. 145, Misc. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Petition for writ of certiorari dismissed October 8, 1968, pursuant to Rule 60 of the Rules of this Court.

Miscellaneous Order.

No. 613. MCARTHUR ET AL. *v.* CLIFFORD, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Application for stay denied. *Philip J. Hirschkop* for applicants.

OCTOBER 11, 1968.

Miscellaneous Order.

No. ——. SULLIVAN ET AL. *v.* CUSHMAN ET AL. D. C. Mass. Motion for stay, referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the stay. *Moses M. Falk* on the motion. *Solicitor General Griswold* for respondents in opposition. Reported below: 290 F. Supp. 659.

OCTOBER 14, 1968.

Miscellaneous Orders.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Case set for argument on supplemental decrees proposed by the United States and the State of Texas. Motion of the State of Louisiana for additional time for oral argument on supplemental decree applicable to it denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. *Jack P. F. Gremillion,* Attorney General of Louisiana, *John L. Madden,* Assistant Attorney General, and *Victor A. Sachse, Paul M. Hebert, Thomas W. Leigh, W. Scott Wilkinson, J. B. Miller, Oliver P. Stockwell, J. J. Davidson,* and *Frederick W. Ellis,* Special Assistant Attorneys General, on the motion. [For earlier order herein, see 391 U. S. 910.]

No. 19. UNIVERSAL INTERPRETIVE SHUTTLE CORP. *v.* WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 390 U. S. 943.] Motion of respondent Washington Metropolitan Area Transit Commission to preclude argument on question not in issue, and the motion of respondent D. C. Transit System, Inc., to clarify the status of question regarding D. C. Transit System's franchise, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Russell W. Cunningham* for respondent Washington Metropolitan Area Transit Commission, and *Manuel J. Davis* for respondent D. C. Transit System, Inc., on the motions. *Jeffrey L. Nagin* and *Ralph S. Cunningham, Jr.,* for petitioner. *Solicitor General Griswold* for the United States, as *amicus curiae,* and *Mr. Davis* for respondent D. C. Transit System, Inc., in opposition to the motion of respondent Washington Metropolitan Area Transit Commission.

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No. 993, Misc. In re Disbarment of Lichota. It is ordered that Edith Fischer Lichota, of Toledo, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 39. Perez *v.* California. Sup. Ct. Cal. [Certiorari granted, 390 U. S. 942.] Motion of petitioner for appointment of counsel granted. It is ordered that *Peter G. Fetros, Esquire,* of San Francisco, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 53. Kaufman *v.* United States. C. A. 8th Cir. Motion of petitioner for transcription and certification of additional portions of record granted. Mr. Justice Marshall took no part in the consideration or decision of this motion. *Bruce R. Jacob* on the motion. [For earlier orders herein, see, *e. g.,* 391 U. S. 901.]

No. 56. Lear, Inc. *v.* Adkins. Sup. Ct. Cal. [Certiorari granted, 391 U. S. 912.] Motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* granted and twenty minutes allotted for that purpose. A similar amount of time likewise allotted to counsel for respondent. *Solicitor General Griswold* for the United States on the motion.

No. 71. Presbyterian Church in the United States et al. *v.* Mary Elizabeth Blue Hull Memorial Presbyterian Church et al. Sup. Ct. Ga. [Certiorari granted, 392 U. S. 903.] Motion of Right Reverend John E. Hines, Presiding Bishop of the Protestant Episcopal Church in the United States of America, for leave to file a brief, as *amicus curiae,* granted.

No. 44. SKINNER ET AL. *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 391 U. S. 963.] Motion of petitioners for leave to proceed further herein *in forma pauperis* granted. *G. Wray Gill, Sr.,* on the motion.

No. 74. STILES *v.* UNITED STATES. C. A. 1st Cir. [Certiorari granted, 391 U. S. 903.] Motion of petitioner for appointment of counsel granted. It is ordered that *Charles J. Rogers, Jr., Esquire,* of Providence, Rhode Island, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 81. BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* MCELROY ET AL.; and

No. 128. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* MCELROY ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 191. SNELL ET AL. *v.* WYMAN, COMMISSIONER OF DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 163. YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY *v.* HARRIS ET AL. Appeal from D. C. C. D. Cal. The Attorney General of California is invited to file a brief in this case expressing the views of the State of California.

No. 198. SMITH *v.* HOOEY, JUDGE. Sup. Ct. Tex. [Certiorari granted, 392 U. S. 925.] Motion of petitioner for appointment of counsel granted. It is ordered that *Charles Alan Wright, Esquire,* of Austin, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

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No. 193. INTERNATIONAL SALT CO. *v.* OHIO TURNPIKE COMMISSION. C. A. 8th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari granted. *Robert D. Stiles* on the motion.

No. 199. HARRIS, U. S. DISTRICT JUDGE (WALKER, REAL PARTY IN INTEREST) *v.* NELSON, WARDEN. C. A. 9th Cir. [Certiorari granted, 392 U. S. 925.] Motion of petitioner for appointment of counsel granted. It is ordered that *J. Stanley Pottinger, Esquire,* of San Francisco, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 620. MOORE ET AL. *v.* SHAPIRO, GOVERNOR OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. Because of the representation of the State of Illinois that "it would be a physical impossibility" for the State "to effectuate the relief which the appellants seek," the "Motion to Advance and Expedite the Hearing and Disposition of this Cause" is denied. MR. JUSTICE FORTAS would grant the motion. *Richard F. Watt* on the motion. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Thomas E. Brannigan,* Assistant Attorneys General, for appellees in opposition. Reported below: 293 F. Supp. 411.

No. 197. BUTENKO *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 392 U. S. 923.] Motion of petitioner for appointment of counsel granted. It is ordered that *Charles Danzig, Esquire,* of Newark, New Jersey, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 647. HADNOTT ET AL. *v.* AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. D. C. M. D. Ala. Application for restoration of temporary relief granted pending oral argument on the application, which is set for Friday, October 18, 1968, at 9 a. m. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Charles Morgan, Jr., Reber F. Boult, Jr., Orzell Billingsley, Jr., Melvin L. Wulf,* and *Eleanor Holmes Norton* for applicants. Reported below: 295 F. Supp. 1003.

No. 594, Misc. TIME, INC., ET AL. *v.* BON AIR HOTEL, INC. C. A. 5th Cir and D. C. S. D. Ga. Motion for leave to file petition for writ of certiorari denied. *Harold R. Medina, Jr.,* on the motion.

No. 451, Misc. JONES *v.* BLACKWELL, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *Solicitor General Griswold* for respondent in opposition.

No. 11, Misc. WHARTON *v.* CROUSE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART would transfer this case to the United States District Court under 28 U. S. C. § 2241 (b). *Peyton* v. *Rowe,* 391 U. S. 54. *Robert C. Londerholm,* Attorney General of Kansas, and *Edward G. Collister, Jr.,* Assistant Attorney General, for respondent in opposition to the motion.

No. 140, Misc. MILLER *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Solicitor General Griswold, Assistant Attorney General Martz,* and *Roger P. Marquis* for respondent Udall in opposition.

No. 266, Misc. CHANDLER *v.* TURNER, WARDEN;
No. 272, Misc. MCCRAY *v.* WILLINGHAM, WARDEN;
No. 302, Misc. PELLETIER *v.* PARKER, WARDEN;
No. 346, Misc. MAGEE *v.* NELSON, WARDEN, ET AL.;
No. 347, Misc. JONES *v.* FOLLETTE, WARDEN;
No. 353, Misc. KANIESKI *v.* BURKE, WARDEN;
No. 367, Misc. IN RE KAMSLER;
No. 381, Misc. CARD *v.* KROPP, WARDEN;
No. 419, Misc. HOLSCHER *v.* YOUNG, WARDEN;
No. 436, Misc. TAYLOR *v.* BURKE, WARDEN;
No. 501, Misc. HAYMAN *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT;
No. 509, Misc. ROBERTS *v.* PEYTON, PENITENTIARY SUPERINTENDENT;
No. 511, Misc. LACAZE ET AL. *v.* BLACKWELL, WARDEN;
No. 558, Misc. BYRD *v.* NELSON, WARDEN;
No. 579, Misc. COWLING *v.* CRAVEN, WARDEN; and
No. 584, Misc. OWEN *v.* ARKANSAS. Motions for leave to file petitions for writs of habeas corpus denied.

No. 296, Misc. SMITH *v.* HOCKER, WARDEN;
No. 316, Misc. ANDERTEN *v.* WARDEN, SOUTH DAKOTA PENITENTIARY;
No. 334, Misc. NIELSON *v.* ERICKSON, WARDEN;
No. 361, Misc. WELSH *v.* NELSON, WARDEN;
No. 536, Misc. FOSSUM *v.* PORTER, SHERIFF; and
No. 576, Misc. WELSH *v.* NELSON, WARDEN. 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. 200, Misc. HARSHAW *v.* LEVIN, U. S. DISTRICT JUDGE; and
No. 205, Misc. BIGGS *v.* CAMPBELL, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 105, Misc. ALLISON *v.* NELSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris,* Assistant Attorney General, and *Charles R. B. Kirk,* Deputy Attorney General, for respondents in opposition.

No. 169, Misc. WILSON *v.* CALIFORNIA. C. A. 9th Cir. Motion for leave to file petition for writ of certiorari denied.

No. 526, Misc. COLCHICO ET AL. *v.* SWEIGERT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Melvin B. Belli* on the motion. *Solicitor General Griswold* for respondent in opposition.

No. 374, Misc. OSBORN *v.* WEICK, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Maclin P. Davis, Jr.,* on the motion. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for respondent United States in opposition.

No. 448, Misc. ORTEGA *v.* MONTANTE, JUDGE; and
No. 532, Misc. ANDERSON *v.* UNITED STATES ET AL. Motions for leave to file petitions for writs of prohibition denied.

No. 516, Misc. AMERICAN PIPE & CONSTRUCTION CO. *v.* PENCE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Norbert A. Schlei* and *George W. Jansen* on the motion. *William H. Ferguson* and *Charles S. Burdell* in opposition.

Probable Jurisdiction Noted.

No. 258. KRAMER *v.* UNION FREE SCHOOL DISTRICT No. 15 ET AL. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. *Melvin L. Wulf, Murray A. Miller,* and *Alan H. Levine* for appellant. *John P. Jehu* for appellees. *Louis J. Lefkowitz, pro se,* and *Daniel M. Cohen,* Assistant Attorney General, for the Attorney General of New York, intervenor below. Reported below: 282 F. Supp. 70.

No. 376. DUNBAR-STANLEY STUDIOS, INC. *v.* ALABAMA. Appeal from Sup. Ct. Ala. Probable jurisdiction noted. *J. Edward Thornton* for appellant. *MacDonald Gallion,* Attorney General of Alabama, and *Willard W. Livingston* and *William H. Burton,* Assistant Attorneys General, for appellee. Reported below: 282 Ala. 221, 210 So. 2d 696.

No. 48. JULIAN MESSNER, INC., ET AL. *v.* SPAHN. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Counsel are requested to discuss in their briefs and oral arguments, in addition to the other questions presented, question whether injunctive relief provided in final judgment entered September 3, 1964, in the Supreme Court for the County of New York constitutes an unconstitutional restraint upon publication. *Selig J. Levitan* for appellants. *Frederic A. Johnson* for appellee. *Irwin Karp* for Authors League of America, Inc., as *amicus curiae.* Reported below: 21 N. Y. 2d 124, 233 N. E. 2d 840.

No. 370. KOOTA, DISTRICT ATTORNEY OF KINGS COUNTY *v.* ZWICKLER. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for appellant. Reported below: 290 F. Supp. 244.

No. 293. STANLEY *v.* GEORGIA. Appeal from Sup. Ct. Ga. Probable jurisdiction noted. *Wesley R. Asinof* for appellant. *Lewis R. Slaton, J. Walter LeCraw,* and *J. Robert Sparks* for appellee. Reported below: 224 Ga. 259, 161 S. E. 2d 309.

No. 269. GUNN, SHERIFF, ET AL. *v.* UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM ET AL. Appeal from D. C. W. D. Tex. Probable jurisdiction noted. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Hawthorne Phillips* and *Howard M. Fender,* Assistant Attorneys General, for appellants. *Sam Houston Clinton, Jr.,* for appellees. Reported below: 289 F. Supp. 469.

No. 238. WELLS *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Case set for oral argument to follow Nos. 30 and 31 [390 U. S. 939, October Term, 1967, Nos. 1116 and 1117]. *Robert B. McKay* for appellant. *Louis J. Lefkowitz,* Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *George D. Zuckerman,* Assistant Attorney General, for appellees. Reported below: 281 F. Supp. 821.

Certiorari Granted. (See also No. 263, *ante,* p. 15; No. 3, Misc., *ante,* p. 20; No. 39, Misc., *ante,* p. 21; No. 59, Misc., *ante,* p. 19; No. 86, Misc., *ante,* p. 16; No. 87, Misc., *ante,* p. 2; No. 133, Misc., *ante,* p. 10; No. 149, Misc., *ante,* p. 21; No. 187, Misc., *ante,* p. 5; and No. 458, Misc., *ante,* p. 2.)

No. 156. KRAMER *v.* CARIBBEAN MILLS, INC. C. A. 5th Cir. Certiorari granted. *Eugene Gressman* for petitioner. *Morris Harrell* for respondent. Reported below: 392 F. 2d 387.

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No. 158. Brotherhood of Railroad Trainmen et al. *v.* O'Connell et al. C. A. 2d Cir. Certiorari granted. *Arnold B. Elkind* for petitioners. *Ruth Weyand* for respondents. Reported below: 391 F. 2d 156.

No. 280. United States *v.* Skelly Oil Co. C. A. 10th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein, Myron C. Baum,* and *Loring W. Post* for the United States. *Robert J. Casey* and *Thomas J. McCoy, Jr.,* for respondent. Reported below: 392 F. 2d 128.

No. 291. Federal Marine Terminals, Inc. *v.* Burnside Shipping Co., Ltd. C. A. 7th Cir. Certiorari granted. *Robert C. Keck* for petitioner. *Lucian Y. Ray* for respondent. Reported below: 392 F. 2d 918.

No. 306. Fortner Enterprises, Inc. *v.* United States Steel Corp. et al. C. A. 6th Cir. Certiorari granted. *John P. Sandidge* for petitioner. *Leo T. Wolford* and *W. H. Buchanan* for respondents.

No. 172. Dirks et al. *v.* Birkholz et al. C. A. 7th Cir. Certiorari granted. Case set to follow No. 158 [*supra*]. *David Previant* and *David Leo Uelmen* for Dirks, *John J. Naughton* for Brotherhood of Railroad Trainmen, and *James P. Reedy* for Chicago, Milwaukee, St. Paul & Pacific Railroad Co., petitioners. *Ruth Weyand* for respondents. Reported below: 391 F. 2d 289.

No. 329, Misc. Boykin *v.* Alabama. Sup. Ct. Ala. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *E. Graham Gibbons* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 281 Ala. 659, 207 So. 2d 412.

No. 273. SCOFIELD ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted, reserving for decision, after argument, question of whether the petition for writ of certiorari was timely filed. *James Urdan* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *Joseph L. Rauh, Jr., John Silard, Harriett R. Taylor,* and *Stephen I. Schlossberg* for International Union, UAW, respondents. *Walter S. Davis* for Wisconsin Manufacturers' Assn. et al., as *amici curiae,* in support of the petition. A brief was filed by Illinois Manufacturers Assn., as *amicus curiae,* in support of the petition. Reported below: 393 F. 2d 49.

No. 60, Misc. DAVIS *v.* MISSISSIPPI. Sup. Ct. Miss. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the first question presented by the petition which reads as follows: "Whether the introduction into evidence at petitioner's criminal trial of his fingerprints, taken as a result of petitioner's illegal arrest, violated petitioner's rights under the Fourth and Fourteenth Amendments?" Case transferred to appellate docket. *Jack Greenberg, Michael Meltsner, Melvyn Zarr, Anthony G. Amsterdam,* and *Jack Young* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent. Reported below: 204 So. 2d 270.

No. 529, Misc. FRAZIER *v.* CUPP, WARDEN. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *R. W. Nahstoll* for petitioner. *Robert Y. Thornton,* Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent. Reported below: 388 F. 2d 777.

No. 68, Misc. OROZCO *v.* TEXAS. Ct. Crim App. Tex. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Charles W. Tessmer* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 428 S. W. 2d 666.

No. 560, Misc. BOULDEN *v.* HOLMAN, WARDEN. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 385 F. 2d 102, 393 F. 2d 932, 395 F. 2d 169.

No. 202, Misc. O'CALLAHAN *v.* PARKER, WARDEN. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the first question presented by the petition which reads as follows: "Does a court-martial, held under the Articles of War, Tit. 10, U. S. C. § 801 *et seq.,* have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" Case transferred to appellate docket. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 360.

Certiorari Denied. (See also No. 159, *ante,* p. 10; No. 179, *ante,* p. 11; No. 270, *ante,* p. 16; No. 326, *ante,* p. 11; No. 197, Misc., *ante,* p. 15; No. 430, Misc., *ante,* p. 22; No. 473, Misc., *ante,* p. 20; and Misc. Nos. 296, 316, 334, 361, 536, and 576, *supra.*)

No. 58. SOMERVILLE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Charles A. Bellows* for petitioner. *John J. Stamos* and *Joel M. Flaum* for respondent. Reported below: 88 Ill. App. 2d 134, 231 N. E. 2d 701.

No. 59. SOMERVILLE ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Charles A. Bellows* for petitioners. *John J. Stamos* and *Joel M. Flaum* for respondent. Reported below: 88 Ill. App. 2d 212, 232 N. E. 2d 115.

No. 70. PARRISH *v.* UNITED STATES; and

No. 72. PARZOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Walter E. Rogers* for petitioner in No. 70, and *Raymond W. Bergan* and *Thomas R. Dyson, Jr.,* for petitioner in No. 72. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States in both cases. Reported below: 391 F. 2d 240.

No. 66. ALVAREZ *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Melvin L. Wulf* and *Anthony G. Amsterdam* for petitioner. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Ralph H. Gillan,* Assistant Attorney General, for respondent. Reported below: 182 Neb. 358, 154 N. W. 2d 746.

No. 64. METHEANY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Murray L. Randall* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 390 F. 2d 559.

No. 75. CAROLINA PIPELINE CO. *v.* YORK COUNTY NATURAL GAS AUTHORITY. C. A. 4th Cir. Certiorari denied. *H. Simmons Tate, Jr.,* and *John M. Spratt* for petitioner. *David W. Robinson II* and *C. W. F. Spencer, Jr.,* for respondent. Reported below: 388 F. 2d 297.

No. 78. BIG RUN COAL & CLAY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Lowell T. Hughes* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 385 F. 2d 788.

No. 79. DUBIN-HASKELL LINING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Deane Ramey* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. Reported below: 386 F. 2d 306.

No. 83. AMERICAN MANUFACTURING CO. OF TEXAS *v.* HEALD MACHINE CO. C. C. P. A. Certiorari denied. *Munson H. Lane* for petitioner. *Norman S. Blodgett* for respondent. Reported below: 55 C. C. P. A. (Pat.) 838, 385 F. 2d 456.

No. 90. GOODMAN ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Jay Leo Rothschild* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Philip R. Miller* for the United States. Reported below: 182 Ct. Cl. 662, 390 F. 2d 915.

No. 86. AMP INC. *v.* COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari denied. *Marshall M. Holcombe, Vincent A. Kleinfeld, Alan H. Kaplan, Selma M. Levine,* and *Joel E. Hoffman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *James W. Knapp* for respondents. Reported below: 389 F. 2d 825.

No. 87. CLARK, GUARDIAN *v.* GREAT AMERICAN INSURANCE CO. OF NEW YORK. C. A. 5th Cir. Certiorari denied. *Cecil D. Franklin* for petitioner. Reported below: 387 F. 2d 710.

No. 89. STEADHAM ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *G. Hughel Harrison* for petitioners. Reported below: 224 Ga. 78, 159 S. E. 2d 397.

No. 92. DUGGAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Joseph W. Louisell* and *Ivan E. Barris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 391 F. 2d 433.

No. 93. GRIMES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. O. Cooper, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 391 F. 2d 709.

No. 96. ORLANDO DAILY NEWSPAPERS, INC., ET AL. *v.* BELLI. C. A. 5th Cir. Certiorari denied. *William Y. Akerman* for petitioners. *Paul A. Louis* and *Bertha Claire Lee* for respondent. Reported below: 389 F. 2d 579.

No. 88. BARTSCH *v.* METRO-GOLDWYN-MAYER, INC. C. A. 2d Cir. Certiorari denied. *Monroe E. Stein* and *Stanley Rothenberg* for petitioner. *Eugene L. Girden* for respondent. Reported below: 391 F. 2d 150.

No. 97. POWE ET VIR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *M. M. Roberts* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Carolyn R. Just* for respondent. Reported below: 389 F. 2d 46.

No. 99. CINCINNATI GAS & ELECTRIC CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. *Walter E. Beckjord* for Cincinnati Gas & Electric Co., and *William A. McClain* for City of Cincinnati, petitioners. *Solicitor General Griswold, Richard A. Solomon,* and *Peter H. Schiff* for Federal Power Commission; *J. David Mann, Jr.,* for City of Hamilton; and *Christopher T. Boland, George J. Meiburger,* and *Robert O. Koch* for Texas Gas Transmission Corp., respondents. Reported below: 389 F. 2d 272.

No. 100. SUTHER *v.* CITY OF MIDFIELD, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 389 F. 2d 1002.

No. 101. DENIRO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James J. Carroll* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 392 F. 2d 753.

No. 102. SHAPARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *David C. Shapard* for petitioner. *G. T. Blankenship,* Attorney General of Oklahoma, and *Penn Lerblance,* Assistant Attorney General, for respondent. Reported below: 437 P. 2d 565.

No. 103. WINKLER *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 387 F. 2d 380.

No. 104. UNITED STATES *v.* CAJO TRADING, INC. C. C. P. A. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge,* and *Robert V. Zener* for the United States. *James R. Sharp* for respondent. Reported below: 55 C. C. P. A. (Cust.) 61, 403 F. 2d 268.

No. 105. CONTINENTAL CASUALTY CO. *v.* UNITED STATES FOR THE USE AND BENEFIT OF MINNEAPOLIS-HONEYWELL REGULATOR CO. C. A. 4th Cir. Certiorari denied. *Kahl K. Spriggs* for petitioner. Reported below: 389 F. 2d 387.

No. 107. IANNIELLO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Maurice Edelbaum* and *William Sonenshine* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 21 N. Y. 2d 418, 235 N. E. 2d 439.

No. 110. KOMITOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 392 F. 2d 520.

No. 111. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Philip Blank* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 118. VINCE ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 394 F. 2d 462.

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No. 112. DIFCO LABORATORIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Leonard A. Keller* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Leonard M. Wagman* for respondent. Reported below: 389 F. 2d 663.

No. 113. MANDASK COMPANIA DE VAPORES, S. A. *v.* FEDERAZIONE ITALIANA DEI CONSORZI AGRARI ET AL. C. A. 2d Cir. Certiorari denied. *Edwin Longcope* and *David C. Wood* for petitioner. *Walter P. Hickey* for respondents. Reported below: 388 F. 2d 434.

No. 115. DEL MAR ET AL., EXECUTORS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Brackley Shaw* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Robert N. Anderson* for the United States. Reported below: 129 U. S. App. D. C. 51, 390 F. 2d 466.

No. 116. GENERAL LONGSHORE WORKERS, I. L. A., LOCAL UNION 1418, ET AL. *v.* NEW ORLEANS STEAMSHIP ASSN. C. A. 5th Cir. Certiorari denied. *Alvin J. Liska* for petitioners. *Samuel Lang* for respondent. Reported below: 389 F. 2d 369.

No. 121. ABINOJA ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Melvyn E. Stein* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent.

No. 127. BASSICK CO. ET AL. *v.* BLAKE ET AL. C. A. 7th Cir. Certiorari denied. *Dugald S. McDougall* and *Augustus G. Douvas* for petitioners. *John D. Dewey* for respondents. Reported below: 392 F. 2d 879.

No. 123. American Finishing Co. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *William W. Goodman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 389 F. 2d 1004.

No. 125. Luria Brothers & Co., Inc. *v.* Federal Trade Commission; and

No. 126. Baldwin-Lima-Hamilton Corp. et al. *v.* Federal Trade Commission. C. A. 3d Cir. Certiorari denied. *Morris Wolf* for petitioner in No. 125. *Arthur Littleton* for petitioner Baldwin-Lima-Hamilton Corp.; *Albert R. Connelly* for petitioner Bethlehem Steel Corp.; *Howard M. Holtzmann* for petitioner CF&I Steel Corp.; *C. M. Thorp, Jr.,* and *Charles Weiss* for petitioner Edgewater Steel Co.; *William R. Bascom* and *Edwin S. Taylor* for petitioner Granite City Steel Co.; *Roger T. Clapp* for petitioner Grinnell Corp.; *Samuel D. Slade* for petitioner Lukens Steel Co.; *William B. Cudlip* for petitioner McLouth Steel Corp.; *Mr. Weiss* for petitioners National Steel Corp. et al.; and *W. H. Buchanan* for petitioner United States Steel Corp., in No. 126. *Solicitor General Griswold, Assistant Attorney General Zimmerman, James McI. Henderson,* and *David B. Morris* for respondent in both cases. Reported below: 389 F. 2d 847.

No. 135. Funk *v.* Funk et al. Ct. App. Ariz. Certiorari denied. *Leven B. Ferrin* for petitioner. *Ralph E. Hunsaker* for respondents.

No. 140. Good-All Electric Mfg. Co. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. *James J. Fitzgerald, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Crombie J. D. Garrett,* and *Louis M. Kauder* for respondent. Reported below: 391 F. 2d 775.

No. 142. GROGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hubert Humphrey* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 394 F. 2d 287.

No. 145. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. W. Gill, Sr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 391 F. 2d 221.

No. 148. FULLBRIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *David C. Shapard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 392 F. 2d 432.

No. 151. NASON *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Rita E. Hauser* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for respondent. Reported below: 394 F. 2d 223.

No. 152. TRUST CO. OF GEORGIA, EXECUTOR, ET AL. *v.* ROSS, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Francis Shackelford, James E. Thomas, H. C. Kilpatrick,* and *John W. Gillon* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Harry Baum* for respondent. Reported below: 392 F. 2d 694.

No. 153. EATON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 154. FORT HOWARD PAPER CO. *v.* KIMBERLY-CLARK CORP. C. C. P. A. Certiorari denied. *Ellsworth M. Jennison* and *Arthur L. Morsell* for petitioner. *Jerome Gilson* for respondent. Reported below: 55 C. C. P. A. (Pat.) 947, 390 F. 2d 1015.

No. 155. ABRAMSON ET UX. *v.* COLONIAL OIL CO. C. A. 5th Cir. Certiorari denied. *Walter Warren* for petitioners. *C. Harris Dittmar* for respondent. Reported below: 390 F. 2d 873.

No. 157. HOUSTON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *G. Edward Friar* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States.

No. 160. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Stephen I. Schlossberg, John A. Fillion, Jordan Rossen,* and *Bernard F. Ashe* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board; and *Owen J. Neighbours* for Pierce Governor Co., Inc., respondents. Reported below: 129 U. S. App. D. C. 282, 394 F. 2d 757.

No. 162. GOLUBIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *F. Lee Bailey* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 393 F. 2d 590.

No. 182. TRUCHINSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 393 F. 2d 627.

No. 167. Banco Credito y Ahorro Ponceno *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari denied. *Guy Farmer* and *William Lespier* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 110.

No. 169. DePugh *v.* United States. C. A. 8th Cir. Certiorari denied. *Charles B. Blackmar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 393 F. 2d 367.

No. 170. Local Union No. 705, Hotel & Restaurant Employees & Bartenders Union, AFL–CIO *v.* Wirtz, Secretary of Labor. C. A. 6th Cir. Certiorari denied. *Ernest Goodman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, Alan S. Rosenthal,* and *Robert V. Zener* for respondent. Reported below: 389 F. 2d 717.

No. 171. Bricklayers, Masons & Plasterers' International Union of America, Local 11, AFL–CIO *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Irving Kessler* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 173. Gorman *v.* United States. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* and *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 393 F. 2d 209.

No. 186. Mills *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. *Eugene P. Kenny* for petitioner. Reported below: 51 N. J. 277, 240 A. 2d 1.

No. 174. HANSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Philip J. Lesser* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 393 F. 2d 763.

No. 176. REXACH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Walter L. Newsom, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Meyer Rothwacks,* and *Louis M. Kauder* for the United States. Reported below: 390 F. 2d 631.

No. 178. KRAMER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *John A. Kendrick* for petitioner. *John F. Wilson* for respondent. Reported below: 72 Wash. 2d 904, 435 P. 2d 970.

No. 183. A. J. INDUSTRIES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl A. Stutsman, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Robert N. Anderson* for the United States. Reported below: 181 Ct. Cl. 1017, 388 F. 2d 701.

No. 185. ATTOCKNIE *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. *Durward McDaniel* and *David Cobb* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz,* and *Roger P. Marquis* for respondent. Reported below: 390 F. 2d 636.

No. 189. JACOBSEN, ADMINISTRATOR *v.* INTERNATIONAL TRANSPORT, INC., ET AL. C. A. 8th Cir. Certiorari denied. *Walter A. Newport, Jr.,* for petitioner. *George E. Wright* for respondents. Reported below: 391 F. 2d 49.

No. 187. PREUSS, TRUSTEE IN BANKRUPTCY *v.* GENERAL ELECTRIC CO., INC. C. A. 2d Cir. Certiorari denied. *John A. Reilly* for petitioner. *John Hoxie* for respondent. Reported below: 392 F. 2d 29.

No. 188. MIAMI BEACH FIRST NATIONAL BANK ET AL., EXECUTORS, ET AL. *v.* INTER-CONTINENTAL PROMOTIONS, INC. C. A. 5th Cir. Certiorari denied. *Marion E. Sibley* and *Robert C. Ward* for petitioners. *Murray Sams, Jr.,* for respondent. Reported below: 367 F. 2d 293.

No. 190. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Ernest J. Howard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 395 F. 2d 848.

No. 194. CARSON PIRIE SCOTT & CO. ET AL. *v.* FACTOR. C. A. 7th Cir. Certiorari denied. *George W. McBurney* for Carson Pirie Scott & Co., *Jack Edward Dwork* for Kroch's & Brentano's, Inc., *Narcisse A. Brown* and *William F. McNally* for the Fair, and *Eloise Johnstone* for Brennan, petitioners. *Albert E. Jenner, Jr., Philip W. Tone,* and *Keith F. Bode* for respondent. Reported below: 393 F. 2d 141.

No. 196. DE SIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irving Anolik* for petitioner. *Solicitor General Griswold* for the United States.

No. 204. BAUCH ET AL. *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. *Samuel J. Cohen* for petitioners. *J. Lee Rankin, Norman Redlich,* and *Pauline K. Berger* for respondents. Reported below: 21 N. Y. 2d 599, 237 N. E. 2d 211.

No. 192. WALKER *v.* OHIO RIVER CO. Sup. Ct. Pa. Certiorari denied. *Harry Alan Sherman* for petitioner. *Harold R. Schmidt* for respondent. Reported below: 428 Pa. 552, 239 A. 2d 206.

No. 202. LEE RUBBER & TIRE CORP. *v.* UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL–CIO, LOCAL 102, ET AL. C. A. 3d Cir. Certiorari denied. *Edwin P. Rome* and *Goncer M. Krestal* for petitioner. *Samuel L. Rothbard* for respondents. Reported below: 394 F. 2d 362.

No. 207. MARYLAND PETITION COMMITTEE ET AL. *v.* JOHNSON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied. *Geo. Washington Williams* for petitioners. *Solicitor General Griswold* for respondents. Reported below: 391 F. 2d 933.

No. 208. RAYEX CORP. ET AL. *v.* AMERICAN OPTICAL CO. ET AL. C. A. 2d Cir. Certiorari denied. *John Vaughan Groner* and *Jules P. Kirsch* for petitioners. *Edward C. Wallace* for respondents. Reported below: 394 F. 2d 155.

No. 209. MARCAN PRODUCTS CORP. ET AL. *v.* A. H. EMERY CO. C. A. 2d Cir. Certiorari denied. *John M. Calimafde, Roy C. Hopgood,* and *Paul H. Blaustein* for petitioners. *John C. Blair* for respondent. Reported below: 389 F. 2d 11.

No. 213. LANGLEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *William C. Erbecker* for petitioner. *John J. Dillon,* Attorney General of Indiana, *Douglas B. McFadden,* Assistant Attorney General, and *Murray West,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 232 N. E. 2d 611.

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No. 215. BAKER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George T. Davis* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 393 F. 2d 604.

No. 217. JOHNSON *v.* BENBROOK WATER & SEWER AUTHORITY. Sup. Ct. Tex. and/or Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. *Henry E. Kerry* for petitioner. *S. G. Johndroe, Jr.,* for respondent. Reported below: 410 S. W. 2d 644.

No. 218. ALCOA STEAMSHIP CO., INC. *v.* CHARLES FERRAN & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *Benjamin W. Yancey* for petitioner. *Leon Sarpy, James G. Burke, Jr.,* and *Paul A. Nalty* for respondents. Reported below: 383 F. 2d 46.

No. 220. SHAPIRO *v.* SHAPIRO. App. Ct. Ill., 1st Dist. Certiorari denied. *Charles A. Bellows* for petitioner. *Samuel A. Rinella* for respondent.

No. 222. WEYERHAEUSER CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Kenneth E. Roberts* and *Snyder J. King* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz,* and *Roger P. Marquis* for the United States. Reported below: 392 F. 2d 448.

No. 224. J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 388 F. 2d 896.

No. 223. MAHONEY ET AL. *v.* FEDERAL SAVINGS & LOAN INSURANCE CORP. C. A. 7th Cir. Certiorari denied. *Willard J. Lassers, Alex Elson,* and *Aaron S. Wolff* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 393 F. 2d 156.

No. 226. SILVER, INC., ET AL. *v.* WEBCOR, INC., ET AL. C. A. 7th Cir. Certiorari denied. *I. Harvey Levinson, Melvin E. Levinson,* and *Robert M. Woodward* for petitioners. *Arnold M. Quittner* and *Miles G. Seeley* for respondents International Fastener Research Corp. et al., and *William S. Collen* for Whiston, Trustee in Bankruptcy of Webcor, Inc., et al. Reported below: 392 F. 2d 893.

No. 227. AVELLA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *George R. Sommer* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 395 F. 2d 762.

No. 232. RETAIL STORE EMPLOYEES UNION LOCAL 954 *v.* LANE DRUG CO. ET AL.; and

No. 233. LANE DRUG CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. *Joseph E. Finley* for petitioner in No. 232. *Leonard Lane* for petitioners in No. 233 and for respondents Lane Drug Co. et al. in No. 232. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board in both cases. Reported below: 391 F. 2d 812.

No. 235. GIBRALTAR FACTORS CORP. *v.* BARANOW, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Sydney Krause* for petitioner. *Marshall S. Marcus* for respondent. Reported below: 393 F. 2d 60.

No. 229. McFarland *v.* United States. C. A. 6th Cir. Certiorari denied. *Edward J. Walsh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 392 F. 2d 192.

No. 234. Tonkin Corp. of California, dba Seven-Up Bottling Co. of Sacramento *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Morton B. Jackson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. Reported below: 392 F. 2d 141.

No. 236. Connor *v.* California. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 240. Seafarers International Union of North America, AFL–CIO, et al. *v.* Wirtz, Secretary of Labor. C. A. D. C. Cir. Certiorari denied. *Howard Schulman* and *Stephen Kurzman* for petitioners. *Solicitor General Griswold* for respondent.

No. 241. Ching-Szu Chen *v.* Foley, District Director of Immigration and Naturalization Service. C. A. 6th Cir. Certiorari denied. *Bernard E. Bernstein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent. Reported below: 385 F. 2d 929.

No. 252. Stuyvesant Insurance Co. *v.* United States. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 394 F. 2d 262.

No. 245. TALLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Glasser* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 394 F. 2d 435.

No. 246. MARKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Eugene Gressman* and *Randall S. Jones* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States. Reported below: 391 F. 2d 210.

No. 253. HAMMOND *v.* ARKANSAS EX REL. DAVIS, SHERIFF. Sup. Ct. Ark. Certiorari denied. *Leon B. Catlett* for petitioner. Reported below: 244 Ark. 186, 424 S. W. 2d 861.

No. 254. ARGONAUT SAVINGS & LOAN ASSN. ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP., RECEIVER. C. A. 9th Cir. Certiorari denied. *Howard B. Crittenden, Jr.,* for petitioners. *Charles A. Legge, S. Rex Lewis,* and *Leslie H. Fisher* for respondent. Reported below: 392 F. 2d 195.

No. 255. BRENNAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Rosenberg* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 394 F. 2d 151.

No. 259. RHODES, GOVERNOR OF OHIO, ET AL. *v.* BUCHANAN ET AL. C. A. 6th Cir. Certiorari denied. *William B. Saxbe,* Attorney General of Ohio, and *Charles S. Lopeman* for petitioners. *Richard M. Markus* for respondents. Reported below: 400 F. 2d 882.

No. 256. CEPEDA *v.* COWLES MAGAZINES & BROADCASTING, INC. C. A. 9th Cir. Certiorari denied. *Marvin E. Lewis* for petitioner. *William K. Coblentz* for respondent. Reported below: 392 F. 2d 417.

No. 257. IN RE YORK ET UX. C. A. D. C. Cir. Certiorari denied. *Robert A. Diemer* for petitioners. *Charles T. Duncan, Hubert B. Pair,* and *Richard W. Barton* in opposition.

No. 261. KLEBANOFF *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE. Ct. App. N. Y. Certiorari denied. *Milton Bard* for petitioner. *Angelo T. Cometa* for respondent. Reported below: 21 N. Y. 2d 920, 237 N. E. 2d 75.

No. 264. GROW *v.* UNITED STATES; and

No. 275. MENSIK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Edward P. Morgan* and *Thomas M. P. Christensen* for petitioner in No. 264, and *Kinsey T. James* for petitioner in No. 275. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States in both cases. Reported below: 394 F. 2d 182.

No. 265. BERLIN *v.* BERLIN. Ct. App. N. Y. Certiorari denied. *Wilfred R. Caron* for petitioner. *Helen L. Buttenwieser* for respondent. Reported below: 21 N. Y. 2d 371, 235 N. E. 2d 109.

No. 276. SERV-AIR, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Frank Carter* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Glen M. Bendixsen* for respondent. Reported below: 395 F. 2d 557.

No. 266. FLORIDA *v.* EMELWON, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Joe N. Unger* for petitioner. *Al J. Cone* for respondents. Reported below: 391 F. 2d 9.

No. 268. BURNS ET AL. *v.* NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied. *Joseph A. Calamia* for petitioners. *Boston E. Witt,* Attorney General of New Mexico, for respondents. Reported below: 79 N. M. 53, 439 P. 2d 702.

No. 274. MOREALI *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Arthur L. Johnson* for petitioner. *Everett A. Corten* for respondent Workmen's Compensation Appeals Board of California.

No. 277. MONTGOMERY, EXECUTRIX, ET AL. *v.* GOODYEAR AIRCRAFT CORP. C. A. 2d Cir. Certiorari denied. *Harry H. Lipsig* for petitioners. *Paul W. Williams, H. Richard Schumacher,* and *Robert F. Martin* for respondent. Reported below: 392 F. 2d 777.

No. 292. UNITED MINE WORKERS OF AMERICA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Edward L. Carey, Harrison Combs, Willard Owens,* and *M. E. Boiarsky* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 393 F. 2d 265.

No. 281. KENNER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Pugh, Gilbert E. Andrews,* and *Robert J. Campbell* for respondent. Reported below: 387 F. 2d 689.

No. 272. BEASLEY ET AL. *v.* MCFADDIN ET AL. C. A. 5th Cir. Certiorari denied. *Richard H. Cocke* for petitioners. *Major T. Bell, George A. Weller,* and *Ewell Strong* for respondents. Reported below: 393 F. 2d 68.

No. 267. JOHNSON *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *William H. Oltarsh* for petitioner. *Frank S. Hogan, Michael Juviler,* and *Michael R. Stack* for respondent.

No. 283. HANNAH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joe Stamper* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 396 F. 2d 785.

No. 285. GENERAL TIRE & RUBBER CO. *v.* ISOCYANATE PRODUCTS, INC. C. A. 3d Cir. Certiorari denied. *John T. Kelton, Herbert Blecker,* and *Arthur G. Connolly, Jr.,* for petitioner. *C. Walter Mortenson, Charles A. Weigel, Jr., Virgil E. Woodcock,* and *John J. Mackiewicz* for respondent. Reported below: 391 F. 2d 936.

No. 287. AMERICAN PIPE & CONSTRUCTION CO. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Norbert A. Schlei* and *George W. Jansen* for petitioner. *William H. Ferguson* and *Charles S. Burdell* for respondents. Reported below: 393 F. 2d 568. [See No. 516, Misc., *supra,* p. 817.]

No. 288. JEFFERSON CONSTRUCTION CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Philip M. Cronin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for the United States. Reported below: 183 Ct. Cl. 720, 392 F. 2d 1006.

No. 289. First American Insurance Co. *v.* O'Connor. C. A. 5th Cir. Certiorari denied. *Joe N. Unger* for petitioner. *J. B. Spence* for respondent. Reported below: 392 F. 2d 588.

No. 294. Hauff *v.* United States. C. A. 7th Cir. Certiorari denied. *Daniel C. Ahern* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 395 F. 2d 555.

No. 295. Lothridge et al. *v.* United States. C. A. 6th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States.

No. 296. Pearce *v.* United States. C. A. 4th Cir. Certiorari denied. *Philip G. Denman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 397 F. 2d 375.

No. 300. Grisham *v.* United States. Ct. Cl. Certiorari denied. *Lawrence J. Simmons* and *H. Clay Espey* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge,* and *Robert V. Zener* for the United States. Reported below: 183 Ct. Cl. 657, 392 F. 2d 980.

No. 301. LTV Electrosystems, Inc. *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. *Robert T. Thompson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Lawrence M. Joseph* for respondent. Reported below: 388 F. 2d 683.

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No. 299. ERWIN-NEWMAN CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *H. Struve Hensel* and *Harry Cohen* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 183 Ct. Cl. 822, 393 F. 2d 819.

No. 302. ODDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Nicholas Capuano* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 396 F. 2d 806.

No. 304. SOUTHERN BLOWPIPE & ROOFING CO. ET AL. *v.* CHATTANOOGA GAS CO. C. A. 6th Cir. Certiorari denied. *Sizer Chambliss* for petitioners. *W. D. Spears* and *Jack Wilson* for respondent.

No. 308. RITTER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Daniel M. Gribbon, Brice M. Clagett,* and *Michael Boudin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Philip R. Miller* for the United States. Reported below: 183 Ct. Cl. 875, 393 F. 2d 823.

No. 309. KUBIK ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Louis M. Kaplan* and *John P. Diuguid* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 395 F. 2d 170.

No. 310. DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY *v.* NASH ET UX. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Martz,* and *Roger P. Marquis* for petitioner. *William T. Hannan* for respondents. Reported below: 129 U. S. App. D. C. 348, 395 F. 2d 571.

No. 312. CROUCH, ADMINISTRATRIX *v.* CHESAPEAKE & OHIO RAILWAY CO. Sup. Ct. App. Va. Certiorari denied. *Milton Heller, Paul Whitehead, Morris Benson,* and *Arthur Meisnere* for petitioner. *Henry M. Sackett, Jr.,* and *Aubrey R. Bowles, Jr.,* for respondent. Reported below: 208 Va. 602, 159 S. E. 2d 650.

No. 313. GRAHAM *v.* COLON. C. A. 7th Cir. Certiorari denied. *Joseph T. Helling* for petitioner. *Roland Obenchain, Jr.,* for respondent. Reported below: 393 F. 2d 166.

No. 316. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: 395 F. 2d 453.

No. 318. VANCE TRUCKING CO., INC., ET AL. *v.* CANAL INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. *W. Francis Marion* and *O. G. Calhoun* for petitioners. *Wesley M. Walker* for respondents Canal Insurance Co. et al. Reported below: 395 F. 2d 391.

No. 319. RAO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Bennett Williams* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 394 F. 2d 354.

No. 341. ESTATE OF FREELAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* and *Adam Y. Bennion* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Rogovin* for respondent. Reported below: 393 F. 2d 573.

No. 321. HART *v.* HEDRICK, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *James H. Tucker* for petitioner. *David W. Hedrick,* respondent, *pro se.* Reported below: 390 F. 2d 10.

No. 327. JACOBS *v.* TOLEDO BAR ASSN. Sup. Ct. Ohio. Certiorari denied. *Rankin M. Gibson* for petitioner. *Charles E. Ide, Jr.,* for respondent. Reported below: 13 Ohio St. 2d 147, 235 N. E. 2d 230.

No. 328. WEBB *v.* CITY OF LYNCHBURG. Sup. Ct. App. Va. Certiorari denied. *Paul Whitehead* and *Frank M. McCann* for petitioner.

No. 331. EUCLID NATIONAL BANK *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 6th Cir. Certiorari denied. *Bingham W. Zellmer* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 396 F. 2d 950.

No. 333. PAN AMERICAN WORLD AIRWAYS, INC. *v.* ALLIED AIR FREIGHT INTERNATIONAL CORP. C. A. 2d Cir. Certiorari denied. *Fowler Hamilton* and *George Weisz* for petitioner. *Milton Horowitz* for respondent. Reported below: 393 F. 2d 441.

No. 336. LYSCZYK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Robert I. Perina* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 397 F. 2d 505.

No. 339. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William C. Erbecker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 395 F. 2d 116.

No. 334. MIZNER *v.* MIZNER. Sup. Ct. Nev. Certiorari denied. *Richard C. Minor* for petitioner. Reported below: —— Nev. ——, 439 P. 2d 679.

No. 340. BREELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill, Sr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 396 F. 2d 805.

No. 342. HENRY, REFORMATORY SUPERINTENDENT *v.* COTNER. C. A. 7th Cir. Certiorari denied. *John J. Dillon,* Attorney General of Indiana, *Douglas B. McFadden,* Assistant Attorney General, and *Rex P. Killian,* Deputy Attorney General, for petitioner. *William C. Erbecker* for respondent. Reported below: 394 F. 2d 873.

No. 345. GRAY ET AL. *v.* DEPARTMENT OF HIGHWAYS OF LOUISIANA ET AL. Sup. Ct. La. Certiorari denied. *Thomas C. Hall* for petitioners. Reported below: 252 La. 51, 209 So. 2d 18.

No. 346. MACDOUGALL, CORRECTIONS DIRECTOR, ET AL. *v.* BAILEY. C. A. 4th Cir. Certiorari denied. *Daniel R. McLeod,* Attorney General of South Carolina, and *Edward B. Latimer,* Assistant Attorney General, for petitioners. Reported below: 392 F. 2d 155.

No. 354. HANSEN, DBA H. J. HANSEN & CO. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. *Mark P. Friedlander, Mark P. Friedlander, Jr.,* and *Blaine P. Friedlander* for petitioner. *Solicitor General Griswold, Philip A. Loomis, Jr., David Ferber,* and *Donald M. Feuerstein* for respondent. Reported below: 130 U. S. App. D. C. 45, 396 F. 2d 694.

No. 351. MIKE ROBERTS COLOR PRODUCTIONS, INC. *v.* COLOURPICTURE PUBLISHERS, INC. C. A. 1st Cir. Certiorari denied. *Edward B. Gregg* and *William G. MacKay* for petitioner. Reported below: 394 F. 2d 431.

No. 353. RATCLIFF *v.* BRUCE ET AL. Sup. Ct. Tex. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi,* Executive Assistant Attorney General, and *J. C. Davis* and *John H. Banks,* Assistant Attorneys General, for respondents.

No. 359. GRAHAM *v.* GREENE, JUDGE, ET AL. C. A. D. C. Cir. Certiorari denied. *Charles T. Duncan, Hubert B. Pair, Richard W. Barton,* and *David P. Sutton* for Greene et al., and *Solicitor General Griswold* for Murphy et al., respondents.

No. 363. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Edward J. Hickey, Jr., James L. Highsaw, Jr.,* and *William J. Donlon* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for National Mediation Board et al., and *David Previant* and *Herbert S. Thatcher* for International Brotherhood of Teamsters, respondents. Reported below: 131 U. S. App. D. C. 55, 402 F. 2d 196.

No. 365. HOLAHAN, TRUSTEE, ET AL. *v.* HENDERSON ET AL. C. A. 5th Cir. Certiorari denied. *George C. Connolly, Jr.,* for petitioners. *John L. Pitts* and *Grove Stafford, Jr.,* for respondent Henderson, and *Robert B. Neblett, Jr.,* for respondent Coleman. Reported below: 394 F. 2d 177.

No. 361. EQUITABLE LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Joseph F. Castiello* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 362. SCHMIDT *v.* MCCARTHY ET AL. C. A. D. C. Cir. Certiorari denied. *Cornelius H. Doherty* for petitioner.

No. 371. LOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Saul Grayson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 391 F. 2d 61.

No. 381. MINICHELLO ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 3d Cir. Certiorari denied. *Anthony C. Falvello* and *Arthur D. Dalessandro* for petitioners. *Solicitor General Griswold* for respondent Camp. Reported below: 394 F. 2d 715.

No. 385. PAXTON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Elwaine F. Pomeroy* for petitioner. *Robert C. Londerholm,* Attorney General of Kansas, and *Edward G. Collister, Jr.,* for respondent. Reported below: 201 Kan. 353 and 607, 440 P. 2d 650.

No. 55. PEYTON, PENITENTIARY SUPERINTENDENT *v.* COLES. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for petitioner. *James R. Moore* for respondent. Reported below: 389 F. 2d 224.

No. 82. MORRIS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. *Richard Kanner* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Charles W. Musgrove,* Assistant Attorney General, for respondent.

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

By denying certiorari in this case, the Court once again sanctions the practice of automatically depriving plaintiffs of their lawsuits or defendants of their defenses merely because their lawyers have failed to file some paper within the time required by Court rules. This is a form of vicarious punishment against which I have frequently protested in both civil and criminal cases, but in vain. See, *e. g., Santana* v. *United States,* 385 U. S. 848 (1966); *Pittsburgh Towing Co.* v. *Barge Line,* 385 U. S. 32, 33 (1966); *Beaufort Concrete Co.* v. *Atlantic States Construction Co.,* 384 U. S. 1004 (1966); *Lord* v. *Helmandollar,* 383 U. S. 928 (1966); *Riess* v. *Murchison,* 383 U. S. 946 (1966); *Berman* v. *United States,* 378 U. S. 530 (1964); *Link* v. *Wabash R. Co.,* 370 U. S. 626, 636 (1962). See also my dissent from this Court's order transmitting to Congress Amendments to the Federal Rules, 383 U. S. 1031, 1032 (1966).

This is a criminal case, where the petitioner's retained attorney filed a timely notice of appeal. Petitioner then hired a new lawyer to handle the appeal. Later, the State moved to dismiss the appeal for failure to prosecute, notifying the defense attorney but not the petitioner who had been convicted. Petitioner's lawyer failed to take any further action, and the court dismissed the appeal with prejudice, thereby depriving petitioner of his right to appellate review. Although petitioner never did receive notice from his lawyer or from the court, when he learned that his case had been dismissed, he quickly asked the court to reinstate it, explaining that he had never been advised that the appeal

was not being actively prosecuted or that the State had moved to dismiss it, and stating that he had now retained a new attorney who was prepared to proceed promptly with the appeal. The court, without ever giving the defendant the benefit of an opinion to explain its action, denied his motion. Now this Court refuses to review and hold that this defendant should be given the benefit of the first and most important rule of due process, which requires notice to a person before he is deprived of his liberty or his property. I would grant certiorari and hold that since Florida provides a right of appeal to criminal defendants in general, it is required to give this defendant an appellate review before he is stigmatized as a criminal.

Of course, the average litigants, who rarely get into court, are not well acquainted with the qualifications of lawyers and they may select poor ones. Even so, there is a vast difference between, on the one hand, holding the litigant responsible for errors in not objecting to evidence or pleadings, and, on the other hand, holding the litigant responsible for complete failure to file papers and then without notice to the litigant dismissing his entire case or defense. When a litigant hires a lawyer who has a state license to practice, he certainly has no reason to suspect that the State will reach into his pocket and make him pay money or take away his valuable cause of action because of his lawyer's neglect.

Many people justify such state action by saying that the litigant can sue his lawyer for malpractice. But there is a long distance between filing a malpractice suit and winning a damage award against an attorney for malpractice. Nor should courts render a judgment based on the idea that although they do a wrong to a litigant, he can be recompensed by a suit against his lawyer. There is a much simpler solution to this problem than malpractice lawsuits. Instead of holding a

litigant responsible in a civil or criminal case for the mistakes of his lawyer, the courts can merely give the litigant notice of his lawyer's defaults and an opportunity to get a new lawyer to present his case. I would grant certiorari and reverse.

No. 94. ACREE ET AL. *v.* AIR LINE PILOTS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Thomas L. Carter, Jr.*, and *Warren S. Gritzmacher* for petitioners. *Samuel J. Cohen* for Air Line Pilots Assn., and *W. Glen Harlan, E. Smythe Gambrell,* and *Charles A. Moye, Jr.*, for Eastern Air Lines, Inc., respondents. Reported below: 390 F. 2d 199.

No. 98. AMELL ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Lee Pressman* and *David Scribner* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl, Alan S. Rosenthal,* and *Robert E. Kopp* for the United States. Reported below: 182 Ct. Cl. 604, 390 F. 2d 880.

No. 119. KAPATOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Julius Lucius Echeles* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 141. COHEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Abraham Glasser* for petitioner. *Aaron E. Koota* and *William I. Siegel* for respondent.

No. 136. PEREZ ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *McPherson Berrien E. Moore* and *Hiram W. Kwan* for petitioners.

No. 290. CROWN COAT FRONT CO., INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Edwin J. McDermott* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for the United States. Reported below: 395 F. 2d 160.

No. 108. MORGAN *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. *Julian Herndon, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 391 F. 2d 237.

No. 120. PALMISANO ET AL. *v.* BALTIMORE COUNTY WELFARE BOARD. Ct. App. Md. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Louis Peregoff* for petitioners. *R. Bruce Alderman, Harris James George,* and *Jean G. Rogers* for respondent. Reported below: 249 Md. 94, 238 A. 2d 251.

No. 139. REMENYI *v.* CLIFFORD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Loyd Wright* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson* for respondents. Reported below: 391 F. 2d 128.

No. 122. TORMEY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John J. Abt* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for respondent.

No. 133. FULTZ *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard J. Morr* for petitioner. *Melvin G. Rueger* and *Leonard Kirschner* for respondent. Reported below: 13 Ohio St. 2d 79, 234 N. E. 2d 593.

No. 164. DAWKINS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. and/or Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Murray A. Gordon* for petitioners. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky* and *George R. Georgieff,* Assistant Attorneys General, for respondent. Reported below: 208 So. 2d 119.

No. 177. LOSCHI ET AL. *v.* MASSACHUSETTS PORT AUTHORITY. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Vincent J. Celeste* for petitioners. *Warren F. Farr* for respondent. Reported below: 354 Mass. 53, 234 N. E. 2d 901.

No. 203. THORESEN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin W. Miller* for petitioner. *James S. Erwin,* Attorney General of Maine, and *John W. Benoit, Jr.,* Assistant Attorney General, for respondent. Reported below: 239 A. 2d 654.

No. 373. TODD *v.* FRANKEL, GUARDIAN. C. A. 3d Cir. Certiorari denied. *Norman Paul Harvey* for petitioner. Reported below: 393 F. 2d 435.

No. 219. ROSADO *v.* FLOOD, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Irving Anolik* for petitioner. *William Cahn* and *George Danzig Levine* for respondent. Reported below: 394 F. 2d 139.

No. 225. MEACHAM, DBA "BARBARY COAST" *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *McPherson Berrien E. Moore* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *Kenneth Scholtz,* Deputy Attorney General, for respondent.

No. 320. OWENS *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Otto B. Mullinax* for petitioner. *Luther Hudson* for respondent. Reported below: 393 F. 2d 77.

No. 348. IN RE THORESEN. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John P. Frank, John J. Flynn,* and *Peyton Ford* for petitioner. Reported below: 395 F. 2d 466.

No. 143. BRUNS, NORDEMAN & CO. *v.* AMERICAN NATIONAL BANK & TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK dissents. *David J. Colton* and *Spencer Pinkham* for petitioner. *Lawrence Gunnels* for respondent American National Bank & Trust Co. Reported below: 394 F. 2d 300.

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No. 147. FERRELL ET AL. *v.* DALLAS INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. *Marvin Menaker* for petitioners. *Franklin E. Spafford* for respondents. Reported below: 392 F. 2d 697.

MR. JUSTICE DOUGLAS, dissenting.

It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of "life, liberty, and the pursuit of happiness," expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncrasies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men.

Municipalities furnish many services to their inhabitants; and I had supposed that it would be an invidious discrimination to withhold fire protection, police protection, garbage collection, health protection, and the like merely because a person was an offbeat nonconformist when it came to hairdo and dress as well as to diet, race, religion, or his views on Vietnam.

I would grant the petition for certiorari in this Texas case and put it down for argument.

No. 298. VAUGHN *v.* MUNICIPAL COURT, LOS ANGELES JUDICIAL DISTRICT. Sup. Ct. Cal. Motion to dispense with printing petition granted. Certiorari denied. *Frank D. Reeves* for petitioner. *John H. Larson* for respondent.

No. 349. THORESEN *v.* GOODWIN, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John P. Frank, John J. Flynn,* and *Peyton Ford* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for respondent.

No. 184. ARKANSAS VALLEY G & T, INC., ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Motion of Tri-State Generation & Transmission Association, Inc., for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Wallace L. Duncan, Stephen A. West,* and *J. A. Riggins, Jr.,* for petitioners. *Solicitor General Griswold, Peter H. Schiff,* and *William H. Arkin* for respondent Federal Power Commission; *Reuben Goldberg* for respondent Minnkota Power Cooperative, Inc.; and *William C. Wise* for respondents Committee of Rural Electric Cooperatives et al. *Raphael J. Moses* and *John J. Conway* for Tri-State Generation & Transmission Association, Inc., as *amicus curiae,* in support of the petition. Reported below: 129 U. S. App. D. C. 117, 391 F. 2d 470.

No. 149. COURTNEY *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *F. Conger Fawcett* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 390 F. 2d 521.

No. 211. NORTH CAROLINA *v.* LOGNER. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and judgment reversed. *Daniel K. Edwards* for petitioner. Reported below: 392 F. 2d 222.

No. 132. YUEN KAM CHUEN ET AL. *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d 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. *Abraham Lebenkoff* and *Jules E. Coven* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for respondent. Reported below: See 279 F. Supp. 151.

No. 210. PARMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Daniel A. Rezneck* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 130 U. S. App. D. C. 188, 399 F. 2d 559.

No. 311. CONLEY ELECTRONICS CORP., DBA TELEPROMPTER OF LIBERAL, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *John P. Cole, Jr.,* and *Alan Raywid* for petitioner. *Solicitor General Griswold, Assistant Attorney General Zimmerman, Howard E. Shapiro, Henry Geller,* and *John H. Conlin* for respondents. Reported below: 394 F. 2d 620.

No. 303. PARKS *v.* SIMPSON TIMBER CO. ET AL.; and No. 322. SIMPSON TIMBER CO. *v.* PARKS ET AL. C. A. 9th Cir. Motion in No. 303 to use record in No. 1335, October Term, 1966, granted. Certiorari denied. *Eugene Gressman* for petitioner in No. 303. *Kenneth E. Roberts* and *Albert Brick* for petitioner in No. 322 and for respondent Simpson Timber Co. in No. 303. Reported below: 390 F. 2d 353.

No. 337. TIME, INC., ET AL. *v.* BON AIR HOTEL, INC. C. A. 5th Cir. Certiorari denied. *Harold R. Medina, Jr.*, for petitioners.

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

I would grant certiorari in this case and hold that the petitioners, Time, Inc., and Dan Jenkins, were entitled to summary judgment since, for the reasons stated in the separate opinions of MR. JUSTICE DOUGLAS and myself in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293; *Rosenblatt* v. *Baer,* 383 U. S. 75, 94; and *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 170, I believe that a libel judgment against these petitioners is forbidden by the First Amendment's guarantee that freedom of the press shall not be abridged, a guarantee made applicable to the States by the Fourteenth Amendment. This constitutional bar would apply to any state of facts that might be shown at the trial of this case. I believe the First Amendment was intended to leave the press free from the harassment and expense of suits such as this.

No. 214. WHITE *v.* EVANSVILLE AMERICAN LEGION HOME ASSN. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE BLACK dissents from the denial of the petition for writ of certiorari. *Theodore Lockyear* for petitioner. *Frederick P. Bamberger* for respondent.

No. 314. RAY *v.* SEABOARD AIR LINE RAILROAD CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE BLACK dissents from the denial of certiorari in this case; he would grant certiorari and reverse summarily, believing it was clearly error to grant summary judgment against petitioner. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James F. Lang* and *William N. Avera* for petitioner. *John S. Cox* for respondent. Reported below: 205 So. 2d 537.

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No. 350. HAINES *v.* SOUTHERN PACIFIC CO. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE BLACK dissents from denial of certiorari; he would grant certiorari and set the case down for oral argument. *Rex E. Lee* for petitioner. *Ralph W. Bilby* for respondent.

No. 367. UTAH PIE CO. *v.* CONTINENTAL BAKING CO. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Joseph L. Alioto, Matthew P. Mitchell,* and *Robert W. Hughes* for petitioner. *John H. Schafer* for Continental Baking Co.; *Peter W. Billings* and *James R. Baird, Jr.,* for Carnation Co.; and *George P. Lamb, Carrington Shields, John P. Lipscomb,* and *Gene Mayfield* for Pet Milk Co., respondents. Reported below: 396 F. 2d 161.

No. 8, Misc. O'HALLORAN *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *Michael J. Rotko* and *Arlen Specter* for respondent. Reported below: 384 F. 2d 997.

No. 9, Misc. MORALES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Gloria F. DeHart,* Deputy Attorney General, for respondent.

No. 25, Misc. NAPIER *v.* UNITED STATES;
No. 26, Misc. COWART *v.* UNITED STATES; and
No. 27, Misc. SKIPPER *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: 387 F. 2d 147.

No. 12, Misc. JOHNSON ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent.

No. 14, Misc. SCHWEININGER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *George J. Aspland* and *John Copertino* for respondent.

No. 15, Misc. LAUDERMILK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent. Reported below: 67 Cal. 2d 272, 431 P. 2d 228.

No. 17, Misc. SESSIONS *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. *Michael J. Rotko* and *Arlen Specter* for respondent.

No. 18, Misc. AGOSTO *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 19, Misc. FORD *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 20, Misc. CLARKE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *David J. Cannon* for respondent. Reported below: 36 Wis. 2d 263, 153 N. W. 2d 61.

No. 24, Misc. RENSING *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Aaron E. Koota* and *Stanley M. Meyer* for respondent. Reported below: 20 N. Y. 2d 936, 233 N. E. 2d 459.

No. 21, Misc. PETERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Bertrand De Blanc* for respondent. Reported below: 251 La. 273, 204 So. 2d 284.

No. 28, Misc. BANKS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Nelson P. Kempsky,* Deputy Attorney General, for respondent.

No. 29, Misc. MARTIN *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: 386 F. 2d 213.

No. 30, Misc. CINDLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *G. T. Blankenship,* Attorney General of Oklahoma, and *Hugh H. Collum,* Assistant Attorney General, for respondent. Reported below: 433 P. 2d 528.

No. 31, Misc. TORRES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Edward J. Horowitz,* Deputy Attorney General, for respondent.

No. 32, Misc. CRAWFORD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *William E. Gray* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 385 F. 2d 156.

No. 33, Misc. WHITED *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *H. G. Hamilton,* Assistant Attorney General, for respondent. Reported below: 182 Neb. 282, 154 N. W. 2d 508.

No. 34, Misc. ALMEIDA *v.* RUNDLE, WARDEN. C. A. 3d Cir. Certiorari denied. *Herbert G. Keene, Jr.,* for petitioner. *Michael J. Rotko* and *Arlen Specter* for respondent. Reported below: 383 F. 2d 421.

No. 35, Misc. BOYD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Charles W. Tessmer* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 419 S. W. 2d 843.

No. 36, Misc. KING *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Deputy Attorney General, for respondent.

No. 37, Misc. HANKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Kenneth K. Simon* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 388 F. 2d 171.

No. 38, Misc. SALAS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 121.

No. 40, Misc. RUSSEL *v.* CRAVEN, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gerald H. Genard,* Deputy Attorney General, for respondents.

No. 41, Misc. RAY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *James M. Weinberg* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci,* Deputy Attorney General, for respondent. Reported below: 252 Cal. App. 2d 932, 61 Cal. Rptr. 1.

No. 44, Misc. HOLDEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 388 F. 2d 240.

No. 42, Misc. FLOURNOY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *W. B. Keeling* for respondent.

No. 45, Misc. WATROBA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Gloria F. DeHart,* Deputy Attorney General, for respondent.

No. 49, Misc. BALL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole,* Assistant Attorney General, for respondent.

No. 53, Misc. PERSINGER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 72 Wash. 2d 561, 433 P. 2d 867.

No. 46, Misc. HANDY *v.* PATUXENT INSTITUTION DIRECTOR. Ct. Sp. App. Md. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, and *Edward F. Borgerding,* Assistant Attorney General, for respondent.

No. 51, Misc. BERNAL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 254 Cal. App. 2d 283, 62 Cal. Rptr. 96.

No. 47, Misc. SCHOEPFLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William S. Hochman* and *Robert E. Lynch, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 391 F. 2d 390.

No. 48, Misc. CHABOLLA-DELGADO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Stella Gramer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for respondent. Reported below: 384 F. 2d 360.

No. 54, Misc. PADGETT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *David U. Tumin,* Assistant Attorney General, for respondent. Reported below: 387 F. 2d 387.

No. 56, Misc. MILANI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 39 Ill. 2d 22, 233 N. E. 2d 398.

No. 58, Misc. KENDRICK *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for respondents.

No. 62, Misc. USSERY 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: 386 F. 2d 495.

No. 65, Misc. HINDMARSH *v.* UNITED STATES; and No. 66, Misc. HINDMARSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William J. Dammarell* for petitioner in each case. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 389 F. 2d 137.

No. 67, Misc. MCKINNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 69, Misc. STRAIN *v.* GOSLIN, SHERIFF. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *William P. Schuler,* Second Assistant Attorney General, for respondent.

No. 71, Misc. LIMON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Don Jacobson,* Deputy Attorneys General, for respondent. Reported below: 255 Cal. App. 2d 519, 63 Cal. Rptr. 91.

No. 63, Misc. NEWTON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *James B. Wilkinson* for respondent.

No. 70, Misc. LOUX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Ralph J. Steinberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 911.

No. 72, Misc. ST. CLAIR *v.* NAPOLI, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 73, Misc. BRADWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gerald F. Stevens* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 388 F. 2d 619.

No. 74, Misc. SMITH *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *James S. Tegart,* Assistant Attorney General, for respondents.

No. 76, Misc. MINOR *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent.

No. 77, Misc. VELASCO ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent. Reported below: 386 F. 2d 283.

No. 78, Misc. GLORIOSO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent. Reported below: 386 F. 2d 664.

No. 80, Misc. TALBOT *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Edward P. O'Brien* and *George R. Nock,* Deputy Attorneys General, for respondent. Reported below: 390 F. 2d 801.

No. 82, Misc. JOHNSON *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers, Dunklin Sullivan,* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 383 F. 2d 197.

No. 84, Misc. JENNINGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Paul E. Gifford* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 391 F. 2d 512.

No. 85, Misc. TAYLOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Blaine P. Friedlander* for petitioner. *Solicitor General Griswold* for the United States.

No. 90, Misc. FITZSIMMONS *v.* YEAGER, PRINCIPAL KEEPER, ET AL. C. A. 3d Cir. Certiorari denied. *John G. Thevos* for respondents. Reported below: 391 F. 2d 849.

No. 91, Misc. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Gordon W. Neilson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 390 F. 2d 278.

No. 92, Misc. DAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Ira B. Grudberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 390 F. 2d 879.

No. 93, Misc. STOCKLEY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Daniel Hartnett* for petitioner. *Wescott B. Northam* for respondent.

No. 94, Misc. WELLS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Francis Conklin* for petitioner. Reported below: 72 Wash. 2d 492, 433 P. 2d 869.

No. 95, Misc. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph J. Rekofke* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 911.

No. 101, Misc. KITT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 2 Md. App. 306, 234 A. 2d 621.

No. 99, Misc. ROY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *David B. Stanton,* Deputy Attorney General, for respondent.

No. 97, Misc. RAMER *v.* UNITED STATES; and

No. 141, Misc. CHURCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Mervyn Hamburg* for the United States in both cases. Reported below: 390 F. 2d 564.

No. 100, Misc. GREGORY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Charles L. Kellar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 391 F. 2d 281.

No. 102, Misc. LATTA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jerold A. Prod,* Deputy Attorney General, for respondent.

No. 104, Misc. BISHOP *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 107, Misc. COGHLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Bernard G. Winsberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Theodore George Gilinsky* for the United States. Reported below: 391 F. 2d 371.

No. 108, Misc. AVENT ET AL. *v.* NEWARK HOUSING AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. *David L. Krooth, Norman S. Altman, Victor A. Altman, William S. Tennant, Augustine J. Kelly,* and *Michael M. Alercio* for respondents. Reported below: 384 F. 2d 151.

No. 106, Misc. McCoy *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 109, Misc. Blumner et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Jerome J. Londin* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 111, Misc. Smith *v.* Montgomery Ward & Co., Inc. C. A. 6th Cir. Certiorari denied. Reported below: 388 F. 2d 291.

No. 112, Misc. Bynacker *v.* McMichael. Sup. Ct. La. Certiorari denied. *Edward B. Dufreche* for petitioner. Reported below: 251 La. 654, 205 So. 2d 433.

No. 114, Misc. Boggs et al. *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 255 Cal. App. 2d 693, 63 Cal. Rptr. 430.

No. 115, Misc. Edgerton *v.* Maryland. C. A. 4th Cir. Certiorari denied.

No. 117, Misc. Dear *v.* Dear. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 87 Ill. App. 2d 72, 77, 230 N. E. 2d 385, 386.

No. 118, Misc. Thomas *v.* Field, Men's Colony Superintendent, et al. Sup. Ct. Cal. Certiorari denied.

No. 119, Misc. Marcelin *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 122, Misc. BOONE *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 123, Misc. BRODERICK *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Ferdinand Samper* for petitioner. Reported below: —— Ind. ——, 231 N. E. 2d 526.

No. 124, Misc. YOUNT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 126, Misc. VARONE *v.* VARONE. C. A. 7th Cir. Certiorari denied. Reported below: 392 F. 2d 855.

No. 127, Misc. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 128, Misc. BARRIO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 130, Misc. GROGG *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 131, Misc. HILL *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied. *Michael H. Rosen* for petitioner. *A. L. Newbould* for respondent. Reported below: 72 Wash. 2d 786, 435 P. 2d 692.

No. 132, Misc. CERDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 391 F. 2d 219.

No. 134, Misc. CARLINO *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: 390 F. 2d 624.

No. 135, Misc. FLETCHER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 137, Misc. BURNS *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 139, Misc. EVANS *v.* COUNTY OF DELAWARE, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 390 F. 2d 617.

No. 142, Misc. DAVIS *v.* HARPER, CORRECTION COMMISSIONER. C. A. 6th Cir. Certiorari denied.

No. 146, Misc. CLARK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 391 F. 2d 57.

No. 148, Misc. MANNI *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: 391 F. 2d 922.

No. 150, Misc. RUCKER *v.* CITY OF FLINT ET AL. C. A. 6th Cir. Certiorari denied.

No. 151, Misc. BOONE *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 152, Misc. MINIARD *v.* LEWIS ET AL., TRUSTEES. C. A. D. C. Cir. Certiorari denied. *Julian H. Singman* for petitioner. *Welly K. Hopkins, Harold H. Bacon,* and *Joseph T. McFadden* for respondents. Reported below: 128 U. S. App. D. C. 299, 387 F. 2d 864.

No. 155, Misc. GUTKOWSKY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 154, Misc. SHERRICK *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 389 F. 2d 648.

No. 157, Misc. REDD *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 159, Misc. TAYLOR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Harland M. Britz* for petitioner. *Harry Friberg* for respondent.

No. 160, Misc. THOMAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 161, Misc. MINHINNICK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 162, Misc. SMITH *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: 391 F. 2d 543.

No. 163, Misc. TENORIO *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: 390 F. 2d 96.

No. 164, Misc. HARRIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *H. H. Gearinger* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 391 F. 2d 348.

No. 165, Misc. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 166, Misc. JORDAN *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for respondent United States.

No. 168, Misc. LEYVA *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 170, Misc. HENRY *v.* WEAVER, PAROLE ADMINISTRATOR. C. A. 9th Cir. Certiorari denied.

No. 171, Misc. LUSK *v.* STRICKLAND ET AL. C. A. 7th Cir. Certiorari denied. *Howard W. Campbell* for respondents Strickland et al.

No. 172, Misc. BURNS *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: 390 F. 2d 659.

No. 173, Misc. WILSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 174, Misc. WRIGHT *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 175, Misc. STOCKMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 176, Misc. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Patrick J. Hughes, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 389 F. 2d 629.

No. 179, Misc. RAMOS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

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No. 177, Misc. HUDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 331.

No. 180, Misc. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 181, Misc. DURAN *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 182, Misc. BREAUX *v.* G. H. LEIDENHEIMER CO., LTD., ET AL. Sup. Ct. La. Certiorari denied. *Floyd J. Reed* for petitioner.

No. 183, Misc. DARBY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, for respondent.

No. 184, Misc. JONES *v.* STANTON ET AL. C. A. 6th Cir. Certiorari denied. *Robert K. Dwyer,* Executive Assistant Attorney General of Tennessee, and *Eugene C. Gaerig,* Assistant Attorney General, for respondents.

No. 185, Misc. SYKES *v.* PURTELL, SHERIFF. Sup. Ct. Wis. Certiorari denied.

No. 186, Misc. NICHOLSON ET AL. *v.* SIGLER, WARDEN. Sup. Ct. Neb. Certiorari denied. Reported below: 183 Neb. 24, 157 N. W. 2d 872.

No. 191, Misc. JONES *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. 189, Misc. REEVES *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 20 Utah 2d 434, 439 P. 2d 288.

No. 190, Misc. BLACKWELDER *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 192, Misc. DUVAL *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 203.

No. 193, Misc. LOCKETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 390 F. 2d 168.

No. 194, Misc. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 196, Misc. HEMPHILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 392 F. 2d 45.

No. 198, Misc. BOONE *v.* MOYLAN ET AL. C. A. 4th Cir. Certiorari denied.

No. 199, Misc. LEVY ET AL. *v.* MONTGOMERY COUNTY ET AL. Ct. App. Md. Certiorari denied. *Alfred H. Carter* and *H. Christopher Malone, Jr.,* for respondent Montgomery County, and *Edgar F. Czarra, Jr.,* for respondents Evening Star Broadcasting Co., Trustee, et al. Reported below: 248 Md. 346, 236 A. 2d 737.

No. 203, Misc. WOOLLASTON *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 204, Misc. OGLESBY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 206, Misc. LOEWING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 392 F. 2d 218.

No. 209, Misc. REA *v.* RUSSELL, WARDEN. Sup. Ct. Tenn. Certiorari denied. *George F. McCanless*, Attorney General of Tennessee, and *Paul E. Jennings*, Assistant Attorney General, for respondent.

No. 210, Misc. MCTAGUE *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.

No. 212, Misc. NORDESTE *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: 393 F. 2d 335.

No. 213, Misc. HOOPER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 214, Misc. TROTTER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 218, Misc. RICE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 37 Wis. 2d 392, 155 N. W. 2d 116.

No. 215, Misc. DURHAM *v.* BREWER, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 216, Misc. BLAYLOCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 219, Misc. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 220, Misc. JACKSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Arden M. Siegendorf,* Assistant Attorney General, for respondent.

No. 222, Misc. ANCRUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 225, Misc. STAHL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Cleary* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 393 F. 2d 101.

No. 228, Misc. MAYBERRY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 229, Misc. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Clement Theodore Cooper* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 385 F. 2d 835.

No. 230, Misc. STAMM *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 389 F. 2d 1006.

No. 232, Misc. TAYLOR *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 421 S. W. 2d 310.

No. 233, Misc. CHACON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 234, Misc. MYERS *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: 390 F. 2d 793.

No. 236, Misc. WALLE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 182 Neb. 642, 156 N. W. 2d 810.

No. 237, Misc. BELK *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Charles V. Bell* for petitioner. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent. Reported below: 272 N. C. 517, 158 S. E. 2d 335.

No. 238, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 240, Misc. DETABLAN *v.* ADMINISTRATOR, U. S. VETERANS ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 243, Misc. RANDEL *v.* TEXAS BOARD OF PARDONS AND PAROLES ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 239, Misc. ELTON *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 241, Misc. NETTLES *v.* ILLINOIS. Cir. Ct., Will County, Ill. Certiorari denied.

No. 242, Misc. ESTRADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 392 F. 2d 529.

No. 244, Misc. FAJERIAK *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 439 P. 2d 783.

No. 245, Misc. WILLIAMS *v.* ESSEX COUNTY WELFARE BOARD. Super. Ct. N. J. Certiorari denied. *William H. Sheil* for respondent.

No. 246, Misc. BURCHIL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 247, Misc. LEAVITT *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. *F. Lee Bailey* for petitioner. *Herbert F. DeSimone,* Attorney General of Rhode Island, and *Richard J. Israel* and *Donald P. Ryan,* Assistant Attorneys General, for respondent. Reported below: —— R. I. ——, 237 A. 2d 309.

No. 250, Misc. POTTER *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 256, Misc. HARVEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wilfred C. Varn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 390 F. 2d 662.

No. 251, Misc. PACHECO *v.* CARBERRY, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. *William Klein* and *Edward L. Cragen* for petitioner. Reported below: 389 F. 2d 93.

No. 253, Misc. SIWAKOWSKI *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 254, Misc. JONES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *George A. Fath* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 392 F. 2d 567.

No. 257, Misc. POOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 259, Misc. COLE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 260, Misc. DAVIS *v.* CALIFORNIA. Super. Ct. Cal., County of Butte. Certiorari denied.

No. 261, Misc. JACKSON *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 264, Misc. MANNING *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 392 F. 2d 197.

No. 265, Misc. ORTIZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 267, Misc. MOODY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Gerald I. Roth* for petitioner. Reported below: 429 Pa. 39, 239 A. 2d 409.

No. 268, Misc. COSTANZO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 395 F. 2d 441.

No. 270, Misc. MARSHALL ET UX. *v.* SOUTHERN FARM BUREAU CASUALTY CO. ET AL. Sup. Ct. La. Certiorari denied. *J. Minos Simon* for petitioners.

No. 273, Misc. BLACKMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 274, Misc. YOUNGLOVE *v.* ATTORNEY GENERAL OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 275, Misc. FURTAK *v.* McMANN, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 276, Misc. PILLIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 659.

No. 277, Misc. GOINGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Thomas H. Foye* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 393 F. 2d 884.

No. 278, Misc. SHIFFLETT *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 281, Misc. MARKS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 598.

No. 279, Misc. SCOTT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. *Raymond E. LaPorte* for petitioner. Reported below: 207 So. 2d 493.

No. 282, Misc. NASH *v.* REINCKE, WARDEN. Sup. Ct. Conn. Certiorari denied. Reported below: 156 Conn. 339, 240 A. 2d 877.

No. 283, Misc. CAGNOLATTI *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 285, Misc. DAVIS *v.* CALIFORNIA MEDICAL FACILITY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 2d 754.

No. 286, Misc. ODDY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 291, Misc. PEMBERTON *v.* OHIO. C. A. 6th Cir. Certiorari denied. *Lee C. Davies, Robert K. Lewis, Jr.,* and *Louis A. Dirker* for petitioner. *James V. Barbuto* and *Stephan M. Gabalac* for respondent.

No. 293, Misc. COPELAND *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 295, Misc. MCGUIRE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 39 Ill. 2d 244, 234 N. E. 2d 772.

No. 297, Misc. THOMPSON *v.* EVENING STAR NEWSPAPER CO. C. A. D. C. Cir. Certiorari denied. *Charles P. Howard, Jr.,* for petitioner. Reported below: 129 U. S. App. D. C. 299, 394 F. 2d 774.

No. 298, Misc. REDD *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 301, Misc. REID *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 305, Misc. RUSSO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *W. Edward Morgan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 391 F. 2d 1004.

No. 308, Misc. CHRISTMAN *v.* LESHER. C. A. 3d Cir. Certiorari denied.

No. 309, Misc. WRIGHT *v.* MCKENDRICK, WARDEN. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 310, Misc. HARPER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 313, Misc. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 393 F. 2d 687.

No. 315, Misc. MISSMER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 72 Wash. 2d 1022, 435 P. 2d 638.

No. 318, Misc. PIERCE *v.* COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 388 F. 2d 846.

No. 320, Misc. MCKEAN ET UX. *v.* CARMAE CORP. ET AL. Sup. Ct. La. Certiorari denied. *Benjamin E. Smith* and *Leonard E. Yokum, Jr.,* for petitioners.

No. 311, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 319, Misc. KOVIC *v.* FLORIDA DEPARTMENT OF PUBLIC WELFARE. C. A. 5th Cir. Certiorari denied.

No. 321, Misc. ROGERS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 322, Misc. JOERGER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Arden M. Siegendorf,* Assistant Attorney General, for respondent.

No. 323, Misc. TUNSTALL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 325, Misc. HARBOUR TOWER DEVELOPMENT CORP. ET AL. *v.* MATHESON ET AL., TRUSTEES. C. A. 5th Cir. Certiorari denied. *Lyon L. Tyler, Jr.,* for petitioners. *Neal P. Rutledge* for respondents.

No. 326, Misc. MARANZE *v.* TERRY. C. A. 6th Cir. Certiorari denied.

No. 327, Misc. ENGLEHART *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Willie J. Davis,* Assistant Attorney General, for respondent. Reported below: 353 Mass. 561, 233 N. E. 2d 737.

No. 328, Misc. PEREZ *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 182 Neb. 680, 157 N. W. 2d 162.

No. 332, Misc. TAIT *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 331, Misc. HINES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 333, Misc. MOORE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 339, Misc. WILLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 393 F. 2d 118.

No. 340, Misc. ANDERSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Emmett Colvin, Jr.,* for petitioner. Reported below: 424 S. W. 2d 923.

No. 341, Misc. BOSTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 342, Misc. BOAG *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 344, Misc. GUERRERO *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 345, Misc. WILLOUGHBY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 348, Misc. SHELBY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 232 N. E. 2d 363.

No. 350, Misc. BALL *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 351, Misc. HASKETT *v.* MARION COUNTY CRIMINAL COURT, DIVISION ONE, ET AL. Sup. Ct. Ind. Certiorari denied. *Ferdinand Samper* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *John F. Davis,* Deputy Attorney General, for respondents. Reported below: —— Ind. ——, 234 N. E. 2d 636.

No. 352, Misc. GOGLEY *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 355, Misc. BAKER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 356, Misc. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Eleanor Jackson Piel* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 357, Misc. BARFIELD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 358, Misc. HENDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 360, Misc. RUTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Joseph L. Garrubbo* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 394 F. 2d 134.

No. 363, Misc. WALLACE *v.* FIELD, MEN'S COLONY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 366, Misc. NETTLES *v.* ILLINOIS. Cir. Ct., Will County, Ill. Certiorari denied.

No. 364, Misc. JONES *v.* HULSE ET AL. C. A. 8th Cir. Certiorari denied. *D. Jeff. Lance* for respondents. Reported below: 391 F. 2d 198.

No. 365, Misc. LUCIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 394 F. 2d 511.

No. 368, Misc. WILLIFORD *v.* WILLINGHAM, WARDEN. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 370, Misc. CRISAFI *v.* OLIVER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 396 F. 2d 293.

No. 371, Misc. DILLON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Ivan E. Barris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 391 F. 2d 433.

No. 372, Misc. HUBBARD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 2 Md. App. 364, 234 A. 2d 775.

No. 375, Misc. TUCKER *v.* STEFFES, JUDGE. Sup. Ct. Wis. Certiorari denied. *Sydney M. Eisenberg* for petitioner.

No. 384, Misc. GARCIA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 385, Misc. JENKINS *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 378, Misc. GREER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *Sidney Z. Karasik* and *Errett O. Graham* for petitioner. Reported below: 393 F. 2d 44.

No. 382, Misc. MORTON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 200 Kan. 259, 436 P. 2d 382.

No. 386, Misc. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 260 Cal. App. 2d 211, 67 Cal. Rptr. 35.

No. 388, Misc. GILES *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Lance D. Evans,* Assistant Attorney General, for respondent.

No. 389, Misc. GARCIA *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied.

No. 390, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. Garland Head III* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 394 F. 2d 821.

No. 392, Misc. WALCOTT *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *James E. Kennedy* for respondent. Reported below: 72 Wash. 2d 959, 435 P. 2d 994.

No. 393, Misc. WATTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 396, Misc. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 392 F. 2d 377.

No. 398, Misc. EARP *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 250 Ore. 19, 440 P. 2d 214.

No. 400, Misc. BLACK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 401, Misc. WILLIAMSON *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 78 N. M. 751, 438 P. 2d 161.

No. 402, Misc. HOSKINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 404, Misc. VAUGHN *v.* TRUJILLO, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 406, Misc. WILLIAMS *v.* FIELD, MEN'S COLONY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 2d 329.

No. 407, Misc. FOX *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 250 Ore. 83, 439 P. 2d 1009.

No. 450, Misc. BOWMAN *v.* FIRST NATIONAL BANK OF HARRISONBURG ET AL. C. A. 4th Cir. Certiorari denied. *L. J. H. Herwig* for petitioner. *W. W. Wharton* for respondents First National Bank of Harrisonburg et al., and *Solicitor General Griswold* for respondent White. Reported below: 388 F. 2d 756.

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No. 415, Misc. ANDREWS ET VIR *v.* BETANCOURT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Daniel M. Semel* for respondent.

No. 426, Misc. TURNER *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States et al.

No. 445, Misc. PRITCHETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 446, Misc. VIENNE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 447, Misc. MAGBY *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 452, Misc. ROSA *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Gerald W. Griffin* for petitioner. Reported below: 395 F. 2d 721.

No. 453, Misc. MORTON *v.* AVERY, CORRECTION COMMISSIONER. C. A. 6th Cir. Certiorari denied. Reported below: 393 F. 2d 138.

No. 454, Misc. TOLIVER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 456, Misc. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 470, Misc. MACEY *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 395 F. 2d 768.

No. 457, Misc. LUCERO *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 461, Misc. LOMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 464, Misc. YOUNG ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 465, Misc. FREDERICK *v.* BAKER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 469, Misc. WADE *v.* YEAGER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 471, Misc. FAIR *v.* ADAMS, SECRETARY OF STATE OF FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 472, Misc. MCDANIELS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 474, Misc. HOLSTEIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Robert A. Green, Jr.,* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for respondent.

No. 476, Misc. CASSIDY *v.* RIDDLES. C. A. 4th Cir. Certiorari denied.

No. 477, Misc. MADDOX *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Leon B. Polsky* for petitioner.

No. 491, Misc. MARCUM *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. *John B. Breckinridge,* Attorney General of Kentucky, and *David Murrell,* Assistant Attorney General, for respondents.

No. 527, Misc. HOHENSEE ET AL. *v.* MINEAR. Ct. App. Md. Certiorari denied. *Jo V. Morgan, Jr.,* for respondent.

No. 484, Misc. LEVINE ET AL. *v.* REVLON, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 530, Misc. BIGLOW *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. *Phillip A. Hubbart* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Harold Mendelow,* Assistant Attorney General, for respondent.

No. 538, Misc. SWANSON *v.* BRIDGES ET AL. C. A. 6th Cir. Certiorari denied. *J. Brad Reed* for respondents.

No. 556, Misc. MCCORPEN *v.* CENTRAL GULF STEAMSHIP CORP. C. A. 5th Cir. Certiorari denied. *Arthur J. Mandell* for petitioner. *Leroy Denman Moody* for respondent. Reported below: 396 F. 2d 547.

No. 582, Misc. TURNER *v.* SHEEHY, REFORMATORY SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for respondent.

No. 23, Misc. JORDAN *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David F. McLain* for respondents.

No. 55, Misc. SMOAK *v.* CALIFORNIA. Super. Ct. Cal., County of Orange. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 612, Misc. WASHINGTON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Peter Murray* and *Richard Newman* for petitioner.

No. 61, Misc. EDWARDS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for respondent.

No. 64, Misc. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Irl B. Baris* for petitioner. *Norman H. Anderson,* Attorney General of Missouri, and *Howard L. McFadden* and *Richard E. Dorr,* Assistant Attorneys General, for respondent. Reported below: 422 S. W. 2d 50.

No. 98, Misc. BANKS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *S. R. Zimmerman III* for petitioner. *Clarence C. Newcomer* for respondent. Reported below: 428 Pa. 571, 237 A. 2d 339.

No. 306, Misc. HASHFIELD *v.* CIRCUIT COURT OF MONROE COUNTY ET AL. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Ferdinand Samper* for petitioner. *John J. Dillon,* Attorney General of Indiana, *Douglas B. McFadden,* Assistant Attorney General, and *Duejean C. Garrett,* Deputy Attorney General, for respondents. Reported below: —— Ind. ——, 234 N. E. 2d 268.

No. 125, Misc. BOECKENHAUPT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Plato Cacheris* and *James C. Cacheris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Robert L. Keuch* for the United States. Reported below: 392 F. 2d 24.

No. 263, Misc. WINTERS *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Moses M. Falk* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 390 F. 2d 879. [For earlier order herein, see, *e. g.,* 391 U. S. 910.]

No. 83, Misc. WRIGHT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari and other relief denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent.

No. 96, Misc. SCHAWARTZBERG *v.* UNITED STATES. C. A. 2d 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 *Mervyn Hamburg* for the United States.

No. 338, Misc. OQUENDO *v.* UNITED STATES. C. A. 2d Cir. Motion of Youth Against War & Fascism for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *Conrad J. Lynn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. *Marvin M. Karpatkin* for Youth Against War & Fascism, as *amicus curiae,* in support of the petition.

No. 312, Misc. LUCAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jay Greenfield* for petitioner. *Frank S. Hogan* and *Michael Juviler* for respondent.

No. 494, Misc. CHARLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *John J. Dwyer* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 130 U. S. App. D. C. 151, 397 F. 2d 712.

No. 113, Misc. LEVY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Motion to supplement record granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Solicitor General Griswold* for respondents.

No. 121, Misc. VIGLIANO *v.* THEVOS ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Leonard I. Garth* for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, *William J. Brennan III,* Assistant Attorney General, and *Douglas J. Harper,* Deputy Attorney General, for respondents. Reported below: 390 F. 2d 55.

No. 158, Misc. MILLER *v.* PATE, WARDEN. C. A. 7th Cir. Motion of Radio Station W–A–I–T (Chicago) et al. for leave to file a brief, as *amici curiae,* granted. Certiorari denied. *Arthur G. Greenberg, Harry Golter, William R. Ming, Jr.,* and *Willard J. Lassers* for petitioner. *Roger W. Hayes* for respondent. *Maurice Rosenfield* for Radio Station W–A–I–T (Chicago) et al., as *amici curiae,* in support of the petition.

No. 300, Misc. FERMIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States.

Rehearing Denied.

No. 247, October Term, 1967. PUYALLUP TRIBE *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL., 391 U. S. 392;

No. 405, October Term, 1967. POWELL *v.* TEXAS, 392 U. S. 514;

No. 508, October Term, 1967. LEVY, ADMINISTRATRIX *v.* LOUISIANA THROUGH THE CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS ET AL., 391 U. S. 68;

No. 639, October Term, 1967. GLONA *v.* AMERICAN GUARANTEE & LIABILITY INSURANCE CO. ET AL., 391 U. S. 73;

No. 765, October Term, 1967. WILLS *v.* UNITED STATES, 392 U. S. 908;

No. 941, October Term, 1967. CARCERANO *v.* GLADDEN, WARDEN, 392 U. S. 631;

No. 1015, October Term, 1967. WITHERSPOON *v.* ILLINOIS ET AL., 391 U. S. 510;

No. 1076, October Term, 1967. PICKENS *v.* OLIVER, WARDEN, 392 U. S. 300;

No. 1178, October Term, 1967. FRANZEN *v.* TOWNSHIP OF ELK ET AL., 392 U. S. 909;

No. 1245, October Term, 1967. IN RE WHITESIDE, 391 U. S. 920;

No. 1255, October Term, 1967. JONES *v.* LOUISIANA, 392 U. S. 302; and

No. 501, Misc., October Term, 1967. ROBINSON *v.* CIVIL SERVICE COMMISSION, CITY OF CLEVELAND, 392 U. S. 944. Petitions for rehearing denied.

No. 1261, October Term, 1967. GOLDMAN *v.* NEW YORK, 392 U. S. 643;

No. 1289, October Term, 1967. COCHRAN ET AL. *v.* UNITED STATES, 391 U. S. 913;

No. 1319, October Term, 1967. HAGERTY *v.* LOUISIANA, 391 U. S. 935;

No. 1330, October Term, 1967. SKOLNICK ET AL. *v.* MOSES ET AL., 391 U. S. 600;

No. 1343, October Term, 1967. O'KELLEY ET AL. *v.* CALIFORNIA, 391 U. S. 965;

No. 1452, October Term, 1967. SCARSELLETTI *v.* AETNA CASUALTY & SURETY CO., 392 U. S. 907;

No. 920, Misc., October Term, 1967. ROBERTS *v.* RUSSELL, 392 U. S. 293;

No. 969, Misc., October Term, 1967. WOLFF *v.* FOLEY, 392 U. S. 933;

No. 1030, Misc., October Term, 1967. WEST *v.* McMANN, WARDEN, 392 U. S. 933;

No. 1198, Misc., October Term, 1967. HOBBS *v.* FRYE, WARDEN, 392 U. S. 934;

No. 1224, Misc., October Term, 1967. CARROLL *v.* TEXAS, 392 U. S. 664;

No. 1262, Misc., October Term, 1967. KOZUCK ET UX. *v.* LAL CONSTRUCTION CO., 392 U. S. 934;

No. 1309, Misc., October Term, 1967. HODGE *v.* TENNESSEE, 392 U. S. 912;

No. 1363, Misc., October Term, 1967. BERCERA-SOTO *v.* UNITED STATES, 391 U. S. 928;

No. 1401, Misc., October Term, 1967. JACKSON *v.* UNITED STATES, 392 U. S. 935;

No. 1447, Misc., October Term, 1967. WATSON *v.* COMMON PLEAS COURT OF PHILADELPHIA ET AL., 391 U. S. 953; and

No. 1482, Misc., October Term, 1967. SIEGAL *v.* UNITED STATES, 391 U. S. 954. Petitions for rehearing denied.

No. 1494, Misc., October Term, 1967. PERKINS *v.* UNITED STATES, 391 U. S. 954;

No. 1571, Misc., October Term, 1967. MCNEILL *v.* GARRITY, WARDEN, 391 U. S. 971;

No. 1637, Misc., October Term, 1967. FIELDS *v.* DEPARTMENT OF SOCIAL WELFARE, 392 U. S. 297;

No. 1646, Misc., October Term, 1967. CINNAMON *v.* KENTUCKY, 392 U. S. 939;

No. 1653, Misc., October Term, 1967. LANDMAN *v.* PEYTON, PENITENTIARY SUPERINTENDENT, 392 U. S. 939;

No. 1674, Misc., October Term, 1967. BIGGS *v.* UNITED STATES, 392 U. S. 945;

No. 1675, Misc., October Term, 1967. BIGGS *v.* CAMPBELL, CHIEF JUDGE, U. S. DISTRICT COURT, 392 U. S. 922;

No. 1854, Misc., October Term, 1967. BIGGS *v.* DOES ET AL., 392 U. S. 922;

No. 1861, Misc., October Term, 1967. MORFORD *v.* HOCKER, WARDEN, 392 U. S. 944; and

No. 1875, Misc., October Term, 1967. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT, 392 U. S. 921. Petitions for rehearing denied.

No. 469, October Term, 1962. LARKIN, DBA LARKIN CO. *v.* PLATT CONTRACTING CO., INC., ET AL., 371 U. S. 924. Motion for leave to file petition for rehearing denied. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 232, October Term, 1967. UNITED STATES *v.* O'BRIEN; and

No. 233, October Term, 1967. O'BRIEN *v.* UNITED STATES, 391 U. S. 367. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 23, October Term, 1967. First National Bank of Arizona *v.* Cities Service Co., 391 U. S. 253. Petition for rehearing denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 335, October Term, 1967. Hanover Shoe, Inc. *v.* United Shoe Machinery Corp.; and

No. 463, October Term, 1967. United Shoe Machinery Corp. *v.* Hanover Shoe, Inc., 392 U. S. 481. Petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 1200, October Term, 1967. Powell *v.* Committee on Admissions and Grievances of the United States District Court for the District of Columbia, 392 U. S. 929. Petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 1269, October Term, 1967. Central Bank & Trust Co. *v.* United States et al.; and

No. 1270, October Term, 1967. Boyle *v.* United States et al., 391 U. S. 469. Petitions for rehearing denied. Mr. Justice Fortas took no part in the consideration or decision of these petitions.

No. 1364, October Term, 1967. Commissioner of Internal Revenue *v.* Sugar Daddy, Inc., et al., 392 U. S. 929. Petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 1389, October Term, 1967. Weinberg et ux. *v.* Commissioner of Internal Revenue, 392 U. S. 929. Petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 974, October Term, 1967. IN RE POWELL, 392 U. S. 930. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 857, October Term, 1967. MILLER, AKA COPPOLA *v.* UNITED STATES, 392 U. S. 929. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 309, October Term, 1967. AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. *v.* CARROLL ET AL.; and

No. 310, October Term, 1967. CARROLL ET AL. *v.* AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL., 391 U. S. 99. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 618, October Term, 1967. FORTNIGHTLY CORP. *v.* UNITED ARTISTS TELEVISION, INC., 392 U. S. 390. Motion of Authors League of America, Inc., for leave to file a brief, as *amicus curiae*, in support of rehearing granted. Petition for rehearing denied. MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Irwin Karp* on the motion.

No. 1377, October Term, 1967. WECHSLER ET AL. *v.* UNITED STATES, 392 U. S. 932. Motion for leave to file supplement to petition for rehearing granted. Petition for rehearing denied.

No. 548, Misc., October Term, 1967. MCCARTY ET AL. *v.* KANSAS, 392 U. S. 308. Petition for rehearing by petitioner McCarty denied.

No. 788, October Term, 1967. McCollough *v.* Travelers Insurance Co. et al., 389 U. S. 1050;

No. 877, October Term, 1967. Nicholson *v.* Calbeck, Deputy Commissioner, et al., 389 U. S. 1051;

No. 1017, October Term, 1967. Houser *v.* O'Leary, Deputy Commissioner, Fourteenth Compensation District, et al., 390 U. S. 954; and

No. 1369, October Term, 1967. Sonderegger *v.* Heiss, 392 U. S. 931. Motions for leave to file petitions for rehearing denied.

No. 883, Misc., October Term, 1967. Parker *v.* Maryland et al., 390 U. S. 982 and 1018. Motion for leave to file second petition for rehearing denied.

No. 1550, Misc., October Term, 1967. Clark *v.* Payne, 391 U. S. 970. Motion of Lewis Clark for leave to file a brief, as *amicus curiae*, in support of petition for rehearing granted. Petition for rehearing denied.

No. 1579, Misc., October Term, 1967. Silva *v.* Beto, Corrections Director, 392 U. S. 913. Motion for leave to file petition for rehearing denied.

October 16, 1968.

Miscellaneous Orders.

No. —. Cavagnaro *v.* Clark, Attorney General, et al.; and

No. 889, Misc. Paulekas *v.* Clark, Attorney General, et al. Applications for stays, made to Mr. Justice Douglas, were submitted by him to the Court and denied by it. Mr. Justice Douglas, Mr. Justice Harlan, and Mr. Justice Stewart would grant the stays. *Norman Leonard* for applicant in each case. *Solicitor General Griswold* for respondents in both cases. Reported below: 291 F. Supp. 606 (D. C. N. D. Cal.).

October 16, 17, 19, 1968. 393 U. S.

No. ——. McAbee et al. *v.* Martinez et al. D. C. Md. Application for injunctive relief presented to The Chief Justice, and by him referred to the Court, denied. *Peter R. Sherman* for applicants. Reported below: 291 F. Supp. 77.

October 17, 1968.

Dismissal Under Rule 60.

No. 526. Tillamook Cheese & Dairy Assn. *v.* State Department of Agriculture. Sup. Ct. Ore. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Edwin J. Peterson* for petitioner. *Robert Y. Thornton,* Attorney General of Oregon, and *Harold E. Burke,* Assistant Attorney General, for respondent. Reported below: —— Ore. ——, 439 P. 2d 592; —— Ore. ——, 442 P. 2d 608.

October 19, 1968.

Miscellaneous Order.

No. 647. Hadnott et al. *v.* Amos, Secretary of State of Alabama, et al. D. C. M. D. Ala. Order entered October 14, 1968 [*ante,* p. 815], restoring temporary relief is continued pending action upon the jurisdictional statement which has been filed. Motion to advance and expedite denied. Mr. Justice Stewart and Mr. Justice White dissent from continuance of the order restoring temporary relief. Mr. Justice Black took no part in the consideration or decision of this matter. *Charles Morgan, Jr., Orzell Billingsley, Robert P. Schwenn,* and *Melvin L. Wulf* on the motion.

Mr. Justice Harlan, concurring in part and dissenting in part.

The State of Alabama has excluded from its ballot in the forthcoming general election all but two of the candidates for local, state, and national office nominated

by the National Democratic Party of Alabama, a newly organized political group. Members of the Party, together with the Party itself, contend before us that the state statutes invoked in justification of Alabama's action violate rights guaranteed both by the Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. § 1973 (1964 ed., Supp. III), and the Constitution of the United States.[1] It is clear to me that both the statutory and constitutional issues appellants have raised require plenary consideration of difficult and important questions that cannot be properly resolved in the time remaining before the ballots are cast, no matter how expeditiously the appeal is heard. Consequently, I concur in the Court's denial of the motion to advance plenary hearing on the merits of the case.

Such study as I have been able to make of the papers, in the short time since they were submitted to the Court, nevertheless convinces me that the chances of the Party's ultimate success on the merits are sufficiently substantial so that we may appropriately take steps to prevent the risk of an irretrievable loss of important federal rights in the approaching election. Unfortunately, while the Court properly seeks to protect appellants from irreparable injury, it has done so in a manner that is almost

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[1] The three-judge District Court which initially heard this case issued a temporary injunction requiring Alabama to include on the ballot the names of all candidates of the National Democratic Party, and Alabama proceeded to comply. Upon consideration of the case on the merits, the District Court, with Chief Judge Frank M. Johnson dissenting, held against the plaintiffs and dissolved its temporary injunction. This occurred on October 11, 1968. A motion to reinstate the lower court's temporary relief was made to us on the following day and an appeal was filed on Monday, October 14, along with a motion to accelerate our consideration of the cause. On the same day, we set the two motions before us for argument on Friday, October 18, reinstating the District Court's injunction for the interim period.

bound to create substantial confusion in the minds of Alabama's voters when they cast their ballots for the Presidency of the United States. By ordering appellants' slate of Presidential Electors on the ballot, the Court has created a situation in which two different slates, both pledged to support Hubert H. Humphrey and Edmund S. Muskie, will be presented to the electorate in November. In addition to the National Democratic Party, the Alabama Independent Democratic Party—whose right to ballot position is uncontested—has advanced a list of Electors who are pledged to this same national ticket. Since many voters do not realize that they do not have a direct voice in the selection of the President, it will not be clear to them that the votes cast for the Humphrey-Muskie ticket on the National Democratic line of the ballot will not be cumulated in the final tabulation with the votes cast for these same national candidates on the Independent Democratic line. But that, of course, is precisely the legal result—for votes cast for two different Electoral slates are not properly counted together under state law. A split in the Humphrey-Muskie vote, which in large part may simply be the product of ignorance, will be the almost certain result.

In our recent decision in *Williams* v. *Rhodes, ante,* at 33 (opinion of the Court), and at 46–47 (MR. JUSTICE HARLAN, concurring in the result), we recognized that the State may properly take steps to prevent a clear risk of voter confusion. This interest should inform our decision here. Alabama's Presidential election will be much fairer, under all the circumstances, without the presence of the National Democratic Party. Moreover, it seems quite evident that it would be possible for the State's election officials to comply with a decision of this Court ordering that all National Democratic candidates, other than those running for the office of Presidential Elector,

be placed before the voters in November. My inspection of the sample ballots submitted to us leads me to believe that such an order would present no insuperable administrative obstacles,[2] and I do not understand counsel for the State to contend otherwise.[3]

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[2] The names of each Party's 10 candidates for the office of Elector are not interspersed with the names of the candidates for other offices, but appear one after another in a bloc on the sample ballot that has been submitted to us.

[3] At the argument, Alabama's counsel made the following statements as to the State's ability to comply with an order of this Court:

"Mr. Justice Brennan: What is the situation about the preparation and distribution of ballots?

"Mr. Redden (for Alabama): The probate judges in the various counties are charged with the preparation of the ballots in their particular county. I think the Court will readily understand as has been pointed out that this is not a complete ballot [pointing to a sample ballot], as the ballot will vary from county to county because of the fact that there are local and county offices up for election during 1968. So that on the ballot in each county you would have your statewide offices, you would have only one of these candidacies for Congress. We have eight congressional districts so that in the appropriate district you have a different ballot in each county.

"Mr. Justice Stewart: Is there only one ballot in each county, however?

"Mr. Redden: Sir?

"Mr. Justice Stewart: In other words, is there only one ballot . . . ?

"Mr. Redden: As I understand the question, there is only one ballot in each county.

"Mr. Justice Stewart: Yes—but each one is different . . . .

"Mr. Redden: To answer your question I would have to say that you would not have a uniform situation with reference to the degree of preparation of the ballot from county to county.

"Mr. Justice Brennan: Do we have any information as to what each probate court judge did when the interim order came down?

"Mr. Redden: I have some hearsay information solely. Remember that in the portions of the state voting on voting machines, those have been prepared in a great many cases following the District Court's order. In some other instances the ballots are being printed

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Equity does not require the broad injunction the Court has issued, but rather an act of discretion that is fully cognizant of all the consequences of our actions.

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by printers at the order of the probate judges. There is no uniformity right now. They are in various states of preparation.

"Mr. Justice Brennan: Well, is that to say then that to the extent that ballots are being prepared whether they are printed ballots or on voting machines, that they comply with the interim order and include the Column 7 [National Democratic Party] list?

"Mr. Redden: I would have to say that a good many do not, that probably more do not than do. We have made contact since the Court rendered the order here with as many [probate judges] as we have been able to contact to advise them of the issuance of this order and to have them to undertake to do whatever they can do with regard to trying to wait and trying to find a printer who can put them in a position of compliance. But really we are getting very close to the election and I am sorry that I am unable to tell the Court precisely what the situation is in each county . . . .

"Mr. Justice Fortas: Now you did not—the Attorney General did not—in the telegram sent to this Court assert that it would be impossible to comply with an order, if there were any, granting the relief requested.

"Mr. Redden: That's my understanding.

"Mr. Justice Fortas: Are you now saying that compliance would be impossible or are you not?

"Mr. Redden: I would not represent that to the Court. I would say that the officials will make every effort to comply with any order this Court makes. I'm not sure that it will be [possible] in every case, but I make no assertion of impossibility. I am not prepared to.

. . . . . .

"Mr. Justice Harlan: As I understand it, the restraining order in its present posture states that you would have on your ballot two sets of Presidential Electors, each of them pledged to Humphrey and Muskie, and then you have a third set pledged to Wallace, and a set pledged to Nixon and Agnew. Assuming for the moment that the restraining order were modified so as to eliminate the Electors of the appellant here but to leave their candidates on the ballot for other offices, what effect would that have on the Election? Could that be done? Could you eliminate from the ballot the Presidential Electors of these appellants and leave the other candidates on?

"Mr. Redden: I can't say that it cannot be done. I would only have to represent to you that if it can be done it would be an

I would therefore modify the temporary relief this Court granted on October 14, 1968, to permit the State's election officials to remove from the ballot the Party's candidates for the office of Presidential Elector.

OCTOBER 21, 1968.

Miscellaneous Orders.

No. 40. JOHNSON *v.* AVERY, CORRECTION COMMISSIONER, ET AL. C. A. 6th Cir. [Certiorari granted, 390 U. S. 943.] Motion of American Civil Liberties Union et al. for leave to file a brief, as *amici curiae*, granted. *Melvin L. Wulf* on the motion.

No. 217, Misc. SANDERS ET AL. *v.* BELL, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Joe W. Gerstein* for petitioners.

No. 463, Misc. GULLO *v.* DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS, DOMESTIC RELATIONS BRANCH, ET AL. Motion for leave to file petition for writ of mandamus denied. *Joseph S. Gullo* for petitioner.

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extremely difficult thing to accomplish. I don't want to represent further than that because I don't have the knowledge adequate to do it.

"Mr. Justice Harlan: Would it be more difficult than taking all the names off?

"Mr. Redden: Yes, sir, for this reason, as I may point this out. The uniform removal may be accomplished in other ways that are very simple, whether to use a machine or a ballot because the intersplicing would be difficult. The District Court ruled in favor of the defendants on the constitutional issues and said that we exercised our discretion to refrain from deciding individual factual disputes. Those have not been ruled on.

"Mr. Justice Brennan: If, as you suggested, it might be difficult to delete the Electors now under the interim order to be on the ballot for this Party. Of course it would be much more difficult to substitute other names . . . ."

No. 17, Orig. NEBRASKA *v.* IOWA.

IT IS ORDERED that the Honorable Joseph P. Willson, Senior Judge of the United States District Court for the Western District of Pennsylvania, be, and he is hereby, appointed Special Master in this case in the place of the Honorable Charles J. Vogel, resigned. The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[For earlier order herein, see, *e. g.*, 392 U. S. 918.]

Probable Jurisdiction Noted.

No. 366. UNITED STATES *v.* COVINGTON. Appeal from D. C. S. D. Ohio. Probable jurisdiction noted and case set for oral argument immediately following No. 65 [No. 1365, October Term, 1967, 392 U. S. 903]. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. Supp. 886.

No. 243. CITIZEN PUBLISHING CO. ET AL. *v.* UNITED STATES. Appeal from D. C. Ariz. Probable jurisdiction noted. MR. JUSTICE FORTAS took no part in the consideration or decision of this case. *Richard J. MacLaury, John L. Donahue, Jr.,* and *George Read Carlock* for appellants. *Solicitor General Griswold, Assistant Attorney General Zimmerman, Howard E. Shapiro,* and *Charles D. Mahaffie, Jr.,* for the United States. *Robert L. Stern* for the Albuquerque Journal et al., and *Arthur B. Hanson* and *S. Chesterfield Oppenheim* for American Newspaper Publishers Assn., as *amici curiae,* in support of appellants. Reported below: 280 F. Supp. 978.

Certiorari Granted. (See also Nos. 247 and 248, *ante,* p. 71; No. 279, *ante,* p. 76; and No. 379, *ante,* p. 74.)

No. 109. SNYDER *v.* HARRIS ET AL. C. A. 8th Cir. Certiorari granted. *Hyman G. Stein* for petitioner. *Morris A. Shenker* for respondents. Reported below: 390 F. 2d 204.

No. 343. UNITED STATES *v.* AN ARTICLE OF DRUG . . . BACTO-UNIDISK. . . . C. A. 6th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Lawrence G. Wallace, Beatrice Rosenberg,* and *William W. Goodrich* for the United States. *Edward Brown Williams* for respondent (Difco Laboratories, Inc., real party in interest). Reported below: 392 F. 2d 21.

No. 117. GAS SERVICE CO. *v.* COBURN. C. A. 10th Cir. Certiorari granted and case set for oral argument immediately following No. 109, *supra. Kirke W. Dale* and *Dale M. Stucky* for petitioner. *Robert Martin* and *D. Arthur Walker* for respondent. Reported below: 389 F. 2d 831.

No. 297. IMMIGRATION AND NATURALIZATION SERVICE *v.* STANISIC. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted and petition for writ of certiorari granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for petitioner. *Dorothy McCullough Lee* for respondent. Reported below: 393 F. 2d 539.

No. 43, Misc. BANKS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Louise H. Renne,* Deputy Attorney General, for respondent.

Certiorari Denied. (See also No. 195, *ante,* p. 78; No. 352, *ante,* p. 76; and No. 364, *ante,* p. 77.)

No. 80. CANARD ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Russell E. Parsons* for petitioners. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 257 Cal. App. 2d 444, 65 Cal. Rptr. 15.

No. 146. GALLICCHIO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Michael A. Querques* and *Daniel E. Isles* for petitioner. *Herbert H. Tate* for respondent. Reported below: 51 N. J. 313, 240 A. 2d 166.

No. 307. BRADY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *William R. Kraham* and *Irvin M. Gottlieb* for petitioner. *Solicitor General Griswold* for the United States.

No. 166. RINALDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry B. Rothblatt* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 393 F. 2d 97.

No. 282. NATIONAL PLAN, INC., ET AL. *v.* CHURCH OF CHRIST OF ECORSE, MICHIGAN, ET AL.; and

No. 391. CHURCH OF CHRIST OF ECORSE, MICHIGAN, ET AL. *v.* NATIONAL PLAN, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Rufus S. Garrett, Jr.,* for petitioners in No. 282, and *William Burrow* for petitioners in No. 391. Reported below: 391 F. 2d 357.

No. 305. WESTREICH *v.* MCFARLAND. C. A. D. C. Cir. Certiorari denied. *Aaron R. Fodiman* and *Moses Krislov* for petitioner. *William O. Bittman* for respondent.

No. 315. HOFFENBERG *v.* KAMINSTEIN, REGISTER OF COPYRIGHTS. C. A. D. C. Cir. Certiorari denied. *Charles Rembar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for respondent. *Irwin Karp* for Authors League of America, Inc., as *amicus curiae,* in support of the petition. Reported below: 130 U. S. App. D. C. 35, 396 F. 2d 684.

No. 329. BRAKEFIELD *v.* MCFARLAND. C. A. D. C. Cir. Certiorari denied. *Aaron R. Fodiman* and *Moses Krislov* for petitioner. *William O. Bittman* for respondent.

No. 347. AMERICAN LIFE & ACCIDENT INSURANCE CO. OF KENTUCKY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Richard A. Chenoweth* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 394 F. 2d 616.

No. 338. WINN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. *Joseph F. McDermott* for petitioner. *William H. Adams III* for respondent. Reported below: 208 So. 2d 809.

No. 356. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, LONG BEACH LOCAL No. 1–128 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. *Jerry D. Anker* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *Willard Z. Carr, Jr.,* for MacMillan Ring-Free Oil Co., Inc., respondents. Reported below: 394 F. 2d 26.

No. 360. HALSTEAD *v.* REFINED SYRUPS & SUGARS, INC. C. A. D. C. Cir. Certiorari denied. *J. Sterling Halstead,* petitioner, *pro se. Sheldon E. Bernstein* and *Paul H. Mannes* for respondent.

No. 368. ASSOCIATION ON BROADCASTING STANDARDS, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 369. KING'S GARDEN, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 390. WBEN, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *Michael H. Bader* and *William J. Potts, Jr.,* for Association on Broadcasting Standards, Inc., and *James A. McKenna, Jr., Vernon L. Wilkinson,* and *John L. Tierney* for May Broadcasting Co. et al., petitioners in No. 368; *Lewis I. Cohen* for petitioner in No. 369; and *Frank U. Fletcher, Robert L. Heald,* and *Edward F. Kenehan* for petitioner in No. 390. *Solicitor General Griswold, Assistant Attorney General Zimmerman, Henry Geller, Daniel R. Ohlbaum,* and *Stuart F. Feldstein* for respondents in all three cases. Reported below: 396 F. 2d 601.

No. 374. Totton, dba Totton & Dunn Co. *v.* Local 43, United Association of Journeymen & Apprentices of Plumbing & Pipe Fitting Industry of the United States & Canada. C. A. 6th Cir. Certiorari denied. *John A. Chambliss, Jr.,* and *Sizer Chambliss* for petitioner. *S. Del Fuston* for respondent.

No. 382. Latta *v.* Wells Fargo Bank et al. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 260 Cal. App. 2d 120, 66 Cal. Rptr. 832.

No. 330. Lynch et al. *v.* Maryland. Ct. App. Md. Certiorari denied. Mr. Justice Black dissents. *Melvin L. Wulf* and *Elsbeth Bothe* for petitioners. *Francis B. Burch,* Attorney General of Maryland, *S. Leonard Rottman,* Assistant Attorney General, and *Charles E. Moylan, Jr.,* for respondent. Reported below: See 2 Md. App. 546, 236 A. 2d 45.

No. 378. Delaware Valley Conservation Assn. et al. *v.* Resor, Secretary of the Department of the Army, et al. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 392 F. 2d 331.

No. 50, Misc. Daegele *v.* Crouse, Warden. C. A. 10th Cir. Certiorari denied. *Robert C. Londerholm,* Attorney General of Kansas, and *J. Richard Foth* and *Edward G. Collister, Jr.,* Assistant Attorneys General, for respondent.

No. 289, Misc. Shorey *v.* Warden, Maryland Penitentiary. C. A. 4th Cir. Certiorari denied. *Fred E. Weisgal* for petitioner. *Francis B. Burch,* Attorney General of Maryland, and *Fred Oken,* Assistant Attorney General, for respondent. Reported below: 401 F. 2d 474.

No. 75, Misc. TAYLOR *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *C. L. Ray, Jr.*, for petitioner. *Crawford C. Martin*, Attorney General of Texas, *Nola White*, First Assistant Attorney General, *A. J. Carubbi, Jr.*, Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener*, Assistant Attorneys General, for respondent. Reported below: 421 S. W. 2d 403.

No. 418, Misc. JOHNSON *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 420, Misc. WILLIAMS *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 421, Misc. FLETCHER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 424, Misc. STEINHARDT *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 205 So. 2d 30.

No. 432, Misc. BROWN *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 434, Misc. GILMORE *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 435, Misc. NICHOLS *v.* PAGE, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied. Reported below: 441 P. 2d 470.

No. 439, Misc. ROBBINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. Reported below: 88 Ill. App. 2d 447, 232 N. E. 2d 302.

No. 433, Misc. RAY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 468, Misc. TOWNSEND *v.* CITY OF HELENA. Sup. Ct. Ark. Certiorari denied. Reported below: 244 Ark. 228, 424 S. W. 2d 856.

No. 488, Misc. MONTAGUE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 489, Misc. CORN *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 394 F. 2d 478.

No. 492, Misc. ARNOLD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 89 Ill. App. 2d 185, 232 N. E. 2d 483.

No. 493, Misc. DORIAN *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 496, Misc. PIERCE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 260 Cal. App. 2d 852, 67 Cal. Rptr. 438.

No. 504, Misc. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 510, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 518, Misc. MCDONOUGH *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied. Reported below: 3 Md. App. 539, 240 A. 2d 322.

No. 514, Misc. MELENDEZ *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 517, Misc. COLLINS *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 519, Misc. FAIR *v.* SCHLEMAN, TAX COLLECTOR, ET AL. Sup. Ct. Fla. Certiorari denied.

No. 523, Misc. VALDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 539, Misc. URBANO *v.* SONDERN, EXECUTRIX. C. A. 2d Cir. Certiorari denied.

No. 544, Misc. HANKINS ET AL. *v.* KANE, COLLECTOR OF ESTATE. C. A. D. C. Cir. Certiorari denied.

No. 549, Misc. FERMIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 551, Misc. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Benjamin Lipsitz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 396 F. 2d 841.

No. 574, Misc. GREGORY *v.* WALLER. Sup. Ct. App. Va. Certiorari denied.

No. 156, Misc. ELLENBOGEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Daniel H. Greenberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 390 F. 2d 537.

No. 588, Misc. WENDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 394 F. 2d 627.

No. 623, Misc. RAY *v.* UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 633, Misc. DESMOND *v.* UNITED STATES BOARD OF PAROLE. C. A. 1st Cir. Certiorari denied. *Thomas G. Dignan, Jr.,* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 397 F. 2d 386.

No. 641, Misc. GRAVES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. *Harry E. Clairborne* for petitioner. *Harvey Dickerson,* Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: —— Nev. ——, 439 P. 2d 476.

No. 648, Misc. KAYSER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 394 F. 2d 601.

No. 583, Misc. SPIESEL *v.* ROOS ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Rehearing Denied.

No. 569, Misc., October Term, 1966. GRIFFIN *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT, 385 U. S. 981. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 636, Misc., October Term, 1967. RUCKER *v.* PARKER ET AL., 389 U. S. 995, 390 U. S. 930. Motion for leave to file second petition for rehearing denied.

OCTOBER 25, 1968.

Miscellaneous Orders.

No. —. JOHNSON ET AL. *v.* POWELL. C. A. 5th Cir. Application for stay of deployment presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Elsbeth Levy Bothe* for applicants. *Solicitor General Griswold* in opposition.

MR. JUSTICE DOUGLAS.

This application for a stay denied by my Brother BLACK was referred to me. I asked for a response from the Solicitor General so that the application could be submitted to the entire Conference October 25, 1968. I have now been advised that applicants were moved to Vietnam October 24.

This hurried calculated change in military plans has deprived applicants of the full hearing to which they are entitled. The question is not frivolous as Article I, Section 8, of the Constitution restricts members of the militia to service to "execute the Laws of the Union, suppress Insurrections and repel Invasions"—none of which, as I understand it, is relevant to service in Vietnam.

The Solicitor General maintains that the status of these applicants must be measured not as members of the "militia" but as members of the Ready Reserve with whom we dealt in *Morse* v. *Boswell, ante,* p. 802. That contention might in time prevail, but it is not free of doubt; and I am not yet persuaded that either the Army or the Solicitor General can play loosely with the concept of "militia" as used in the Constitution and thus create a credibility gap at the constitutional level. It is, after all, the Constitution that creates in our people the faith that no one—not even the Department of Justice or the military—is above the law.

It was for these reasons that I felt that the full Court should consider the question of law at the Octo-

ber 25, 1968, Conference. Since, however, applicants have been spirited out of the country,[1] I have concluded to treat the case in practical effect, though not legally,[2] as moot.

No. 889, Misc. PAULEKAS *v.* CLARK, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Petition for rehearing from denial of stay of induction [*ante*, p. 903] granted, and the stay heretofore granted by MR. JUSTICE DOUGLAS is continued until further order of the Court. MR. JUSTICE FORTAS dissents.

OCTOBER 28, 1968.

Miscellaneous Orders.

No. —. ROMAN *v.* CRITZ. C. A. 5th Cir. Application for stay of court-martial presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Stewart J. Alexander* for applicant.

No. 31, Orig. UTAH *v.* UNITED STATES. Report of Special Master received and ordered filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter. [For earlier order herein, see, *e. g.*, 391 U. S. 962.]

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[1] Rule 49 of the Rules of the Court were flouted by the Solicitor General and the Army, as subdivision (1) provides:

"Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party."

[2] *Ex parte Endo*, 323 U. S. 283, 306; *Jones* v. *Cunningham*, 371 U. S. 236, 243–244.

No. 71. PRESBYTERIAN CHURCH IN THE UNITED STATES ET AL. *v.* MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH ET AL. Sup. Ct. Ga. [Certiorari granted, 392 U. S. 903.] Motion of W. J. Williamson, Secretary of Concerned Presbyterians, Inc., for leave to file a brief, as *amicus curiae,* granted. *William J. McLeod, Jr.,* and *W. Calvin Wells, Jr.,* on the motion.

No. 161. CHOCTAW NATION ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 10th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 425, Misc. MURPHY *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Certiorari Granted. (See also No. 212, *ante,* p. 85; and No. 249, *ante,* p. 80.)

No. 403. MCKART *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Marshall Patner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 395 F. 2d 906.

No. 413. NORTH CAROLINA ET AL. *v.* PEARCE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. *Thomas Wade Bruton,* Attorney General of North Carolina, for petitioners. Reported below: 397 F. 2d 253.

Certiorari Denied.

No. 387. EVANS ET AL. *v.* ALLEN ET AL. C. A. 5th Cir. Certiorari denied. *Robert L. Mitchell* for petitioners. Reported below: 396 F. 2d 801.

No. 383. MACKIEWICZ ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Curtiss K. Thompson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 401 F. 2d 219.

No. 384. NEW YORK CREDIT MEN'S ADJUSTMENT BUREAU, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert J. Clerkin, Harry A. Margolis,* and *Marks F. Paskes* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Crombie J. D. Garrett* for the United States. Reported below: 394 F. 2d 340.

No. 386. SWINFORD *v.* ALLIED FINANCE CO. OF CASA VIEW. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. *Thomas P. Brown III* for petitioner. *John Louis Shook* and *Dixon W. Holman* for respondent. Reported below: 424 S. W. 2d 298.

No. 388. MALCO MANUFACTURING CO. ET AL. *v.* NATIONAL CONNECTOR CORP. C. A. 8th Cir. Certiorari denied. *Erwin C. Heininger* for petitioner Amphenol Corp. *Ralph F. Merchant* for respondent. Reported below: 392 F. 2d 766.

No. 389. CONTINENTAL NUT CO. *v.* ROBERT L. BERNER CO. C. A. 7th Cir. Certiorari denied. *George L. Saunders, Jr., James C. Leaton,* and *Robert A. Sprecher* for petitioner. *James E. Knox, Jr.,* for respondent. Reported below: 393 F. 2d 283.

No. 392. SWAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederick M. Reuss, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 396 F. 2d 883.

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No. 393. MATZNER ET UX. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *F. Lee Bailey* for petitioners. *Arthur J. Sills,* Attorney General of New Jersey, *Joseph A. Hoffman,* First Assistant Attorney General, and *Elias Abelson,* Deputy Attorney General, for respondent. Reported below: 52 N. J. 7, 243 A. 2d 225.

No. 395. POLLOCK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William H. Bowman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States. Reported below: 394 F. 2d 922.

No. 396. AIR INDIA *v.* HOFFMAN, EXECUTOR, ET AL. C. A. 5th Cir. Certiorari denied. *Jackson L. Peters* for petitioner. *Walter H. Beckham, Jr.,* for respondents. Reported below: 393 F. 2d 507.

No. 397. STANDARD CIGAR CO. *v.* TABACALERA SEVERIANO JORGE, S. A., ET AL. C. A. 5th Cir. Certiorari denied. *William A. Gillen* for petitioner. *Thomas H. Anderson* for respondents. Reported below: 392 F. 2d 706.

No. 398. COBB ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Palmer K. Ward* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 397 F. 2d 416.

No. 402. DIGIOVANNI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 397 F. 2d 409.

No. 401. VALLEY *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Anthony F. Zarlengo* for petitioner. Reported below: —— Colo. ——, 441 P. 2d 14.

No. 404. SCHEPPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Edwin M. Sigel* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States. Reported below: 395 F. 2d 749.

No. 405. MAYER *v.* ORDMAN, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *David G. Heilbrun* for petitioner. *Solicitor General Griswold, Arnold Ordman, pro se, Dominick L. Manoli, Norton J. Come,* and *Arthur A. Horowitz* for respondent. Reported below: 391 F. 2d 889.

No. 406. MCCULLOUGH TOOL CO. *v.* WELL SURVEYS, INC., NOW DRESSER SIE, INC., ET AL. C. A. 10th Cir. Certiorari denied. *R. Welton Whann* for petitioner. *Rufus S. Day, Jr.,* and *Robert J. Woolsey* for respondents. Reported below: 395 F. 2d 230.

No. 407. HENDERSON, WARDEN *v.* PROGUE ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *George A. Bourgeois,* Assistant Attorney General, for petitioner. Reported below: 393 F. 2d 938.

No. 408. NUGARA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Anna R. Lavin* for petitioner. Reported below: 39 Ill. 2d 482, 236 N. E. 2d 693.

No. 411. F. H. SPARKS CO., INC. *v.* GEORGE SOLLITT CONSTRUCTION CO. C. A. 7th Cir. Certiorari denied. *Francis X. Conway* for petitioner. *Albert E. Jenner, Jr.,* for respondent. Reported below: 397 F. 2d 439.

No. 409. Los Angeles Herald Examiner, a Division of Hearst Corp., et al. *v.* San Francisco-Oakland Newspaper Guild et al. C. A. 9th Cir. Certiorari denied. *Charles G. Bakaly, Jr.*, for petitioners. *Stephen Reinhardt* and *George E. Bodle* for San Francisco-Oakland Newspaper Guild et al., and *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for Kennedy, respondents.

No. 412. Glavin et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *G. G. Baumen* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 396 F. 2d 725.

No. 415. Ebbert et al. *v.* Brenner, Commissioner of Patents. C. A. D. C. Cir. Certiorari denied. *John A. Blair* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 130 U. S. App. D. C. 168, 398 F. 2d 762.

No. 249, Misc. Thomas *v.* United States. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States.

No. 369, Misc. Clay et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *William H. Bowen* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 394 F. 2d 281.

No. 521, Misc. Failla *v.* California et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 256 Cal. App. 2d 869, 65 Cal. Rptr. 115.

No. 405, Misc. FORD *v.* UNITED STATES; and

No. 414, Misc. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 395 F. 2d 679.

No. 410, Misc. STEELE *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 411, Misc. STREETER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 427, Misc. DENTIS *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 478, Misc. JACKSON *v.* MARYLAND. Cir. Ct. Baltimore County. Certiorari denied.

No. 479, Misc. SMITH *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 486, Misc. FONTANA ET UX. *v.* WALKER ET AL. Ct. App. Md. Certiorari denied. Reported below: 249 Md. 459, 240 A. 2d 268.

No. 513, Misc. MORTON *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 393 F. 2d 482.

No. 525, Misc. LAMB *v.* CITY OF EASTLAKE. Sup. Ct. Ohio. Certiorari denied. *Ronald M. Benjamin* and *David P. Freed* for petitioner.

No. 578, Misc. RAFFA *v.* CITY OF CLEVELAND. Sup. Ct. Ohio. Certiorari denied. *James R. Willis* for petitioner. *Thomas J. Italiano* for respondent. Reported below: 13 Ohio St. 2d 112, 235 N. E. 2d 138.

No. 528, Misc. BELL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. *John D. Buchanan, Jr.*, for petitioner. Reported below: 208 So. 2d 474.

No. 535, Misc. WOOD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 537, Misc. SWANSON *v.* WHITE HOUSE UTILITY DISTRICT ET AL. C. A. 6th Cir. Certiorari denied.

No. 573, Misc. JACKSON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 621, Misc. KAMSLER *v.* TRI PAR RADIO & APPLIANCE CO., INC., ET AL. C. A. 7th Cir. Certiorari denied.

No. 626, Misc. CARROLL *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *Robert P. Bradley* and *Walter S. Turner,* Assistant Attorneys General, for respondent.

No. 630, Misc. HESLIP *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 294, Misc. ROBINSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Francis B. Burch,* Attorney General of Maryland, and *Alfred J. O'Ferrall III,* Assistant Attorney General, for respondent. Reported below: 249 Md. 200, 238 A. 2d 875.

No. 408, Misc. WHITE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *Francis J. Larkin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 395 F. 2d 5.

No. 593, Misc. PUTT *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: 392 F. 2d 64.

No. 600, Misc. MCCLELLAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS concur in the denial of certiorari, pointing out that the issues under *Witherspoon* v. *Illinois,* 391 U. S. 510, can be decided only upon consideration of a transcript of the *voir dire* of the jury, which is not now in the record but which can presumably be made available in state or federal collateral proceedings. *Harry Friberg* for respondent.

NOVEMBER 1, 1968.

Dismissal Under Rule 60.

No. 175. LIBERTY NATIONAL BANK & TRUST CO. *v.* BUSCAGLIA, DIRECTOR, DIVISION OF SALES TAX, ERIE COUNTY, ET AL. Appeal from Ct. App. N. Y. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Manly Fleischmann* for appellant. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Robert W. Bush,* Assistant Attorney General, for appellees. Reported below: 21 N. Y. 2d 357, 235 N. E. 2d 101.

NOVEMBER 4, 1968.

Miscellaneous Order.

No. 1065, Misc. VALENTI *v.* LUMBARD, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Request for acceleration of time within which respondents may submit their response to motion for leave to file petition for mandamus denied without prejudice to consideration of petition on its merits.

NOVEMBER 8, 1968.

Miscellaneous Order.

No. —. SHANKER ET AL. *v.* RANKIN, CORPORATION COUNSEL OF THE CITY OF NEW YORK. Ct. App. N. Y. Application for stay presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. *Ralph P. Katz* for applicants. *J. Lee Rankin, pro se,* and *Frederic S. Nathan* and *Stanley Buchsbaum* in opposition. Reported below: 23 N. Y. 2d 111, 242 N. E. 2d 802.

NOVEMBER 12, 1968.

Miscellaneous Orders.

No. 132, October Term, 1965. HOLT ET AL. *v.* KIRBY ET AL., 384 U. S. 28, 967. Motion of Morris Smith et al. to recall and amend judgment in this case denied. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Robert L. Bobrick* on the motion. *John E. Tobin* and *Benjamin Vinar* for Kirby et al., and *Mark F. Hughes* and *Vincent R. Fitzpatrick* for Alleghany Corp., in opposition.

No. 65. LEARY *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 392 U. S. 903.] Motion of American Civil Liberties Union for leave to file a brief, as *amicus curiae,* granted. *Jonathan Sobeloff* and *Melvin L. Wulf* on the motion.

No. 644. BOULDEN *v.* HOLMAN, WARDEN. C. A. 5th Cir. [Certiorari granted, *ante,* p. 822.] Motion of petitioner for appointment of counsel granted. It is ordered that *William B. Moore, Jr., Esquire,* of Montgomery, Alabama, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 461. SUFFIN *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 642. BOYKIN *v.* ALABAMA. Sup. Ct. Ala. [Certiorari granted, *ante*, p. 820.] Motion of petitioner for the appointment of counsel granted. It is ordered that *E. Graham Gibbons, Esquire,* of Mobile, Alabama, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 646. O'CALLAHAN *v.* PARKER, WARDEN. C. A. 3d Cir. [Certiorari granted, *ante*, p. 822.] Application for bail or release on personal recognizance presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. *Victor Rabinowitz* for applicant. *Solicitor General Griswold* filed a memorandum for respondent.

No. 670. BANKS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. [Certiorari granted, *ante*, p. 912.] Motion of petitioner for the appointment of counsel granted. It is ordered that *Thomas J. Klitgaard, Esquire,* of San Francisco, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 678, Misc. MALENA *v.* CALIFORNIA ET AL.;
No. 679, Misc. IN RE HENDERSON; and
No. 795, Misc. DIAMOND *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 568, Misc. JULIANO *v.* OHIO ET AL.;
No. 591, Misc. FAIR *v.* PUBLIC SERVICE COMMISSION;
No. 718, Misc. FAIR *v.* TAYLOR, CLERK, CIRCUIT COURT OF HILLSBOROUGH COUNTY, ET AL.; and
No. 786, Misc. IN RE KAMSLER. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted. (See also No. 399, *ante,* p. 122.)

No. 418. SIMPSON, WARDEN *v.* RICE. C. A. 5th Cir. Certiorari granted and case set for oral argument immediately following No. 413 [*ante,* p. 922]. *MacDonald Gallion,* Attorney General of Alabama, and *Paul T. Gish, Jr.,* Assistant Attorney General, for petitioner. *Oakley Melton, Jr.,* for respondent. Reported below: 396 F. 2d 499.

No. 436. RODRIGUE ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 5th Cir. Certiorari granted. *George Arceneaux, Jr.,* for petitioners Rodrigue et al. *W. Ford Reese* for respondents Mayronne et al. Reported below: 391 F. 2d 671; 395 F. 2d 216.

No. 463. NATIONAL LABOR RELATIONS BOARD *v.* WYMAN-GORDON CO. C. A. 1st Cir. Certiorari granted. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for petitioner. *Quentin O. Young* for respondent. Reported below: 397 F. 2d 394.

No. 453. GREGG *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted limited to the questions raised with respect to Rule 32 (c)(1) of the Federal Rules of Criminal Procedure. *Palmer K. Ward* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States.

Certiorari Denied. (See also No. 533, Misc., *ante,* p. 128.)

No. 221. STIDHAM *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. *Neal Rutledge* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Charles W. Musgrove,* Assistant Attorney General, for respondent. Reported below: 204 So. 2d 359.

No. 394. HUCKABY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James Easly* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 410. DAVID *v.* STRELECKI, DIRECTOR OF DIVISION OF MOTOR VEHICLES OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Patrick T. McGahn, Jr.,* for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, *Joseph A. Hoffman,* First Assistant Attorney General, and *William J. Brennan III,* Assistant Attorney General, for respondent. Reported below: 51 N. J. 563, 242 A. 2d 371.

No. 416. EPLING *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio. Certiorari denied. *George E. Tyack* for petitioner. *Samuel T. Gaines* for respondent. Reported below: 15 Ohio St. 2d 23, 238 N. E. 2d 558.

No. 419. HART *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio. Certiorari denied. *George E. Tyack* for petitioner. *Samuel T. Gaines* and *James F. Shumaker* for respondent. Reported below: 15 Ohio St. 2d 97, 238 N. E. 2d 560.

No. 420. LORAINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 396 F. 2d 335.

No. 421. WANGROW ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 399 F. 2d 106.

No. 422. COCHRAN *v.* MORRIS ET AL., EXECUTORS AND TRUSTEES, ET AL. Sup. Ct. Pa. Certiorari denied. *John A. Eichman 3d* for petitioner. *Joseph Neff Ewing* and *Thomas S. Weary* for respondents Bryn Mawr Hospital et al.; and *William C. Sennett,* Attorney General of Pennsylvania, *pro se,* and *Charles A. Woods, Jr.,* Deputy Attorney General, and *Edward Friedman,* Counsel General, for respondent Sennett. Reported below: 430 Pa. 318, 241 A. 2d 534.

No. 424. DRESSER INDUSTRIES, INC. *v.* HERAEUS ENGELHARD VACUUM, INC. C. A. 3d Cir. Certiorari denied. *Jerome Gilson* for petitioner. *Ralph D. Dinklage* for respondent. Reported below: 395 F. 2d 457.

No. 425. MONROE AUTO EQUIPMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *J. Max Harding* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 392 F. 2d 559.

No. 427. OWENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Robert S. Rizley* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 396 F. 2d 540.

No. 428. LANGEMYR, DBA TOM CARPENTRY CONSTRUCTION CO. *v.* CAMPBELL ET AL. Ct. App. N. Y. Certiorari denied. *Gerard E. Molony* for petitioner. *Robert Silagi* for respondents. Reported below: 21 N. Y. 2d 796, 235 N. E. 2d 770.

No. 433. BUXBOM *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Riverside. Certiorari denied. *Stanley Fleishman* and *Sam Rosenwein* for petitioner.

No. 429. CAPPABIANCA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Ira B. Grudberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 398 F. 2d 356.

No. 434. DEPARTMENT OF FORESTS AND PARKS ET AL. *v.* GEORGE'S CREEK COAL & LAND CO. Ct. App. Md. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, and *Richard C. Rice,* Special Assistant Attorney General, for petitioners. *William C. Walsh* for respondent. Reported below: 250 Md. 125, 242 A. 2d 165.

No. 435. GENERAL ELECTRIC CREDIT CORP. *v.* NOBLETT. C. A. 10th Cir. Certiorari denied. *James D. Fellers* for petitioner. Reported below: 400 F. 2d 442.

No. 437. BARENFANGER, DBA BARENFANGER CONSTRUCTION CO. *v.* LOUIS. Sup. Ct. Ill. Certiorari denied. *John Page Wham* for petitioner. *Irving M. Greenfield* for respondent. Reported below: 39 Ill. 2d 445, 236 N. E. 2d 724.

No. 440. GEORGIA HIGHWAY EXPRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Alexander E. Wilson, Jr.,* and *Donald G. Mayhall* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. Reported below: 131 U. S. App. D. C. 195, 403 F. 2d 921.

No. 442. SWOFFORD ET AL., DBA PATHFINDER CO. *v.* B & W, INC. C. A. 5th Cir. Certiorari denied. *Jack W. Hayden* for petitioners. *Tom Arnold* for respondent. Reported below: 395 F. 2d 362.

No. 444. BAGGETT TRANSPORTATION CO. *v.* HUGHES TRANSPORTATION, INC., ET AL. C. A. 8th Cir. Certiorari denied. *William G. Somerville, Jr.,* for petitioner. *Albert Thomson* and *Frank B. Hand* for Hughes Transportation, Inc., and *Bernard A. Gould, Robert W. Ginnane,* and *Fritz R. Kahn* for Interstate Commerce Commission, respondents. Reported below: 393 F. 2d 710.

No. 445. ROBERTS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Crombie J. D. Garrett* for respondent. Reported below: 398 F. 2d 340.

No. 447. MUSTELL *v.* ROSE ET AL. Sup. Ct. Ala. Certiorari denied. *Robert C. Barnett* for petitioner. *Andrew J. Thomas* for respondents. Reported below: 282 Ala. 358, 211 So. 2d 489.

No. 448. LARIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jack Wasserman* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 397 F. 2d 286.

No. 449. BRAKE *v.* SHOEMAKER ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Robert M. Brake,* petitioner, *pro se. William C. Steel* for respondents. Reported below: 208 So. 2d 107.

No. 450. HAMILTON MEMORIAL GARDENS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Jacquin D. Bierman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Louis M. Kauder,* and *Jonathan S. Cohen* for respondent. Reported below: 394 F. 2d 905.

No. 452. NEWLAND *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Palmer K. Ward* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *John F. Davis,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 236 N. E. 2d 45.

No. 454. EATON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 398 F. 2d 485.

No. 456. CUMBERLAND FARMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *James L. Taft, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Leonard M. Wagman* for respondent. Reported below: 396 F. 2d 866.

No. 458. TELLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna L. Lavin* and *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 397 F. 2d 494.

No. 459. COASTWISE PACKET CO., INC. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John M. Hall* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander,* and *Robert V. Zener* for the United States. Reported below: 398 F. 2d 77.

No. 466. GYURO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. *W. Paul Flynn* for petitioner. Reported below: 156 Conn. 391, 242 A. 2d 734.

No. 460. TURPIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William Sonenshine* for petitioner.

No. 464. COURTESY CHEVROLET, INC. *v.* TENNESSEE WALKING HORSE BREEDERS' & EXHIBITORS' ASSOCIATION OF AMERICA. C. A. 9th Cir. Certiorari denied. *John H. Finger* for petitioner. *John J. Hooker* for respondent. Reported below: 393 F. 2d 75.

No. 465. FAUCETTE, TRUSTEE IN BANKRUPTCY *v.* VAN DOLSON. C. A. 4th Cir. Certiorari denied. *Philip Wittenberg* for petitioner. *M. M. Weinberg, Jr.*, for respondent. Reported below: 397 F. 2d 287.

No. 467. JUAIRE *v.* WALTER MARSHAK, INC. C. A. 2d Cir. Certiorari denied. *Albert Averbach* and *Pierre Lorsy* for petitioner. *O. John Rogge* for respondent. Reported below: 395 F. 2d 373.

No. 468. GYPSUM TRANSPORTATION, LTD. *v.* BOARD OF COMMISSIONERS OF PORT OF NEW ORLEANS. Ct. App. La., 4th Cir. Certiorari denied. *Paul A. Nalty* and *Leon Sarpy* for petitioner. Reported below: 209 So. 2d 296.

No. 469. PARKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 470. JANEL SALES CORP. ET AL. *v.* LANVIN PARFUMS, INC., NOW LANVIN-CHARLES OF THE RITZ, INC. C. A. 2d Cir. Certiorari denied. *Morris Siegel* for petitioners. *Macdonald Flinn* for respondent. Reported below: 396 F. 2d 398.

No. 576. HUCKABY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James Easly* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 400 F. 2d 576.

No. 578. WYMAN-GORDON CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Quentin O. Young* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 397 F. 2d 394.

No. 205. MURCHISON & CO. ET AL. *v.* GLO CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Robert H. Richards, Jr.,* and *E. Norman Veasey* for petitioner Sunray DX Oil Co. *William D. Bailey, Jr.,* for respondent. Reported below: 397 F. 2d 928.

No. 423. BARATTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abraham Glasser* and *Herman Edelman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 397 F. 2d 215.

No. 462. SMITH ET AL. *v.* KIRBY ET AL., GUARDIANS, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Robert L. Bobrick* for petitioners. *John E. Tobin* for Kirby et al., *Samuel N. Greenspoon* for Fitzsimmons, and *Vincent R. FitzPatrick* for Alleghany Corp., respondents. Reported below: 394 F. 2d 381.

No. 430. LYONS *v.* CHICAGO PARK DISTRICT. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Franklin C. Salisbury* for petitioner. *Thomas M. Thomas* for respondent. Reported below: 39 Ill. 2d 584, 237 N. E. 2d 519.

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No. 144. PORT OF NEW YORK AUTHORITY ET AL. *v.* WOLIN. C. A. 2d Cir. Motion of respondent to dispense with printing response granted. Certiorari denied. *Sidney Goldstein* for petitioners. Reported below: 392 F. 2d 83.

No. 455. CAPERCI ET AL. *v.* HUNTOON ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Arthur V. Getchell* for petitioners. *Paul T. Smith* for respondents. Reported below: 397 F. 2d 799.

No. 509. SOBELL *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. The renewed application for release presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant bail for the reason that petitioner arguably has never received credit for the entire time he has served in prison. MR. JUSTICE WHITE took no part in the consideration or decision of this petition and application. *Thomas I. Emerson, David Rein, Morey M. Myers,* and *Joseph Forer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley,* and *Kevin T. Maroney* for respondents. Reported below: 400 F. 2d 986.

No. 120, Misc. POE *v.* FITZHARRIS, PRISON SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg,* Deputy Attorney General, for respondent.

No. 138, Misc. SAPP *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Daniel J. Sullivan* for respondent.

No. 129, Misc. HOWARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Phillip G. Samovar,* Deputy Attorney General, for respondent.

No. 235, Misc. EVANS *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. *Robert Y. Thornton,* Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent.

No. 288, Misc. GEORGE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Timothy A. Reardon,* Deputy Attorney General, for respondent. Reported below: 259 Cal. App. 2d 424, 66 Cal. Rptr. 442.

No. 303, Misc. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 391 F. 2d 439.

No. 359, Misc. HARRIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *George Howard, Jr.,* for petitioner. *Joe Purcell,* Attorney General of Arkansas, and *John Leslie Evitts,* Chief Deputy Attorney General, for respondent. Reported below: 244 Ark. 314, 425 S. W. 2d 293.

No. 377, Misc. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 392 F. 2d 169.

No. 391, Misc. ROMAN-MORALES *v.* UNITED STATES; and

No. 497, Misc. JUAREZ-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States in both cases. Reported below: 394 F. 2d 161.

No. 399, Misc. WHITE *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. *Robert W. Duggan* for respondent.

No. 437, Misc. LEWIS *v.* FRYE, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 438, Misc. JACKSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 440, Misc. FORD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. Reported below: 89 Ill. App. 2d 69, 233 N. E. 2d 51.

No. 444, Misc. DEFOE *v.* UNITED STATES; and

No. 462, Misc. MORGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Clyde P. West* for petitioner in No. 444, Misc. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States in both cases. Reported below: 394 F. 2d 973.

No. 467, Misc. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Roland D. Hartshorn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 393 F. 2d 491.

No. 482, Misc. WATTS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 498, Misc. TEPLITSKY *v.* BUREAU OF COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 398 F. 2d 820.

No. 520, Misc. VALENZUELA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 259 Cal. App. 2d 826, 66 Cal. Rptr. 825, 67 Cal. Rptr. 691.

No. 546, Misc. JEMISON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Bernard Cohen* for petitioner. Reported below: 14 Ohio St. 2d 47, 236 N. E. 2d 538.

No. 547, Misc. CARDER *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied. Reported below: 3 Md. App. 309, 239 A. 2d 143.

No. 567, Misc. HUGHES *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.

No. 595, Misc. INDIA *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 598, Misc. ALOBAIDI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner. Reported below: 433 S. W. 2d 440.

No. 624, Misc. STUCKEY *v.* CLARK, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondents.

No. 611, Misc. COTTLO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 613, Misc. THOMAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 206 So. 2d 475.

No. 614, Misc. COONTS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 617, Misc. SHANNON *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 622, Misc. NASH *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 635, Misc. CANTRELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 201 Kan. 182, 440 P. 2d 580.

No. 636, Misc. COMBS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 637, Misc. MARVEL *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 653, Misc. MASTERSON *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. 661, Misc. KAMSLER *v.* STAMOS, STATE'S ATTORNEY FOR COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 664, Misc. HALE *v.* GOTTEN. C. A. 6th Cir. Certiorari denied. *Charles M. Murphy, Jr.,* for petitioner. *Robert L. Green* for respondent.

No. 649, Misc. COLEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 666, Misc. ESPARZA *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 671, Misc. MARTINEZ *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. *Allan G. Shepard,* Attorney General of Idaho, and *William D. Collins,* Assistant Attorney General, for respondent. Reported below: 92 Idaho 183, 439 P. 2d 691.

No. 677, Misc. BRINSON *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 681, Misc. PEREZ *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Robert N. McAllister, Jr.,* for respondent.

No. 687, Misc. POLLARD *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. 693, Misc. TURNER *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 696, Misc. ODES *v.* CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied.

No. 698, Misc. JOHNSON *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of L. A. Certiorari denied.

No. 700, Misc. SASSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James W. Marshall* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 398 F. 2d 356.

No. 701, Misc. MORGANTI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 2d 679, 238 N. E. 2d 757.

No. 716, Misc. WARD *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 723, Misc. POSTON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Joseph A. Ryan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 396 F. 2d 103.

No. 746, Misc. PRINCE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Conrad J. Lynn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 398 F. 2d 686.

No. 758, Misc. QUINONES *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied. *Frank S. Hogan* and *Sybil Landau* for respondent.

No. 694, Misc. FOSTER *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari and other relief denied.

No. 695, Misc. ALLISON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Dist. Ct. App. Fla., 1st Dist. Certiorari and other relief denied.

Rehearing Denied.

No. 37, Misc. HANKS *v.* UNITED STATES, *ante*, p. 863;

No. 46, Misc. HANDY *v.* PATUXENT INSTITUTION DIRECTOR, *ante*, p. 865;

No. 54, Misc. PADGETT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante*, p. 865;

No. 137, Misc. BURNS *v.* TURNER, WARDEN, *ante*, p. 873;

No. 293, Misc. COPELAND *v.* FLORIDA, *ante*, p. 884;

No. 322, Misc. JOERGER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante*, p. 886;

No. 382, Misc. MORTON *v.* KANSAS, *ante*, p. 890; and

No. 419, Misc. HOLSCHER *v.* YOUNG, WARDEN, *ante*, p. 816. Petitions for rehearing denied.

NOVEMBER 18, 1968.

Dismissal Under Rule 60.

No. 193. INTERNATIONAL SALT CO. *v.* OHIO TURNPIKE COMMISSION. C. A. 8th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Robert D. Stiles* for petitioner. *James W. Shocknessy* for respondent. Reported below: 392 F. 2d 579. [For earlier order herein, see *ante*, p. 814.]

Miscellaneous Orders.

No. ——. DRENT ET AL. *v.* MCKEAN ET AL. C. A. 5th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Bernard D. Fischman* for applicants.

No. 823, Misc. BUCHANAN *v.* BURKE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 156, Misc. ELLENBOGEN *v.* UNITED STATES, *ante*, p. 918. Respondent requested to file a response to petition for rehearing within 30 days. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.

No. 30. KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. *v.* PREISLER ET AL.; and

No. 31. HEINKEL ET AL. *v.* PREISLER ET AL. Appeals from D. C. W. D. Mo. [Probable jurisdiction noted, 390 U. S. 939.] Motions of appellants for additional time for oral argument granted, and an additional 30 minutes, to be divided equally, allotted to counsel for appellants. An additional 30 minutes allotted to counsel for appellees. *Norman H. Anderson,* Attorney General of Missouri, and *Thomas J. Downey,* First Assistant Attorney General, on the motion in No. 30, and *John David Collins* on the motion in No. 31.

No. 505, Misc. BROWN *v.* BETO, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, in opposition.

Probable Jurisdiction Noted.

No. 492. BRANDENBURG *v.* OHIO. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. The Attorney General of Ohio is invited to file a brief expressing the views of the State of Ohio. *Allen Brown, Melvin L. Wulf, Eleanor Holmes Norton,* and *Bernard A. Berkman* for appellant. *Melvin G. Rueger* and *Leonard Kirschner* for appellee.

Certiorari Granted. (See also No. 323, *ante*, p. 166.)

No. 138. POWELL ET AL. *v.* MCCORMACK, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ET AL. C. A. D. C. Cir. Certiorari granted. *Arthur Kinoy, William M. Kunstler, Edward Bennett Williams, Robert L. Carter, Hubert T. Delany, Herbert O. Reid, Sr., Frank D. Reeves,* and *Henry R. Williams* for petitioners. *Bruce Bromley, John R. Hupper, Thomas D. Barr, Lloyd N. Cutler, John H. Pickering, Louis F. Oberdorfer,* and *Max O. Truitt, Jr.,* for respondents. Reported below: 129 U. S. App. D. C. 354, 395 F. 2d 577.

No. 473. BINGLER, DISTRICT DIRECTOR OF INTERNAL REVENUE *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein, Jonathan S. Cohen,* and *Michael B. Arkin* for petitioner. *James C. Larrimer* for respondents. Reported below: 396 F. 2d 258.

No. 477. UNITED STATES *v.* UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674 (ANGELINI, CLAIMANT). C. A. 7th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. *Anna R. Lavin* for respondent. Reported below: 393 F. 2d 499.

No. 231, Misc. HARRINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *James H. Kline,* Deputy Attorney General, for respondent. Reported below: 256 Cal. App. 2d 209, 64 Cal. Rptr. 159.

No. 480. BLASIUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by the petition which reads as follows:

"Does an individual violate Section 33 of Title 35, United States Code, by representing that he is qualified to prepare applications for patent, when the individual is not registered with the Patent Office?

"(a) Did the Court of Appeals for the Second Circuit err in its opinion that the provisions of Section 33 of Title 35, United States Code, are clear, and not ambiguous as determined by the United States Court of Appeals for the District of Columbia Circuit in *Hull* v. *United States,* 390 F. 2d 462 (D. C. Cir. 1968), thus creating a conflict within the Circuits?

"(b) Does the word 'qualified' as used in Section 33 of Title 35, United States Code, mean skill or 'know-how' in performing the service or does it mean legal and actual authority from the Patent Office to perform a particular function?" *Peyton Ford* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States. *Jacob Stein, Eugene L. Bernard,* and *Donald R. Dunner* for the Bar Association of the District of Columbia, and *Eben M. Graves, Frank L. Neuhauser, W. Brown Morton, Jr.,* and *William H. Elliott, Jr.,* for the American Patent Law Association, as *amici curiae.* Reported below: 397 F. 2d 203.

No. 195, Misc. JENKINS *v.* DELAWARE. Sup. Ct. Del. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Henry N. Herndon, Jr.,* for petitioner. *Jay H. Conner,* Deputy Attorney General of Delaware, for respondent. Reported below: —— Del. ——, 240 A. 2d 146.

No. 227, Misc. RODRIQUEZ *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Solicitor General Griswold* for the United States. Reported below: 387 F. 2d 117.

Certiorari Denied.

No. 237. ANGELERI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Michael A. Querques* and *Daniel E. Isles* for petitioner. *S. Philip Klein* for respondent. Reported below: 51 N. J. 382, 241 A. 2d 3.

No. 250. COYNE *v.* WATSON, SHERIFF. C. A. 6th Cir. Certiorari denied. *Richard J. Morr* for petitioner.

No. 278. LYNN ET AL. *v.* CARAWAY ET AL. C. A. 5th Cir. Certiorari denied. *W. Scott Wilkinson* for petitioners. *Benjamin C. King* for respondent Caraway, and *Marion K. Smith* for respondent Jones. Reported below: 379 F. 2d 943.

No. 471. PERFO-LOG, INC. *v.* WELL SURVEYS, INC., NOW DRESSER SYSTEMS, INC., ET AL. C. A. 10th Cir. Certiorari denied. *R. Welton Whann* for petitioner. *Rufus S. Day, Jr.,* for respondents. Reported below: 396 F. 2d 15.

No. 475. PAUL *v.* DADE COUNTY, FLORIDA. Sup. Ct. Fla. Certiorari denied. *D. P. S. Paul* and *P. D. Thomson* for petitioner. *William W. Gibbs* for respondent. Reported below: 210 So. 2d 200.

No. 476. SHROUT, DBA SHROUT AGENCY *v.* MCDONALD'S SYSTEM, INC., ET AL. Sup. Ct. Ill. Certiorari denied. *Willard Lassers* for petitioner. *Jerome Gilson* for respondents.

No. 481. First Camden National Bank & Trust Co. *v.* Lapinsohn et ux. Super. Ct. Pa. Certiorari denied. *John P. Hauch, Jr.,* for petitioner. *Yale B. Bernstein* for respondents. Reported below: 212 Pa. Super. 185, 240 A. 2d 90.

No. 482. Moretti *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. *George R. Sommer* for petitioner. Reported below: 52 N. J. 182, 244 A. 2d 499.

No. 484. Scroggins *v.* United States. Ct. Cl. Certiorari denied. *Byron N. Scott* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 184 Ct. Cl. 530, 397 F. 2d 295.

No. 485. London & Overseas Insurance Co. et al. *v.* Bunge Corp. et al. C. A. 2d Cir. Certiorari denied. *William Warner, William Garth Symmers,* and *Frederick Fish* for petitioners. *Philip C. Scott* for Bunge Corp., and *Peter H. Kaminer, Edwin J. Wesely,* and *Marie L. McCann* for Banker, respondents. Reported below: 394 F. 2d 496.

No. 472. Garrett et al. *v.* United States. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Emmett Colvin, Jr.,* and *Joe H. Tonahill* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 396 F. 2d 489.

No. 486. Houston *v.* United States. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Marshall Tamor Golding* for the United States. Reported below: 397 F. 2d 261.

No. 489. VAN DEN WYMELENBERG, EXECUTOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Roger C. Minahan* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Jonathan S. Cohen* for the United States. Reported below: 397 F. 2d 443.

No. 495. FITZWATER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Al Matthews* for petitioner. Reported below: 260 Cal. App. 2d 478, 67 Cal. Rptr. 190.

No. 497. BORDEN CO. ET AL. *v.* NATIONAL DAIRY PRODUCTS CORP. C. A. 7th Cir. Certiorari denied. *Stuart S. Ball* for Borden Co., *R. Howard Goldsmith* for L. D. Schreiber & Co. et al., and *Charles F. Meroni* for Safeway Stores, Inc., et al., petitioners. *John T. Chadwell* for respondent. Reported below: 394 F. 2d 887.

No. 493. WOODS *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion to dispense with printing petition granted. Certiorari denied. *William L. Anderson* for petitioner. Reported below: 440 P. 2d 994.

No. 491. UTILITY USERS LEAGUE ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 7th Cir. Motion to dispense with printing portions of appendix to petition granted. Certiorari denied. *Harry R. Booth* for petitioners. *Solicitor General Griswold, Richard A. Solomon, Peter H. Schiff, Drexel D. Journey,* and *Israel Convisser* for Federal Power Commission, and *Charles A. Bane* and *James E. Knox, Jr.,* for Commonwealth Edison Co., respondents. Reported below: 394 F. 2d 16.

No. 566, Misc. BAKER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 498. NEWARK STEREOTYPERS' UNION No. 18 *v.* NEWARK MORNING LEDGER CO. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *William R. Meagher* and *Thomas L. Morrissey* for petitioner. *Bernard G. Segal, Samuel D. Slade,* and *Donald A. Robinson* for respondents. Reported below: 397 F. 2d 594.

No. 314, Misc. PRUETT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Irl B. Baris* for petitioner. *Norman H. Anderson,* Attorney General of Missouri, and *Walter W. Nowotny, Jr.,* Assistant Attorney General, for respondent. Reported below: 425 S. W. 2d 116.

No. 443, Misc. PHILLIPS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *John A. Gose* for petitioner. Reported below: 73 Wash. 2d 462, 438 P. 2d 876.

No. 475, Misc. BENSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Thomas M. Tuggle,* Assistant Attorney General, for respondent.

No. 581, Misc. MARSH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 585, Misc. SALDANA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 394 F. 2d 827.

No. 586, Misc. TYNAN *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 397 F. 2d 53.

No. 639, Misc. FIERRO *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 592, Misc. HAINES ET AL. *v.* KINGSLEY. C. A. 10th Cir. Certiorari denied.

No. 602, Misc. SMITH *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 609, Misc. NICHOLS *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 628, Misc. HILL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 429 S. W. 2d 481.

No. 632, Misc. BLANCHEY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 638, Misc. MAXEY *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 646, Misc. PONCE, AKA DOMINGUEZ *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 689, Misc. VALDIVIA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 259 Cal. App. 2d 593, 66 Cal. Rptr. 615.

No. 692, Misc. CREIGHBAUM *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 398 F. 2d 822.

No. 702, Misc. FRAZIER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 620, Misc. LEVINE ET AL. *v.* LEVER BROTHERS CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

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No. 682, Misc. MIXON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Rehearing Denied.

No. 196. DE SIMONE *v.* UNITED STATES, *ante,* p. 834;

No. 274. MOREALI *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL., *ante,* p. 841;

No. 341. ESTATE OF FREELAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 845;

No. 353. RATCLIFF *v.* BRUCE ET AL., *ante,* p. 848;

No. 50, Misc. DAEGELE *v.* CROUSE, WARDEN, *ante,* p. 915;

No. 150, Misc. RUCKER *v.* CITY OF FLINT ET AL., *ante,* p. 873;

No. 171, Misc. LUSK *v.* STRICKLAND ET AL., *ante,* p. 875;

No. 367, Misc. IN RE KAMSLER, *ante,* p. 816;

No. 396, Misc. LEWIS *v.* UNITED STATES, *ante,* p. 891; and

No. 473, Misc. LEMANSKI *v.* LEMANSKI, *ante,* p. 20. Petitions for rehearing denied.

No. 946, October Term, 1967. CIVIL AERONAUTICS BOARD *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL., 391 U. S. 461. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 132. YUEN KAM CHUEN ET AL. *v.* ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, *ante,* p. 858. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 800, October Term, 1967. WORLD AIRWAYS, INC., ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL.; and

No. 969, October Term, 1967. AMERICAN SOCIETY OF TRAVEL AGENTS, INC. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL., 391 U. S. 461. Motion for leave to supplement petition for rehearing granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

NOVEMBER 20, 1968.

Dismissals Under Rule 60.

No. 483. VIZCARRA-DELGADILLO *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Milton T. Simmons* and *Donald L. Ungar* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 395 F. 2d 70.

No. 616. STEWART ET AL. *v.* WOODWARD. Sup. Ct. R. I. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Richard P. McMahon* and *S. Everett Wilkins* for petitioners. Reported below: —— R. I. ——, 243 A. 2d 917.

NOVEMBER 21, 1968.

Dismissal Under Rule 60.

No. 1065, Misc. VALENTI *v.* LUMBARD, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court. *John Manning Regan* on the motion. *Louis J. Lefkowitz,* Attorney General of New York, and *Jean M. Coon,* Assistant Attorney General, for respondents.

NOVEMBER 25, 1968.

Miscellaneous Orders.

No. ——. ZAFFARANO *v.* FITZPATRICK, WARDEN. C. A. 2d Cir. Application for bail presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. *Irving Spieler* for applicant.

No. 49. ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 391 U. S. 933.] The Solicitor General is invited to file a brief expressing the views of the United States.

No. 838, Misc. FARBENFABRIKEN BAYER A. G. *v.* UNITED STATES. D. C. D. C.; and

No. 839, Misc. FARBENFABRIKEN BAYER A. G. *v.* UNITED STATES. C. A. D. C. Cir. Motions for leave to file petitions for writs of certiorari denied. *Allen F. Maulsby, Arnold M. Lerman, Max O. Truitt, Jr.,* and *Daniel K. Mayers* on the motions in both cases.

No. 717, Misc. COX *v.* BURKE, WARDEN; and

No. 869, Misc. ROBINSON *v.* PEYTON, PENITENTIARY SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (See also No. 134, *ante,* p. 215; and No. 88, Misc., *ante,* p. 216.)

No. 252, Misc. CHIMEL *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, *William E. James,* Assistant Attorney General, and *Ronald M. George,* Deputy Attorney General, for respondent. Reported below: 68 Cal. 2d 436, 439 P. 2d 333.

No. 76. CARDINALE *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. *Nathan Greenberg* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Second Assistant Attorney General, *Leander H. Perez, Jr.,* and *Preston H. Hufft* for respondent. Reported below: 251 La. 827, 206 So. 2d 510.

No. 517. NATIONAL BOARD OF YOUNG MEN'S CHRISTIAN ASSNS. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari granted. *Ronald A. Jacks* for petitioners. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis,* and *S. Billingsley Hill* for the United States. Reported below: 184 Ct. Cl. 427, 396 F. 2d 467.

Certiorari Denied. (See also No. 499, *ante,* p. 214; and No. 501, *ante,* p. 215.)

No. 505. FARBENFABRIKEN BAYER A. G. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Allen F. Maulsby, Arnold M. Lerman, Max O. Truitt, Jr.,* and *Daniel K. Mayers* for petitioner. *Solicitor General Griswold* for the United States.

No. 443. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* BESSEMER & LAKE ERIE RAILROAD CO. ET AL.; and

No. 638. CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA *v.* BESSEMER & LAKE ERIE RAILROAD CO. ET AL. Sup. Ct. Pa. Certiorari denied. *William A. Goichman, Edward Munce,* and *Joseph C. Bruno* for petitioner in No. 443, and *G. P. MacDougall* for petitioner in No. 638. *R. N. Clattenburg, Donald A. Brinkworth,* and *Gordon E. Neuenschwander* for respondents in both cases. *Sheldon E. Bernstein* for Railway Labor Executives' Assn., as *amicus curiae,* in support of the petitions in both cases. Reported below: 430 Pa. 339, 243 A. 2d 358.

No. 165. CALVARY BIBLE PRESBYTERIAN CHURCH OF SEATTLE ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON. Sup. Ct. Wash. Certiorari denied. *William H. Botzer* for petitioners. *John J. O'Connell,* Attorney General of Washington, and *James B. Wilson,* Assistant Attorney General, for respondent. Reported below: 72 Wash. 2d 912, 436 P. 2d 189.

No. 494. ELDEN *v.* ADDISON FARMERS MUTUAL INSURANCE CO. App. Ct. Ill., 2d Dist. Certiorari denied. *William Elden,* petitioner, *pro se.* Reported below: 90 Ill. App. 2d 417, 233 N. E. 2d 42.

No. 503. KINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John T. Gilbertson* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 396 F. 2d 9.

No. 506. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSN. (AFL–CIO) ET AL. Ct. App. N. Y. Certiorari denied. *Alfred Giardino* and *E. Barrett Prettyman, Jr.,* for petitioners. *Howard Schulman* for respondents. Reported below: 22 N. Y. 2d 809, 239 N. E. 2d 650.

No. 508. QUALLS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frederick C. Kurth* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James J. Wood,* Assistant Attorney General, for respondent.

No. 514. FINKS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Walter E. Gillcrist* and *J. Gordon Forester, Jr.,* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 184 Ct. Cl. 480, 395 F. 2d 999.

No. 513. GREY ET AL. *v.* FIRST NATIONAL BANK IN DALLAS ET AL. C. A. 5th Cir. Certiorari denied. *Gerald Meyer* for petitioners. *Henry C. Coke, Jr., John N. Jackson, J. Edwin Fleming,* and *Ernest E. Figari, Jr.,* for First National Bank in Dallas; *E. Taylor Armstrong* for First National Bank in Dallas as trustee of the Morgan trust; *Royal H. Brin, Jr.,* for First National Bank in Dallas as trustee of the O'Connor trust; and *Crawford C. Martin, pro se,* and *Marvin H. Sentell,* Assistant Attorney General, for the Attorney General of Texas, respondents. Reported below: 393 F. 2d 371.

No. 516. BERBERIAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Bernard L. Segal* for petitioner.

No. 518. HOGAN ET AL. *v.* IVOR B. CLARK CO., INC. C. A. 2d Cir. Certiorari denied. *William G. Grant* for petitioners. *Paul H. Tannenbaum* for respondent.

No. 519. HAYUTIN *v.* UNITED STATES; and

No. 567. NASH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* and *Milton S. Gould* for petitioner in No. 519, and *Jerome J. Londin* for petitioner in No. 567. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States in both cases. Reported below: 398 F. 2d 944.

No. 521. DREYFUS *v.* MICHAEL REESE HOSPITAL & MEDICAL CENTER. C. A. 7th Cir. Certiorari denied. *R. Wicks Stephens II* for petitioner. *Frank D. Mayer* for respondent. Reported below: 397 F. 2d 794.

No. 523. ILLINOIS *v.* MILLER. Sup. Ct. Ill. Certiorari denied. *John J. Stamos* for petitioner. *Charles A. Bellows* for respondent. Reported below: 40 Ill. 2d 154, 238 N. E. 2d 407.

No. 522. CROWDER, TRADING AS HARRIMAN BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Vincent A. Pepper* for petitioner. *Solicitor General Griswold* and *Henry Geller* for Federal Communications Commission, and *Arthur H. Schroeder* and *John B. Kenkel* for Folkways Broadcasting Co., Inc., respondents. Reported below: 130 U. S. App. D. C. 198, 399 F. 2d 569.

No. 524. BOARD OF TRUSTEES OF ARKANSAS A. & M. COLLEGE ET AL. *v.* DAVIS. C. A. 8th Cir. Certiorari denied. *Joe Purcell,* Attorney General of Arkansas, and *Don Langston,* Deputy Attorney General, for petitioners. Reported below: 396 F. 2d 730.

No. 529. OWENS *v.* TRAYNOR, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. *Joseph F. Lentz, Jr.,* for petitioner. *Solicitor General Griswold* for Traynor, and *Jesse Slingluff* for Bethlehem Steel Corp., respondents. Reported below: 396 F. 2d 783.

No. 530. ESTATE OF VARIAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Paul E. Anderson, Valentine Brookes,* and *Richard M. Leonard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Loring W. Post,* and *Jonathan S. Cohen* for respondent. Reported below: 396 F. 2d 753.

No. 532. DARLINGTON-HARTSVILLE COCA-COLA BOTTLING CO., INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *J. M. Walters* and *B. E. Geer, Jr.,* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Rogovin* for the United States. Reported below: 393 F. 2d 494.

No. 426. KELLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Bennett Williams* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 395 F. 2d 727.

MR. CHIEF JUSTICE WARREN, dissenting.

The Court, by denying certiorari in this case, has ignored the interrelationship between its recent decision in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and the well-established rule that the Government cannot comment upon the accused's decision to stand mute. See *Wilson* v. *United States,* 149 U. S. 60 (1893). Although I was the lone dissenter in *Marchetti,* see 390 U. S., at 77–84, I am puzzled by the Court's failure to apply the principles it so recently advocated.

Petitioner stands convicted of four related violations of the statutes governing those engaged in the business of accepting wagers: use of interstate facilities for transmitting wagering information in violation of 18 U. S. C. § 1084; use of interstate facilities with intent to carry on an unlawful gambling activity in violation of 18 U. S. C. § 1952; failing to pay the special tax imposed upon gamblers by 26 U. S. C. § 4401; and failing to register as a gambler as required by 26 U. S. C. §§ 4411–4412.[1] The Court of Appeals, on the authority of *Marchetti,* reversed his convictions on the tax and registration counts but affirmed his convictions imposed upon the other two counts. *United States* v. *Kelley,* 395 F. 2d 727 (C. A. 2d Cir. 1968).

In *Marchetti* the Court held that, given the widespread prohibition of gambling activities by both the state and federal sovereigns, the registration and taxation provisions of §§ 4401 and 4411–4412 compelled a gambler to

[1] Petitioner received the maximum sentence on each count, the sentences to run consecutively.

admit that he was engaging in or planned to engage in unlawful activities. Specific reference was made to the criminal sanctions imposed by both § 1084 and § 1952, the two sections which form the basis of petitioner's outstanding convictions. See 390 U. S., at 44. According to the *Marchetti* majority, the Government had in essence said to the accused gambler: either register and pay the tax, thereby exposing your activities, or be prosecuted for failing to incriminate yourself.

I find this rationale equally applicable to this case. The Government in the first two counts indicted petitioner for interstate gambling, yet at the same time in the last two accused him of failing to incriminate himself on the first two counts. Had government counsel introduced evidence that petitioner, when asked if he was a gambler, refused to reply and then argued to the jury that petitioner's silence indicated guilt, I have no doubt that a reversal would be mandated. See *Miranda* v. *Arizona*, 384 U. S. 436, 444, 468, n. 37 (1966).[2] I have difficulty understanding why this same principle is not involved where the Government joins the tax and registration offenses with the substantive gambling offenses, for evidence introduced under counts three and four is a formal government comment on petitioner's failure to confess to an essential element[3] of counts one and two.[4]

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[2] Petitioner's trial began in August 1966 and was thus after the applicable date of *Miranda*. See *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

[3] The essential element is that the accused be a professional gambler. Section 1084 applies to individuals "engaged in the business of betting or wagering"; § 1952 refers to the use of interstate facilities to carry on "any business enterprise involving gambling"; and §§ 4411 and 4412 impose a tax and registration requirement upon those "engaged in the business of accepting wagers" as defined in § 4401.

[4] The Court of Appeals intimated that petitioner did not properly preserve his present claim as he failed to move to sever the gambling

The joinder of the tax and registration counts with the interstate gambling charges also had the result of strengthening a relatively weak case on the gambling charges by combining those charges with a strong case on failure to register and pay the tax. The Government's proof disclosed that petitioner, a professional bookmaker, instructed his clients to call a number at a New York City hotel and ask for a fictitious name. The hotel operator would inform the prospective bettor that his party was not in; the bettor would thereupon give the operator a code name previously agreed upon between the bettor and petitioner. Thereafter, petitioner would call the bettor from his home in Brooklyn and consummate the wager.[5]

To prove its charges on the third and fourth counts the Government was required to show only that petitioner received wagers and had neither registered nor met his tax liability. The indictment on the first and second counts was based upon telephone calls made by bettors to the New York City number from outside New York State. The Government's theory of prosecution was that petitioner caused the out-of-state bettors to use

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counts from the registration and tax counts. 395 F. 2d, at 729. However, prior to trial petitioner moved to dismiss the indictment on the theory that he could not be constitutionally convicted for violations of §§ 4401 and 4411–4412 on grounds subsequently adopted in *Marchetti;* petitioner added that combining charges of failing to register and pay the tax with the substantive gambling charges constituted a comment upon his failure to incriminate himself and therefore asked that the entire indictment be dismissed. On the day of trial this request was renewed. Certainly, these steps were adequate to preserve petitioner's claim.

[5] The Government chose to place venue in the Southern District of New York, the situs of the bettors' telephone calls, rather than in the Eastern District, the district from which the return calls were made. See *United States* v. *Synodinos,* 218 F. Supp. 479 (D. C. Utah 1963); 18 U. S. C. § 3237.

telephone facilities to place their wagers. See 18 U. S. C. § 2 (b). The Government thus had to convince the jury that petitioner was the causative factor prompting the calls,[6] proof not required for the third and fourth counts. Petitioner placed his defense upon the argument that it was unlikely that he, a lowly bookie, caused his customers, men of substantial means, to make the telephone calls. It is at least arguable that the jury, faced with overwhelming evidence of petitioner's guilt of the registration and tax charges, allowed this fact to influence their deliberations concerning the interstate gambling offenses. Furthermore, this risk was compounded by the fact that the trial judge told the jury that, although petitioner was charged with four distinct offenses, these offenses were "interrelated violations of Federal law." Simply, the Government was able to show via a prosecution for offenses which this Court has held constitutionally invalid that petitioner had violated the law; this demonstration may well have induced the jury to conclude that petitioner was guilty of the other charges as well. Cf. *Michelson* v. *United States,* 335 U. S. 469 (1948).

Furthermore, the joinder of these four charges can be viewed as a classic example of the improper use of "other-crimes" evidence.[7] I have in mind the following situa-

[6] The trial judge charged: "Thus the government has attempted to show that the defendant devised a method whereby he caused these individuals to phone the Eldorado number, ask for Mr. Mellon, which the government contends was the name the defendant supplied to them and which was the trigger for his return call to them with the specific wagering information or to accept the particular bet, and when we say the defendant caused the telephone to be used we do not mean that he coerced the bettors."

[7] Typically, other-crimes evidence is introduced to establish intent, design, and system on the part of the accused where the other crimes are similar to the crimes for which he is charged. See *Lisenba* v. *California,* 314 U. S. 219, 227 (1941).

tion. An individual presently charged with interstate gambling has previously suffered a conviction prior to the Court's decision in *Marchetti* for failure to register and pay the tax. Would the Government be able to introduce this previous conviction in the accused's post-*Marchetti* trial although the Court has determined that the statutory scheme under which this conviction was procured is unconstitutional? It appears that by joining the gambling offenses with the registration and tax offenses the Government has been able to utilize just such a procedure.

I would grant certiorari to resolve these issues.

No. 527. CURRY ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Nicholas J. Capuano* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Rogovin* for the United States. Reported below: 396 F. 2d 630.

No. 623. CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (COPELAND ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied. *Samuel N. Hecsh* for respondents Copeland et al. Reported below: 262 Cal. App. 2d 283, 68 Cal. Rptr. 629.

No. 502. MORRISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *William S. Thompson* for petitioner. *Solicitor General Griswold* for the United States.

No. 483, Misc. DENTINE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Saverio A. Muschio* and *Paul A. Victor* for petitioner. *Daniel J. Sullivan* for respondent.

No. 510. SGARLATO *v.* KLEIN. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Morton Liftin* for petitioner. *Solomon A. Klein,* respondent, *pro se.*

No. 515. KAYE *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Morton Liftin* for petitioner. *Angelo T. Cometa* for respondents.

No. 511. SIMONS ET AL. *v.* VINSON ET AL. C. A. 5th Cir. Certiorari and other relief denied. *Robert M. Helton* and *Frank Gibson* for petitioners. *James R. Ryan* for Vinson et al., and *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis,* and *Raymond N. Zagone* for Department of the Interior et al., respondents. Reported below: 394 F. 2d 732.

No. 412, Misc. CABRERA *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 127 Vt. 193, 243 A. 2d 784.

No. 542, Misc. IN RE RUSSO. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States in opposition.

No. 561, Misc. BUNDY *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. 577, Misc. WALLACE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 580, Misc. DISMUKE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 587, Misc. WADSWORTH *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 599, Misc. OLVERA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 260 Cal. App. 2d 143, 67 Cal. Rptr. 45.

No. 604, Misc. BELL *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 391 F. 2d 286.

No. 616, Misc. SCHLETTE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 644, Misc. GONZALEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 647, Misc. LOCKHART *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 654, Misc. HILBERRY *v.* MARONEY, PENITENTIARY SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 660, Misc. GARVIE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 669, Misc. CALDWELL *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 674, Misc. PICHE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 706, Misc. MERCER *v.* SPECTER ET AL. C. A. 3d Cir. Certiorari denied.

No. 601, Misc. BREWER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 73 Wash. 2d 58, 436 P. 2d 473.

No. 676, Misc. HILLIARD *v.* HARRIS, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 707, Misc. DARLING *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 708, Misc. CANTRELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 714, Misc. GROVES *v.* SCHULTZ, SHERIFF, ET AL. C. A. 3d Cir. Certiorari denied.

No. 731, Misc. CONOVER *v.* TV STATION WPTZ, CHANNEL 5, A ROLLINS STATION, PLATTSBURGH. Ct. App. N. Y. Certiorari denied.

No. 737, Misc. AGUIAR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 257 Cal. App. 2d 597, 65 Cal. Rptr. 171.

No. 739, Misc. WELSH *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 756, Misc. WATSON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 768, Misc. MILLER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 775, Misc. MADISON *v.* BROWN. C. A. 4th Cir. Certiorari denied.

No. 380, Misc. STARRETT *v.* BRUCE, DBA BRUCE TRUCKING CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Raymond C. Jopling, Jr.*, for respondent. Reported below: 391 F. 2d 320.

No. 631, Misc. LAWS ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Charles L. Bertini* for Laws and *Gerald E. Monaghan* for Washington, petitioners. *Guy W. Calissi* for respondent. Reported below: 50 N. J. 159, 233 A. 2d 633; 51 N. J. 494, 242 A. 2d 333.

Rehearing Denied.

No. 1511, Misc., October Term, 1967. COPELAND *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LAKE COUNTY ET AL., 391 U. S. 955; and

No. 527, Misc. HOHENSEE ET AL. *v.* MINEAR, *ante*, p. 894. Motions for leave to file petitions for rehearing denied.

No. 242. ROSSO ET UX. *v.* PUERTO RICO, *ante*, p. 14. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

No. 50. HANOVER INSURANCE CO. OF NEW YORK *v.* VICTOR, *ante*, p. 7;

No. 154. FORT HOWARD PAPER CO. *v.* KIMBERLY-CLARK CORP., *ante*, p. 831;

No. 159. BIDDLE, ADMINISTRATRIX *v.* BOWSER ET AL., *ante*, p. 10;

No. 270. PENJASKA ET AL. *v.* GOODBODY & CO., *ante*, p. 16; and

No. 281. KENNER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 841. Petitions for rehearing denied.

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No. 319. RAO *v.* UNITED STATES, *ante*, p. 845;

No. 321. HART *v.* HEDRICK, TRUSTEE IN BANKRUPTCY, *ante*, p. 846;

No. 334. MIZNER *v.* MIZNER, *ante*, p. 847;

No. 343. UNITED STATES *v.* AN ARTICLE OF DRUG . . . BACTO-UNIDISK . . . , *ante*, p. 911;

No. 359. GRAHAM *v.* GREENE, JUDGE, ET AL., *ante*, p. 848;

No. 126, Misc. VARONE *v.* VARONE, *ante*, p. 872;

No. 172, Misc. BURNS *v.* UNITED STATES, *ante*, p. 875;

No. 405, Misc. FORD *v.* UNITED STATES, *ante*, p. 927; and

No. 424, Misc. STEINHARDT *v.* FLORIDA, *ante*, p. 916. Petitions for rehearing denied.

DECEMBER 9, 1968.

Miscellaneous Orders.

No. ——. GRANELLO, AKA BURNS *v.* UNITED STATES. C. A. 2d Cir. Application for bail presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL took no part in the consideration or decision of this application. *Irving Anolik* for applicant. *Solicitor General Griswold* for the United States in opposition.

No. ——. THOMAS *v.* CREVASSE, SHERIFF. C. A. 5th Cir. Application for bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *Robert G. Petree* for applicant. *Earl Faircloth*, Attorney General of Florida, and *Raymond L. Marky*, Assistant Attorney General, in opposition.

No. ——. HAIRSTON *v.* ILLINOIS. Sup. Ct. Ill. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Marshall Patner* for applicant.

No. —. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Application for bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

No. —. BLOSS *v.* MICHIGAN. Sup. Ct. Mich. Application for stay and bail presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. *Stanley Fleishman* and *Sam Rosenwein* for applicant.

No. 40. JOHNSON *v.* AVERY, CORRECTION COMMISSIONER, ET AL. [Certiorari granted, 390 U. S. 943.] Motions of Harry D. Smith and Calvin C. Shobe for leave to file briefs, as *amici curiae,* denied.

No. 366. UNITED STATES *v.* COVINGTON. [Probable jurisdiction noted, *ante,* p. 910.] Motion of appellee for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted. It is ordered that *William J. Davis, Esquire,* of Columbus, Ohio, be, and he is hereby, appointed to serve as counsel for appellee in this case.

No. 413. NORTH CAROLINA ET AL. *v.* PEARCE. [Certiorari granted, *ante,* p. 922.] Motion of respondent for appointment of counsel granted. It is ordered that *Larry B. Sitton, Esquire,* of Greensboro, North Carolina, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 65. LEARY *v.* UNITED STATES. [Certiorari granted, 392 U. S. 903.] Motion of National Student Assn. for leave to file a brief, as *amicus curiae,* granted. *Joseph S. Oteri* on the motion.

No. 794, Misc. ALEXANDER *v.* KAESS, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* for respondent in opposition.

No. —. SCHNITZLER *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 703, Misc. PARK *v.* NELSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 749. RODRIQUEZ *v.* UNITED STATES. [Certiorari granted, *ante*, p. 951.] Motion of petitioner for appointment of counsel granted. It is ordered that *William R. Wallace, Esquire*, of San Francisco, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 780, Misc. HARPER *v.* CRAVEN, WARDEN, ET AL.;
No. 886, Misc. STOUT *v.* MICHIGAN;
No. 913, Misc. TURNER *v.* SHEEHY, REFORMATORY SUPERINTENDENT, ET AL.; and
No. 963, Misc. SHIPP *v.* CRAVEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 788, Misc. STANDARD FRUIT & STEAMSHIP CO. *v.* LYNNE, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus denied. *Eberhard P. Deutsch, Robert M. Moore,* and *René H. Himel, Jr.*, on the motion. *Solicitor General Griswold* for the United States, and *Hugh B. Cox* and *James H. McGlothlin* for United Fruit Co. in opposition.

Probable Jurisdiction Noted.

No. 244. BOYLE, JUDGE, ET AL. *v.* LANDRY ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. *John J. Stamos, pro se,* and *Edward J. Hladis* and *Ronald Butler,* for appellants. *Robert L. Tucker* for appellees. Reported below: 280 F. Supp. 938.

No. 548. JENKINS *v.* MCKEITHEN, GOVERNOR OF LOUISIANA, ET AL. Appeal from D. C. E. D. La. Probable jurisdiction noted. *J. Minos Simon* for appellant. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ashton L. Stewart,* Special Assistant Attorney General, for appellees. Reported below: 286 F. Supp. 537.

No. 580. SAMUELS ET AL. *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL.; and

No. 844, Misc. FERNANDEZ *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL. Appeals from D. C. S. D. N. Y. Probable jurisdiction noted. Cases consolidated and one hour allotted for oral argument. Motion for leave to proceed *in forma pauperis* in No. 844, Misc., granted and case transferred to appellate docket. *Victor Rabinowitz* and *Leonard B. Boudin* for appellants in No. 580, and *Eleanor Jackson Piel* for appellant in No. 844, Misc. *Peter J. O'Connor* for Mackell, *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *Mortimer Sattler,* Assistant Attorney General, for appellees in both cases. Reported below: 288 F. Supp. 348.

Certiorari Granted.

No. 574. UNITED STATES *v.* ESTATE OF GRACE ET AL. Ct. Cl. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein, Harry Baum,* and *Philip R. Miller* for the United States. *William S. Downard* for respondents. Reported below: 183 Ct. Cl. 745, 393 F. 2d 939.

No. 488. DANIEL ET AL. *v.* PAUL. C. A. 8th Cir. Certiorari granted. *Jack Greenberg, James M. Nabrit III,* and *Norman C. Amaker* for petitioners. Reported below: 395 F. 2d 118.

No. 228. WILLINGHAM, WARDEN, ET AL. *v.* MORGAN. C. A. 10th Cir. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Morton Hollander* for petitioners. Reported below: 383 F. 2d 139.

No. 528. NACIREMA OPERATING CO., INC., ET AL. *v.* JOHNSON ET AL.; and

No. 663. TRAYNOR ET AL., DEPUTY COMMISSIONERS *v.* JOHNSON ET AL. C. A. 4th Cir. Motion of respondent Avery in No. 528 to dispense with printing his brief in opposition granted. Certiorari granted. Cases are consolidated and one hour allotted for oral argument. *William A. Grimes* and *Randall C. Coleman* for Nacirema Operating Co., Inc., and *William B. Eley* for Liberty Mutual Insurance Co., petitioners in No. 528; and *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for petitioners in No. 663. *John J. O'Connor, Jr.,* and *Leroy W. Preston* for respondents Johnson et al., and *Ralph Rabinowitz* for respondent Avery, in No. 528. *Francis A. Scanlan, Edward D. Vickery, Scott H. Elder,* and *J. Stewart Harrison* for National Association of Stevedores et al., as *amici curiae,* in support of the petition in No. 528. Reported below: 398 F. 2d 900.

No. 442, Misc. DUVERNAY *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 403 [*ante,* p. 922]. *Benjamin Smith, Morton Stavis, Arthur Kinoy,* and *William M. Kunstler* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 394 F. 2d 979.

Certiorari Denied. (See also No. 423, Misc., *ante*, p. 221; and No. 747, Misc., *ante*, p. 221.)

No. 180. COSENTINO *v.* ROYAL NETHERLANDS STEAMSHIP Co. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *William L. F. Gardiner* for respondent. Reported below: 389 F. 2d 726.

No. 487. NATIONAL DAIRY PRODUCTS CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *John T. Chadwell, Richard W. McLaren,* and *William E. Nuessle* for petitioner. *Solicitor General Griswold, Assistant Attorney General Zimmerman, James McI. Henderson,* and *Alvin L. Berman* for respondent. Reported below: 395 F. 2d 517.

No. 531. WYNDHAM ASSOCIATES ET AL. *v.* BINTLIFF ET AL. C. A. 2d Cir. Certiorari denied. *Howard M. Jaffe* for petitioners. *Leo T. Kissam* for respondent Bintliff; *Frank W. Adams* for respondents McNeese et al.; *John Logan O'Donnell* and *Donald F. Johnston, Jr.,* for respondent Moroney, Beissner & Co., Inc.; *Samuel R. Pierce, Jr.,* for respondent A. G. Becker & Co., Inc.; *Thomas A. McGovern* and *Burton L. Knapp* for respondent American Stock Exchange; and *Edward J. Reilly* for respondent Chase Manhattan Bank, N. A. Reported below: 398 F. 2d 614.

No. 533. GREEN ET AL. *v.* TEXAS GULF SULPHUR Co. ET AL. C. A. 5th Cir. Certiorari denied. *Sizer Chambliss* and *Andrew A. Wassick* for petitioners. *Major T. Bell, George A. Weller,* and *Ewell Strong* for Texas Gulf Sulphur Co. et al.; *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Ben M. Harrison* and *Houghton Brownlee, Jr.,* Assistant Attorneys General, for Sadler, respondents. Reported below: 393 F. 2d 67.

No. 534. WHAYNE *v.* M. V. SHUTTLER, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Avram G. Adler* for petitioner. *Mark D. Alspach* for respondents. Reported below: 397 F. 2d 287.

No. 535. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *John G. Wayman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 391 F. 2d 119.

No. 536. REITER ET AL., TRUSTEES *v.* FEDERAL SAVINGS & LOAN INSURANCE CORP. C. A. 7th Cir. Certiorari denied. *William R. Quinlan* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for respondent. Reported below: 396 F. 2d 407.

No. 537. HENDRY CORP. *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 5th Cir. Certiorari denied. *Stanley W. Rosenkranz* and *Charles W. Pittman* for petitioner. *E. Dixie Beggs* for respondent. Reported below: 391 F. 2d 13.

No. 538. LAVINO SHIPPING CO. *v.* AMERICAN-WEST AFRICAN LINE, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Thomas F. Mount* for petitioner. *James F. Young* for respondents. Reported below: 397 F. 2d 170.

No. 539. RESOLUTE INSURANCE CO. *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. *Wade H. Penny, Jr.,* for petitioner. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondents. Reported below: 397 F. 2d 586.

No. 540. EASTERN AIR LINES, INC. *v.* SCOTT, ADMINISTRATOR. C. A. 3d Cir. Certiorari denied. *J. Grant McCabe III* and *John J. Martin* for petitioner. *John R. McConnell* for respondent. Reported below: 399 F. 2d 14.

No. 541. LELAURIN *v.* FROST NATIONAL BANK, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. *Edward V. Dylla* for petitioner. *C. Stanley Banks, Jr.*, for respondents. Reported below: 391 F. 2d 687.

No. 545. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Norman J. Gundlach* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States. Reported below: 397 F. 2d 467.

No. 547. RAMANTANIN *v.* DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. *J. Lee Rankin* and *Stanley Buchsbaum* for respondent.

No. 549. SENCHAL ET AL. *v.* CARROLL, TRUSTEE. C. A. 10th Cir. Certiorari denied. *Harvey L. Davis* for petitioners. *Harry L. Dyer* for respondent. Reported below: 394 F. 2d 797.

No. 551. CORN PRODUCTS CO. *v.* BAXTER LABORATORIES, INC. C. A. 7th Cir. Certiorari denied. *John A. Dienner* and *Richard R. Wolfe* for petitioner. *Edward A. Haight* for respondent. Reported below: 394 F. 2d 892.

No. 560. ARNOLD CONSTABLE CORP. *v.* EUDOWOOD SHOPPING CENTER, INC. Ct. App. Md. Certiorari denied. *Norman P. Ramsey* for petitioner. *Robert L. Sullivan, Jr.*, for respondent.

No. 550. SLOUGH *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. *Fredric T. Suss* for petitioner. *Solicitor General Griswold* and *James McI. Henderson* for respondent. Reported below: 396 F. 2d 870.

No. 552. N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND" *v.* STANDARD OIL CO. OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Francis L. Tetreault* for petitioner. *Stanley J. Madden* for respondent. Reported below: 398 F. 2d 835.

No. 554. SCAM INSTRUMENT CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *David C. Newman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Allison W. Brown, Jr.,* for respondent. Reported below: 394 F. 2d 884.

No. 557. PARK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Wesley R. Asinof* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, and *Marion O. Gordon,* Assistant Attorney General, for respondent. Reported below: 224 Ga. 467, 162 S. E. 2d 359.

No. 564. CONFEDERATION LIFE ASSN. *v.* VEGA Y ARMINAN. Sup. Ct. Fla. Certiorari denied. *John G. Laylin, Cotton Howell, William H. Allen,* and *George V. Allen, Jr.,* for petitioner. *Thomas B. DeWolf* for respondent. Reported below: 211 So. 2d 169.

No. 565. FREDKIN *v.* IRASEK. C. C. P. A. Certiorari denied. *Robert H. Rines, David Rines,* and *Nelson H. Shapiro* for petitioner. *John Hoxie* and *William T. Estabrook* for respondent. Reported below: 55 C. C. P. A. (Pat.) 1302, 397 F. 2d 342.

No. 566. SULGER *v.* POCHYLA ET AL. C. A. 9th Cir. Certiorari denied. *George T. Davis* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 397 F. 2d 173.

No. 569. CURRY *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. *Paul A. Louis, Bertha Claire Lee,* and *Fay L. Becker* for petitioner. *Lyle D. Holcomb, Jr.,* for respondent. Reported below: 211 So. 2d 169.

No. 570. SNELLING & SNELLING OF BALTIMORE, INC. *v.* MASCARO ET AL. Ct. App. Md. Certiorari denied. *Benjamin Lipsitz* and *Hyman K. Cohen* for petitioner. *Ambler H. Moss* for respondent Mascaro. Reported below: 250 Md. 215, 243 A. 2d 1.

No. 571. SYLVIA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Milton E. Grusmark* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Melvin B. Grossman,* Assistant Attorney General, for respondent. Reported below: 210 So. 2d 286.

No. 575. PRESTON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Kenneth J. Ehlenbach* for petitioner. *Warren H. Resh* for respondent. Reported below: 38 Wis. 2d 582, 157 N. W. 2d 615.

No. 577. GLIMCO ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Harry Baum,* and *Louis M. Kauder* for respondent. Reported below: 397 F. 2d 537.

No. 590. JAYSON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *O. P. Easterwood, Jr.,* for petitioners. *Solicitor General Griswold* for the United States.

No. 581. GROSSMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Ralph N. Strayhorn* and *E. C. Bryson, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Marshall Tamor Golding* for the United States. Reported below: 400 F. 2d 951.

No. 583. SANNER ET UX. *v.* TRUSTEES OF THE SHEPPARD & ENOCH PRATT HOSPITAL. C. A. 4th Cir. Certiorari denied. *D. Robert Cervera* for petitioners. *Norman P. Ramsey* for respondent. Reported below: 398 F. 2d 226.

No. 586. TRUJILLO-M *v.* BANK OF NOVA SCOTIA. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Michael M. Platzman* for petitioner. *Henry Harfield* for respondent.

No. 588. HLH PRODUCTS, DIVISION OF HUNT OIL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Owen J. Neighbours* and *Robert W. Henderson* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 396 F. 2d 270.

No. 589. MARXUACH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Albert J. Krieger* and *Theodore Krieger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 398 F. 2d 548.

No. 178, Misc. GRUENWALD *v.* COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr* and *Julius C. Biervliet* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 591.

No. 556. ANDERSON ET AL. *v.* EMPIRE SEAFOODS, INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Roger Robb* and *H. Donald Kistler* for petitioners. *Roland R. Parent* for respondent Cleary Bros. Construction Co. Reported below: 398 F. 2d 204.

No. 558. PENNINGTON ET AL. *v.* UNITED MINE WORKERS OF AMERICA. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *John A. Rowntree* and *Robert S. Young, Jr.*, for petitioners. *Edward L. Carey, Harrison Combs, Willard P. Owens, E. H. Rayson,* and *M. E. Boiarsky* for respondent. Reported below: 400 F. 2d 806.

No. 568. QUINN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Samuel E. Hirsch* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 398 F. 2d 298.

No. 584. RAMOS ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jerome A. Duffy* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Gilbert E. Andrews,* and *Loring W. Post* for the United States. Reported below: 393 F. 2d 618.

No. 89, Misc. DVORSKY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 173 Ct. Cl. 638, 352 F. 2d 373.

No. 116, Misc. SMALL *v.* COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 390 F. 2d 186.

No. 136, Misc. SHALE, DBA J & C CO., INC., DBA SOUTHERN HOME PROPERTIES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John Paul Howard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: 388 F. 2d 616.

No. 207, Misc. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Robert P. Jaye* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: 129 U. S. App. D. C. 332, 394 F. 2d 957.

No. 248, Misc. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 394 F. 2d 258.

No. 262, Misc. REED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 392 F. 2d 865.

No. 304, Misc. GALLAGHER *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Richard A. Baenen* and *Jerry C. Straus* for petitioner. *Solicitor General Griswold* for the United States.

No. 324, Misc. GRAY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Lawrence C. Cantor* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 394 F. 2d 96.

No. 335, Misc. WATSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 391 F. 2d 927.

No. 343, Misc. MOORE *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. *Robert Y. Thornton,* Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent.

No. 413, Misc. GILBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 416, Misc. ALAWAY *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.

No. 428, Misc. HILL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 503, Misc. MCHALE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Francis C. Browne* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 130 U. S. App. D. C. 163, 398 F. 2d 757.

No. 460, Misc. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 392 F. 2d 291.

No. 466, Misc. DAUGHERTY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Gilbert J. Pena,* Assistant Attorneys General, for respondent. Reported below: 388 F. 2d 810.

No. 481, Misc. CORNISH *v.* KENNEY, U. S. ATTORNEY, ET AL. C. A. 4th Cir. Certiorari denied.

No. 548, Misc. HALL *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: 396 F. 2d 428.

No. 552, Misc. SCOTT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Ira M. Lowe* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 129 U. S. App. D. C. 396, 395 F. 2d 619.

No. 554, Misc. ROGERSON *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.

No. 575, Misc. HEISLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 394 F. 2d 692.

No. 607, Misc. MATHERNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James David McNeill* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 397 F. 2d 406.

No. 659, Misc. CALLOWAY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Albert J. Ahern, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 130 U. S. App. D. C. 273, 399 F. 2d 1006.

No. 672, Misc. CIFARELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 512.

No. 673, Misc. DAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 399 F. 2d 948.

No. 675, Misc. BAUMAN *v.* BAUMAN. Sup. Ct. Pa. Certiorari denied. *Melvin Hirshman* and *Sebert H. Keiffer* for petitioner.

No. 697, Misc. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harry D. Steward* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 149.

No. 713, Misc. DAVIS ET AL. *v.* TURNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 395 F. 2d 671.

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No. 645, Misc. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 704, Misc. PEREZ *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 705, Misc. SWANSON ET AL. *v.* BOYERS, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 722, Misc. MUNIZ *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied. *Joseph A. Calamia* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, *Robert C. Flowers* and *Allo B. Crow, Jr.,* Assistant Attorneys General, and *W. Barton Boling* for respondent.

No. 740, Misc. BELTOWSKI *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 281 Minn. 28, 160 N. W. 2d 705.

No. 748, Misc. LEE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 749, Misc. HILL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty* for petitioner.

No. 750, Misc. ROLAND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty, James J. Doherty,* and *Marshall J. Hartman* for petitioner. Reported below: 93 Ill. App. 2d 97, 237 N. E. 2d 553.

No. 754, Misc. MORALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 760, Misc. HAUGHEY *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 761, Misc. RAULLERSON *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 765, Misc. SMITH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 4 Md. App. 550, 243 A. 2d 897.

No. 771, Misc. IN RE GASKINS. Sup. Ct. Pa. Certiorari denied. *Mary Bell Hammerman* for petitioner. Reported below: 430 Pa. 298, 244 A. 2d 662.

No. 772, Misc. GREEN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 777, Misc. NICHOLS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 783, Misc. LEMON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 784, Misc. SCHULTZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 787, Misc. WILLARD *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 789, Misc. CATALANOTTO *v.* ASSOCIATES DISCOUNT CORP. Sup. Ct. La. Certiorari denied. *Edward B. Dufreche* for petitioner. Reported below: 252 La. 105, 209 So. 2d 38.

No. 800, Misc. COURTNEY *v.* VIRGINIA STATE PAROLE BOARD. C. A. 4th Cir. Certiorari denied.

No. 792, Misc. BROOKS *v.* BUDER, JUDGE. Sup. Ct. Mo. Certiorari denied. *John L. Davidson, Jr.*, for petitioner.

No. 802, Misc. CRAIG *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 805, Misc. MARTINEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 442 P. 2d 422.

No. 809, Misc. CHINOWITH *v.* INSURANCE CO. OF NORTH AMERICA. C. A. 5th Cir. Certiorari denied. *Luther E. Jones, Jr.*, for petitioner. Reported below: 393 F. 2d 916.

No. 816, Misc. HOGAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 821, Misc. CONWAY *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 822, Misc. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 824, Misc. THOMPSON ET UX. *v.* WALSH ET AL., U. S. DISTRICT JUDGES. C. A. D. C. Cir. Certiorari denied. *Charles P. Howard, Jr.*, for petitioners.

No. 827, Misc. PRILLERMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 290, Misc. EDWARDS *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, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States.

No. 825, Misc. STAPLETON *v.* SUPERIOR COURT, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 853, Misc. BRADSHAW *v.* ISLAND CREEK COAL CO. C. A. 4th Cir. Certiorari denied. Reported below: 396 F. 2d 501.

No. 280, Misc. GUNSTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States.

No. 299, Misc. O'DAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States.

No. 651, Misc. BRANDON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Allen E. Stim* for petitioner. *Frank S. Hogan* and *Michael R. Stack* for respondent. Reported below: 22 N. Y. 2d 476, 239 N. E. 2d 885.

No. 711, Misc. SUMRALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Lawrence A. Aschenbrenner* and *Elliott C. Lichtman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 397 F. 2d 924.

No. 742, Misc. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari and other relief denied.

No. 725, Misc. LINGO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles Morgan, Jr., Reber F. Boult, Albert M. Horn, Melvin L. Wulf, Eleanor Norton,* and *Martin Garbus* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Marion O. Gordon,* Assistant Attorney General, and *William R. Childers, Jr.,* Deputy Assistant Attorney General, for respondent. Reported below: 224 Ga. 333, 162 S. E. 2d 1.

Rehearing Denied.

No. 149. COURTNEY *v.* UNITED STATES, *ante,* p. 857;

No. 212. OVERTON *v.* NEW YORK, *ante,* p. 85;

No. 249. FULLER *v.* ALASKA, *ante,* p. 80;

No. 364. LAKE ET VIR *v.* POTOMAC LIGHT & POWER CO., *ante,* p. 77;

No. 381. MINICHELLO ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL., *ante,* p. 849;

No. 414. LICHTEN ET AL. *v.* TEXAS, *ante,* p. 86;

No. 82, Misc. JOHNSON *v.* BETO, CORRECTIONS DIRECTOR, *ante,* p. 868;

No. 544, Misc. HANKINS ET AL. *v.* KANE, COLLECTOR OF ESTATE, *ante,* p. 918;

No. 621, Misc. KAMSLER *v.* TRI PAR RADIO & APPLIANCE CO., INC., ET AL., *ante,* p. 928;

No. 661, Misc. KAMSLER *v.* STAMOS, STATE'S ATTORNEY FOR COOK COUNTY, ET AL., *ante,* p. 944; and

No. 786, Misc. IN RE KAMSLER, *ante,* p. 931. Petitions for rehearing denied.

No. 239. ESTATE OF BURNELL *v.* COLORADO, *ante,* p. 13;

No. 316, Misc. ANDERTEN *v.* WARDEN, SOUTH DAKOTA PENITENTIARY, *ante,* p. 816; and

No. 421, Misc. FLETCHER *v.* CALIFORNIA, *ante,* p. 916. Motions for leave to file petitions for rehearing denied.

No. 375. MENGELKOCH ET AL. *v.* INDUSTRIAL WELFARE COMMISSION ET AL., *ante*, p. 83. Petition for rehearing by appellant Mengelkoch denied.

No. 300, Misc. FERMIN *v.* UNITED STATES, *ante*, p. 898. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

DECEMBER 11, 1968.

Dismissals Under Rule 60.

No. 765. WESTSIDE MARKET, INC. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed pursuant to Rule 60 of the Rules of this Court. *Harold Easton* for appellant. *Thomas C. Lynch*, Attorney General of California, and *Lynn Henry Johnson*, Deputy Attorney General, for appellee.

No. 1149, Misc. ADAMS *v.* CLERK, DELAWARE COUNTY COURT. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

DECEMBER 16, 1968.

Miscellaneous Orders.

No. ——. GAVIN *v.* LYNCH. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Application for stay presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *Daniel H. Mahoney* for applicant.

No. ——. SKOLNICK ET AL. *v.* MAYOR OF CHICAGO ET AL. C. A. 7th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Raymond F. Simon, Marvin E. Aspen*, and *Edmund Hatfield* for Mayor of Chicago et al. in opposition.

No. ——. GREAT NORTHERN RAILWAY MERGER CASE. D. C. D. C. Applications by the United States and the City of Auburn, Washington, for stay of effectiveness of orders of the Interstate Commerce Commission, dated November 30, 1967, and April 11, 1968, authorizing merger of Great Northern Railway Co., Northern Pacific Railway Co., Chicago, Burlington & Quincy Railroad Co., Pacific Coast Railway Co., and Spokane, Portland & Seattle Railway Co., granted, said stay to remain in effect until further order of the Court. MR. JUSTICE FORTAS took no part in the consideration or decision of these applications. *Solicitor General Griswold* for the United States, and *Robert L. Wald* and *Joel E. Hoffman* for the City of Auburn on the applications. *Valentine B. Deale* for Livingston Anti-Merger Committee in support of the applications. Memoranda in opposition were filed by *Hugh B. Cox, Ray Garrett, D. Robert Thomas, Anthony Kane, Louis E. Torinus, Earl F. Requa, Frank S. Farrell, Eldon Martin,* and *Richard J. Flynn* for Great Northern Railway Co. et al.; *Robert W. Ginnane, Fritz R. Kahn,* and *Jerome Nelson* for Interstate Commerce Commission · and by 230 Pacific Northwest Shippers.

No. 201. BENTON *v.* MARYLAND. Ct. Sp. App. Md. [Certiorari granted, 392 U. S. 925.] Case restored to the docket for reargument on March 24, 1969, limited to the following question, not specified in the original writ: Does the "concurrent sentence doctrine," enunciated in *Hirabayashi* v. *United States,* 320 U. S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U. S. 629, 633, n. 2, *Peyton* v. *Rowe,* 391 U. S. 54, *Carafas* v. *LaVallee,* 391 U. S. 234, 237–238, and *Sibron* v. *New York,* 392 U. S. 40, 50–58? The Solicitor General is invited to file a brief expressing the views of the United States and to participate in oral argument.

No. 49. ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC., ET AL. C. A. 7th Cir. Request for additional time granted and a total of three hours allotted for oral argument. [For earlier orders herein, see, *e. g., ante,* p. 958.]

No. 243. CITIZEN PUBLISHING CO. ET AL. *v.* UNITED STATES. Appeal from D. C. Ariz. [Probable jurisdiction noted, *ante,* p. 911]. Motion of Robert L. Stern for leave to participate in oral argument, for *amici curiae,* denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion. *Robert L. Stern, pro se,* on the motion.

No. 273. SCOFIELD ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 821.] Motion of respondent International Union, UAW, to argue orally granted and twenty additional minutes allotted for that purpose. Counsel for petitioners likewise allotted twenty additional minutes for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Joseph L. Rauh, Jr., John Silard,* and *Stephen I. Schlossberg* on the motion.

No. 379. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* N. V. NEDERL. AMERIK STOOMV. MAATS., *ante,* p. 74. Motion to recall and amend judgment of this Court granted. It is ordered that the certified copy of the judgment sent to the District Court be recalled and that the case be remanded to the United States Court of Appeals for the Second Circuit. *Edmund F. Lamb* on the motion.

No. 889, Misc. PAULEKAS *v.* CLARK, ATTORNEY GENERAL, ET AL. Stay heretofore granted by this Court on October 25, 1968 [*ante,* p. 921], is hereby dissolved.

No. 646. O'CALLAHAN *v.* PARKER, WARDEN. C. A. 3d Cir. [Certiorari granted, *ante,* p. 822.] Motion to remove case from summary calendar denied. *Victor Rabinowitz* on the motion.

No. 841, Misc. DOOLEY *v.* ALABAMA. Motion for leave to file petition for writ of habeas corpus denied.

No. 860, Misc. SCHMIEDEBERG *v.* WALTON, JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 620. MOORE ET AL. *v.* SHAPIRO, GOVERNOR OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. *Richard F. Watt* for appellants. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Thomas E. Brannigan,* Assistant Attorneys General, for appellees. Reported below: 293 F. Supp. 411.

No. 647. HADNOTT ET AL. *v.* AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. D. C. M. D. Ala. Motion to dispense with printing jurisdictional statement granted. Probable jurisdiction noted and case set for oral argument on January 21, 1969, together with motion for an order to show cause why Judge Herndon should not be held in contempt and for other relief. Appellants' briefs shall be filed by January 3, 1969, and responding briefs by January 17, 1969. Case may be presented on original record, without printing. MR. JUSTICE BLACK took no part in the consideration or decision of these matters. *Charles Morgan, Jr., Reber F. Boult, Jr., Orzell Billingsley, Jr., Robert P. Schwenn,* and *Melvin L. Wulf* on the motion. [For earlier orders herein, see, *e. g., ante,* p. 904.]

Certiorari Granted.

No. 573. National Labor Relations Board *v.* Gissel Packing Co., Inc., et al.; and

No. 691. Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO *v.* Gissel Packing Co., Inc. C. A. 4th Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for petitioner in No. 573, and *Albert Gore* for petitioner in No. 691. *Lewis P. Hamlin, Jr.,* for respondent General Steel Products, Inc., in No. 573. Reported below: 398 F. 2d 336, 337, and 339.

No. 585. Sinclair Co. *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari granted and case set for oral argument immediately following Nos. 573 and 691, *supra. Edward B. Schwartz* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 397 F. 2d 157.

No. 622. Maxwell *v.* Bishop, Penitentiary Superintendent. C. A. 8th Cir. Certiorari granted limited to Questions 2 and 3 of the petition which read as follows:

"2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?

"3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination on

the guilt issue, violates the Fifth and Fourteenth Amendments?"

Case set for oral argument immediately following No. 642 [*Boykin* v. *Alabama, ante,* p. 820]. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Michael Meltsner, George Howard, Jr.,* and *Anthony G. Amsterdam* for petitioner. *Joe Purcell,* Attorney General of Arkansas, and *Don Langston,* Deputy Attorney General, for respondent. Reported below: 398 F. 2d 138.

No. 167, Misc. WILLIAMS *v.* CITY OF OKLAHOMA CITY ET AL. Ct. Crim. App. Okla. Certiorari granted. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Giles K. Ratcliffe* for respondents. Reported below: 439 P. 2d 965.

Certiorari Denied.

No. 525. MATSON NAVIGATION CO. *v.* SMITH, SECRETARY OF COMMERCE, ET AL. C. A. 9th Cir. Certiorari denied. *Alvin J. Rockwell, Willis R. Deming,* and *George D. Rives* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for respondent Smith, and *Edward D. Ransom* for respondent States Steamship Co. Reported below: 394 F. 2d 514.

No. 597. MISSISSIPPI POWER CO. ET AL. *v.* SOUTH MISSISSIPPI ELECTRIC POWER ASSN. Sup. Ct. Miss. Certiorari denied. *James S. Eaton* and *Thomas H. Watkins* for Mississippi Power Co., and *Sherwood W. Wise* for Mississippi Power & Light Co., petitioners. *T. Harvey Hedgepeth* and *Donald Wadsworth Williamson, Jr.,* for respondent. Reported below: 211 So. 2d 827.

No. 602. BARR ET AL. *v.* CHATMAN ET AL. C. A. 7th Cir. Certiorari denied. *Franklin J. Lunding, Jr.,* for petitioners. Reported below: 397 F. 2d 515.

No. 593. PORTER, ADMINISTRATRIX *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. Sup. Ct. Miss. Certiorari denied. *Frank E. Everett, Jr.*, for petitioner. *C. R. Bolton, E. D. Grinnell,* and *W. W. Dalton* for respondent. Reported below: 211 So. 2d 530.

No. 594. LEGAL INTEGRITY PRESERVATION SOCIETY, INC., ET AL. *v.* MURPHY ET AL. C. A. D. C. Cir. Certiorari denied. *Irvin Lechliter* for petitioners. Respondent *Eugene X. Murphy, pro se.*

No. 599. PHOENIX TITLE & TRUST CO., NOW TRANSAMERICA TITLE INSURANCE CO. *v.* MARKEL. Sup. Ct. Ariz. Certiorari denied. *Carl W. Divelbiss* for petitioner. *Leven B. Ferrin* for respondent. Reported below: 103 Ariz. 353, 442 P. 2d 97.

No. 600. ARCHITECTURAL MODELS, INC. *v.* NEKLASON ET AL., DBA SCALE MODELS UNLIMITED. C. A. 9th Cir. Certiorari denied. *James M. Naylor, Frank A. Neal,* and *Karl A. Limbach* for petitioner. *Edward B. Gregg* for respondents. Reported below: 397 F. 2d 405.

No. 601. HOWIE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Esther M. Stevens* for petitioner. *Elliot L. Richardson,* Attorney General of Massachusetts, *Ruth I. Abrams* and *Willie Davis,* Assistant Attorneys General, and *John J. Droney* for respondent. Reported below: 354 Mass. 769, 238 N. E. 2d 373.

No. 604. STILLEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Byron N. Scott* for petitioner. *Solicitor General Griswold* for the United States.

No. 607. CRIBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Sewell Elliott* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 397 F. 2d 361.

No. 603. CONTINENTAL NUT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Kenneth C. McGuiness* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 395 F. 2d 830.

No. 612. THEATRICAL PROTECTIVE UNION No. 1, INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE EMPLOYEES, AFL–CIO *v.* PHALEN ET AL. Ct. App. N. Y. Certiorari denied. *Harold P. Spivak* and *Louis Kantor* for petitioner. *Solomon D. Monshine* for respondents. Reported below: 22 N. Y. 2d 34, 238 N. E. 2d 295.

No. 614. COMMERCIAL NATIONAL BANK OF KANSAS CITY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Robert B. Langworthy* and *Glenn Thomas* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Melva M. Graney,* and *Louis M. Kauder* for the United States. Reported below: 404 F. 2d 927.

No. 618. ALABAMA POWER CO. *v.* ALABAMA ELECTRIC COOPERATIVE, INC., ET AL. C. A. 5th Cir. Certiorari denied. *S. Eason Balch, John Bingham,* and *Merrell E. Clark, Jr.,* for petitioner. *J. M. Williams, Jr.,* and *Bennett Boskey* for Alabama Electric Cooperative, Inc., and *Solicitor General Griswold, Assistant Attorney General Weisl, Alan S. Rosenthal,* and *Leonard Schaitman* for the United States et al., respondents. Reported below: 394 F. 2d 672.

No. 621. RAGEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Herman F. Selvin* for petitioner. Reported below: 262 Cal. App. 2d 392, 68 Cal. Rptr. 700.

No. 687. YOUNGER, DISTRICT ATTORNEY OF COUNTY OF LOS ANGELES *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (SIRHAN, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. *Evelle J. Younger*, petitioner, *pro se*. *Joseph A. Ball* for respondent.

No. 591. BARRON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion to dispense with printing petition granted. Certiorari denied. *Milton E. Grusmark* for petitioner. *Earl Faircloth*, Attorney General of Florida, and *Edward D. Cowart* and *Jesse J. McCrary, Jr.*, Assistant Attorneys General, for respondent. Reported below: 207 So. 2d 696.

No. 592. BENNETT, WARDEN *v.* STUMP. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Richard C. Turner*, Attorney General of Iowa, and *David A. Elderkin* and *William A. Claerhout*, Assistant Attorneys General, for petitioner. Reported below: 398 F. 2d 111.

No. 595. HINGER *v.* CITY OF PIQUA. Sup. Ct. Ohio. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Leo H. Faust* for petitioner. *Richard K. Wilson* for respondent. Reported below: 15 Ohio St. 2d 110, 238 N. E. 2d 766.

No. 608. THECKSTON ET UX. *v.* TRIANGLE PUBLICATIONS, INC., ET AL. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE FORTAS is of the opinion that certiorari should be granted. *Harry Green* and *Sidney W. Bookbinder* for petitioners. *Harold E. Kohn* for respondents. Reported below: 52 N. J. 173, 244 A. 2d 302.

No. 613. McArthur et al. *v.* Clifford, Secretary of Defense, et al. C. A. 4th Cir. Motions to dispense with printing petition and to amend petition granted. Certiorari denied. *Philip J. Hirschkop* for petitioners. *Solicitor General Griswold* for respondents. Reported below: 402 F. 2d 58.

Mr. Justice Douglas, dissenting.

I dissent from a denial of certiorari in this case. An important unresolved constitutional issue of immediate importance to many Americans is involved. It is whether men may be sent abroad to fight in a war which has not been declared by Congress. This is a point on which I wrote rather elaborate dissents in *Holmes* v. *United States,* 391 U. S. 936, and *Hart* v. *United States,* 391 U. S. 956. This certainly is a substantial question and one which has never been resolved by this Court.

The question of the power of the President to conduct a war without a declaration of war was raised in the *Prize Cases,* 2 Black 635, during the Civil War. That was an internal insurrection which would perhaps be analogous here if the Vietnamese were invading the United States.

It was a five-to-four decision, upholding Presidential power. Would it have been the same if Lincoln had had an expeditionary force fighting a "war" overseas?

There should not be the slightest doubt that whenever the Chief Executive of the country takes any citizen by the neck and either puts him in prison or subjects him to some ordeal or sends him overseas to fight in a war, the question is a justiciable one. To call issues of that kind "political" would be to abdicate the judicial function which the Court honored in the midst of the Civil War in the *Prize Cases.*

The spectre of executive war-making is an ominous threat to our republican institutions. What can be done

in Vietnam can be done in many areas of this troubled world without debate or responsible public decision.

I would put the case down for argument and resolve this important constitutional problem.

No. 258, Misc. JONES *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Arnold O. Overoye,* Deputy Attorney General, for respondents.

No. 287, Misc. OWENS *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. *Paul Bender* for petitioner. *William C. Sennett,* Attorney General of Pennsylvania, and *Stanley Asher Winikoff* and *Frank P. Lawley, Jr.,* Deputy Attorneys General, for respondents.

No. 336, Misc. PINCUS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Elliott Golden* and *Harold M. Brown* for respondent.

No. 373, Misc. EARLY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 394 F. 2d 117.

No. 441, Misc. BEAVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 459, Misc. BEAN ET AL. *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Douglas W. Thomson* for petitioners. *Douglas M. Head,* Attorney General of Minnesota, *Richard H. Kyle,* Solicitor General, and *William B. Randall* for respondent. Reported below: 280 Minn. 35, 157 N. W. 2d 736.

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No. 531, Misc. SHELDON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. *Richard C. Turner,* Attorney General of Iowa, and *David A. Elderkin,* Assistant Attorney General, for respondent.

No. 596, Misc. ZERSCHAUSKY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Fred A. Semaan* and *James R. Gillespie* for petitioner. *Crawford Martin,* Attorney General of Texas, *Lonnie Zwiener,* Assistant Attorney General, *James E. Barlow,* and *Preston H. Dial, Jr.,* for respondent. Reported below: 396 F. 2d 356.

No. 597, Misc. VAN ERMEN *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. *Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent. Reported below: 398 F. 2d 329.

No. 615, Misc. LEMON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent.

No. 658, Misc. BANDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Acting Solicitor General Friedman, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 396 F. 2d 929.

No. 685, Misc. LESSARD *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 2d 88.

No. 727, Misc. GRIMSLEY *v.* PINTO, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 690, Misc. WARNER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Peter L. F. Sabbatino* for petitioner. *William Cahn* for respondent.

No. 499, Misc. TOLBERT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *John N. Crudup* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, and *Marion O. Gordon, Mathew Robins,* and *Frank E. Blankenship,* Assistant Attorneys General, for respondent. Reported below: 224 Ga. 291, 161 S. E. 2d 279.

No. 763, Misc. ROBERTS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 538.

No. 767, Misc. JORDAN *v.* UNITED STATES; and
No. 774, Misc. STOKES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John W. Condon, Jr.,* for petitioner in No. 767, Misc., and *Herald Price Fahringer* for petitioner in No. 774, Misc. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Mervyn Hamburg* for the United States in both cases. Reported below: 399 F. 2d 610.

No. 769, Misc. PLAISANCE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Jack Peebles* for petitioner. Reported below: 252 La. 212, 210 So. 2d 323.

No. 778, Misc. KNEPFLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 396 F. 2d 819.

No. 814, Misc. HOLLIS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 810, Misc. WILLIAMS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Michael Meltsner* for petitioner. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent. Reported below: 208 Va. 724, 160 S. E. 2d 781.

No. 818, Misc. BANDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Acting Solicitor General Friedman, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 398 F. 2d 333.

No. 845, Misc. CONWAY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 861, Misc. BENNETT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 866, Misc. WILLIAMS *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 896, Misc. BLUNT *v.* SHEEHY, REFORMATORY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied.

No. 897, Misc. WILLIAMS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 898, Misc. HENLEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Louis A. Ginocchio* and *Thomas Stueve* for petitioner. *Melvin G. Rueger, Calvin W. Prem,* and *Leonard Kirschner* for respondent. Reported below: 15 Ohio St. 2d 86, 228 N. E. 2d 773.

No. 843, Misc. STUDENROTH *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 430 Pa. 425, 243 A. 2d 352.

No. 903, Misc. DELANEY *v.* CUPP, WARDEN. Sup. Ct. Ore. Certiorari denied.

No. 147, Misc. POOL *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari and other relief denied. *Thomas C. Lynch,* Attorney General of California, and *Derald E. Granberg* and *William D. Stein,* Deputy Attorneys General, for respondents.

No. 223, Misc. MENDEZ *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Daniel J. Kremer,* Deputy Attorneys General, for respondent.

No. 330, Misc. COLEMAN *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent. Reported below: 387 F. 2d 134.

No. 255, Misc. HILL *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 390 F. 2d 640.

Rehearing Denied.

No. 696, Misc. ODES *v.* CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO ET AL., *ante*, p. 945; and

No. 698, Misc. JOHNSON *v.* CALIFORNIA, *ante*, p. 945. Petitions for rehearing denied.

No. 86, Misc. BATES ET AL. *v.* NELSON, WARDEN, *ante*, p. 16; and

No. 132, Misc. CERDA *v.* UNITED STATES, *ante*, p. 872. Motions for leave to file petitions for rehearing denied.

JANUARY 10, 1969.

Dismissal Under Rule 60.

No. 1159, Misc. SMALLS *v.* IVES, HIGHWAY COMMISSIONER OF CONNECTICUT. Appeal from D. C. Conn. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Bernard D. Fischman* for appellant. *Robert K. Killian*, Attorney General of Connecticut, and *Jack Rubin* and *Clement J. Kichuk*, Assistant Attorneys General, for appellee. Reported below: 296 F. Supp. 448.

JANUARY 13, 1969.

Dismissal Under Rule 60.

No. 480. BLASIUS *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, *ante*, p. 950.] Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Peyton Ford* and *Harry Grossman* for petitioner. *Solicitor General Griswold* for the United States. *Donald R. Dunner* for American Patent Law Assn. et al., as *amici curiae*.

Miscellaneous Orders.

No. 216. MARTONE *v.* MORGAN ET AL., *ante*, p. 12. Motion to consolidate this case with No. 548 [*ante*, p. 975] denied. *J. Minos Simon* on the motion.

No. —. DICKENS *v.* UNITED STATES. Application for bail pending appeal presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Murry L. Randall* for applicant. *Solicitor General Griswold* for the United States in opposition.

No. —. SCHONBRUN *v.* COMMANDING OFFICER ET AL. C. A. 2d Cir. Application for reconsideration of denial of stay of mandate presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted. *Julius B. Kuriansky* for applicant.

No. 13. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL., *ante*, p. 87. Appellees are requested to file within 30 days a response to the petition for rehearing.

No. 44. SKINNER ET AL. *v.* LOUISIANA. Sup. Ct. La. Motion of petitioners for leave to file brief after argument granted, and such brief shall be filed within 10 days. *G. Wray Gill, Sr.*, and *George M. Leppert* for Skinner et al., and *Robert S. Link, Jr.*, for Charbonnet, on the motion. [For earlier orders herein, see, *e. g.*, *ante*, p. 813.]

No. 138. POWELL ET AL. *v.* MCCORMACK, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 949.] Motion to remove case from summary calendar granted. *Herbert O. Reid* and *Arthur Kinoy* on the motion.

No. 1029, Misc. WESTENDORF *v.* PATTERSON, 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. 297. IMMIGRATION AND NATURALIZATION SERVICE *v.* STANISIC. C. A. 9th Cir. [Certiorari granted, *ante,* p. 912.] Motion of respondent for appointment of counsel granted. It is ordered that *G. Bernhard Fedde, Esquire,* of Portland, Oregon, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 418. SIMPSON, WARDEN *v.* RICE. C. A. 5th Cir. [Certiorari granted, *ante,* p. 932.] Motions of respondent for leave to proceed further herein *in forma pauperis* and for the appointment of counsel granted. It is ordered that *Oakley W. Melton, Esquire,* of Montgomery, Alabama, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 453. GREGG *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, *ante,* p. 932.] Motions of petitioner for leave to proceed further herein *in forma pauperis* and for appointment of counsel granted. It is ordered that *Dean E. Richards, Esquire,* of Indianapolis, Indiana, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 750. HARRINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante,* p. 949.] Motion of respondent to dispense with printing appendix denied. *Thomas C. Lynch,* Attorney General of California, and *James H. Kline,* Deputy Attorney General, on the motion.

No. 1021, Misc. FAIR *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL.; and

No. 1049, Misc. FAIR *v.* FLORIDA PUBLIC SERVICE COMMISSION. Motions for leave to file petitions for writs of mandamus denied.

No. 770. CHIMEL *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, *ante*, p. 958.] Joint motion to dispense with printing appendix denied. Request by petitioner for additional time for oral argument denied. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Ronald M. George*, Deputy Attorney General, for respondent on the joint motion.

No. 1005, Misc. ALLOWAY *v.* EYMAN, WARDEN, ET AL.;
No. 1044, Misc. MCCARTHY *v.* NORTH CAROLINA;
No. 1058, Misc. MONTALBANO *v.* FIELD, MEN'S COLONY SUPERINTENDENT;
No. 1063, Misc. CUPP *v.* CROUSE, WARDEN;
No. 1071, Misc. SCHWAMB *v.* BURKE, WARDEN, ET AL.;
No. 1081, Misc. BERRY *v.* FITZHARRIS, WARDEN;
No. 1083, Misc. PIPPIN *v.* BLACKWELL, WARDEN;
No. 1092, Misc. BRYANT *v.* CRAVEN, WARDEN;
No. 1101, Misc. SCHMITT *v.* BURKE, WARDEN;
No. 1102, Misc. ARCHULETA *v.* TURNER, WARDEN; and
No. 1125, Misc. CHILDRESS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 977, Misc. BIGGS *v.* JUSTICES OF THE SUPREME COURT OF ILLINOIS. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted.

No. 701. GASTON COUNTY, NORTH CAROLINA *v.* UNITED STATES. Appeal from D. C. D. C. Probable jurisdiction noted. *Grady B. Stott* and *Wesley E. McDonald, Sr.*, for appellant. *Solicitor General Griswold, Assistant Attorney General Pollak*, and *Nathan Lewin* for the United States. Reported below: 288 F. Supp. 678.

No. 610. SULLIVAN, TAX COMMISSIONER OF CONNECTICUT, ET AL. *v.* UNITED STATES ET AL. Appeal from C. A. 2d Cir. Probable jurisdiction noted. *Robert K. Killian,* Attorney General of Connecticut, and *F. Michael Ahern, Ralph G. Murphy,* and *Richard A. Gitlin,* Assistant Attorneys General, for appellants. *Solicitor General Griswold* for the United States. Brief of *amici curiae,* in support of appellants, was filed by: *MacDonald Gallion,* Attorney General, and *Willard W. Livingston* for the State of Alabama; *Duke W. Dunbar,* Attorney General, and *Aurel M. Kelly,* Assistant Attorney General, for the State of Colorado; *Arthur K. Bolton,* Attorney General, and *William L. Harper,* Assistant Attorney General, for the State of Georgia; *John B. Breckinridge,* Attorney General, and *William F. Riley,* Assistant Attorney General, for the State of Kentucky; *James S. Erwin,* Attorney General, and *John R. Doyle,* Assistant Attorney General, for the State of Maine; *Francis B. Burch,* Attorney General, and *Jon. F. Oster,* Assistant Attorney General, for the State of Maryland; *Elliot L. Richardson,* Attorney General, and *Alan J. Dimond,* Assistant Attorney General, for the State of Massachusetts; *Frank J. Kelley,* Attorney General, and *Maurice Barbour,* Assistant Attorney General, for the State of Michigan; *Douglas M. Head,* Attorney General, for the State of Minnesota; *Norman H. Anderson,* Attorney General, and *Walter W. Nowotny, Jr.,* Assistant Attorney General, for the State of Missouri; *Ralph H. Gillan,* Assistant Attorney General, for the State of Nebraska; *Harvey Dickerson,* Attorney General, for the State of Nevada; *Thomas Wade Bruton,* Attorney General, and *Robert L. Gunn,* Assistant Attorney General, for the State of North Carolina; *William C. Sennett,* Attorney General, and *Edward T. Baker,* Deputy Attorney General, for the State of Pennsylvania; *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant

Attorney General, *Kerns B. Taylor,* Assistant Attorney General, and *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, for the State of Texas; *Robert Y. Button,* Attorney General, and *M. Harris Parker,* Assistant Attorney General, for the State of Virginia; *James Barrett,* Attorney General, for the State of Wyoming; and the States of Louisiana and Oklahoma. Reported below: 398 F. 2d 672.

No. 163. YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY *v.* HARRIS ET AL. Appeal from D. C. C. D. Cal. Motion to dispense with printing motion to affirm granted. Probable jurisdiction noted. *Evelle J. Younger,* appellant, *pro se. Frank S. Pestana, A. L. Wirin,* and *Fred Okrand* for appellees. *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Clifford K. Thompson, Jr.,* Deputy Attorney General, filed a brief for the State of California, by invitation of the Court, *ante,* p. 813. Reported below: 281 F. Supp. 507.

Certiorari Granted. (See also No. 221, Misc., *ante,* p. 314.)

No. 624. PERKINS *v.* STANDARD OIL CO. OF CALIFORNIA. C. A. 9th Cir. Certiorari granted. *Earl W. Kintner, George R. Kucik, Roger Tilbury, Ernest Bonyhadi,* and *Bruce M. Hall* for petitioner. *Francis R. Kirkham, Richard J. MacLaury,* and *H. Helmut Loring* for respondent. Reported below: 396 F. 2d 809.

No. 672. UNITED STATES *v.* KING. Ct. Cl. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Weisl, Harris Weinstein,* and *John C. Eldridge* for the United States. *Neil B. Kabatchnick* for respondent. Reported below: 182 Ct. Cl. 631, 390 F. 2d 894.

No. 717. UNITED STATES ET AL. *v.* RADIO TELEVISION NEWS DIRECTORS ASSN. ET AL. C. A. 7th Cir. Certiorari granted and set for oral argument immediately following No. 2 [*Red Lion Broadcasting Co., Inc., et al.* v. *Federal Communications Commission et al.*, certiorari granted, 389 U. S. 968]. *Solicitor General Griswold, Assistant Attorney General Zimmerman, Henry Geller,* and *Daniel R. Ohlbaum* for the United States et al. *Archibald Cox, W. Theodore Pierson, Robert M. Lichtman,* and *Maurice Rosenfield* for Radio Television News Directors Assn. et al., *Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk,* and *Herbert Wechsler* for Columbia Broadcasting System, Inc., and *Lawrence J. McKay, Raymond L. Falls, Jr., Corydon B. Dunham, Jr.,* and *Howard E. Monderer* for National Broadcasting Co., Inc., respondents. Reported below: 400 F. 2d 1002.

Certiorari Denied. (See also No. 719, *ante,* p. 320; No. 871, Misc., *ante,* p. 322; and No. 1029, Misc., *supra.*)

No. 332. MOSKOWITZ *v.* KINDT ET AL. C. A. 3d Cir. Certiorari denied. *Abraham J. Brem Levy* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 394 F. 2d 648.

No. 400. VERES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Phillip Weeks* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *William E. Eubank,* Chief Assistant Attorney General, for respondent.

No. 451. FORT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Marshall Patner* for petitioner. *Elmer C. Kissane* for respondent. Reported below: 91 Ill. App. 2d 212, 234 N. E. 2d 384.

No. 81. Brotherhood of Locomotive Engineers *v.* McElroy et al.; and

No. 128. Terminal Railroad Association of St. Louis *v.* McElroy et al. C. A. 7th Cir. Certiorari denied. *Harold A. Ross* and *John H. Haley, Jr.*, for petitioner in No. 81 and for respondent Brotherhood of Locomotive Engineers in No. 128. *James A. Wilcox* for petitioner in No. 128. *Charles R. Judge* for respondents McElroy et al. in both cases. *Solicitor General Griswold, Assistant Attorney General Weisl, Peter L. Strauss,* and *John C. Eldridge* filed a brief for the United States, as *amicus curiae,* by invitation of the Court, *ante,* p. 813, in both cases. Reported below: 392 F. 2d 966.

No. 441. Bryant et ux. *v.* Illinois et al. Sup. Ct. Ill. Certiorari denied. *R. Dickey Hamilton* for petitioners. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole,* Assistant Attorney General, for respondents.

No. 512. General Time Corp. *v.* Securities and Exchange Commission et al. C. A. 2d Cir. Certiorari denied. *Edward R. Neaher* and *Paul G. Pennoyer, Jr.,* for petitioner. *Solicitor General Griswold* and *Philip A. Loomis, Jr.,* for Securities and Exchange Commission, *Breck P. McAllister, Walter L. Stratton,* and *Benjamin Vinar* for Talley Industries, Inc., and *Clendon H. Lee* and *Stanley L. Sabel* for American Investors Fund, Inc., et al., respondents. Reported below: 399 F. 2d 396.

No. 631. Yellow Cab Co. *v.* Democratic Union Organizing Committee, Local 777, S. I. U. N. A., AFL–CIO. C. A. 7th Cir. Certiorari denied. *Robert E. Haythorne* for petitioner. *Harold A. Katz* and *Irving M. Friedman* for respondent. Reported below: 398 F. 2d 735.

No. 625. HABIB *v.* EDWARDS. C. A. D. C. Cir. Certiorari denied. *Raphael G. Urciolo* and *Herman Miller* for petitioner. Reported below: 130 U. S. App. D. C. 126, 397 F. 2d 687.

No. 627. LIBBEY-OWENS-FORD GLASS CO. *v.* MCCULLOCH, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. D. C. Cir. Certiorari denied. *Guy Farmer* and *Arnold F. Bunge, Sr.*, for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondents. Reported below: 131 U. S. App. D. C. 190, 403 F. 2d 916.

No. 629. IN RE SUCCESSION OF ANDRAU (BANK OF THE SOUTHWEST NATIONAL ASSN., HOUSTON *v.* SIEGLER ET AL.). Sup. Ct. La. Certiorari denied. *L. Keith Simmer* for petitioner. *Claude R. Miller* for respondents Siegler et al.

No. 630. BARNES ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Eberhard P. Deutsch, René H. Himel, Jr.*, and *Charles K. Reasonover* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for the United States.

No. 635. FRIEDMAN ET UX. *v.* CHESAPEAKE & OHIO RAILWAY CO. ET AL. C. A. 2d Cir. Certiorari denied. *Abraham Glasser* for petitioners. *Carl E. Newton* and *M. Lauck Walton* for Chesapeake & Ohio Railway Co., and *Eugene Z. DuBose* and *John L. Rogers, Jr.*, for Baltimore & Ohio Railroad Co., respondents. Reported below: 395 F. 2d 663.

No. 640. ULTIMATE RESEARCH & DEVELOPMENT CORP. ET AL. *v.* TAYLOR WINE CO., INC. C. A. 2d Cir. Certiorari denied. *Hoffman Stone* for petitioners. Reported below: 397 F. 2d 784.

No. 628. ANDERSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *H. Dale Cook* for petitioner. Reported below: 444 P. 2d 239.

No. 637. TOWN OF HEMPSTEAD ET AL. *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Howard E. Levitt* for petitioners. *Fowler Hamilton, Lyman M. Tondel, Jr.,* and *George Weisz* for American Airlines, Inc., et al., *Sidney Goldstein, Daniel B. Goldberg,* and *Joseph Lesser* for Port of New York Authority, *Samuel J. Cohen* for Ruby et al., and *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge,* and *Norman Knopf* for the Administrator of the Federal Aviation Agency, respondents. Reported below: 398 F. 2d 369.

No. 639. WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION *v.* UNITED STATES ET AL.; and

No. 658. WASHINGTON, VIRGINIA & MARYLAND COACH CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *Russell W. Cunningham* for petitioner in No. 639, and *Manuel J. Davis* and *Samuel M. Langerman* for petitioners in No. 658. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis, Thomas L. McKevitt,* and *A. Donald Mileur* for the United States et al. in both cases. Reported below: 130 U. S. App. D. C. 171, 398 F. 2d 765.

No. 649. DUGGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Kenneth K. Simon* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 396 F. 2d 279.

No. 653. PRESCOTT *v.* SHELL OIL CO., INC. C. A. 6th Cir. Certiorari denied. *Leslie A. Nicholson* for petitioner. *J. Martin Regan* for respondent. Reported below: 398 F. 2d 592.

No. 654. SOUTHALL, TRADING AS SOUTHALL REALTY CO. *v.* BROWN. C. A. D. C. Cir. Certiorari denied. *Raphael G. Urciolo* and *Herman Miller* for petitioner. *Florence Wagman Roisman* for respondent.

No. 655. DAVIS *v.* LITTELL. C. A. 9th Cir. Certiorari denied. *Laurence Davis*, petitioner, *pro se*. *Joseph S. Jenckes, Jr.*, for respondent. Reported below: 398 F. 2d 83.

No. 656. NORMAN ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Richard L. Merrick* for Norman et al., and *Clifford A. Dougherty* for Martin, petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl*, and *John C. Eldridge* for the United States. Reported below: 183 Ct. Cl. 41, 392 F. 2d 255.

No. 661. SHOTT *v.* CONROY, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *James G. Andrews, Jr.*, for petitioner. *J. Vincent Aug* and *William H. Neiman* for respondent.

No. 664. RANSBURG ELECTRO-COATING CORP. *v.* IONIC ELECTROSTATIC CORP. C. A. 4th Cir. Certiorari denied. *James P. Hume* and *Clyde F. Willian* for petitioner. *John S. McDaniel, Jr.*, for respondent. Reported below: 395 F. 2d 92.

No. 666. TRICE, EXECUTRIX *v.* COMMERCIAL UNION ASSURANCE CO., LTD., ET AL. C. A. 6th Cir. Certiorari denied. *Fyke Farmer* for petitioner. *Lon P. MacFarland* for respondents. Reported below: 397 F. 2d 889.

No. 669. IVANCIE *v.* THORNTON, ATTORNEY GENERAL OF OREGON, ET AL. Sup. Ct. Ore. Certiorari denied. *Floyd A. Fredrickson* for petitioner. Reported below: 250 Ore. 550, 443 P. 2d 612.

No. 674. PRESTON ET AL. *v.* UNITED STATES TRUST CO. OF NEW YORK ET AL., TRUSTEES, ET AL. C. A. 2d Cir. Certiorari denied. *C. Dickerman Williams* for petitioners. *Louis L. Stanton, Jr.*, and *Stanley F. Reed, Jr.*, for United States Trust Co. of New York et al., and *Standish F. Medina* for Hutchings et al., respondents. Reported below: 394 F. 2d 456.

No. 677. POPROWSKI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. *Robert Gerard Tardif* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 394 F. 2d 987.

No. 678. FLAMBEAU PLASTICS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Walter S. Davis* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *David Previant* for Local No. 380, International Union, Allied Industrial Workers of America, AFL–CIO, respondents. Reported below: 401 F. 2d 128.

No. 679. IN RE SHAVIN. Sup. Ct. Ill. Certiorari denied. *George D. Crowley* for petitioner. *John Cadwalader Menk* for Commissioners of the Supreme Court of Illinois in opposition to the petition. Reported below: 40 Ill. 2d 254, 239 N. E. 2d 790.

No. 688. UNITED STEELWORKERS OF AMERICA *v.* CCI CORP. C. A. 10th Cir. Certiorari denied. *Elliot Bredhoff, Michael H. Gottesman, George H. Cohen, Chris Dixie,* and *Bernard Kleiman* for petitioner. *Carl D. Hall, Jr.*, for respondent. Reported below: 395 F. 2d 529.

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No. 680. BYRD *v.* LANE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. *Ferdinand Samper* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *John F. Davis,* Deputy Attorney General, for respondents. Reported below: 398 F. 2d 750.

No. 681. JARBOE BROS. STORAGE WAREHOUSE, INC. *v.* ALLIED VAN LINES, INC. C. A. 4th Cir. Certiorari denied. *Howard G. Reamer* for petitioner. *Francis D. Murnaghan, Jr.,* and *Joseph H. H. Kaplan* for respondent. Reported below: 400 F. 2d 743.

No. 685. UNION RAILWAY CO. *v.* SWIFT & CO. C. A. 6th Cir. Certiorari denied. *Cooper Turner, Jr.,* for petitioner. *Jack Petree* for respondent. Reported below: 396 F. 2d 798.

No. 686. BALL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Milton E. Grusmark* for petitioner. Reported below: 207 So. 2d 492.

No. 689. FAMIANO *v.* ENYEART ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin Piser* for petitioner. *Nathan Levy* and *George N. Beamer, Jr.,* for respondents. Reported below: 398 F. 2d 661.

No. 690. STOLTZFUS ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Converse Murdoch* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 398 F. 2d 1002.

No. 692. DEMING NATIONAL BANK *v.* MORRISON FLYING SERVICE. C. A. 10th Cir. Certiorari denied. *Benjamin M. Sherman* for petitioner. *John H. Risken* for respondent. Reported below: 404 F. 2d 856.

No. 693. ZAKUTANSKY ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Bernard H. Sokol* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States et al. Reported below: 401 F. 2d 68.

No. 695. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 5 *v.* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari denied. *Loyal H. Gregg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Pollak,* and *Russell Specter* for respondent. Reported below: 398 F. 2d 248.

No. 696. CITY OF MIAMI BEACH *v.* KUGEL ET UX. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Raphael Steinhardt* for petitioner. *Martin Greenbaum* for respondents. Reported below: 206 So. 2d 282.

No. 697. ROMERO ET UX. *v.* TEN EYCK-SHAW, INC. C. A. 9th Cir. Certiorari denied. *Alfred C. Marquez* for petitioners. *Madison B. Graves* for respondent. Reported below: 400 F. 2d 81.

No. 700. HUNT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Luther E. Jones, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 306.

No. 702. SAMUELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben F. Foster* and *Gordon G. Hawn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States. Reported below: 398 F. 2d 964.

No. 694. PAGANO *v.* MARTIN ET AL. C. A. 4th Cir. Certiorari denied. *Robert M. Harcourt* and *Philip J. Hirschkop* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge,* and *Walter H. Fleischer* for respondents. Reported below: 397 F. 2d 620.

No. 707. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Alex Elson, Harold C. Heiss, Willard J. Lassers,* and *Aaron S. Wolff* for petitioners. *James P. Reedy* for respondent. Reported below: 397 F. 2d 541.

No. 710. BLACKBURN *v.* UNITED STATES; and

No. 723. CALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Larry S. Moore* and *Julius A. Rousseau, Jr.,* for petitioner in No. 710, and *Franklin Smith* for petitioner in No. 723. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States in both cases. Reported below: No. 710, 401 F. 2d 574; No. 723, 401 F. 2d 540.

No. 714. ESTATE OF TALBOTT (CARVER, EXECUTOR) *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Walter E. Barton* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Harry Baum* for respondent. Reported below: 403 F. 2d 851.

No. 725. PATRIARCA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Francis J. DiMento* for petitioner Patriarca and *Ronald J. Chisholm* for petitioner Cassesso. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 402 F. 2d 314.

No. 718. DAWSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Benjamin Ungerman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 400 F. 2d 194.

No. 721. DARLINGTON MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 722. DEERING MILLIKEN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. *Thornton H. Brooks, Hugh B. Cox, Brice M. Clagett,* and *George V. Allen, Jr.,* for petitioner in No. 721, and *Stuart N. Updike* and *John R. Schoemer, Jr.,* for petitioners in No. 722. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Nancy M. Sherman* for respondent National Labor Relations Board in both cases. Reported below: 397 F. 2d 760.

No. 724. MARCUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Marvin J. Bloch* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 401 F. 2d 563.

No. 727. BURGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles Fuller Blanchard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 402 F. 2d 85.

No. 728. CLEMENS *v.* CENTRAL RAILROAD CO. OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. *Lawrence J. Richette* for petitioner. *Robert H. Kleeb* for respondents. Reported below: 399 F. 2d 825.

No. 729. International Woodworkers of America, Local Union 3–3, AFL–CIO *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Joseph L. Rauh, Jr.*, and *John Silard* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. *James C. Dezendorf* for Western Wirebound Box Co., defendant below, in opposition.

No. 730. Shelton *v.* United States. C. A. D. C. Cir. Certiorari denied. *Fred Blanton, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Robert L. Keuch* for the United States. Reported below: 131 U. S. App. D. C. 315, 404 F. 2d 1292.

No. 737. Napue *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, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 401 F. 2d 107.

No. 742. Transit Casualty Co. et al. *v.* Security Trust Co. et al. C. A. 5th Cir. Certiorari denied. *Samuel J. Powers, Jr.*, and *George P. Bowie* for petitioners. *James A. Dixon* and *Sam Daniels* for respondent Security Trust Co., and *John M. Allison* for respondent Treasurer and Insurance Commissioner of Florida. Reported below: 396 F. 2d 803, 399 F. 2d 665.

No. 747. Structural Laminates, Inc. *v.* Douglas Fir Plywood Assn. C. A. 9th Cir. Certiorari denied. *Kenneth E. Roberts* for petitioner. *Alfred J. Schweppe* and *Arthur S. Langlie* for respondent. Reported below: 399 F. 2d 155.

No. 736. CAIN, DBA CAIN'S BAR *v.* STATE BEVERAGE DEPARTMENT OF FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. *A. K. Black* for petitioner.

No. 743. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Jack G. Day* and *Frank E. Haddad, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 400 F. 2d 992.

No. 739. MORGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joe J. Harrell* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 399 F. 2d 93.

No. 746. CONVERSE *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. *William Braly Murray* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz, S. Billingsley Hill,* and *George R. Hyde* for respondent. Reported below: 399 F. 2d 616.

No. 751. CANNERY WORKERS UNION OF THE PACIFIC *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Robert W. Gilbert* and *Louis A. Nissen* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 396 F. 2d 955.

No. 752. MILTON FRANK ALLEN PUBLICATIONS, INC. *v.* GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC. Sup. Ct. Ga. Certiorari denied. *Lynwood A. Maddox* for petitioner. *James A. Mackay* and *Cleburne E. Gregory, Jr.*, for respondent. Reported below: 224 Ga. 518, 162 S. E. 2d 724.

No. 821. GENERAL TIME CORP. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *Edward R. Neaher* and *Paul G. Pennoyer, Jr.*, for petitioner. *Walter L. Stratton, Breck P. McAllister,* and *Benjamin Vinar* for respondent Talley Industries, Inc., *Clendon H. Lee* and *Stanley L. Sabel* for respondents American Investors Fund, Inc., et al. Reported below: 407 F. 2d 65.

No. 633. KREBS ET AL. *v.* ASHBROOK ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin L. Wulf, Philip J. Hirschkop, Arthur Kinoy, William M. Kunstler,* and *Jeremiah Gutman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson* for respondents. Reported below: —— U. S. App. D. C. ——, 407 F. 2d 306.

No. 709. WHITFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Claude L. Rowe* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 401 F. 2d 480.

No. 716. GENERAL TIME CORP. *v.* TALLEY INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward R. Neaher* and *Paul G. Pennoyer, Jr.*, for petitioner. *Walter L. Stratton* and *Benjamin Vinar* for respondents Talley Industries, Inc., et al., and *Clendon H. Lee* and *Stanley L. Sabel* for respondent American Investors Fund, Inc. Reported below: 403 F. 2d 159.

No. 754. TARBORO *v.* READING CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Avram G. Adler* for petitioner. *Levy Anderson* for respondent. Reported below: 396 F. 2d 941.

No. 636. YEAGER, PRINCIPAL KEEPER *v.* JOHNSON ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. *A. Morton Shapiro* for petitioner. *Curtis R. Reitz, Stanford Shmukler,* and *M. Gene Haeberle* for respondents. Reported below: 399 F. 2d 508.

No. 657. SAN JACINTO SAND CO., INC. *v.* SOUTHWESTERN BELL TELEPHONE CO. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Motion to enlarge record granted. Certiorari denied. *Alvin Diamond* for petitioner. *David T. Searls* for respondent. Reported below: 426 S. W. 2d 338.

No. 667. GARNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 711. BARTONE *v.* UNITED STATES. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Arlene B. Steuer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States. Reported below: 400 F. 2d 459.

No. 676. GENOVESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Wilfred L. Davis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 671. LEONARD, ADMINISTRATRIX *v.* WHARTON, ADMINISTRATOR. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 396 F. 2d 452.

No. 683. ROSE *v.* NEW MEXICO. Sup. Ct. N. M. Motion to dispense with printing petition granted. Certiorari denied. *Dean Zinn* for petitioner. Reported below: 79 N. M. 277, 442 P. 2d 589.

No. 682. DITTO *v.* CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Richard F. Watt* and *Stanley A. Bass* for petitioner. *Raymond F. Simon* and *Robert E. Wiss* for respondents. Reported below: 86 Ill. App. 2d 340, 230 N. E. 2d 41.

No. 16, Misc. WALKER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 201, Misc. MCCULLOUGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Charles Jay Bogdanoff* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: 389 F. 2d 563.

No. 317, Misc. MIXON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Edmond B. Mamer,* Deputy Attorney General, for respondent.

No. 349, Misc. MENENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John Paul Howard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 393 F. 2d 312.

No. 354, Misc. KRUG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edward A. Hinz, Jr.,* Deputy Attorney General, for respondent. Reported below: 256 Cal. App. 2d 219, 63 Cal. Rptr. 813.

No. 362, Misc. BRADLEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *William D. Roth,* Assistant Attorney General, for respondent. Reported below: 206 So. 2d 657.

No. 376, Misc. LACEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John F. X. Peloso* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 395 F. 2d 881.

No. 383, Misc. HOLSEN *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: 392 F. 2d 292.

No. 643, Misc. BAILEY ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *John M. Linsenmeyer* for petitioners. *Elliott Golden* and *Frank Di Lalla* for respondent.

No. 394, Misc. OLIVERI *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. *Richard C. Turner,* Attorney General of Iowa, and *James C. Sell,* Assistant Attorney General, for respondent. Reported below: —— Iowa ——, 156 N. W. 2d 688.

No. 455, Misc. MOORE, AKA LOUIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ralph L. Crawford* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 394 F. 2d 818.

No. 495, Misc. ZAMORA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Roger E. Venturi,* Deputy Attorneys General, for respondent.

No. 555, Misc. MACK *v.* WALKER, WARDEN. C. A. 5th Cir. Certiorari denied. *James Domengeaux* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, for respondent. Reported below: 372 F. 2d 170.

No. 557, Misc. TYLER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 391 F. 2d 993.

No. 563, Misc. CARLTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Frank A. Bauman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 395 F. 2d 10.

No. 565, Misc. HENDRICKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 394 F. 2d 807.

No. 569, Misc. TOLEVER *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. *Reuben A. Garland* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Marion O. Gordon* and *Mathew Robins,* Assistant Attorneys General, and *Courtney Wilder Stanton,* Deputy Assistant Attorney General, for respondent. Reported below: 224 Ga. 270, 161 S. E. 2d 266.

No. 603, Misc. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Mervyn Hamburg* for the United States. Reported below: 396 F. 2d 492.

No. 610, Misc. MENDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *S. Clark Moore,* Deputy Attorney General, for respondent.

No. 650, Misc. BAROFSKY *v.* GENERAL ELECTRIC CORP. C. A. 9th Cir. Certiorari denied. *William H. Pavitt, Jr.,* for petitioner. *Ford W. Harris, Jr.,* and *Thomas A. Briody* for respondent. Reported below: 396 F. 2d 340.

No. 655, Misc. BAUERLIEN *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 657, Misc. PRICE *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 670, Misc. TINCH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States.

No. 684, Misc. BOYKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 398 F. 2d 483.

No. 719, Misc. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States.

No. 728, Misc. RETOLAZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *H. Thomas Howell* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 398 F. 2d 235.

No. 735, Misc. HOPKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 736, Misc. NELSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 759, Misc. WOLENSKI *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 764, Misc. LLANES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Murray M. Segal* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Ronald L. Gainer* for the United States. Reported below: 398 F. 2d 880.

No. 779, Misc. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Joseph J. De Raad* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 396 F. 2d 243.

No. 782, Misc. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John S. Tucker, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 395 F. 2d 694.

No. 791, Misc. PEABODY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 394 F. 2d 175.

No. 796, Misc. YANT *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 396 F. 2d 808.

No. 803, Misc. WEBB *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 806, Misc. ARNOLD *v.* HENDRICK, COUNTY PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 808, Misc. BIRRELL *v.* HERLANDS, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent. Reported below: 399 F. 2d 343.

No. 835, Misc. DOONER *v.* BUCKMAN, STATE HOSPITAL DIRECTOR. Ct. App. N. Y. Certiorari denied.

No. 811, Misc. LUPINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 817, Misc. COLAVECCHIO ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioners. *John T. Corrigan* for respondent.

No. 819, Misc. HAMLETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States.

No. 820, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 399 F. 2d 492.

No. 830, Misc. STRICKLAND *v.* COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. *John B. Culbertson* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 396 F. 2d 954.

No. 832, Misc. BLAKEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States.

No. 833, Misc. BUMPUS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *William P. Homans, Jr.,* for petitioner. *Howard M. Miller,* Assistant Attorney General of Massachusetts, and *Bruce G. McNeill,* Deputy Assistant Attorney General, for respondent.

No. 837, Misc. HENDERSON *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 842, Misc. McCLOSKEY *v.* BOSLOW, INSTITUTION DIRECTOR. Ct. Sp. App. Md. Certiorari denied. Reported below: 4 Md. App. 581, 244 A. 2d 463.

No. 846, Misc. BOND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James R. West* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 397 F. 2d 162.

No. 848, Misc. WOODSIDE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 849, Misc. TORTORICE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 852, Misc. HIBBERT *v.* NEW YORK CITY TRANSIT AUTHORITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Herman Adlerstein* for petitioner. *Helen R. Cassidy* for respondent.

No. 854, Misc. FURLONG *v.* WALKER. C. A. 3d Cir. Certiorari denied.

No. 856, Misc. LEEMAN *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: 398 F. 2d 835.

No. 862, Misc. ZIMMERMAN *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Ct. Sp. App. Md. Certiorari denied.

No. 863, Misc. WURTZBURGER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Leon B. Polsky* for petitioner.

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No. 864, Misc. LARSON *v.* BENNETT, WARDEN. Sup. Ct. Iowa. Certiorari denied. Reported below: —— Iowa ——, 160 N. W. 2d 303.

No. 868, Misc. NEW ENGLAND ENTERPRISES, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Stanley M. Brown* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 58.

No. 870, Misc. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 400 F. 2d 83.

No. 872, Misc. MCCARTHY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 873, Misc. WATKINS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 39 Wis. 2d 718, 159 N. W. 2d 675.

No. 874, Misc. LENT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 876, Misc. JOHNSON *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 878, Misc. BOYDEN *v.* CURTIS, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for respondent.

No. 882, Misc. BRACAMONTE *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 879, Misc. NORMAN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James J. Wood,* Assistant Attorney General, for respondent.

No. 880, Misc. DESROCHE *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. Sup. Ct. La. Certiorari denied. *Floyd J. Reed* for petitioner. *Robert B. Acomb, Jr.,* for respondents.

No. 881, Misc. ALAWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States.

No. 885, Misc. SNELL *v.* SIMPSON, WARDEN. Sup. Ct. Ala. Certiorari denied.

No. 888, Misc. NORMAN *v.* CHAMBERS, U. S. CIRCUIT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 889, Misc. PAULEKAS *v.* CLARK, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. *Norman Leonard* for petitioner. *Solicitor General Griswold* for respondents.

No. 890, Misc. CARLIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 261 Cal. App. 2d 30, 67 Cal. Rptr. 557.

No. 891, Misc. WILSON *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 892, Misc. LEWIS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 893, Misc. BASKIN *v.* TOURLENTES ET AL. C. A. 7th Cir. Certiorari denied. *William G. Clark,* Attorney General of Illinois, *John J. O'Toole,* Assistant Attorney General, and *Stuart D. Perlman,* Special Assistant Attorney General, for Tourlentes et al., and *Sheldon P. Migdal* for Carson et al., respondents.

No. 895, Misc. SHAIRD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 899, Misc. HOFLER *v.* SPEARIN, PRESTON & BURROWS, INC., ET AL., DBA SPEARIN-TULLY. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Morton Alpert* for petitioner. *Emil V. Pilz* and *George Foster Mackey* for respondents.

No. 900, Misc. HILL *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 902, Misc. OWENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 904, Misc. PINKNEY *v.* KORET OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Everett A. Corten* for respondent Workmen's Compensation Appeals Board of California.

No. 906, Misc. ELLIOTT *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 918, Misc. TARRANCE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *G. Wray Gill, Sr.,* and *George M. Leppert* for petitioner. Reported below: 252 La. 396, 211 So. 2d 304.

No. 908, Misc. MILLER *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 397 F. 2d 363.

No. 911, Misc. RIFFON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 914, Misc. CAMMANN *v.* BURKE, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 915, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 916, Misc. KNAUB *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 443 P. 2d 44.

No. 917, Misc. NASSAR *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *William P. Homans, Jr.*, for petitioner. *Elliot L. Richardson*, Attorney General of Massachusetts, *John J. Jennings*, Special Assistant Attorney General, *Howard M. Miller*, Assistant Attorney General, *Wilmot R. Hastings*, First Assistant Attorney General, and *John M. Finn*, Deputy Assistant Attorney General, for respondent. Reported below: 354 Mass. 249, 237 N. E. 2d 39.

No. 920, Misc. STEVENS *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 443 P. 2d 600.

No. 922, Misc. MARTIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 925, Misc. WALLER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 927, Misc. MACE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 427 S. W. 2d 507.

No. 910, Misc. DELANEY *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 397 F. 2d 17.

No. 928, Misc. MCCRIMMON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 930, Misc. CATLETT *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 931, Misc. DORSEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States.

No. 932, Misc. HART *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 933, Misc. KEPLINGER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 935, Misc. WARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 941, Misc. MAGEE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 942, Misc. PEACOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 400 F. 2d 992.

No. 957, Misc. EVANS *v.* UNITED STATES VETERANS ADMINISTRATION HOSPITAL. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 391 F. 2d 261.

No. 944, Misc. JACKSON *v.* PINTO, PRISON FARM SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 945, Misc. PICHE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 74 Wash. 2d 9, 442 P. 2d 632.

No. 948, Misc. MURRAY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. C. A. 5th Cir. Certiorari denied. *Guy Sparks, Melvin L. Wulf, Charles Morgan, Jr.,* and *Reber F. Boult, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for respondents.

No. 950, Misc. SMILEY *v.* PREGERSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 954, Misc. OWENS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 955, Misc. BURCHFIELD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 958, Misc. ELLIOTT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 283 Ala. 67, 214 So. 2d 420.

No. 961, Misc. ANDERTEN *v.* ERICKSON, WARDEN. Sup. Ct. S. D. Certiorari denied.

No. 962, Misc. AKIN *v.* BOARD OF EDUCATION OF RIVERSIDE UNIFIED SCHOOL DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied. *A. L. Wirin, Fred Okrand,* and *Laurence R. Sperber* for petitioner. Reported below: 262 Cal. App. 2d 161, 68 Cal. Rptr. 557.

No. 965, Misc. ALDABE *v.* ALDABE. Sup. Ct. Nev. Certiorari denied. *Paul A. Richards* for respondent. Reported below: —— Nev. ——, 441 P. 2d 691.

No. 970, Misc. BICKMAN *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 972, Misc. PIPKIN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 974, Misc. CARTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Emmett Colvin, Jr.,* for petitioner. Reported below: 431 S. W. 2d 8.

No. 975, Misc. PEELE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Jerry C. Wilson* for petitioner. *Thomas Wade Bruton,* Attorney General of North Carolina, *Harry W. McGalliard,* Deputy Attorney General, and *Millard R. Rich, Jr.,* Assistant Attorney General, for respondent. Reported below: 274 N. C. 106, 161 S. E. 2d 568.

No. 983, Misc. SAWYER *v.* DEPARTMENT OF CORRECTION ET AL. C. A. 4th Cir. Certiorari denied.

No. 989, Misc. WILLIAMSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1000, Misc. HATCHER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1008, Misc. SCHIAVONI, ADMINISTRATOR *v.* HONUS WAGNER CO. C. A. 3d Cir. Certiorari denied. *Harry Alan Sherman* for petitioner. Reported below: 396 F. 2d 757.

No. 1002, Misc. CHANDLER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 262 Cal. App. 2d 350, 68 Cal. Rptr. 645.

No. 1007, Misc. VACCA *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1009, Misc. NATHANIEL *v.* TEXAS. Dist. Ct. Brazoria County, Tex., 23d Jud. Dist. Certiorari denied.

No. 1011, Misc. ARGO *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1012, Misc. KROLL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 402 F. 2d 221.

No. 1013, Misc. PEREZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1016, Misc. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1028, Misc. MAYBERRY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Richard Newman* for petitioner. Reported below: 52 N. J. 413, 245 A. 2d 481.

No. 397, Misc. PRENDEZ *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *Peyton* v. *Rowe,* 391 U. S. 54. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edward A. Hinz, Jr.,* Deputy Attorney General, for respondent.

No. 1017, Misc. KLECHKA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 1025, Misc. GRANT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 422, Misc. FORNEY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James A. Lake* for petitioner. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Harold Mosher,* Assistant Attorney General, for respondent. Reported below: 182 Neb. 802, 157 N. W. 2d 403.

No. 572, Misc. MCWILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Motion to remand and petition for writ of certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Bernard J. Mellman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 394 F. 2d 41.

No. 743, Misc. GRAY *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, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States.

No. 884, Misc. CACHOIAN *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to supplement petition granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States.

No. 924, Misc. CUNNINGHAM *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari and other relief denied. Reported below: 397 F. 2d 724.

Rehearing Denied.

No. 131. PALMIERI *v.* FLORIDA, *ante*, p. 218;

No. 423. BARATTA *v.* UNITED STATES, *ante*, p. 939;

No. 443. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* BESSEMER & LAKE ERIE RAILROAD CO. ET AL., *ante*, p. 959;

No. 519. HAYUTIN *v.* UNITED STATES, *ante*, p. 961;

No. 521. DREYFUS *v.* MICHAEL REESE HOSPITAL & MEDICAL CENTER, *ante*, p. 961;

No. 560. ARNOLD CONSTABLE CORP. *v.* EUDOWOOD SHOPPING CENTER, INC., *ante*, p. 979;

No. 567. NASH *v.* UNITED STATES, *ante*, p. 961;

No. 36, Misc. KING *v.* TENNESSEE, *ante*, p. 863;

No. 62, Misc. USSERY ET AL. *v.* UNITED STATES, *ante*, p. 866;

No. 521, Misc. FAILLA *v.* CALIFORNIA ET AL., *ante*, p. 926;

No. 704, Misc. PEREZ *v.* CROUSE, WARDEN, *ante*, p. 988; and

No. 740, Misc. BELTOWSKI *v.* MINNESOTA, *ante*, p. 988. Petitions for rehearing denied.

No. 16. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL., *ante*, p. 129;

No. 18. HARDIN, PROSECUTING ATTORNEY, ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL., *ante*, p. 129; and

No. 558. PENNINGTON ET AL. *v.* UNITED MINE WORKERS OF AMERICA, *ante*, p. 983. Petitions for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these petitions.

No. 374. TOTTON, DBA TOTTON & DUNN CO. *v.* LOCAL 43, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES & CANADA, *ante*, p. 915;

No. 394. HUCKABY *v.* UNITED STATES, *ante*, p. 933;

No. 576. HUCKABY *v.* UNITED STATES, *ante*, p. 938;

No. 472. GARRETT ET AL. *v.* UNITED STATES, *ante*, p. 952; and

No. 692, Misc. CREIGHBAUM *v.* BURKE, WARDEN, *ante*, p. 955. Motions for leave to file petitions for rehearing denied.

No. 568. QUINN *v.* UNITED STATES, *ante*, p. 983. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

JANUARY 17, 1969.

Dismissals Under Rule 60.

No. 48. JULIAN MESSNER, INC., ET AL. *v.* SPAHN. Appeal from Ct. App. N. Y. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Selig J. Levitan* for appellants. *Frederic A. Johnson* for appellee. [For earlier order herein, see *ante*, p. 818.]

No. 825. CLIFFORD, SECRETARY OF DEFENSE, ET AL. *v.* FAULKNER. Appeal from D. C. E. D. N. Y. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander,* and *Robert V. Zener* for appellants. *Stanley Faulkner* for appellee. Reported below: 289 F. Supp. 895.

JANUARY 20, 1969.

Miscellaneous Orders.

No. 582. CONTINENTAL CASUALTY CO. ET AL. *v.* ROBERTSON LUMBER CO. Appeal from Sup. Ct. N. D. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 580. SAMUELS ET AL. *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL.; and

No. 813. FERNANDEZ *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante,* p. 975.] Joint motion of appellants to enlarge time for oral argument of these consolidated cases granted, and 15 additional minutes allotted for that purpose. Counsel for appellees likewise allotted 15 additional minutes for oral argument. *Victor Rabinowitz* for Samuels et al. in No. 580, and *Eleanor Jackson Piel* for Fernandez in No. 813, on the motion.

No. 670. BANKS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion of respondent to dispense with printing record denied. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien,* Deputy Attorney General, on the motion. *Thomas J. Klitgaard* for petitioner in opposition. [For previous orders herein, see, *e. g., ante,* p. 931.]

No. 1014, Misc. HENDRIX *v.* BLACKWELL, WARDEN;

No. 1129, Misc. SMITH *v.* PAGE, WARDEN, ET AL.;

No. 1132, Misc. FOSSUM *v.* PORTER, SHERIFF; and

No. 1168, Misc. WHITE *v.* WARDEN, MARYLAND PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 791. CRANE *v.* CEDAR RAPIDS & IOWA CITY RAILWAY CO. Sup. Ct. Iowa. Certiorari granted. *E. Barrett Prettyman, Jr.,* for petitioner. *William M. Dallas* and *John F. Gaston* for respondent. Reported below: —— Iowa ——, 160 N. W. 2d 838.

No. 830. NOYD *v.* BOND ET AL. C. A. 10th Cir. Certiorari granted. Stay heretofore granted by MR. JUSTICE DOUGLAS shall remain in effect pending issuance of judgment of this Court or until further order of this Court. *Marvin M. Karpatkin, Melvin L. Wulf,* and *William F. Reynard* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 402 F. 2d 441.

Certiorari Denied.

No. 161. CHOCTAW NATION ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 10th Cir. Certiorari denied. *J. D. McLaughlin* for petitioners. *Streeter B. Flynn* for respondents Atchison, Topeka & Santa Fe Railway Co. et al. *Solicitor General Griswold* filed a memorandum for the United States, as *amicus curiae,* by invitation of the Court, *ante,* p. 922, in opposition. Reported below: 396 F. 2d 578, 582, 583.

No. 542. DUGAS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Sam J. D'Amico* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for respondent. Reported below: 252 La. 345, 211 So. 2d 285.

No. 712. INTERNATIONAL ASSOCIATION OF MACHINISTS *v.* BRADY;

No. 713. TRANS WORLD AIRLINES, INC. *v.* BRADY; and

No. 735. BRADY *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Edward J. Hickey, Jr.,* and *James L. Highsaw, Jr.,* for petitioner in No. 712 and for respondent International Association of Machinists in No. 735. *Harold L. Warner, Jr.,* and *Carl S. Rowe* for petitioner in No. 713. *Morris Duane* for petitioner in No. 735 and for respondent in Nos. 712 and 713. Reported below: 401 F. 2d 87.

No. 757. WELCH ET AL. *v.* LEAVEY, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. *W. Jiles Roberts* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Morton Hollander* for Leavey, and *E. D. Vickery* for Atlantic & Gulf Stevedores, Inc., et al., respondents. Reported below: 397 F. 2d 189.

No. 758. JOHN LANGENBACHER CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Algernon M. Miller* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 398 F. 2d 459.

No. 759. INTERTYPE CO., A DIVISION OF HARRIS-INTERTYPE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Kenneth C. McGuiness* and *Flournoy L. Largent, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 401 F. 2d 41.

No. 761. BEATY ET AL. *v.* M. S. STEEL CO., INC. C. A. 4th Cir. Certiorari denied. *Eugene A. Alexander III* for petitioners. *Patrick A. O'Doherty* and *Hamilton O'Dunne* for respondent. Reported below: 401 F. 2d 157.

No. 760. HESSION ET UX. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *W. Bradley Ward* and *Samuel D. Slade* for petitioners. *William C. Sennett,* Attorney General of Pennsylvania, and *Robert W. Cunliffe,* Assistant Attorney General, for respondent. Reported below: 430 Pa. 273, 242 A. 2d 432.

No. 766. LEA ET AL., TRADING AS HARRY R. LEA & CO. *v.* CONSOLIDATED SUN RAY, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Arthur R. Littleton* for petitioners. *Robert H. Malis* for respondents. Reported below: 401 F. 2d 650.

No. 767. DELTA THEATRES, INC. *v.* PARAMOUNT PICTURES, INC., ET AL. C. A. 5th Cir. Certiorari denied. *C. Ellis Henican* for petitioner. *Harry McCall, Jr.*, and *Ashton Phelps* for respondents. Reported below: 398 F. 2d 323.

No. 768. CROLL-REYNOLDS CO., INC., ET AL. *v.* PERINI-LEAVELL-JONES-VINELL ET AL. C. A. 5th Cir. Certiorari denied. *Jennings Bailey, Jr.*, and *Nelson Littell, Jr.*, for petitioners. *William A. Denny* for respondents. Reported below: 399 F. 2d 913.

No. 771. ORSINI *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied. *Igor I. Sikorsky, Jr.*, for petitioner. Reported below: 397 F. 2d 977.

No. 774. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. *Alex Elson, Willard J. Lassers, Aaron S. Wolff, Herbert L. Segal, Harold C. Heiss, Russell Day,* and *Robert E. Hogan* for petitioners. *John P. Sandidge, Joseph L. Lenihan, Marvin D. Jones,* and *David M. Yearwood* for Louisville & Nashville Railroad Co., and *Harold A. Ross* and *Charles I. Dawson* for Brotherhood of Locomotive Engineers, respondents. Reported below: 400 F. 2d 572.

No. 762. KIMBRELL *v.* LAWRENCE COUNTY BAR ASSN. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 769. CITY OF AMARILLO ET AL. *v.* EAKENS ET AL., TRUSTEES. C. A. 5th Cir. Certiorari denied. *C. J. Taylor, Jr.*, and *R. A. Wilson* for petitioners. *Stephen P. Killough* for respondents. Reported below: 399 F. 2d 541.

No. 775. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Ronald Podolsky* for petitioner.

No. 779. GARRISON *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *Roscoe B. Hogan* for petitioner. *MacDonald Gallion*, Attorney General of Alabama, and *Robert P. Bradley*, Assistant Attorney General, for respondent. Reported below: 44 Ala. App. 463, 213 So. 2d 369.

No. 786. WILCOX MANUFACTURING CO. *v.* JEFFREY GALION MANUFACTURING CO. C. A. 4th Cir. Certiorari denied. *John W. Malley* and *William T. Bullinger* for petitioner. *William H. Webb, John M. Webb*, and *David Young* for respondent. Reported below: 400 F. 2d 960.

No. 789. SNYDER ET AL. *v.* CITY OF BOULDER. C. A. 10th Cir. Certiorari denied. *Anthony F. Zarlengo* for petitioners. Reported below: 396 F. 2d 853.

No. 559. CALIFORNIA *v.* JOHNSON. Sup. Ct. Cal. Motion to dispense with printing respondent's brief granted. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Edsel W. Haws* and *Arnold O. Overoye*, Deputy Attorneys General, for petitioner. *Robert J. Nareau* for respondent. Reported below: 68 Cal. 2d 646, 441 P. 2d 111.

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No. 781. URBANO *v.* READERS DIGEST ASSN., INC. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. *Purvis Brearley* for petitioner. *Thomas F. Daly* for respondent.

No. 764. MORSE ET AL. *v.* BOSWELL ET AL. C. A. 4th Cir. Certiorari denied. *Fred Okrand* and *Elsbeth Levy Bothe* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Morton Hollander* for respondents. Reported below: 401 F. 2d 544.

MR. JUSTICE DOUGLAS, dissenting.

When this case was before us earlier on an application for a stay, I filed a dissenting opinion, *ante,* p. 802, indicating that the issues to be presented on the petition for certiorari were at least in part substantial.

Some of the enlistment contracts with which we deal provide that these reservists agree to active duty in "time of war or of national emergency declared by Congress," as provided in 10 U. S. C. § 672. That section calls for active duty "[i]n time of war or of national emergency declared by Congress, or when otherwise authorized by law." And see 10 U. S. C. § 673.

The call-up was pursuant to a 1966 Act, 80 Stat. 981, 10 U. S. C. § 263 n. (1964 ed., Supp. III), which authorized the President to activate any unit of the Reserve for a period not to exceed 24 months.

There has been no declaration of a national emergency either by Congress or by the President.

There has been no declaration of war by the Congress.

How then can 10 U. S. C. § 672 and the enlistment contracts be dishonored?

The only answer given is that the phrase "when otherwise authorized by law" contained in 10 U. S. C. § 672 covers all future laws that may be passed.

That phrase, as I understand it, refers to existing law, not to any law that may be passed. Mr. Justice Holmes

said as much in *United States* v. *Dalcour,* 203 U. S. 408, 421. In that case the words were "otherwise provided by law" and he said:

> "These words must be taken to refer to existing provisions and not to be merely a futile permission to future legislatures to make a change."

The meaning must of course depend on the precise setting of the phrase. It does real violence to reason and to morality to read § 672 as an open-end power to change any promise willy-nilly. As I indicated in my dissent when the stay was before us, the phrase "when otherwise authorized by law" has meaning when construed as referring to existing law alone. See *ante,* at 808–809, and n. 17.

When we allow it a more expanded meaning as embracing all future laws passed, we become an agency for helping to create an awesome credibility gap.

We should construe laws as fulfilling, not breaking, promises made by this all-powerful government to its citizens, unless no alternative is open to us.

The alternative is plain: to apply the 1966 Act to all enlistment contracts that do not contain the solemn promise that active duty starts only on a declaration of war or a declaration of a national emergency.

This case should be set for argument.

No. 782. LEE, ADMINISTRATRIX, ET AL. *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. *Lee S. Kreindler* and *Samuel N. Hecsh* for petitioners. *Solicitor General Griswold, Assistant Attorney General Weisl, Morton Hollander,* and *Leonard Schaitman* for the United States. Reported below: 400 F. 2d 558.

No. 785. CHENG FU SHENG ET AL. *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *David Carliner* and *Robert S. Bixby* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for respondent. Reported below: 400 F. 2d 678.

MR. JUSTICE DOUGLAS, dissenting.

I would grant this petition and put the case down for argument.

Under § 243 (h) of the Immigration and Nationality Act, 66 Stat. 214, as amended, 79 Stat. 918, 8 U. S. C. § 1253 (h) (1964 ed., Supp. III), the Attorney General is authorized to withhold deportation of any alien who would, if returned to his country, be subject "to persecution on account of . . . political opinion."

Taiwan's intolerance of criticism is well known. Lei Chen, after a one-day military trial, was sentenced to 10 years for trying to form a non-Communist political party in opposition to the Kuomintang. Military trials of men expressing "radical" ideas are common. The pressures to conform to Kuomintang orthodoxy are so great that no more than 5% of the students who go abroad to study return to Taiwan.

These petitioners, who have denounced the Chiang Kai-shek regime as a "police state," will most assuredly either face a firing squad on their return or receive heavy sentences. Any person critical of the regime is called a "defector." The list of political victims of Taipei's intolerance is too long and the secret military trials of dissidents too notorious for me to acquiesce in denial of certiorari here.

No. 686, Misc. MCINTYRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 396 F. 2d 859.

No. 763. ROSEE *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Motion to dispense with printing portions of appendix denied. Motion to amend petition granted. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *John C. Eldridge* for respondents Kibby et al.

No. 787. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA *v.* UNITED STATES. Ct. Cl. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *John W. Cragun, Charles A. Hobbs,* and *Richard A. Baenen* for petitioners. *Solicitor General Griswold, Assistant Attorney General Martz, Roger P. Marquis,* and *Edmund B. Clark* for the United States. Reported below: 185 Ct. Cl. 421, 401 F. 2d 785.

No. 788. KNICKERBOCKER INSURANCE CO. *v.* FAISON ET AL. Ct. App. N. Y. Motion of Motor Vehicle Accident Indemnification Corp. for leave to file a brief, as *amicus curiae,* granted, and brief filed. Certiorari denied. *Arnold Davis* for petitioner. *Jacob D. Fuchsberg* for respondents. Reported below: 22 N. Y. 2d 554, 240 N. E. 2d 34.

No. 431, Misc. GONZALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Philip C. Griffin,* Deputy Attorney General, for respondent. Reported below: 68 Cal. 2d 467, 439 P. 2d 655.

No. 522, Misc. BUTCHER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *W. S. Moore* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent.

No. 502, Misc. ERB *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *David B. Stanton,* Deputy Attorney General, for respondent. Reported below: 259 Cal. App. 2d 159, 66 Cal. Rptr. 274.

No. 570, Misc. KAST ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of S. F. Certiorari denied. *Leigh Athearn* for petitioners. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *James B. Cuneo,* Deputy Attorneys General, for respondent.

No. 634, Misc. ADAMS *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied. *William E. Gray* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 430 S. W. 2d 194.

No. 745, Misc. MARSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Max O. Truitt, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Ronald L. Gainer* for the United States. Reported below: 408 F. 2d 644.

No. 855, Misc. SULLIVAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *David Berman* for petitioner. *Elliot L. Richardson,* Attorney General of Massachusetts, and *Willie J. Davis,* Assistant Attorney General, for respondent. Reported below: 354 Mass. 598, 239 N. E. 2d 5.

No. 662, Misc. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 396 F. 2d 66.

No. 799, Misc. BEARDSLEY *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.

No. 834, Misc. BARRINGER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 130 U. S. App. D. C. 186, 399 F. 2d 557.

No. 858, Misc. FLORES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 68 Cal. 2d 563, 440 P. 2d 233.

No. 887, Misc. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Steven B. Duke* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 394 F. 2d 823.

No. 894, Misc. KANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 399 F. 2d 730.

No. 919, Misc. HORMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William Cahn* for respondent. Reported below: 22 N. Y. 2d 378, 239 N. E. 2d 625.

No. 905, Misc. MONTGOMERY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Glenn A. Mitchell* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 923, Misc. BERNIER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *Willie Davis,* Assistant Attorney General of Massachusetts, *John J. Droney,* and *Ruth I. Abrams* for respondent. Reported below: 354 Mass. 193, 236 N. E. 2d 642.

No. 926, Misc. CUNNINGHAM *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* and *Gretchen White Oberman* for petitioner. Reported below: 397 F. 2d 143.

No. 934, Misc. PHILLIPS *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 940, Misc. COLEMAN *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. Reported below: 399 F. 2d 662.

No. 949, Misc. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 396 F. 2d 867.

No. 951, Misc. PAROUTIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 395 F. 2d 673.

No. 990, Misc. MCDONALD *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 969, Misc. GOODMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 976, Misc. MURRAY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 30 App. Div. 2d 584, 290 N. Y. S. 2d 292.

No. 998, Misc. THOMPSON *v.* PARKER, WARDEN. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 399 F. 2d 774.

No. 1020, Misc. MUSZALSKI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 260 Cal. App. 2d 611, 67 Cal. Rptr. 378.

No. 1032, Misc. MURRAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 444 P. 2d 236.

No. 1035, Misc. LEAVER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 1036, Misc. SUPER *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 1047, Misc. MCNEILL *v.* STATE USE INDUSTRIES, AUTOMOBILE REGISTRATION PLATES DEPARTMENT. C. A. 4th Cir. Certiorari denied.

No. 798, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 396 F. 2d 779.

No. 1128, Misc. QUARLES *v.* CLARK, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for respondents.

No. 1130, Misc. RAMIREZ *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 1118, Misc. WOOD *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for respondent. Reported below: 402 F. 2d 62.

Rehearing Denied. (See also Nos. 478 and 479, *ante,* p. 407.)

No. 442. SWOFFORD ET AL., DBA PATHFINDER CO. *v.* B & W, INC., *ante,* p. 935;

No. 223, Misc. MENDEZ *v.* CALIFORNIA, *ante,* p. 1007;

No. 711, Misc. SUMRALL *v.* UNITED STATES, *ante,* p. 991;

No. 778, Misc. KNEPFLER *v.* UNITED STATES, *ante,* p. 1005;

No. 787, Misc. WILLARD *v.* FLORIDA, *ante,* p. 989; and

No. 861, Misc. BENNETT *v.* NORTH CAROLINA, *ante,* p. 1006. Petitions for rehearing denied.

JANUARY 27, 1969.

Miscellaneous Orders.

No. 138. POWELL ET AL. *v.* MCCORMACK, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ET AL. C. A. D. C. Cir. Further consideration of respondents' suggestion of mootness postponed to hearing of case on the merits. [For earlier orders herein, see, *e. g., ante,* p. 1009.]

No. 228. WILLINGHAM, WARDEN, ET AL. *v.* MORGAN. C. A. 10th Cir. [Certiorari granted, *ante*, p. 976.] Motion of respondent for leave to proceed further herein *in forma pauperis* and for assistance of counsel granted. It is ordered that *Joseph M. Snee, Esquire*, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel to brief and argue this case in this Court on behalf of respondent.

No. 488. DANIEL ET AL. *v.* PAUL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 975.] *James W. Gallman, Esquire*, of Fayetteville, Arkansas, a member of the Bar of this Court, is invited to brief and argue this case, as *amicus curiae*, in support of the judgment below.

No. 1106, Misc. IRWIN *v.* DOWNIE, WARDEN, ET AL. 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. 1062, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 705. CIPRIANO *v.* CITY OF HOUMA ET AL. Appeal from D. C. E. D. La. Probable jurisdiction noted. *Kenneth Watkins* for appellant. *E. E. Huppenbauer, Jr.*, for appellees. Reported below: 286 F. Supp. 823.

Certiorari Granted. (See also No. 95, *ante*, p. 478; and No. 752, Misc., *ante*, p. 482.)

No. 820. PHELPS *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. Sup. Ct. Mo. Certiorari granted. *John H. Haley, Jr., James T. Williamson*, and *Thomas J. Conway* for petitioner. *Howard A. Crawford* for respondent. Reported below: 438 S. W. 2d 181.

No. 211, Misc. CONWAY *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *George R. Nock,* Deputy Attorney General, for respondents.

Certiorari Denied. (See also No. 1106, Misc., *supra.*)

No. 461. SUFFIN *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. *Mordecai Rosenfeld, William E. Haudek,* and *Irving Morris* for petitioner. *David L. Wilson* for Pennsylvania Railroad Co. (now Penn Central Co.), *William S. Potter* for Pennsylvania Co., and *Francis S. Bensel* for Norfolk & Western Railway Co., respondents. *Solicitor General Griswold* filed a memorandum for the United States, as *amicus curiae,* by invitation of the Court, *ante,* p. 931. Reported below: 396 F. 2d 75.

No. 507. PYNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 398 F. 2d 464.

No. 800. IRWIN ET AL. *v.* CLARK, DBA OILFIELD VACUUM SERVICE. C. A. 9th Cir. Certiorari denied. *Thomas R. Davis* for petitioners. *Luther Kenneth Say* for respondent. Reported below: 400 F. 2d 882.

No. 801. HIRSCHFIELD ET AL. *v.* BARRETT, CLERK OF COOK COUNTY. Sup. Ct. Ill. Certiorari denied. *L. Louis Karton* and *Myer H. Gladstone* for petitioners. Reported below: 40 Ill. 2d 224, 239 N. E. 2d 831.

No. 611. MOORE ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. *Jefferson Greer* for petitioners. *Joe Purcell,* Attorney General of Arkansas, and *Don Langston,* Deputy Attorney General, for respondent. Reported below: 244 Ark. 1197, 429 S. W. 2d 122.

No. 793. DETROIT, TOLEDO & IRONTON RAILROAD CO. *v.* LONES ET AL. C. A. 6th Cir. Certiorari denied. *Robert B. Gosline* for petitioner. *Donald P. Traci* and *Thomas A. Heffernan* for respondents. Reported below: 398 F. 2d 914.

No. 794. GIVENS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Michael Washor* for petitioner. Reported below: 22 N. Y. 2d 897, 241 N. E. 2d 744.

No. 795. ALEXANDER ET UX. *v.* MORRISON-KNUDSEN CO., INC., ET AL. Sup. Ct. Colo. Certiorari denied. *Walter L. Gerash* and *John S. Carroll* for petitioners. *Robert A. Schiff* for Morrison-Knudsen Co., Inc., *M. O. Shivers, Jr., John J. Conway,* and *John A. Hughes* for Colorado-Ute Electric Assn., Inc., and *I. Martin Leavitt* for Yampa Valley Electric Assn., Inc., respondents. Reported below: —— Colo. ——, 444 P. 2d 397.

No. 802. BLACK & DECKER MANUFACTURING CO. *v.* PORTER-CABLE MACHINE CO. ET AL. C. A. 4th Cir. Certiorari denied. *Theodore S. Kenyon, Benjamin C. Howard,* and *C. Willard Hayes* for petitioner. *John D. Nies* for respondents. Reported below: 402 F. 2d 517.

No. 803. FIRST NATIONAL BANK IN ANOKA *v.* KENNEALLY, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. Certiorari denied. *Thomas G. Lovett, Jr.,* for petitioner. *Michael Langdon Culhane* for respondent. Reported below: 400 F. 2d 838.

No. 805. HICKS *v.* HARDIN, SECRETARY OF AGRICULTURE. C. A. 4th Cir. Certiorari denied. *Robinson O. Everett, Irving I. Geller, Elmer A. Ambrogne,* and *Charles O. Verrill, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for respondent. Reported below: 397 F. 2d 193.

No. 806. WAYNE KNITTING MILLS ET AL. *v.* RUSSELL HOSIERY MILLS, INC. C. A. 4th Cir. Certiorari denied. *Joseph W. Grier, Jr.,* and *David H. Semmes* for petitioners. *Thomas B. Van Poole, Charles R. Fenwick,* and *Welch Jordan* for respondent. Reported below: 400 F. 2d 964.

No. 807. CITY OF WEST ALLIS ET AL. *v.* COUNTY OF MILWAUKEE. Sup. Ct. Wis. Certiorari denied. *Maxwell H. Herriott* for petitioners. *Robert P. Russell* for respondent. Reported below: 39 Wis. 2d 356, 159 N. W. 2d 36.

No. 808. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* ALEXANDER ET AL. C. A. 2d Cir. Certiorari denied. *J. Edmund de Castro, Jr.,* for petitioner. *Stuart Goldstein* for respondent Alexander. Reported below: 382 F. 2d 963.

No. 809. ARNOLD *v.* ARNOLD. C. A. 9th Cir. Certiorari denied.

No. 815. OHIO CASUALTY INSURANCE CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Samuel L. Finn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge,* and *Norman Knopf* for the United States. Reported below: 399 F. 2d 387.

No. 810. MYERS ET AL. *v.* HARRIS. Sup. Ct. Pa. Certiorari denied. *Roland J. Christy* for petitioners. *Walter Phipps, Jr.*, for respondent. Reported below: 431 Pa. 293, 245 A. 2d 647.

No. 812. HILL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *David C. Shapard* for petitioner. Reported below: 444 P. 2d 223.

No. 816. UNITED STATES STEEL CORP. *v.* GUY ET AL. C. A. 3d Cir. Certiorari denied. *Gilbert J. Helwig* and *Steven A. Stepanian II* for petitioner.

No. 817. BROWN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *R. Monroe Schwartz* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Gilbert E. Andrews,* and *Stuart A. Smith* for respondent. Reported below: 398 F. 2d 832.

No. 818. NELSON, WARDEN, ET AL. *v.* COLEMAN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Gloria F. DeHart,* Deputy Attorneys General, for petitioners. Reported below: 401 F. 2d 536.

No. 819. MAGNESIUM CASTING CO. *v.* HOBAN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Vernon C. Stoneman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 401 F. 2d 516.

No. 337, Misc. NEGRON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Sybil H. Landau* for respondent.

No. 796. DREDGE CORP. *v.* PENNY, STATE SUPERVISOR, BUREAU OF LAND MANAGEMENT, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *George W. Nilsson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Martz,* and *Roger P. Marquis* for respondents Penny et al. Reported below: 398 F. 2d 791.

No. 804. SCHULTER *v.* RORAFF, JUDGE. Sup. Ct. Wis. Motion to dispense with printing petition granted. Certiorari denied. *Robert Friebert* for petitioner. *Bronson C. La Follette,* Attorney General of Wisconsin, *William F. Eich,* Deputy Attorney General, and *Betty R. Brown,* Assistant Attorney General, for respondent. Reported below: 39 Wis. 2d 342, 159 N. W. 2d 25.

No. 811. MISKUNAS *v.* UNION CARBIDE CORP. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Myron J. Hack* for petitioner. *Harry T. Ice* for respondent. Reported below: 399 F. 2d 847.

No. 449, Misc. MACIAS ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam* for petitioners. *William G. Clark,* Attorney General of Illinois, and *John J. O'Toole* and *Donald J. Veverka,* Assistant Attorneys General, for respondent. Reported below: 39 Ill. 2d 208, 234 N. E. 2d 783.

No. 524, Misc. CASSASA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Clifford K. Thompson, Jr.,* Deputy Attorney General, for respondent.

No. 292, Misc. ROBINSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent. Reported below: 21 N. Y. 2d 338, 234 N. E. 2d 687.

No. 541, Misc. MCALLISTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 395 F. 2d 852.

No. 543, Misc. ROOTS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 130 U. S. App. D. C. 203, 399 F. 2d 574.

No. 618, Misc. TYLER *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. *Harry C. Batchelder, Jr.,* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen,* Assistant Attorney General, for respondent.

No. 667, Misc. HALE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 397 F. 2d 427.

No. 699, Misc. STUCKEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 130 U. S. App. D. C. 203, 399 F. 2d 574.

No. 710, Misc. WILLOCK *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *David Kaplan* for petitioner. *John B. Breckinridge,* Attorney General of Kentucky, and *James H. Barr,* Assistant Attorney General, for respondent. Reported below: 435 S. W. 2d 771.

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No. 715, Misc. ARGO *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

No. 793, Misc. INGENITO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *A. Morton Shapiro* for respondent.

No. 797, Misc. BUICK *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: 396 F. 2d 912.

No. 801, Misc. CORBBINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 397 F. 2d 790.

No. 812, Misc. HARLING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 130 U. S. App. D. C. 327, 401 F. 2d 392.

No. 847, Misc. BOSTICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 400 F. 2d 449.

No. 859, Misc. MCDOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 939, Misc. O'SHEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *William P. Homans, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 78.

No. 946, Misc. CHUNING *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Robert C. Londerholm,* Attorney General of Kansas, and *Edward G. Collister, Jr.*, Assistant Attorney General, for respondent. Reported below: 201 Kan. 784, 443 P. 2d 248.

No. 953, Misc. LANGLEY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 156 Conn. 598, 244 A. 2d 366.

No. 967, Misc. WILSON ET AL. *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: 398 F. 2d 331.

No. 985, Misc. WILKES *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 987, Misc. GIBSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Marshall Tamor Golding* for the United States.

No. 992, Misc. KROLL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 923.

No. 971, Misc. LYNCH *v.* LANDY, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondents Landy et al. Reported below: 396 F. 2d 440.

No. 997, Misc. RAMOS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1006, Misc. SPENCER *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1022, Misc. HORTON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1023, Misc. THOMPSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1026, Misc. DUVALL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 262 Cal. App. 2d 417, 68 Cal. Rptr. 708.

No. 1030, Misc. BEVERLY *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1034, Misc. PALMER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 214 So. 2d 661.

No. 1052, Misc. BOYD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1053, Misc. SMITH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 40 Ill. 2d 290, 239 N. E. 2d 782.

No. 1054, Misc. FONSECA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 1060, Misc. BOSTICK *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1070, Misc. WALKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1079, Misc. SMITH *v.* MARESCA, UNITED STATES MARSHAL, ET AL. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for respondents.

No. 571, Misc. FITZPATRICK *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Duke W. Dunbar,* Attorney General of Colorado, and *James F. Pamp,* Assistant Attorney General, for respondent.

No. 781, Misc. NELLOMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Howard Moore, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 399 F. 2d 295.

No. 829, Misc. SHEPTIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *P. D. Thomson* for petitioner. *Ellen J. Morphonios* for respondent.

No. 1061, Misc. STUBBLEFIELD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 399 F. 2d 424.

No. 1088, Misc. TAYLOR *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. *C. H. Erskine Smith* for petitioner.

Rehearing Denied.

No. 89, Misc. DVORSKY *v.* UNITED STATES, *ante*, p. 983; and

No. 723, Misc. POSTON *v.* UNITED STATES ET AL., *ante*, p. 946. Motions for leave to file petitions for rehearing denied.

FEBRUARY 24, 1969.

Miscellaneous Orders.

No. 1635, Misc. MALAGON-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Treating the papers in this case as a petition for a writ of certiorari and as a motion of counsel to be relieved from perfecting and prosecuting the petition, we take no present action on the petition and refer the motion to the Court of Appeals for the Ninth Circuit for consideration and action in the light of what petitioner's counsel refers to as paragraph 4 (c) of the "provisions for the representation on appeal of defendants financially unable to obtain representation, adopted by the Judicial Council of the Ninth Circuit, pursuant to the provisions of the Criminal Justice Act of 1964," which is said to require counsel appointed in the Court of Appeals to file a petition for certiorari "if requested to do so by the defendant." *J. Perry Langford* for petitioner. Reported below: 404 F. 2d 604.

No. ——. FUKUMOTO *v.* UNITED STATES. C. A. 9th Cir. Application for bail pending appeal presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

No. 138. POWELL ET AL. *v.* MCCORMACK, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ET AL. C. A. D. C. Cir. Motion of George Meader for leave to file a brief, as *amicus curiae,* granted. *George Meader, pro se,* on the motion. [For earlier orders herein, see, *e. g., ante,* p. 1060.]

No. 413. NORTH CAROLINA ET AL. *v.* PEARCE. C. A. 4th Cir. [Certiorari granted, *ante,* p. 922]; and

No. 418. SIMPSON, WARDEN *v.* RICE. C. A. 5th Cir. [Certiorari granted, *ante,* p. 932.] Motion of American Civil Liberties Union et al. for leave to file a brief, as *amici curiae,* granted. *William W. Van Alstyne* and *Melvin L. Wulf* on the motion.

No. 463. NATIONAL LABOR RELATIONS BOARD *v.* WYMAN-GORDON CO. C. A. 1st Cir. [Certiorari granted, *ante,* p. 932.] Motion of respondent to postpone oral argument denied. *Quentin O. Young* on the motion. *Solicitor General Griswold* for petitioner in opposition.

No. 580. SAMUELS ET AL. *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL.; and

No. 813. FERNANDEZ *v.* MACKELL, DISTRICT ATTORNEY OF QUEENS COUNTY, ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante,* p. 975.] Motion of appellee Mackell to require certification of additional record denied. *Thomas J. Mackell, pro se,* on the motion. *Victor Rabinowitz* for appellants in No. 580 in opposition.

No. 622. MAXWELL *v.* BISHOP, PENITENTIARY SUPERINTENDENT. C. A. 8th Cir. [Certiorari granted, *ante*, p. 997.] Motion of the State of California to remove case from summary calendar granted. *Thomas C. Lynch*, Attorney General of California, *Albert W. Harris, Jr.*, Assistant Attorney General, and *Robert R. Granucci*, Deputy Attorney General, on the motion.

No. 663. TRAYNOR ET AL., DEPUTY COMMISSIONERS *v.* JOHNSON ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 976.] Request of petitioners for additional time for oral argument granted and 20 additional minutes allotted for that purpose. Respondents likewise allotted 20 additional minutes for oral argument.

No. 894. WEITZEN ET AL. *v.* HEIT ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 269, Misc. IN RE DISBARMENT OF ROTHBARD. It having been reported to the Court that Sol Rothbard of Washington, District of Columbia, has been disbarred from the practice of law by the United States Court of Appeals for the District of Columbia Circuit, duly entered on the 18th day of April, 1968, and this Court by order of May 20, 1968 [391 U. S. 911], having suspended the said Sol Rothbard 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 Sol Rothbard 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. 750. HARRINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante,* p. 949.] Motion of petitioner for appointment of counsel granted. It is ordered that *Roger S. Hanson, Esquire,* of Woodland Hills, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 993, Misc. IN RE DISBARMENT OF LICHOTA. Edith Fischer Lichota, of Twinsburg, Ohio, having resigned as a member of the Bar of this Court, it is ordered that her name be stricken from the roll of attorneys admitted to practice in this Court. The rule to show cause heretofore issued [*ante,* p. 812] is discharged.

No. 883, Misc. BISHOP *v.* CICCONE, WARDEN;

No. 1001, Misc. PETERSON *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT;

No. 1175, Misc. SMITH *v.* ROGERS, STATE HOSPITAL SUPERINTENDENT;

No. 1181, Misc. WOOD *v.* TURNER, WARDEN;

No. 1188, Misc. WILLIAMS *v.* CALIFORNIA CONSERVATION CENTER SUPERINTENDENT;

No. 1192, Misc. FURTAK *v.* MANCUSI, WARDEN;

No. 1208, Misc. VINSON *v.* EYMAN, WARDEN, ET AL.;

No. 1260, Misc. MCMAHON *v.* FIELD, MEN'S COLONY SUPERINTENDENT;

No. 1295, Misc. RABON *v.* EYMAN, WARDEN, ET AL.;

No. 1296, Misc. JONES *v.* TURNER, WARDEN;

No. 1312, Misc. HUNT *v.* CRAVEN, WARDEN;

No. 1322, Misc. BOONE *v.* FITZBERGER, WARDEN;

No. 1325, Misc. PEARSON *v.* ADULT PAROLE AUTHORITY OF OHIO ET AL.;

No. 1332, Misc. MCGURRIN *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT; and

No. 1399, Misc. SMITH *v.* NELSON, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1284, Misc. GARRETT ET AL. *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied. *Joe Tonahill* and *Morris Lavine* on the motion.

No. 1251, Misc. GARNER *v.* NEW YORK. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 1094, Misc. BURKHART *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* for the United States in opposition.

No. 1157, Misc. BELCHER *v.* HALLOWS, CHIEF JUSTICE, SUPREME COURT OF WISCONSIN, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1187, Misc. MCKINNEY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted.

No. 662. DEBACKER *v.* BRAINARD, SHERIFF. Appeal from Sup. Ct. Neb. Probable jurisdiction noted. *William G. Line* and *John F. Kerrigan* for appellant. *Melvin Kent Kammerlohr,* Assistant Attorney General of Nebraska, for appellee. Reported below: 183 Neb. 461, 161 N. W. 2d 508.

No. 829. DUTTON, WARDEN *v.* EVANS. Appeal from C. A. 5th Cir. Probable jurisdiction noted. *Arthur K. Bolton,* Attorney General of Georgia, and *Alfred L. Evans, Jr., Marion O. Gordon,* and *Mathew Robins,* Assistant Attorneys General, for appellant. *Robert B. Thompson* for appellee. Reported below: 400 F. 2d 826.

No. 899. UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION ET AL.;

No. 942. BRUNDAGE ET AL. *v.* UNITED STATES ET AL.;

No. 999. CITY OF AUBURN *v.* UNITED STATES ET AL.; and

No. 1003. LIVINGSTON ANTI-MERGER COMMITTEE *v.* INTERSTATE COMMERCE COMMISSION ET AL. Appeals from D. C. D. C. Probable jurisdiction noted. Cases consolidated and a total of four hours allotted for oral argument for these appeals and any other appeals taken from the same judgment as to which jurisdiction may hereafter be noted. MR. JUSTICE FORTAS took no part in the consideration or decision of this matter. *Solicitor General Griswold, Assistant Attorney General Zimmerman, Deputy Solicitor General Springer,* and *Howard E. Shapiro* for the United States, appellant, in No. 899; *Louis B. Dailey* and *Harry Tyson Carter* for appellants Brundage et al. in No. 942; *Robert L. Wald* and *Joel E. Hoffman* for appellant in No. 999; and *Valentine B. Deale* for appellant in No. 1003. *Robert W. Ginnane, Fritz R. Kahn,* and *Jerome Nelson* for appellee Interstate Commerce Commission in all four cases; *Alan F. Wohlstetter* for appellees 230 Pacific Northwest Shippers in No. 899; *Robert Y. Thornton,* Attorney General of Oregon, and *Richard W. Sabin* for appellee Public Utility Commissioner in No. 899; *Hugh B. Cox, Ray Garrett, D. Robert Thomas, Lee B. McTurnan, Anthony Kane, Louis E. Torinus, Earl F. Requa, Frank S. Farrell, Eldon Martin,* and *Richard J. Flynn* for appellees Great Northern Railway Co. et al. in all four cases; and *Edwin O. Schiewe, Raymond K. Merrill, Thomas H. Ploss,* and *Edward H. Foley* for appellee Chicago, Milwaukee, St. Paul & Pacific Railroad Co. in No. 899. [For earlier order herein, see *ante,* p. 994, *sub nom. Great Northern Railway Merger Case.*]

No. 842. TURNER ET AL. *v.* FOUCHE ET AL. Appeal from D. C. S. D. Ga. Probable jurisdiction noted. *Jack Greenberg, Michael Meltsner,* and *Howard Moore, Jr.,* for appellants. *Charles J. Bloch* and *Wilbur D. Owens, Jr.,* for Fouche et al., and *Arthur K. Bolton,* Attorney General, and *Alfred L. Evans, Jr.,* and *J. Lee Perry,* Assistant Attorneys General, for the State of Georgia, appellees. Reported below: 290 F. Supp. 648.

No. 921. BROCKINGTON *v.* RHODES, GOVERNOR OF OHIO, ET AL. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. *Ralph Rudd* for appellant. *Paul W. Brown,* Attorney General of Ohio, *Charles S. Lopeman,* First Assistant Attorney General, and *Julius J. Nemeth,* Assistant Attorney General, for Rhodes et al., and *John T. Corrigan* and *John L. Dowling* for Cipollone et al., appellees.

No. 828, Misc. CAVITT *v.* NEBRASKA. Appeal from Sup. Ct. Neb. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Richard A. Huebner* for appellant. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Melvin Kent Kammerlohr,* Assistant Attorney General, for appellee. Reported below: 182 Neb. 712, 157 N. W. 2d 171; 183 Neb. 243, 159 N. W. 2d 566.

Certiorari Granted. (See also No. 91, *ante,* p. 527; No. 57, Misc., *ante,* p. 533; No. 81, Misc., *ante,* p. 531; No. 110, Misc., *ante,* p. 533; and No. 153, Misc., *ante,* p. 532.)

No. 130. SNIADACH *v.* FAMILY FINANCE CORPORATION OF BAY VIEW ET AL. Sup. Ct. Wis. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Leroy D. Clark,* and *William F. Young, Jr.,* for petitioner. *Byron E. Kopp* for respondent Family Finance Corp. of Bay View. Reported below: 37 Wis. 2d 163, 154 N. W. 2d 259.

No. 934. BRYSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Richard Gladstein* and *Norman Leonard* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson* for the United States. Reported below: 403 F. 2d 340.

No. 777. FIRST NATIONAL BANK IN PLANT CITY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL.; and

No. 932. CAMP, COMPTROLLER OF THE CURRENCY *v.* DICKINSON, COMPTROLLER OF FLORIDA, ET AL. C. A. 5th Cir. Motion of First National Bank of Cornelia, Georgia, et al. for leave to file a brief, as *amici curiae,* granted. Petitions for writs of certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion and these petitions. *Robert S. Edwards* for petitioner in No. 777, and *Solicitor General Griswold, Assistant Attorney General Weisl, John C. Eldridge,* and *Robert E. Kopp* for petitioner in No. 932. *Wm. Reece Smith, Jr.,* and *V. Carroll Webb* for respondents in both cases. *E. Barrett Prettyman, Jr.,* on the motion in both cases in support of the petitions. Reported below: 400 F. 2d 548.

No. 409, Misc. WADE *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris,* Assistant Attorney General, and *Karl S. Mayer,* Deputy Attorney General, for respondents. Reported below: 390 F. 2d 632.

Certiorari Denied. (See also No. 431, *ante,* p. 528; No. 632, *ante,* p. 529; and No. 859, *ante,* p. 527.)

No. 753. PORTER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. *Betty M. Sloan* for petitioner. Reported below: 251 S. C. 393, 162 S. E. 2d 843.

No. 77. HOLLAND ET AL. *v.* LUCAS COUNTY BOARD OF ELECTIONS ET AL. Sup. Ct. Ohio. Certiorari denied. *Robert L. Carter* for petitioners. *John A. DeVictor, Jr.*, for respondents.

No. 262. NAPLES *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. *Dan W. Duffy* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *David L. Kessler* and *Leo J. Conway,* Assistant Attorneys General, for respondent. Reported below: 393 F. 2d 615.

No. 372. CALIFORNIA *v.* SESSLIN. 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 petitioner. Reported below: 68 Cal. 2d 418, 439 P. 2d 321.

No. 432. PEREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Max Cohen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 398 F. 2d 658.

No. 562. BENSON *v.* CARTER, PROBATION OFFICER, ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Evelle J. Younger* for respondents. Reported below: 396 F. 2d 319.

No. 835. D. H. OVERMYER WAREHOUSE CO., INC., ET AL. *v.* FLORIDA STEEL CORP. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Cotton Howell* and *Russell Morton Brown* for petitioners. *Robert C. Ward* for respondent.

No. 650. MARTIN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *W. Walters Miller* for petitioner. *Paul Klasen* for respondent. Reported below: 73 Wash. 2d 616, 440 P. 2d 429.

No. 673. BROCKER *v.* BROCKER. Sup. Ct. Pa. Certiorari denied. *Armand I. Robinson* for petitioner. *John Murrin* for respondent. Reported below: 429 Pa. 513, 241 A. 2d 336.

No. 778. KENT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 397 F. 2d 446.

No. 783. D. C. TRANSIT SYSTEM, INC. *v.* WILLIAMS ET AL. C. A. D. C. Cir. Certiorari denied. *Harvey M. Spear, Leon G. R. Spoliansky,* and *Edmund L. Jones* for petitioner. *Leonard N. Bebchick, pro se,* and for Williams et al., and *Russell W. Cunningham* for Washington Metropolitan Area Transit Commission, respondents. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 824. LYONS ET AL. *v.* DAVOREN, SECRETARY OF STATE OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. *Elliot L. Richardson,* Attorney General of Massachusetts, *pro se, Alan J. Dimond,* Assistant Attorney General, and *Mark L. Cohen,* Deputy Assistant Attorney General, for respondents. Reported below: 402 F. 2d 890.

No. 826. MARIANI *v.* FOLEY, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Leonard Litz* for petitioner. *Solicitor General Griswold* for respondent.

No. 827. PINES *v.* ZEMURRAY ET AL. C. A. 5th Cir. Certiorari denied. *Jacob Rassner* for petitioner. Reported below: 397 F. 2d 810.

No. 828. STERNBACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 402 F. 2d 353.

No. 833. LOKER *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Frederick Bernays Wiener* for petitioner. Reported below: 250 Md. 677, 245 A. 2d 814.

No. 840. HECHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Frederick Klaessig* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 843. LEACH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. S. Moore* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 402 F. 2d 268.

No. 845. SCOTT *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. *Joseph H. Shortell* for petitioner. Reported below: 445 P. 2d 39.

No. 847. LANDWER *v.* VILLAGE OF NORTH BARRINGTON. App. Ct. Ill., 2d Dist. Certiorari denied. *Eva Schwartzman* for petitioner. *Willard L. King* and *Gerald C. Snyder* for respondent. Reported below: 94 Ill. App. 2d 265, 237 N. E. 2d 350.

No. 848. HALL ET UX. *v.* BLEISCH ET UX. C. A. 5th Cir. Certiorari denied. *Royal H. Brin, Jr.*, for petitioners. Reported below: 400 F. 2d 896.

No. 850. FUNSETH *v.* GREAT NORTHERN RAILWAY CO. C. A. 9th Cir. Certiorari denied. *Carlton R. Reiter* for petitioner. *Anthony Kane* and *Woodrow L. Taylor* for respondent. Reported below: 399 F. 2d 918.

No. 855. ULLMAN ET AL. *v.* GRAINGER. C. A. 9th Cir. Certiorari denied. *John N. Frolich* for petitioners. *Arnold M. Quittner* for respondent. Reported below: 396 F. 2d 635.

No. 856. EXCHANGE NATIONAL BANK OF CHICAGO *v.* BONHIVER, RECEIVER, ET AL. C. A. 8th Cir. Certiorari denied. *Edgar Bernhard* for petitioner. *J. Neil Morton* for respondent Bonhiver.

No. 858. MOORE, DBA MOORE'S BARBECUE RESTAURANT *v.* WOOTEN ET AL. C. A. 4th Cir. Certiorari denied. *Douglas P. Connor* for petitioner. Reported below: 400 F. 2d 239.

No. 860. LEWRON TELEVISION, INC. *v.* D. H. OVERMYER LEASING CO., INC. C. A. 4th Cir. Certiorari denied. *Edward L. Blanton, Jr.*, for petitioner. *Russell Morton Brown* for respondent. Reported below: 401 F. 2d 689.

No. 863. RABY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Leo E. Holt* for petitioner. *Elmer C. Kissane* for respondent. Reported below: 40 Ill. 2d 392, 240 N. E. 2d 595.

No. 866. BRUNWASSER *v.* SUAVE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 400 F. 2d 600.

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No. 864. CITY OF HIGHLAND PARK *v.* FIORE ET UX. App. Ct. Ill., 2d Dist. Certiorari denied. *Samuel T. Lawton, Jr.*, for petitioner. Reported below: 93 Ill. App. 2d 24, 235 N. E. 2d 23.

No. 865. BYCZYNSKI ET UX. *v.* NEW YORK CENTRAL DEVELOPMENT CORP. ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. *John A. Berry* and *John E. Cassidy* for petitioners. *D. Robert Thomas* for respondents. Reported below: 95 Ill. App. 2d 474, 238 N. E. 2d 414.

No. 867. SCHERER *v.* MORROW. C. A. 7th Cir. Certiorari denied. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for respondent. Reported below: 401 F. 2d 204.

No. 868. SHOFFEITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert B. Thompson* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 991.

No. 869. F. J. BUCKNER CORP., DBA UNITED ENGINEERING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *George R. Richter, Jr.*, for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 401 F. 2d 910.

No. 873. BEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William H. Beck* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 404 F. 2d 58.

No. 871. GREGORY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Richard F. Watt* and *John M. Bowlus* for petitioner. *Elmer C. Kissane* for respondent. Reported below: 95 Ill. App. 2d 396, 237 N. E. 2d 720.

No. 872. DAVIS *v.* UNITED FRUIT CO. C. A. 2d Cir. Certiorari denied. *James David Auslander* for petitioner. *William M. Kimball* for respondent. Reported below: 402 F. 2d 328.

No. 877. HUGHES *v.* GENGLER. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 404 F. 2d 229.

No. 879. HENZEL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Daniel A. Rezneck* for petitioner. Reported below: 212 So. 2d 92.

No. 881. DAYTON FOOD FAIR STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Jerome Goldman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 399 F. 2d 153.

No. 882. REDDY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Eugene X. Giroux* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 403 F. 2d 26.

No. 890. KING *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *Thomas E. Fox,* Deputy Attorney General of Tennessee, and *Lance D. Evans,* Assistant Attorney General, for respondent.

No. 884. SHAFTER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Eardley, Morton Hollander,* and *Bruno A. Ristau* for the United States. Reported below: 400 F. 2d 584.

No. 885. HOLT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Herbert K. Hyde* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 404 F. 2d 914.

No. 886. UNITED JEWISH APPEAL OF GREATER NEW YORK, INC., ET AL. *v.* SCHAEFLER, EXECUTOR, ET AL. Ct. App. N. Y. Certiorari denied. *Joseph T. Arenson* for petitioners. *Richard Henry Pershan* for respondents Schaefler et al. Reported below: 22 N. Y. 2d 456, 239 N. E. 2d 875.

No. 891. COHEN ET UX. *v.* BREDEHOEFT ET AL. C. A. 5th Cir. Certiorari denied. *Presley E. Werlein, Jr.,* and *Charles A. Easterling* for petitioners. *Edward A. Cazares* for respondents. Reported below: 402 F. 2d 61.

No. 903. BAILEY'S BAKERY, LTD. *v.* CONTINENTAL BAKING CO. ET AL. C. A. 9th Cir. Certiorari denied. *Maxwell Keith, Shiro Kashiwa,* and *David Berger* for petitioner. *John H. Schafer* and *Herbert Dym* for respondents. Reported below: 401 F. 2d 182.

No. 909. HAHN *v.* KENTUCKY ALCOHOLIC BEVERAGE CONTROL BOARD ET AL. Ct. App. Ky. Certiorari denied. *William F. Hopkins* for petitioner. *Chat Chancellor* for respondents. Reported below: 431 S. W. 2d 501.

No. 905. MORRISON *v.* RARICK. Sup. Ct. La. Certiorari denied. *Bascom D. Talley, Jr.*, for petitioner. Reported below: 252 La. 872, 214 So. 2d 545.

No. 907. PIONEER MOTOR SERVICE, INC. *v.* PIONEER TRANSFER & WAREHOUSE CO. ET AL. C. A. 7th Cir. Certiorari denied. *Irving Goodman* for petitioner. *Roy Van Der Kamp* for respondents. Reported below: 402 F. 2d 438.

No. 910. DRENT ET AL. *v.* MCKEAN ET AL. C. A. 5th Cir. Certiorari denied. *Bernard D. Fischman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander,* and *Robert E. Kopp* for respondents.

No. 915. COLSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Gerald F. White* for petitioner. *Robert Morgan,* Attorney General of North Carolina, and *Bernard A. Harrell,* Assistant Attorney General, for respondent. Reported below: 274 N. C. 295, 163 S. E. 2d 376.

No. 918. HARLEYSVILLE MUTUAL INSURANCE CO. *v.* JOHNSON. Super. Ct. Pa. Certiorari denied. *Paul A. Lockrey* for petitioner. Reported below: 212 Pa. Super. 89, 239 A. 2d 828.

No. 919. COBB ET AL. *v.* JOHNS ET AL. C. A. D. C. Cir. Certiorari denied. *John M. Bixler, James F. Gordy,* and *James A. Crooks* for petitioners. *William J. Grove* and *John F. Doyle* for respondents. Reported below: 131 U. S. App. D. C. 85, 402 F. 2d 636.

No. 930. ELLENBURG *v.* SHEPHERD ET AL. C. A. 6th Cir. Certiorari denied. *Philip M. Carden* for petitioner. *Herbert R. Silvers* for respondents.

No. 920. THOMAS, ADMINISTRATRIX, ET AL. *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *Henry Lincoln Johnson, Jr.,* for Thomas, and *Philip J. Lesser* and *I. Irwin Bolotin* for Wynn, petitioners. *Charles T. Duncan, Hubert B. Pair, Richard W. Barton,* and *John R. Hess* for respondent. Reported below: 130 U. S. App. D. C. 365, 401 F. 2d 430.

No. 923. CONSUMERS PRODUCTS OF AMERICA, INC., ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. *Theodore R. Mann* for petitioners. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, James McI. Henderson,* and *Charles C. Moore, Jr.,* for respondent Federal Trade Commission. Reported below: 400 F. 2d 930.

No. 926. WRIGHT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 403 F. 2d 43.

No. 936. FESTA *v.* CITY OF PORTSMOUTH. Sup. Ct. App. Va. Certiorari denied. *Willard J. Moody* for petitioner. *M. A. Korb, Jr.,* for respondent.

No. 943. LOUISVILLE & JEFFERSON COUNTY AIR BOARD *v.* SHIPP ET UX. Ct. App. Ky. Certiorari denied. *James W. Stites* for petitioner. *J. W. Jones* for respondents. Reported below: 431 S. W. 2d 867.

No. 966. CORRIGAN, ADMINISTRATOR *v.* E. W. BOHREN TRANSPORT CO. C. A. 6th Cir. Certiorari denied. *C. D. Lambros* and *Anthony O. Calabrese, Jr.,* for petitioner. *S. Burns Weston* for respondent. Reported below: 408 F. 2d 301.

No. 963. KATZ *v.* STATE BOARD OF MEDICAL EXAMINERS. Sup. Ct. Fla. Certiorari denied. *Milton E. Grusmark* for petitioner. *William J. Roberts* for respondent. Reported below: 213 So. 2d 714.

No. 344. BROWN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Carl E. F. Dally* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent. Reported below: 437 S. W. 2d 828.

No. 587. SHELTON *v.* STYNCHCOMBE, SHERIFF. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Pierre Howard* and *James L. Mayson* for petitioner. *Lewis R. Slaton* and *Carter Goode* for respondent. Reported below: 224 Ga. 451, 162 S. E. 2d 426.

No. 822. BOYLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 395 F. 2d 413.

No. 922. BURTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *J. B. Tietz* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 402 F. 2d 536.

No. 651. CHRISTOFFERSON ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Francis Hoague* for petitioners. *James E. Kennedy* for respondent. Reported below: 74 Wash. 2d 154, 443 P. 2d 815.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, commands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." The question presented by this case is whether the Constitution requires that, at or before the time a warrant issues, the judicial officer make a permanent record of the evidentiary basis for its issuance. In this case the entire record of the proceeding on the application for the warrant consisted of the complaint for the warrant, a copy of the warrant, and the return on the warrant. The complaint, considered alone, failed to state sufficient probable cause for the warrant and, on that ground, petitioner made a motion to suppress the evidence seized on its authority. The State resisted the motion on the basis of affidavits of the judge who issued the warrant, of the prosecuting attorney who applied for it, and of two police officers, purporting to set forth what had transpired at the hearing on the application. The finding of probable cause was sustained on the basis that the affidavits supplied the evidentiary basis not provided in the complaint. Federal courts have held that this procedure cannot be countenanced under Fed. Rule Crim. Proc. 41 (c), *United States* v. *Birrell,* 242 F. Supp. 191 (1965); *Rosencranz* v. *United States,* 356 F. 2d 310 (1966); *United States* v. *Walters,* 193 F. Supp. 788 (1961); *United States* v. *Sterling,* 369 F. 2d 799, 802 n. 2 (1966). The substantive right created by the requirement of probable cause is hardly accorded full sweep without an effective procedural means of assuring meaningful review of a deter-

mination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of that right. It is for this reason that some States have imposed the requirement of a contemporaneous record. Thus, in *Glodowski* v. *State,* 196 Wis. 265, 271–272, 220 N. W. 227, 230 (1928), the Wisconsin Supreme Court stated:

> "It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant was issued. Judicial action must be reviewed upon the record made at or before the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made. This record of the facts presented to the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form and made a part of the record which may be transmitted to the reviewing court."

It seems to me that there is a substantial constitutional issue presented by the question tendered by petitioner. I would therefore grant the petition.

No. 500, Misc. METZE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Eleanor Jackson Piel* for petitioner. *Elliott Golden* and *Aaron Nussbaum* for respondent.

No. 931. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. *v.* STATE TAX COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William H. Allen* for petitioner. *John C. Danforth,* Attorney General of Missouri, and *Louis C. DeFeo, Jr.,* and *Walter W. Nowotny, Jr.,* Assistant Attorneys General, for respondents. Reported below: 436 S. W. 2d 650.

No. 626. LYNCH, ATTORNEY GENERAL OF CALIFORNIA, ET AL. *v.* GILMORE ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *pro se,* and *Robert R. Granucci* and *George R. Nock,* Deputy Attorneys General, for petitioners. Reported below: 400 F. 2d 228.

No. 744. BETO, CORRECTIONS DIRECTOR *v.* SPENCER. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *A. J. Carubbi, Jr.,* Executive Assistant Attorney General, and *Robert C. Flowers, Jim Vollers,* and *Howard M. Fender,* Assistant Attorneys General, for petitioner. *Anthony G. Amsterdam, Michael D. Matheny,* and *Jack Greenberg* for respondent. Reported below: 398 F. 2d 500.

No. 836. POST ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Edward Bennett Williams* and *Raymond W. Bergan* for Post et al., and *Thomas R. Dyson, Jr.,* for Pickett, petitioners. *Solicitor General Griswold* for the United States. Reported below: —— U. S. App. D. C. ——, 407 F. 2d 319.

No. 862. PEYTON, PENITENTIARY SUPERINTENDENT *v.* GILLESPIE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for petitioner. *Henry H. Tiffany* for respondent. Reported below: 399 F. 2d 683.

No. 797. SLOANE ET UX. *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Paul E. Sloane, pro se,* and for other petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Eardley,* and *Alan S. Rosenthal* for respondent. Reported below: 396 F. 2d 641.

No. 832. WESTERN SEED PRODUCTION CORP. *v.* CAMPBELL, JUDGE. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Robert A. Leedy* for petitioner. *E. Frederick Velikanje* for respondent. Reported below: 250 Ore. 262, 442 P. 2d 215.

No. 888. PACIFIC FAR EAST LINE, INC., ET AL. *v.* PACIFIC SEAFARERS, INC., ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Frederick M. Rowe, Edward D. Ransom,* and *R. Frederic Fisher* for petitioners. *Robert E. Sher, Abraham J. Harris,* and *Marvin J. Coles* for respondents. Reported below: 131 U. S. App. D. C. 226, 404 F. 2d 804.

No. 506, Misc. RAINES *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 912. IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. *v.* PHILIP MORRIS INC. C. A. 4th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *W. Brown Morton, Jr.,* for petitioner. *Leslie D. Taggart* and *Lewis T. Booker* for respondent. Reported below: 401 F. 2d 179.

No. 849. INGALLS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Frank Bainbridge* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Meyer Rothwacks,* and *Louis M. Kauder* for the United States. Reported below: 399 F. 2d 143.

No. 853. BATSELL *v.* UNITED STATES. C. A. 8th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 403 F. 2d 395.

No. 875. ARMEMENT DEPPE, S. A., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. *Leonard G. James* and *F. Conger Fawcett* for petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Eardley,* and *John C. Eldridge* for the United States. Reported below: 399 F. 2d 794.

No. 284, Misc. ORR *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen,* Assistant Attorney General, for respondent.

No. 927. GRANELLO, aka BURNS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Irving Anolik* and *Michael P. Direnzo* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 403 F. 2d 337.

No. 941. CROSS ET AL. *v.* THE KAIMANA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Richard Ernst* and *John Paul Jennings* for petitioners. *John Hays* for Pacific Far East Line, Inc., on behalf of S. S. *Kaimana* et al., and *Solicitor General Griswold* for the United States on behalf of S. S. *Coast Progress,* respondents. Reported below: 401 F. 2d 182.

No. 490, Misc. SOYKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 394 F. 2d 443 and 452.

No. 507, Misc. TOLSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 553, Misc. ROACH *v.* MAULDIN, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. *L. Hugh Kemp* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, and *Marion O. Gordon* and *Mathew Robins,* Assistant Attorneys General, for respondents. Reported below: 391 F. 2d 907.

No. 625, Misc. OTERO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *John W. Watson III* for petitioner. Reported below: 211 So. 2d 214.

No. 629, Misc. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Emmett Colvin, Jr.,* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, *Robert C. Flowers* and *Gilbert J. Pena,* Assistant Attorneys General, and *W. V. Geppert* for respondent. Reported below: 429 S. W. 2d 895.

No. 680, Misc. VELEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John W. Watson III* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 397 F. 2d 788.

No. 721, Misc. TENDER ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Francis B. Burch,* Attorney General of Maryland, and *Donald Needle,* Assistant Attorney General, for respondent.

No. 729, Misc. HUSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Anthony Savage, Jr.,* for petitioner. *James E. Kennedy* for respondent. Reported below: 73 Wash. 2d 660, 440 P. 2d 192.

No. 733, Misc. OUGHTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 826, Misc. STIDHAM *v.* SWENSON, WARDEN. Sup. Ct. Mo. Certiorari denied. *Norman H. Anderson,* Attorney General of Missouri, and *B. J. Jones,* Assistant Attorney General, for respondent.

No. 790, Misc. POPE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Ronald L. Gainer* for the United States. Reported below: 398 F. 2d 834.

No. 836, Misc. HULETT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 840, Misc. MACKLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 865, Misc. STEPHENS *v.* CHAIRMAN, U. S. RAILROAD RETIREMENT BOARD, ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for respondents. Reported below: 395 F. 2d 968.

No. 912, Misc. JACKSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 936, Misc. PASTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States.

No. 968, Misc. MAGEE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Peter Murray* and *Raymond A. Brown* for petitioner. Reported below: 52 N. J. 352, 245 A. 2d 339.

No. 980, Misc. PARKER *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: 400 F. 2d 248.

No. 960, Misc. DIRRING *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 400 F. 2d 578.

No. 981, Misc. KAUFMAN *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: 393 F. 2d 172.

No. 986, Misc. HACKER *v.* DISTRICT COURT OF SEDGWICK COUNTY. Sup. Ct. Kan. Certiorari denied.

No. 988, Misc. MCKINNEY *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for respondents.

No. 991, Misc. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Kirk M. McAlpin* and *A. Felton Jenkins, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 399 F. 2d 318.

No. 999, Misc. DA COSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Luke McKissack* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 397 F. 2d 249.

No. 1024, Misc. CASTILLO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1010, Misc. WEEMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 398 F. 2d 274.

No. 1019, Misc. WILLIAMS *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: 399 F. 2d 492.

No. 1027, Misc. GOLDBERG ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for Goldberg, and *Gilbert S. Rosenthal* for Teret, petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 401 F. 2d 644.

No. 1033, Misc. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1038, Misc. CRAWFORD *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *W. L. Longshore* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *Leslie Hall* and *Walter S. Turner,* Assistant Attorneys General, for respondent. Reported below: 44 Ala. App. 393, 210 So. 2d 685.

No. 1051, Misc. MAGUIRE *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: 396 F. 2d 327.

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No. 1039, Misc. NEWFIELD *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.

No. 1040, Misc. HORN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1041, Misc. WALLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Michael F. Dillon* for respondent.

No. 1042, Misc. TANKSLEY *v.* BOWMAN, U. S. DISTRICT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 1043, Misc. SHARP *v.* KANSAS ET AL. Sup. Ct. Kan. Certiorari denied.

No. 1046, Misc. BANKSTON *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 1050, Misc. CHASTAIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 262 Cal. App. 2d 433, 68 Cal. Rptr. 765.

No. 1056, Misc. NETTLES *v.* ILLINOIS. Cir. Ct., Iroquois County, Ill. Certiorari denied.

No. 1057, Misc. THERIAULT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 79.

No. 1059, Misc. COOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert E. Pembleton* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 400 F. 2d 877.

No. 1064, Misc. CLEMMONS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1067, Misc. KNIGHT *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1068, Misc. HUSKEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1073, Misc. CANCEL-MIRANDA ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Len W. Holt* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1074, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1075, Misc. BOGART ET UX. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Peter D. Bogart, pro se,* and for other petitioner.

No. 1076, Misc. TREST *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1077, Misc. MCGURRIN *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1082, Misc. DENNIS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 1087, Misc. DIKOVICS *v.* DISTRICT COURT, JEFFERSON COUNTY, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 1085, Misc. GATES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1089, Misc. WILSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Mitchell A. Kramer* for petitioner. Reported below: 431 Pa. 21, 244 A. 2d 734.

No. 1090, Misc. SALCIDO *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 263 Cal. App. 2d 1, 69 Cal. Rptr. 193.

No. 1091, Misc. DEARINGER ET UX. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Joseph D. Mladinov* for respondent. Reported below: 73 Wash. 2d 563, 439 P. 2d 971.

No. 1093, Misc. DEJARNETTE *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1096, Misc. WEST *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: 399 F. 2d 467.

No. 1098, Misc. TAYLOR *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. *Fred Blanton, Jr.,* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark* and *Walter S. Turner,* Assistant Attorneys General, for respondent. Reported below: 282 Ala. 567, 213 So. 2d 566.

No. 1103, Misc. MADISON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 281 Minn. 170, 160 N. W. 2d 680.

No. 1099, Misc. BATES *v.* McMANN, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1100, Misc. LAWRENCE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1109, Misc. AREY ET AL. *v.* BROWN, DIRECTOR, VIRGINIA DEPARTMENT OF WELFARE AND INSTITUTIONS. C. A. 4th Cir. Certiorari denied.

No. 1110, Misc. CAMPBELL *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 1111, Misc. McDANIEL *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 1113, Misc. ROCHA *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: 401 F. 2d 529.

No. 1114, Misc. BERRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1115, Misc. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Murray C. Goldman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 401 F. 2d 748.

No. 1116, Misc. WILLIAMS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1117, Misc. GILBERT *v.* LaVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1121, Misc. INGRAM *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1122, Misc. TRIGG *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1123, Misc. LOPEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1124, Misc. PERRY *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Ct. Crim. App. Tex. Certiorari denied.

No. 1126, Misc. MORALES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Julius J. Novack* for petitioner. Reported below: 263 Cal. App. 2d 368, 69 Cal. Rptr. 402.

No. 1127, Misc. MERCER *v.* AMARANDO, CLERK OF QUARTER SESSIONS COURT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1134, Misc. MARTIN *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1136, Misc. BERUBE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States. Reported below: 401 F. 2d 773.

No. 1143, Misc. HOLLAND *v.* SHEEHY, REFORMATORY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for respondents.

No. 1137, Misc. GADSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 211 So. 2d 857.

No. 1139, Misc. FURTAK *v.* MANCUSI, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 1141, Misc. WILLIAMS *v.* DUTTON, WARDEN. C. A. 5th Cir. Certiorari denied. *James W. Dorsey* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, and *Alfred L. Evans, Jr.,* and *Marion O. Gordon,* Assistant Attorneys General, for respondent. Reported below: 400 F. 2d 797.

No. 1142, Misc. STEVENSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1144, Misc. LONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1145, Misc. KENNETT *v.* MUNICIPAL COURT, LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied.

No. 1147, Misc. RAPP *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1148, Misc. VAN DUYNE *v.* YEAGER, PRINCIPAL KEEPER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1150, Misc. MERCURI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1154, Misc. DARBY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 3 Md. App. 407, 239 A. 2d 584.

No. 1151, Misc. WHITSON *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1152, Misc. POSEY *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 1155, Misc. COVIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1156, Misc. GUNNER *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1160, Misc. NEWMAN *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied.

No. 1163, Misc. PRETLOW *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1164, Misc. ELLIS ET UX. *v.* HARADA ET UX. Sup. Ct. Hawaii. Certiorari denied.

No. 1165, Misc. DIAMOND *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1166, Misc. KONCZAK *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1169, Misc. CONOVER *v.* HEROLD, STATE HOSPITAL DIRECTOR. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 1176, Misc. JAIMEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1177, Misc. HANEY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 1178, Misc. MONAHAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1180, Misc. ELKSNIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1182, Misc. SIMONS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 2d 533, 240 N. E. 2d 22.

No. 1186, Misc. THWING *v.* SOUTH DAKOTA. Cir. Ct. S. D., 4th Jud. Cir. Certiorari denied.

No. 1189, Misc. GUENTHER *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. Reported below: 282 Ala. 620, 213 So. 2d 679.

No. 1191, Misc. WHITE *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1194, Misc. STEBBINS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied. *Earle K. Shawe* and *Robert E. Anderson* for State Farm Mutual Automobile Insurance Co. et al., and *James F. Bromley* for Keystone Insurance Co. et al., respondents.

No. 1196, Misc. CHESNUT ET AL. *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 20 Utah 2d 268, 437 P. 2d 197.

No. 1199, Misc. MULL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 402 F. 2d 571.

No. 1197, Misc. BAINES ET AL. *v.* MCGRATH, CORRECTION COMMISSIONER. Ct. App. N. Y. Certiorari denied. *William M. Kunstler, Michael Meltsner,* and *Melvyn Zarr* for petitioners.

No. 1201, Misc. CASIAS ET AL. *v.* COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 398 F. 2d 486.

No. 1203, Misc. PENNINGTON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Albert M. Horn* for petitioner. *Lewis R. Slaton, J. Walter Le Craw,* and *Carter Goode* for respondent. Reported below: 117 Ga. App. 701, 161 S. E. 2d 327.

No. 1204, Misc. STUBBS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Bruce K. Carpenter* for petitioner.

No. 1205, Misc. WALLACE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1206, Misc. HUSSAR *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1210, Misc. CONLON *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1211, Misc. PORTER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 201 Kan. 778, 443 P. 2d 360.

No. 1214, Misc. OATIS *v.* NELSON, WARDEN. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 264 Cal. App. 2d 324, 70 Cal. Rptr. 524.

No. 1213, Misc. SCHLETTE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1217, Misc. HULL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1219, Misc. BOYNTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1220, Misc. STANLEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1222, Misc. MAJOR *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 354 Mass. 666, 241 N. E. 2d 822.

No. 1223, Misc. KUK *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 1227, Misc. TANNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 401 F. 2d 281.

No. 1228, Misc. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 1229, Misc. SMITH *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1234, Misc. STEVENSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Arnold T. Taub* for respondent.

No. 1238, Misc. PHILLIPS *v.* GREENE COUNTY, TENNESSEE. C. A. 6th Cir. Certiorari denied. *James N. Hardin* for respondent.

No. 589, Misc. SULLIVAN *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

After denying petitioner's motion to suppress, the trial court below admitted into evidence a tie clasp, keys, radio, and coins which had been searched for and seized in the home of petitioner's mother, where they had been left by petitioner. Although the trial judge found invalid the search warrant under which the police purported to conduct their search, he nevertheless held that these items were admissible against petitioner because his mother had consented to the search and, in the alternative, because petitioner lacked standing to challenge the search and seizure. The first ground advanced by the trial court for denying the suppression motion is appropriate for reconsideration in light of the Court's subsequent decision in *Bumper* v. *North Carolina,* 391 U. S. 543 (1968). The second ground plainly is inconsistent with the Court's decision in *United States* v. *Jeffers,* 342 U. S. 48 (1951), where it was held that the Fourth Amendment protects "effects" as well as "houses" and that the defendant "unquestionably had standing to object" to the warrantless seizure of narcotics which he had left in his aunts' hotel room. I would grant certiorari in this case to consider the apparent conflict between the decision below and the decisions of this Court in *Jeffers* and *Bumper.*

No. 1253, Misc. BURKE *v.* LANGLOIS, WARDEN. Sup. Ct. R. I. Certiorari denied. *Herbert F. De Simone,* Attorney General of Rhode Island, *Donald P. Ryan,* Assistant Attorney General, and *Irving Brodsky* and *Luc R. La Brosse,* Special Assistant Attorneys General, for respondent. Reported below: —— R. I. ——, 244 A. 2d 593.

No. 1298, Misc. DUNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James F. Hewitt* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 404 F. 2d 447.

No. 1240, Misc. DURSO ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *John J. Crown* for petitioner Durso. Reported below: 40 Ill. 2d 242, 239 N. E. 2d 842.

No. 1277, Misc. MAYOCK *v.* MARTIN, STATE HOSPITAL SUPERINTENDENT. Sup. Ct. Conn. Certiorari denied. *Joseph T. Sweeney* for petitioner. Reported below: 157 Conn. 56, 245 A. 2d 574.

No. 590, Misc. ASHBY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert Y. Button,* Attorney General of Virginia, *R. D. McIlwaine III,* First Assistant Attorney General, and *Charles Shepherd Cox, Jr.,* Assistant Attorney General, for respondent.

No. 1084, Misc. IRBY ET AL. *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. 1212, Misc. BEARDEN *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: 403 F. 2d 782.

Rehearing Denied.

No. 14. COMMONWEALTH COATINGS CORP. *v.* CONTINENTAL CASUALTY CO. ET AL., *ante,* p. 145;

No. 17. UNITED STATES *v.* DONRUSS CO., *ante,* p. 297;

No. 451. FORT *v.* ILLINOIS, *ante,* p. 1014;

No. 490. BOYD ET AL. *v.* CLARK, ATTORNEY GENERAL, ET AL., *ante,* p. 316;

No. 572. CLARK, ATTORNEY GENERAL, ET AL. *v.* GABRIEL, *ante,* p. 256;

No. 583. SANNER ET UX. *v.* TRUSTEES OF THE SHEPPARD & ENOCH PRATT HOSPITAL, *ante,* p. 982;

No. 648. MARKHAM ADVERTISING CO., INC., ET AL. *v.* WASHINGTON ET AL., *ante,* p. 316;

No. 671. LEONARD, ADMINISTRATRIX *v.* WHARTON, ADMINISTRATOR, *ante,* p. 1028;

No. 733. WILLIAMS ET AL. *v.* VIRGINIA STATE BOARD OF ELECTIONS ET AL., *ante,* p. 320;

No. 734. ALASKA ET AL. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL–CIO, ET AL., *ante,* p. 405;

No. 737. NAPUE *v.* UNITED STATES, *ante,* p. 1024;

No. 745. HILLIARD *v.* CITY OF GAINESVILLE, *ante,* p. 321;

No. 752. MILTON FRANK ALLEN PUBLICATIONS, INC. *v.* GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC., *ante,* p. 1025;

No. 199, Misc. LEVY ET AL. *v.* MONTGOMERY COUNTY ET AL., *ante,* p. 877;

No. 803, Misc. WEBB *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT, *ante,* p. 1033;

No. 820, Misc. WILLIAMS *v.* UNITED STATES, *ante,* p. 1034;

No. 835, Misc. DOONER *v.* BUCKMAN, STATE HOSPITAL DIRECTOR, *ante,* p. 1033; and

No. 833, Misc. BUMPUS *v.* MASSACHUSETTS, *ante,* p. 1034. Petitions for rehearing denied.

No. 873, Misc. WATKINS *v.* WISCONSIN, *ante*, p. 1036;

No. 889, Misc. PAULEKAS *v.* CLARK, ATTORNEY GENERAL, ET AL., *ante*, p. 1037;

No. 961, Misc. ANDERTEN *v.* ERICKSON, WARDEN, *ante*, p. 1041;

No. 1008, Misc. SCHIAVONI, ADMINISTRATOR *v.* HONUS WAGNER CO., *ante*, p. 1042; and

No. 1047, Misc. MCNEILL *v.* STATE USE INDUSTRIES, AUTOMOBILE REGISTRATION PLATES DEPARTMENT, *ante*, p. 1059. Petitions for rehearing denied.

No. 740, Misc. BELTOWSKI *v.* MINNESOTA, *ante*, pp. 988, 1045. Motion for leave to file second petition for rehearing denied.

No. 798, Misc. JOHNSON *v.* UNITED STATES, *ante*, p. 1059; and

No. 884, Misc. CACHOIAN *v.* UNITED STATES, *ante*, p. 1044. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

Assignment Orders.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims on February 4, 1969, 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.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit beginning February 18, 1969, and ending February 20, 1969, 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.

FEBRUARY 28, 1969.

Dismissal Under Rule 60.

No. 1343, Misc. HAVEN *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Solicitor General Griswold* for the United States. Reported below: 403 F. 2d 384.

MARCH 3, 1969.

Miscellaneous Orders.

No. 436. RODRIGUE ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 932.] Motion for leave to file petitioners' reply brief after argument granted. *Philip E. Henderson* on the motion.

No. 1452, Misc. FOX *v.* BROWN, SECRETARY OF THE AIR FORCE, ET AL. C. A. 2d Cir. Application for stay pending review on certiorari presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Moses M. Falk* for applicant. *Solicitor General Griswold* in opposition. Reported below: 402 F. 2d 837.

No. 901, Misc. WATSON *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Arnold O. Overoye*, Deputy Attorney General, in opposition.

No. 1247, Misc. MAGEE *v.* SCHADE ET AL.; and

No. 1257, Misc. FOSTER *v.* CUMMINGS, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied. *Solicitor General Griswold* in opposition in both cases.

No. 1336, Misc. DELAGARDE *v.* KRUEGER, WARDEN;

No. 1374, Misc. SHEFTON *v.* WARDEN, MARYLAND PENITENTIARY;

No. 1384, Misc. CARTER *v.* MITCHELL, ATTORNEY GENERAL, ET AL.; and

No. 1397, Misc. BARNES *v.* TEXAS ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 908. CARTER ET AL. *v.* JURY COMMISSION OF GREENE COUNTY ET AL. Appeal from D. C. N. D. Ala. Probable jurisdiction noted and case set for oral argument immediately following No. 842 [*ante*, p. 1078.] *Jack Greenberg, Norman C. Amaker,* and *Orzell Billingsley, Jr.,* for appellants. *MacDonald Gallion,* Attorney General of Alabama, and *Robert P. Bradley,* Assistant Attorney General, for appellees. Reported below: 298 F. Supp. 181.

No. 938. HADLEY ET AL. *v.* JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY ET AL. Appeal from Sup. Ct. Mo. Probable jurisdiction noted. *Irving Achtenberg* for appellants. *William J. Burrell* and *Heywood H. Davis* for Junior College District of Metropolitan Kansas City et al., and *John C. Danforth, pro se,* and *Louis C. DeFeo, Jr.,* Assistant Attorney General, for the Attorney General of Missouri, appellees. Reported below: 432 S. W. 2d 328.

Certiorari Granted.

No. 709, Misc. ASHE *v.* SWENSON, WARDEN. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Norman H. Anderson,* Attorney General of Missouri, and *Maxim N. Bach,* Assistant Attorney General, for respondent. Reported below: 399 F. 2d 40.

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No. 798. UNITED STATES *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL.; and

No. 997. CARR ET AL. *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. *Solicitor General Griswold, Assistant Attorney General Pollak,* and *Nathan Lewin* for the United States in No. 798, and *Fred D. Gray, Jack Greenberg, James M. Nabrit III,* and *Melvyn Zarr* for petitioners in No. 997. *Vaughan Hill Robison* and *Joseph D. Phelps* for respondents in both cases. Reported below: 400 F. 2d 1, 402 F. 2d 782.

No. 900. DETROIT & TOLEDO SHORE LINE RAILROAD CO. *v.* UNITED TRANSPORTATION UNION. C. A. 6th Cir. Motion to substitute United Transportation Union in place of Brotherhood of Locomotive Firemen & Enginemen as the party respondent granted. Certiorari granted. *Francis M. Shea, Ralph J. Moore, Jr., David W. Miller, James A. Wilcox,* and *John M. Curphey* for petitioner. *Harold C. Heiss* and *Richard R. Lyman* for respondent. Reported below: 401 F. 2d 368.

No. 925. NATIONAL LABOR RELATIONS BOARD *v.* J. H. RUTTER-REX MANUFACTURING CO., INC., ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Allison W. Brown, Jr.,* for petitioner. *Peter H. Beer* for respondent J. H. Rutter-Rex Manufacturing Co., Inc. Reported below: 399 F. 2d 356.

Certiorari Denied.

No. 913. SARISOHN *v.* APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT. Ct. App. N. Y. Certiorari denied. *Frederic Block* for petitioner. *Solomon A. Klein* for respondent.

No. 948. VON CARSTANJEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Robert C. Lea, Jr.*, for petitioner. *Solicitor General Griswold* for the United States.

No. 951. MUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John B. Brant* for the United States. Reported below: 405 F. 2d 40.

No. 952. J. H. RUTTER-REX MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. *Peter H. Beer* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent National Labor Relations Board. Reported below: 399 F. 2d 356.

No. 957. CUNARD STEAMSHIP CO., LTD. *v.* BURNS ET AL. C. A. 2d Cir. Certiorari denied. *Thomas V. Kingham* for petitioner. *Chester A. Hahn* for Burns, and *Sidney A. Schwartz* for John T. Clark & Son, respondents. Reported below: 404 F. 2d 60.

No. 960. KAZUBOWSKI *v.* KAZUBOWSKI. App. Ct. Ill., 3d Dist. Certiorari denied. *Frank J. Delany* and *Ray E. Dougherty* for petitioner. *Paul A. Cushman* for respondent. Reported below: 93 Ill. App. 2d 126, 235 N. E. 2d 664.

No. 962. PATAT ET AL. *v.* DAY COMPANIES, INC. C. A. 5th Cir. Certiorari denied. *Hosea Alexander Stephens* for petitioners. *James D. Maddox* for respondent. Reported below: 403 F. 2d 792.

No. 965. MCKENZIE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 964. INTER NATIONAL BANK OF MIAMI *v.* BROCK, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. *Sam I. Silver* for petitioner. *Irving M. Wolff* for respondents. Reported below: 400 F. 2d 833.

No. 1053. FAIRCLOTH ET VIR *v.* HESTER. C. A. 5th Cir. Certiorari denied. *Albert W. Stubbs* and *Jesse G. Bowles* for respondent. Reported below: 405 F. 2d 620.

No. 780. FRANKLIN LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Louis F. Gillespie, Frederick H. Stone, Dennis G. Lyons,* and *George B. Gillespie* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Gilbert E. Andrews,* and *Thomas L. Stapleton* for the United States. *Fred C. Scribner, Jr.,* and *Thomas C. Thompson, Jr.,* for American Life Convention, as *amicus curiae,* in support of the petition. Reported below: 399 F. 2d 757.

No. 896. KALERAK ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *George Kaufmann* for petitioners. *Solicitor General Griswold, Acting Assistant Attorney General Taylor,* and *Roger P. Marquis* for Hickel, and *G. Kent Edwards,* Attorney General of Alaska, and *Robert L. Hartig,* Assistant Attorney General, for the State of Alaska, respondents. Reported below: 396 F. 2d 746.

No. 947. BUETTNER ET AL. *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Mark P. Friedlander, Mark P. Friedlander, Jr., Blaine P. Friedlander,* and *Harry P. Friedlander* for petitioners. *William B. Moore* for respondent.

No. 851. GEFEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Joseph M. Glickstein, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Loring W. Post,* and *Robert I. Waxman* for the United States. Reported below: 400 F. 2d 476.

No. 949. KAISER INDUSTRIES CORP. ET AL. *v.* MCLOUTH STEEL CORP. C. A. 6th Cir. Motion of Government of Austria for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *William H. Webb, John A. Dienner, John M. Webb, W. Brown Morton, Jr.,* and *George E. Brand, Jr.,* for petitioners. *William B. Cudlip, John Vaughan Groner,* and *Ronald F. Ball* for respondent. *David Ginsburg* for Government of Austria, as *amicus curiae,* in support of the petition. Reported below: 400 F. 2d 36.

No. 726, Misc. SMITH *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Robert C. Flowers* and *Howard M. Fender,* Assistant Attorneys General, and *Hawthorne Phillips* for respondent. Reported below: 395 F. 2d 747.

No. 940. KENNEY *v.* AMERICAN CAN CO. C. A. 9th Cir. Certiorari and other relief denied. Reported below: 402 F. 2d 478.

No. 688, Misc. HANGER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 398 F. 2d 91.

No. 968. STANEK *v.* CIVIL SERVICE COMMISSION OF CITY OF PITTSBURGH ET AL. Allegheny County Ct. (now Common Pleas Ct.). Certiorari denied. *Robert E. Kline* for petitioner. *Robert E. Dauer* for respondents.

No. 753, Misc. HAYNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James W. Sherman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Ronald L. Gainer* for the United States. Reported below: 398 F. 2d 980.

No. 773, Misc. GAFFORD *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 440 P. 2d 405.

No. 831, Misc. BULLARD *v.* SHEEHY, REFORMATORY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 978, Misc. GUIDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 400 F. 2d 73.

No. 1080, Misc. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederic A. Johnson* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1171, Misc. FULLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Ezekiel G. Stoddard* and *A. Alvis Layne* for petitioner. *Solicitor General Griswold, Acting Assistant Attorney General Kossack, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: —— U. S. App. D. C. ——, 407 F. 2d 1199.

No. 1153, Misc. BONICAMP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1195, Misc. GLAZIOU 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: 402 F. 2d 8.

No. 1225, Misc. BYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 402 F. 2d 492.

No. 1232, Misc. BROWN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 41 Ill. 2d 230, 242 N. E. 2d 242.

No. 1235, Misc. WHITE *v.* ARIZONA EX REL. EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1236, Misc. LINZY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1245, Misc. POSNER *v.* REISTERTOWN FEDERAL SAVINGS & LOAN ASSN. Ct. App. Md. Certiorari denied.

No. 1256, Misc. CAMPBELL *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1289, Misc. CLIFTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Martz, S. Billingsley Hill,* and *Jacques B. Gelin* for the United States. Reported below: 401 F. 2d 896.

No. 1268, Misc. CANNON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Leon B. Polsky* for petitioner.

No. 1275, Misc. MILLER *v.* THORN, EXECUTRIX. C. A. D. C. Cir. Certiorari denied. *Charles William Freeman* for petitioner.

No. 1278, Misc. GREER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 1279, Misc. SILVER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1280, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1286, Misc. RUCKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1288, Misc. MACE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 1292, Misc. MAYBERRY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Martin J. Queenan* for respondent. Reported below: 52 N. J. 493, 246 A. 2d 452.

No. 1294, Misc. BROWN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1297, Misc. MYRICK *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1304, Misc. SULLIVAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 433 S. W. 2d 904.

No. 1306, Misc. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 40 Ill. 2d 522, 240 N. E. 2d 645.

No. 1318, Misc. MARTER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Arthur K. Bolton,* Attorney General of Georgia, and *Marion O. Gordon* and *Mathew Robins,* Assistant Attorneys General, for respondent. Reported below: 224 Ga. 569, 163 S. E. 2d 702.

No. 1333, Misc. BEALE *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1335, Misc. FURTAK *v.* MANCUSI, WARDEN. County Ct., Wyoming County, N. Y. Certiorari denied.

No. 1369, Misc. FURTAK *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 480, Misc. WALLACE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Albert M. Horn* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Marion O. Gordon,* Assistant Attorney General, and *William R. Childers, Jr.,* Deputy Assistant Attorney General, for respondent. Reported below: 224 Ga. 255, 161 S. E. 2d 288.

No. 994, Misc. BRENT *v.* WHITE, WARDEN. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted on the basis of the dissents in *Schmerber* v. *California,* 384 U. S. 757. *Jack Greenberg, James M. Nabrit III,* and *Anthony G. Amsterdam* for petitioner. *Jack P. F. Gremillion* and *Ralph L. Roy* for respondent. Reported below: 398 F. 2d 503.

Rehearing Denied.

No. 13. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL., *ante*, p. 87;

No. 667. GARNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 1027;

No. 725. PATRIARCA ET AL. *v.* UNITED STATES, *ante*, p. 1022;

No. 726. SUTTON *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL., *ante*, p. 404;

No. 758. JOHN LANGENBACHER CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 1049;

No. 763. ROSEE *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., *ante*, p. 1055;

No. 773. VALENTI *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL., *ante*, p. 405;

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No. 745, Misc. MARSON *v.* UNITED STATES, *ante*, p. 1056;

No. 782, Misc. HILL *v.* UNITED STATES, *ante*, p. 1033;

No. 887, Misc. ROBINSON *v.* UNITED STATES, *ante*, p. 1057;

No. 998, Misc. THOMPSON *v.* PARKER, WARDEN, *ante*, p. 1059; and

No. 1062, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante*, p. 1061. Petitions for rehearing denied.

No. 741. DICKINSON, COMPTROLLER OF FLORIDA *v.* FIRST NATIONAL BANK OF HOMESTEAD ET AL., *ante*, p. 409. Petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

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I. Due Process.

1. *Alibi defense—Burden of proof.*—In view of holding by Court of Appeals in another case that the Iowa rule shifting to the defendant the burden of proving an alibi defense in a criminal trial violated due process requirements, this case is vacated and remanded for reconsideration. Johnson v. Bennett, p. 253.

2. *Eviction from public housing—Hearings.*—It would be premature to decide, as petitioner urges, that this Court establish guidelines to insure that she is given not only the reasons for her eviction but also a hearing comporting with due process requirements. Thorpe v. Housing Authority, p. 268.

3. *Procedure before eviction—Notice and hearing.*—Authorities of federally assisted public housing projects must follow the requirements of the Department of Housing and Urban Development's circular providing for notice to tenants of the reasons for eviction and an opportunity for explanation or reply before evicting any tenant residing in such projects on the date of this decision, and such procedure does not involve impairment of contractual obligations in violation of the Due Process Clause of the Fifth Amendment. Thorpe v. Housing Authority, p. 268.

4. *Right to counsel—Revocation of probation and deferred sentencing—Retroactivity.*—Decision in *Mempa* v. *Rhay*, 389 U. S. 128, holding that the Sixth Amendment, as applied through the Fourteenth, requires that counsel be afforded felony defendants in

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5. *Right to counsel at probable-cause hearing—Retroactivity.*—Petitioner's plea of guilty to murder at probable-cause hearing when he had no counsel should not have been admitted at his trial, where he had counsel and denied guilt, as *White* v. *Maryland*, 373 U. S. 59, applies retroactively. Arsenault v. Massachusetts, p. 5.

II. Equal Protection of the Laws.

1. *Foreign nonprofit corporation—Tax exemption.*—When a foreign corporation is permitted to enter a State it is entitled to equal protection with domestic corporations, and New Jersey cannot deny appellant, a Pennsylvania nonprofit corporation operating a television station, an opportunity equivalent to that of a domestic corporation to show that it meets the requirements for a nonprofit corporation under local law. WHYY v. Glassboro, p. 117.

2. *Indigent prisoner—Transcripts of hearings.*—Under California's system of no appeal but repeated hearings on habeas corpus petitions, where transcripts of evidentiary hearings before lower court are readily available to judicial and prosecuting officials of the State, and where no suggestion is made that there is any adequate substitute therefor, they may not be furnished to those who can afford them and denied to those who are paupers. Gardner v. California, p. 367.

3. *Political parties—Position on Ohio ballots—Presidential election.*—State laws enacted to regulate the selection of presidential electors must meet the equal protection requirements of the Fourteenth Amendment, and Ohio's restrictive election laws violate those requirements because they give the two old, established parties a decided advantage over new political parties. Williams v. Rhodes, p. 23.

4. *Racial classification — Housing discrimination.*—Akron's City Charter amendment contains an explicitly racial classification treating racial housing matters differently from other racial and housing matters and places special burdens on minorities within the governmental process by making it more difficult to secure legislation on their behalf. Racial classifications "bear a heavier burden of justification" than other classifications, and Akron has not justified its discrimination against minorities, which constitutes a denial of equal protection of the laws. Hunter v. Erickson, p. 385.

5. *Railroads—Commerce and Due Process Clauses.*—Mileage classification of Arkansas full-crew laws is permissible under Commerce

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and Equal Protection Clauses; and the full-crew laws do not violate Equal Protection Clause by singling out railroads from other forms of transportation, and appellees' contention that the statutes are "unduly oppressive" under the Due Process Clause affords no basis for their invalidation apart from any effect on interstate commerce. Firemen v. Chicago, R. I. & P. R. Co., p. 129.

III. First Amendment.

1. *Church property dispute — Ecclesiastical questions.* — Civil courts cannot, consistently with First Amendment principles, determine ecclesiastical questions in resolving property disputes; and since the departure-from-doctrine element of Georgia's implied trust theory requires civil courts to weigh the significance and meaning of religious doctrines, it can play no role in judicial proceedings. Presbyterian Church v. Hull Church, p. 440.

2. *Establishment of religion—Arkansas' anti-evolution statute.*— Arkansas' anti-evolution statute, making it unlawful to teach or to use a textbook that teaches "that mankind ascended or descended from a lower order of animals," violates the Fourteenth Amendment, which embraces the First Amendment's prohibition of state laws respecting an establishment of religion. Epperson v. Arkansas, p. 97.

3. *Restraining order—Ex parte orders.*—The 10-day restraining order must be set aside, because, where principles guaranteed by the First Amendment are involved, there is no place for such *ex parte* order, issued without formal or informal notice to petitioners, where no showing is made that it is impossible to serve or notify opposing parties and to give them an opportunity to participate in an adversary proceeding. Carroll v. Princess Anne, p. 175.

4. *Student protests—Black armbands.*—In wearing armbands, the students were quiet and passive. They were not disruptive and did not impinge on the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Tinker v. Des Moines School Dist., p. 503.

5. *Teachers and students—School discipline.*—First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments. Tinker v. Des Moines School Dist., p. 503.

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CONSTITUTIONAL LAW—Continued.

IV. Search and Seizure.

1. *Affidavit to support warrant—Corroboration of informant's tip.*—Informant's tip, an essential part of the affidavit, was inadequate since it did not set forth any reason to support conclusion that informant was "reliable" and did not sufficiently state underlying circumstances from which informant concluded that petitioner ran a bookmaking operation, and the tip's reliability was not sufficiently enhanced by the FBI's corroboration of certain limited aspects of the informant's report through independent sources. Spinelli v. United States, p. 410.

2. *Warrantless search—Incident to arrest.*—Entry was not justified as incidental to petitioner's arrest, as police did not have probable cause to believe that crime was being committed. Even where search warrant is obtained police must show more than mere assertion by an unidentified informer, and at least as much is needed to support warrantless search. Recznik v. City of Lorain, p. 166.

3. *Warrantless search—Public places.*—Petitioner's rights were infringed by entry of police onto his premises, as there was no support for finding the apartment was a "public establishment," and the fact that large number of persons congregate in a private home does not transform it into a public place. Recznik v. City of Lorain, p. 166.

V. Sixth Amendment.

1. *Confrontation of witnesses—Retroactivity.*—The holding in *Barber* v. *Page*, 390 U. S. 719, that absence of witness from the jurisdiction would not justify use at trial of preliminary hearing testimony unless State had made good-faith effort to secure witness' presence, should be given retroactive application. Berger v. California, p. 314.

2. *Speedy state trial—Federal prisoner.*—Under the Sixth Amendment as made applicable to the States by the Fourteenth the State of Texas, on demand of federal prisoner who was indicted on Texas criminal charge, was required to make a diligent, good-faith effort to bring him to trial in state court. Smith v. Hooey, p. 374.

VI. Trial by Jury.

Seventh Amendment — Reasonableness of conduct. — Court of Appeals should not have reversed jury's verdict for petitioner, stevedoring company, on ground that as matter of law it had not taken reasonable action to avoid injury to employee, as under the Seventh Amendment the issue as to reasonableness of petitioner's conduct should have been left to the jury. International Co. v. Nederl. Amerik, p. 74.

CONSULTANTS. See **Arbitration.**

CONTAINER INDUSTRY. See **Antitrust Acts**, 1.

CONTRACTORS. See **Arbitration.**

CONTRACTS. See **Administrative Procedure**, 2; **Antitrust Acts**, 2; **Constitutional Law**, I, 2–3; **Mootness**, 2; **National Labor Relations Act**; **Public Housing.**

CORPORATIONS. See also **Constitutional Law**, II, 1; **Taxes**, 1.

Foreign nonprofit corporation—Tax exemption—Equal protection of the laws.—When a foreign corporation is permitted to enter a State it is entitled to equal protection with domestic corporations, and New Jersey cannot deny appellant, a Pennsylvania nonprofit corporation operating a television station, an opportunity equivalent to that of a domestic corporation to show that it meets the requirements for a nonprofit corporation under local law. WHYY v. Glassboro, p. 117.

CORROBORATION. See **Constitutional Law**, IV, 1.

CORRUGATED CONTAINERS. See **Antitrust Acts**, 1.

COST OF SERVICE. See **Federal Power Commission**; **Judicial Review**, 3.

COSTS. See **Interstate Commerce Commission**, 1–2.

COUNSEL. See **Constitutional Law**, I, 4–5; **Procedure**, 6–7.

COUNTY SUPERVISORS. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

COURT OF APPEALS. See **Constitutional Law**, VI; **Federal Power Commission**; **Judicial Review**, 3; **Jurisdiction**, 1; **Procedure**, 2.

COURT OF CLAIMS. See **Courts-Martial**; **Judicial Review**, 1.

COURTS. See also **Constitutional Law**, III, 1; **Damages**; **Jurisdiction**, 1; **Procedure**, 2, 5.

Jury award — Trial court's discretion — Federal Employers' Liability Act.—This Court makes its own independent appraisal, and concludes that there was no abuse of the trial court's discretion in allowing the award, which the Court of Appeals thought excessive, to stand. Grunenthal v. Long Island R. Co., p. 156.

COURTS-MARTIAL. See also **Judicial Review**, 1.

Collateral attack—Back-pay suit—Constitutional challenge.—Even if it is assumed, *arguendo*, despite Article 76 of the Uniform Code of Military Justice, that collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging

COURTS-MARTIAL—Continued.

a "constitutional" defect in the military decision, the claims herein, which involve a rule of evidence concerning accomplice testimony, and the possible application of the Jencks Act, do not on their facts rise to the constitutional level. United States v. Augenblick, p. 348.

CRIMINAL LAW. See **Constitutional Law**, I, 1, 4–5; II, 2; IV, 1–3; V, 2; **Courts-Martial**; **Extortion**; **Federal Communications Act**; **Habeas Corpus**, 1–3; **Judicial Review**, 1; **Procedure**, 1, 4, 6–9.

CRIMINAL PROSECUTION. See **Constitutional Law**, V, 2; **Procedure**, 8.

CROSS-EXAMINATION. See **Constitutional Law**, I, 5; V, 1; **Procedure**, 7; **Witnesses.**

CURRICULUMS. See **Constitutional Law**, III, 2.

DAMAGES. See also **Constitutional Law**, VI; **Courts**; **Procedure**, 5.

Jury award—Federal Employers' Liability Act—Trial court's discretion.—This Court makes its own independent appraisal, and concludes that there was no abuse of the trial court's discretion in allowing the award, which the Court of Appeals thought excessive, to stand. Grunenthal v. Long Island R. Co., p. 156.

DARWINIAN THEORY. See **Constitutional Law**, III, 2.

D. C. TRANSIT SYSTEM. See **District of Columbia**; **Secretary of the Interior**; **Transportation.**

DECLARATORY JUDGMENTS. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

DECREES. See **Administrative Procedure**, 2; **National Labor Relations Act.**

DEFERRED SENTENCES. See **Constitutional Law**, I, 4; **Procedure**, 6.

DELINQUENCY. See **Judicial Review**, 2; **Selective Service Act**, 1–2.

DEMONSTRATIONS. See **Constitutional Law**, III, 4–5.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. See **Constitutional Law**, I, 2–3; **Public Housing.**

DES MOINES. See **Constitutional Law**, III, 4–5.

DICE GAME. See **Constitutional Law**, IV, 2–3.

DIRECTIVES. See **Constitutional Law**, I, 2–3; **Public Housing.**

DISCIPLINE. See **Constitutional Law**, III, 4–5; **Habeas Corpus**, 2; **Prisoners.**

DISCLOSURE. See **Arbitration.**

DISCRETION. See **Courts**; **Damages**; **Federal Power Commission**; **Judicial Review**, 3–4; **Procedure**, 5; **Selective Service Act**, 3.

DISCRIMINATION. See **Constitutional Law**, II, 4; **Interstate Commerce**; **Jurisdiction**, 2; **Mootness**, 1; **Procedure**, 3; **Railroads**; **Taxes**, 2.

DISSOLUTION ORDER. See **Jurisdiction**, 1; **Procedure**, 2.

DISTRICT COURTS. See **Jurisdiction**, 1, 3; **Procedure**, 2, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

DISTRICT OF COLUMBIA. See also **Secretary of the Interior**; **Transportation.**

Bus service on the Mall—Jurisdiction.—When Congress established the Washington Metropolitan Area Transit Commission it did not intend to create dual regulatory jurisdiction by divesting the Secretary of the Interior of his long-standing "exclusive charge and control" over the Mall. D. C. Transit System's franchise does not protect it against competition from petitioner's leisurely sightseeing service on the Mall outside WMATC jurisdiction. Shuttle Corp. v. Transit Comm'n, p. 186.

DIVINITY STUDENTS. See **Judicial Review**, 2; **Selective Service Act**, 1–2.

DIVISIONS. See **Interstate Commerce Commission**, 1–2.

DOCTRINAL DISPUTES. See **Constitutional Law**, III, 1.

DOMINANT MOTIVE. See **Taxes**, 1.

DRAFT BOARDS. See **Judicial Review**, 2, 4; **Selective Service Act**, 1–3.

DUE PROCESS. See **Constitutional Law**, I; **Procedure**, 6–7, 9; **Public Housing**; **Railroads.**

DURHAM. See **Constitutional Law**, I, 2–3; **Public Housing.**

DUTY TO DISCLOSE. See **Arbitration.**

EARNINGS. See **Taxes**, 1.

ECCLESIASTICAL QUESTIONS. See **Constitutional Law**, III, 1.

ECONOMIC POWER. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

ELECTIONS. See **Constitutional Law**, II, 3; **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

EMPLOYER AND EMPLOYEES. See **Constitutional Law**, II, 5; **Jurisdiction**, 2; **Procedure**, 3, 5; **Railroads.**

EMPLOYER BARGAINING ASSOCIATION. See **Administrative Procedure**, 2; **National Labor Relations Act.**

ENGINEERING CONSULTANTS. See **Arbitration.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II; **Corporations**; **Jurisdiction**, 3; **Mootness**, 1; **Procedure**, 10, 12–13; **Railroads**; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

ESTABLISHMENT OF RELIGION. See **Constitutional Law**, III, 1.

EVICTION. See **Constitutional Law**, I, 2–3; **Public Housing.**

EVIDENCE. See **Administrative Procedure**, 1; **Constitutional Law**, IV, 1–3; V, 1; **Courts**; **Courts-Martial**; **Damages**; **Federal Communications Act**; **Federal Trade Commission**, 1–2; **Judicial Review**, 1; **Procedure**, 1; **Witnesses.**

EVIDENTIARY HEARINGS. See **Constitutional Law**, II, 2; **Habeas Corpus**, 1, 3; **Procedure**, 4.

EVOLUTION. See **Constitutional Law**, III, 2.

EXCESSIVE AWARDS. See **Courts**; **Damages**; **Procedure**, 5.

EXCHANGE OF PRICE DATA. See **Antitrust Acts**, 1.

EXCHANGE OF SHARES. See **Securities and Exchange Commission**, 1–3.

EXEMPTIONS. See **Antitrust Acts**, 2; **Constitutional Law**, II, 1; **Corporations**; **Judicial Review**, 2; **Mootness**, 2; **Selective Service Act**, 1–2.

EXHAUSTION OF REMEDIES. See **Jurisdiction**, 2; **Procedure**, 3.

EX PARTE ORDERS. See **Constitutional Law**, III, 3; **Injunctions.**

EXPERTISE. See **Interstate Commerce Commission**, 1–2.

EXPORTS. See **Antitrust Acts**, 2; **Mootness**, 2.

EXTORTION.

State "extortion" statutes—"Blackmail" laws—18 U. S. C. § 1952.—In light of the congressional purpose to assist local law enforcement officials in combating interstate activities of organized crime which

EXTORTION—Continued.

violate state laws and not merely to eliminate only those acts which a State has denominated extortion, the extortionate acts for which appellees were indicted, which were prohibited by Pennsylvania law, fall within the generic term "extortion" as used in 18 U. S. C. § 1952. United States v. Nardello, p. 286.

FAIR HOUSING ORDINANCE. See **Constitutional Law**, II, 4; **Mootness**, 1.

FEDERAL BUREAU OF INVESTIGATION. See **Constitutional Law**, IV, 1.

FEDERAL COMMUNICATIONS ACT. See also **Procedure**, 1.

State criminal trials—Admissibility of evidence—Non-retroactivity.—This Court's decision holding inadmissible in state criminal trials evidence violative of § 605 of the Act is to be applied only to trials in which such evidence is sought to be introduced after the date of that decision (*Lee* v. *Florida*, 392 U. S. 378). Fuller v. Alaska, p. 80.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Courts; Damages; Procedure**, 5.

FEDERALLY ASSISTED HOUSING. See **Constitutional Law**, I, 2–3; **Public Housing.**

FEDERAL POWER COMMISSION. See also **Judicial Review**, 3.

Judicial review—Court of Appeals—Remand.—Court of Appeals, after this Court's remand to determine whether it was significant in applying FPC's tax component formula that respondent had both jurisdictional and nonjurisdictional income, should not have held the issue sufficiently raised by respondent's petition for rehearing before the FPC, as the FPC did not disclose the basis for its order and thus the cases were not in proper posture for judicial review. FPC v. United Gas Pipe Line Co., p. 71.

FEDERAL PRISONERS. See **Constitutional Law**, V, 2; **Procedure**, 8.

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I, 2–3; II, 5; V, 2; **Extortion; Federal Communications Act; Interstate Commerce; Jurisdiction**, 3; **Procedure**, 1, 8, 10, 12–13; **Public Housing; Railroads; Securities and Exchange Commission**, 1–3; **Taxes**, 2; **Three-Judge Courts; Voting Rights Act of 1965**, 1–3.

FEDERAL TRADE COMMISSION. See also **Administrative Procedure**, 1.

1. *Automobile accessories — Sales-commission plan — Economic power.*—Sales-commission system for marketing tires, batteries, and

FEDERAL TRADE COMMISSION—Continued.

accessories (TBA) through service stations is inherently coercive, and despite the absence here of the kind of overtly coercive acts shown in *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, Texaco exerted its dominant economic power over its dealers. FTC v. Texaco, p. 223.

2. *Sales-commission plan—Automobile accessories—Competition.*—The FTC correctly determined that the Texaco-Goodrich arrangement adversely affected competition in marketing TBA, the TBA manufacturer having purchased the oil company's economic power and used it as a partial substitute for competitive merit in gaining a major share of the substantial TBA market. FTC v. Texaco, p. 223.

FIFTEENTH AMENDMENT. See **Voting Rights Act of 1965**, 1–3.

FIFTH AMENDMENT. See **Constitutional Law**, I, 2–3; **Public Housing.**

FILLING STATIONS. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

FIRST AMENDMENT. See **Constitutional Law**, III; **Injunctions**; **Mootness**, 3.

FOREIGN AID. See **Antitrust Acts**, 2; **Mootness**, 2.

FOREIGN CORPORATIONS. See **Constitutional Law**, II, 1; **Corporations.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, I; II; III; IV, 2–3; V; **Corporations**; **Injunctions**; **Jurisdiction**, 3; **Mootness**, 1, 3; **Procedure**, 6–8, 10, 12–13; **Public Housing**; **Railroads**; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3; **Witnesses.**

FOURTH AMENDMENT. See **Constitutional Law**, IV.

FRANCHISES. See **District of Columbia**; **Secretary of the Interior**; **Transportation.**

FRAUD. See **Securities and Exchange Commission**, 1–3.

FREEDOM OF RELIGION. See **Constitutional Law**, III, 2.

FREEDOM OF SPEECH. See **Constitutional Law**, III, 3–5; **Injunctions**; **Mootness**, 3.

FREE TRANSCRIPTS. See **Constitutional Law**, II, 2.

FRINGE BENEFITS. See **Administrative Procedure**, 2; **National Labor Relations Act.**

FULL-CREW LAWS. See **Constitutional Law**, II, 5; **Railroads.**

GAMBLING. See **Constitutional Law**, IV, 1–3.

GASOLINE DEALERS. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

GENERAL CHURCH. See **Constitutional Law**, III, 1.

GEORGIA. See **Constitutional Law**, III, 1.

GOOD-FAITH EFFORT. See **Constitutional Law**, V, 1–2; **Procedure**, 8; **Witnesses.**

GOVERNMENT FINANCING. See **Antitrust Acts**, 2; **Mootness**, 2.

GUIDED TOURS. See **District of Columbia; Secretary of the Interior; Transportation.**

GUIDELINES. See **Constitutional Law**, I, 2–3; **Public Housing.**

HABEAS CORPUS. See also **Constitutional Law**, I, 1; II, 2; **Judicial Review**, 4; **Procedure**, 4, 9; **Prisoners; Selective Service Act**, 3.

1. *Evidentiary hearing—Intervening decision—Abuse of writ.*—Petitioner's failure to demand evidentiary hearing in 1961 followed by such demand after *Townsend* v. *Sain*, 372 U. S. 293, was decided constitutes no abuse of the writ or a waiver of claim to a hearing. Smith v. Yeager, p. 122.

2. *Prison regulations—"Jail-house lawyers."*—In the absence of some provision by Tennessee for a reasonable alternative to assist illiterate or poorly educated prisoners in preparing petitions for post-conviction relief, the State may not validly enforce a regulation which absolutely forbids inmates from furnishing assistance to other prisoners. Johnson v. Avery, p. 483.

3. *Successive proceedings — Res judicata — Waivers.* — Essential question in a subsequent habeas corpus proceeding (to which usual principles of *res judicata* do not apply and regardless of waiver standards in other circumstances) is whether petitioner in prior proceeding "deliberately withheld the newly asserted ground or otherwise abused the writ." Smith v. Yeager, p. 122.

HEARINGS. See **Constitutional Law**, I, 2–3, 5; II, 2; **Habeas Corpus**, 1, 3; **Procedure**, 4, 7; **Public Housing.**

HOMES. See **Constitutional Law**, II, 4; **Mootness**, 1.

HOMOSEXUALS. See **Extortion.**

HOUSING. See **Constitutional Law**, I, 2–3; II, 4. **Public Housing.**

HOUSING DISCRIMINATION. See **Constitutional Law**, II, 4; **Mootness**, 1.

ILLITERATE PRISONERS. See **Habeas Corpus**, 2; **Prisoners.**

ILLITERATE VOTERS. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

IMPAIRMENT OF CONTRACTS. See **Constitutional Law**, I, 2–3; **Public Housing.**

IMPLIED TRUST. See **Constitutional Law**, III, 1.

INCOME TAXES. See **Federal Power Commission**; **Judicial Review**, 3; **Taxes**, 1.

INDEMNITY. See **Constitutional Law**, VI; **Procedure**, 11.

INDEPENDENT CANDIDATES. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

INDICTMENTS. See **Extortion.**

INDIGENT PRISONERS. See **Constitutional Law**, II, 2.

INDUCTION. See **Judicial Review**, 2, 4; **Selective Service Act**, 1–3.

INFORMATION EXCHANGE. See **Antitrust Acts**, 1.

INFORMERS. See **Constitutional Law**, IV, 1–3.

INJUNCTIONS. See also **Constitutional Law**, III, 3; **Mootness**, 3.

Restraining order—Ex parte orders—First Amendment.—The 10-day restraining order must be set aside because, where principles guaranteed by the First Amendment are involved, there is no place for such *ex parte* order, issued without formal or informal notice to petitioners, where no showing is made that it is impossible to serve or notify opposing parties and to give them an opportunity to participate in an adversary proceeding. Carroll v. Princess Anne, p. 175.

INJURY. See **Constitutional Law**, VI; **Courts**; **Damages**; **Procedure**, 5, 11.

INMATES. See **Habeas Corpus**, 2; **Prisoners.**

INSTRUCTIONS TO JURY. See **Constitutional Law**, I, 1; **Procedure**, 9.

INSURANCE COMPANIES. See **Securities and Exchange Commission**, 1–3.

INTERNAL REVENUE CODE. See **Taxes**, 1.

INTERSTATE COMMERCE. See also **Taxes**, 2.

Alabama license tax on photographers—Local activity—Discrimination.—Appellant was engaged in the essentially local activity of taking pictures and could constitutionally be made subject to Alabama license tax on that local activity. The tax does not discriminate against interstate commerce, since it is levied equally on interstate and intrastate transient photographers and on the record here the tax on out-of-state photographers is not so disproportionate to the tax on fixed-location photographers as to come within the condemnation of the Constitution. Dunbar-Stanley Studios v. Alabama, p. 537.

INTERSTATE COMMERCE COMMISSION.

1. *Expertise—Average territorial costs—Adjustments.*—If average territorial costs are shown to be a distortion when applied to particular North-South traffic, reliance on administrative "expertise" is not sufficient, but it must be shown that there is no basic difference, or there must be an adjustment which fairly reflects the difference in costs; and on remand the ICC must make specific findings to adjust average territorial costs with respect to commuter deficits, interchange of cars at border points, and empty freight car return ratios. B. & O. R. Co. v. Aberdeen & R. R. Co., p. 87.

2. *Railroad rate divisions—Costs.*—While mathematical precision and exactitude are not required the nature and volume of the traffic must be known and exposed, if costs are to govern railroad rate divisions. B. & O. R. Co. v. Aberdeen & R. R. Co., p. 87.

INTERSTATE COMPACTS. See **District of Columbia; Secretary of the Interior; Transportation.**

INTERSTATE GAMBLING. See **Constitutional Law**, IV, 1.

INTERSTATE RAILROADS. See **Constitutional Law**, II, 5; **Railroads.**

INTERSTATE TRAVEL. See **Extortion.**

INTRASTATE RAILROADS. See **Constitutional Law**, II, 5; **Railroads.**

INVESTIGATIONS. See **Constitutional Law**, IV, 1.

IOWA. See **Constitutional Law**, I, 1; **Procedure**, 9.

"JAIL-HOUSE LAWYERS." See **Habeas Corpus**, 2; **Prisoners.**

JENCKS ACT. See **Courts-Martial; Judicial Review**, 1.

JOINT RATES. See **Interstate Commerce Commission**, 1–2.

JUDICIAL ENFORCEMENT. See **Administrative Procedure**, 2; **National Labor Relations Act.**

JUDICIAL REVIEW. See also **Courts; Courts-Martial; Damages; Federal Power Commission; Jurisdiction,** 2; **Procedure,** 1, 3, 5; **Selective Service Act,** 1–3.

1. *Collateral attack on court-martial—Back-pay suit—Constitutional challenge.*—Even if it is assumed, *arguendo,* despite Article 76 of the Uniform Code of Military Justice, that collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a "constitutional" defect in the military decision, the claims herein, which involve a rule of evidence concerning accomplice testimony, and the possible application of the Jencks Act, do not on their facts rise to the constitutional level. United States v. Augenblick, p. 348.

2. *Draft registrants—Pre-induction review—Exemption for theological students.*—Pre-induction judicial review is not precluded in this case, as § 10 (b) (3) of the Military Selective Service Act of 1967 cannot be construed to impair the clear mandate of § 6 (g) of the Selective Service Act governing the exemption for theological students. Oestereich v. Selective Service Bd., p. 233.

3. *Federal Power Commission—Court of Appeals—Remand.*—Court of Appeals, after this Court's remand to determine whether it was significant in applying FPC's tax component formula that respondent had both jurisdictional and nonjurisdictional income, should not have held the issue sufficiently raised by respondent's petition for rehearing before the FPC, as the FPC did not disclose the basis for its order and thus the cases were not in proper posture for judicial review. FPC v. United Gas Pipe Line Co., p. 71.

4. *Pre-induction review—Conscientious objectors—Draft Board discretion.*—The draft Board had exercised its statutory discretion, evaluating the evidence regarding appellee's claim to classification as a conscientious objector, and had rejected that claim. Congress may constitutionally require that a registrant's challenges to such decisions be deferred until after induction, when remedy of habeas corpus would be available, or until defense of criminal prosecution, should he refuse to submit to induction. Clark v. Gabriel, p. 256.

JURIES. See **Constitutional Law,** VI; **Procedure,** 5, 11.

JURISDICTION. See also **Constitutional Law,** II, 3; III, 1; **District of Columbia; Federal Power Commission; Judicial Review,** 3; **Procedure,** 10, 12–13; **Secretary of the Interior; Three-Judge Courts; Transportation; Voting Rights Act of 1965,** 1–3.

1. *Court of Appeals—Three-judge court—Appeals.*—Where three-judge court dissolved itself for want of jurisdiction and single district judge then dismissed the case on ground of abstention and incorpo-

JURISDICTION—Continued.

rated the three-judge court's dissolution order in his opinion by reference, jurisdiction of the appeal from both judgments is in Court of Appeals and not the Supreme Court. Mengelkoch v. Welfare Comm'n, p. 83.

2. *Federal courts—Dispute between employees and union and management acting together—Railway Labor Act.*—Federal courts have jurisdiction over this action which essentially involves dispute between some employees, on the one hand, and union and management together, on the other, and not dispute between employees and a carrier concerning meaning of collective bargaining agreement's terms, over which Railroad Adjustment Board would have exclusive jurisdiction under the Railway Labor Act. Glover v. St. Louis-S. F. R. Co., p. 324.

3. *Voting Rights Act of 1965—District courts—Private litigants.*—Restriction of § 14 (b) of the Act, which provides that "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any . . . order . . . against the enforcement of any provision of this subchapter," does not apply to suits by private litigants seeking declaratory judgment that new state enactment is subject to § 5's approval requirements, and these actions may be brought in local district courts. Allen v. State Board of Elections, p. 544.

JURY VERDICT. See **Courts; Damages; Procedure,** 5.

KOREA. See **Antitrust Acts,** 2; **Mootness,** 2.

LABOR. See **Administrative Procedure,** 2; **Constitutional Law,** II, 5; **Jurisdiction,** 2; **National Labor Relations Act; Procedure,** 3, 5; **Railroads.**

LABOR UNIONS. See **Jurisdiction,** 2; **Procedure,** 3.

LANDLORDS. See **Constitutional Law,** I, 2–3; **Public Housing.**

LAW ENFORCEMENT. See **Extortion.**

LEASES. See **Administrative Procedure,** 1; **Constitutional Law,** I, 2–3; **Federal Trade Commission,** 1–2; **Public Housing.**

LICENSE TAXES. See **Interstate Commerce; Taxes,** 2.

LOCAL ACTIVITY. See **Interstate Commerce; Taxes,** 2.

LOCAL CHURCHES. See **Constitutional Law,** III, 1.

LONGSHOREMEN. See **Constitutional Law,** VI; **Procedure,** 11.

MALL. See **District of Columbia; Secretary of the Interior; Transportation.**

MARYLAND. See **Constitutional Law**, III, 3; **Injunctions; Mootness**, 3.

MASSACHUSETTS. See **Constitutional Law**, I, 5; **Procedure**, 7.

MASS TRANSIT SERVICES. See **District of Columbia; Secretary of the Interior; Transportation.**

McCARRAN-FERGUSON ACT. See **Securities and Exchange Commission**, 1–3.

MERGERS. See **Securities and Exchange Commission**, 1–3.

MILEAGE CLASSIFICATION. See **Constitutional Law**, II, 5; **Railroads.**

MILITARY JUSTICE. See **Courts-Martial; Judicial Review**, 1.

MILITARY SELECTIVE SERVICE ACT OF 1967. See **Judicial Review**, 2, 4; **Selective Service Act**, 1–3.

MINIBUSES. See **District of Columbia; Secretary of the Interior; Transportation.**

MINIMUM TRAIN CREWS. See **Constitutional Law**, II, 5; **Railroads.**

MISREPRESENTATIONS. See **Securities and Exchange Commission**, 1–3.

MISSISSIPPI. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965**, 1–3.

MOOTNESS. See also **Antitrust Acts**, 2; **Constitutional Law**, II, 4; III, 3; **Injunctions.**

1. *Akron fair housing ordinance—Civil Rights Acts—State statute.*—The case is not moot. Neither the Civil Rights Act of 1968 (which specifically preserves local fair housing laws), nor the 1866 Civil Rights Act, was intended to pre-empt local housing ordinances; the Ohio Act of October 30, 1965 (which concerns "commercial" housing), does not apply to this case; and the Akron ordinance provides an enforcement mechanism unmatched by either state or federal legislation. Hunter v. Erickson, p. 385.

2. *Antitrust liability—Dissolution of association—Export trade.*—Case is not moot, as Government sought relief not only against the association but also against its members; the Agency for International Development regulation does not apply to all contracts on which former members of the association might bid; and appellees' statement that it would be uneconomical to engage in further joint operations, standing alone, does not satisfy the stringent test for mootness. U. S. v. Phosphate Export Assn., p. 199.

MOOTNESS—Continued.

3. *Restraining order—National States Rights Party—Public rallies.*—Case is not moot, as the Maryland Court of Appeals' approval of the 10-day restraining order continues to play a role in the response of local officials to efforts of petitioners (members of "white supremacist" National States Rights Party) to continue their activities in the county. Carroll v. Princess Anne, p. 175.

MOTIVES. See **Taxes**, 1.

MURDER. See **Constitutional Law**, I, 1, 5; **Procedure**, 7, 9.

NATIONAL LABOR RELATIONS ACT. See also **Administrative Procedure**, 2.

NLRB's authority—Payment of fringe benefits—Judicial enforcement of decree.—NLRB's authority under the Act to remedy unfair labor practice which occurred when respondent refused to sign collective bargaining agreement negotiated on his behalf included power to require payment of fringe benefits under NLRB's remedial authority to take "affirmative action including reinstatement of employees with or without back pay," which is not "affected by any other means of adjustment . . . established by agreement, law, or otherwise . . . ." NLRB v. Strong, p. 357.

NATIONAL PARK LANDS. See **District of Columbia; Secretary of the Interior; Transportation.**

NATIONAL STATES RIGHTS PARTY. See **Constitutional Law**, III, 3; **Injunctions; Mootness**, 3.

NATURAL GAS. See **Federal Power Commission; Judicial Review**, 3.

NEGROES. See **Constitutional Law**, II, 4; **Jurisdiction**, 2; **Mootness**, 1; **Procedure**, 3.

NEW JERSEY. See **Constitutional Law**, II, 1; **Corporations.**

NONCOMMERCIAL STATIONS. See **Constitutional Law**, II, 1; **Corporations.**

NONCOMPETITIVE PRICING. See **Antitrust Acts**, 2; **Mootness**, 2.

NONPROFIT CORPORATIONS. See **Constitutional Law**, II, 1; **Corporations.**

NORTH-SOUTH TRAFFIC. See **Interstate Commerce Commission**, 1–2.

NOTICE. See **Constitutional Law**, I, 2–3; III, 3; **Injunctions; Public Housing.**

OHIO. See **Constitutional Law**, II, 3.

ORDINANCES. See **Constitutional Law**, II, 4; **Mootness**, 1.

ORGANIZED CRIME. See **Extortion.**

PAINTING CONTRACT. See **Arbitration.**

PARKS. See **District of Columbia**; **Secretary of the Interior**; **Transportation.**

PARTIALITY. See **Arbitration.**

PAUPERS. See **Constitutional Law**, II, 2.

PENNSYLVANIA. See **Constitutional Law**, II, 1; **Extortion**; **Corporations.**

PETITIONS. See **Constitutional Law**, II, 3; **Habeas Corpus**, 2; **Prisoners.**

PETROLEUM COMPANIES. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

PHOSPHATES. See **Antitrust Acts**, 2; **Mootness**, 2.

PHOTOGRAPHERS. See **Interstate Commerce**; **Taxes**, 2.

PIPELINES. See **Federal Power Commission**; **Judicial Review**, 3.

PLEAS. See **Constitutional Law**, I, 5; **Procedure**, 7.

POLICE OFFICERS. See **Constitutional Law**, IV, 2–3.

POLITICAL PARTIES. See **Constitutional Law**, II, 3.

POST-CONVICTION RELIEF. See **Constitutional Law**, I, 5; **Habeas Corpus**, 1–3; **Prisoners**; **Procedure**, 4, 7.

PRACTICE OF LAW. See **Habeas Corpus**, 2; **Prisoners.**

PRE-EMPTION. See **Constitutional Law**, II, 5; **Railroads**; **Securities and Exchange Commission**, 1–3.

PRE-INDUCTION JUDICIAL REVIEW. See **Judicial Review**, 2, 4; **Selective Service Act**, 1–3.

PRELIMINARY HEARING TESTIMONY. See **Constitutional Law**, V, 1; **Witnesses.**

PREMATURITY. See **Constitutional Law**, I, 2–3; **Public Housing.**

PRESBYTERIAN CHURCHES. See **Constitutional Law**, III, 1.

PRESIDENTIAL ELECTIONS. See **Constitutional Law**, II, 3.

PRICE DATA. See **Antitrust Acts**, 1.

PRICE-FIXING AGREEMENT. See **Antitrust Acts**, 1.

PRIME CONTRACTORS. See **Arbitration.**

PRINCESS ANNE. See **Constitutional Law**, III, 3; **Injunctions**; **Mootness**, 3.

PRISONERS. See also **Constitutional Law,** II, 2; **Habeas Corpus,** 2.

Post-conviction relief—Prison regulations—"Jail-house lawyers."—In the absence of some provision by Tennessee for a reasonable alternative to assist illiterate or poorly educated prisoners in preparing petitions for post-conviction relief, the State may not validly enforce a regulation which absolutely forbids inmates from furnishing assistance to other prisoners. Johnson v. Avery, p. 483.

PRISON "WRIT WRITERS." See **Habeas Corpus,** 2; **Prisoners.**

PRIVATE HOMES. See **Constitutional Law,** IV, 2–3.

PRIVATE LITIGANTS. See **Jurisdiction,** 3; **Procedure,** 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965,** 1–3.

PRIVILEGE TAXES. See **Interstate Commerce; Taxes,** 2.

PROBABLE CAUSE. See **Constitutional Law,** IV, 2–3.

PROBABLE-CAUSE HEARINGS. See **Constitutional Law,** I, 5; **Procedure,** 7.

PROBATION. See **Constitutional Law,** I, 4; **Procedure,** 6.

PROCEDURE. See also **Constitutional Law,** I, 1, 4–5; II, 2; V, 2; **Courts; Courts-Martial; Damages; Federal Communications Act; Federal Power Commission; Habeas Corpus,** 1, 3; **Judicial Review,** 1–4; **Jurisdiction,** 1–3; **Prisoners; Public Housing; Selective Service Act,** 1–3; **Three-Judge Courts; Voting Rights Act of 1965,** 1–3.

1. *Admissibility of evidence—Federal Communications Act—Nonretroactivity.*—This Court's decision holding inadmissible in state criminal trials evidence violative of § 605 of the Act is to be applied only to trials in which such evidence is sought to be introduced after the date of that decision (*Lee* v. *Florida,* 392 U. S. 378). Fuller v. Alaska, p. 80.

2. *Appeal from three-judge court—Jurisdiction—Court of Appeals.*—Where three-judge court dissolved itself for want of jurisdiction and single district judge then dismissed the case on ground of abstention and incorporated the three-judge court's dissolution order in his opinion by reference, jurisdiction of the appeal from both judgments is in Court of Appeals and not the Supreme Court. Mengelkoch v. Welfare Comm'n, p. 83.

3. *Exhaustion of remedies—Futility of remedies—No bar to judicial review.*—In this case where resort to contractual or administrative remedies would be wholly fruitless, petitioners' failure to exhaust such remedies constitutes no bar to judicial review of their claims. Glover v. St. Louis-S. F. R. Co., p. 324.

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PROCEDURE—Continued.

4. *Habeas corpus—Evidentiary hearing—Intervening decision.*—Petitioner's failure to demand evidentiary hearing in 1961 followed by such demand after *Townsend* v. *Sain,* 372 U. S. 293, was decided constitutes no abuse of the writ or a waiver of claim to a hearing. Smith v. Yeager, p. 122.

5. *Jury award—Trial court's discretion—Federal Employers' Liability Act.*—This Court makes its own independent appraisal, and concludes that there was no abuse of the trial court's discretion in allowing the award, which the Court of Appeals thought excessive, to stand. Grunenthal v. Long Island R. Co., p. 156.

6. *Right to counsel—Revocation of probation and deferred sentencing—Retroactivity.*—Decision in *Mempa* v. *Rhay,* 389 U. S. 128, holding that the Sixth Amendment, as applied through the Fourteenth, requires that counsel be afforded felony defendants in proceeding for revocation of probation and imposition of deferred sentencing, should be applied retroactively. McConnell v. Rhay, p. 2.

7. *Right to counsel at probable-cause hearing—Retroactivity.*—Petitioner's plea of guilty to murder at probable-cause hearing when he had no counsel should not have been admitted at his trial, where he had counsel and denied guilt, as *White* v. *Maryland,* 373 U. S. 59, applies retroactively. Arsenault v. Massachusetts, p. 5.

8. *State criminal procedure—Trial of federal prisoner.*—Under the Sixth Amendment as made applicable to the States by the Fourteenth the State of Texas, on demand of federal prisoner who was indicted on Texas criminal charge, was required to make a diligent, good-faith effort to bring him to trial in state court. Smith v. Hooey, p. 374.

9. *State criminal trial—Intervening decision.*—In view of holding by Court of Appeals in another case that the Iowa rule shifting to the defendant the burden of proving an alibi defense in a criminal trial violated due process requirements, this case is vacated and remanded for reconsideration. Johnson v. Bennett, p. 253.

10. *Supreme Court—Voting Rights Act of 1965—Not argued below.*—Since the Virginia legislation was generally attacked as inconsistent with the Voting Rights Act of 1965, and there is no factual dispute, the Court may, in the interests of judicial economy, determine the applicability of § 5 of the Act, even though that section was not argued below. Allen v. State Board of Elections, p. 544.

11. *Trial by jury—Seventh Amendment—Reasonableness of conduct.*—Court of Appeals should not have reversed jury's verdict for petitioner, stevedoring company, on ground that as matter of law it

PROCEDURE—Continued.

had not taken reasonable action to avoid injury to employee, as under the Seventh Amendment the issue as to reasonableness of petitioner's conduct should have been left to the jury. International Co. v. Nederl. Amerik, p. 74.

12. *Voting Rights Act of 1965—Prospective effect of decision.*—In view of complexity of issues of first impression, lack of deliberate defiance of the Act from States' failure to submit these enactments for approval, and fact that discriminatory purpose or effect of statutes, if any, has not been judicially determined, decision has prospective effect only. States remain subject to § 5 until they obtain from District Court for District of Columbia declaratory judgment that for at least five years they have not used "tests or devices" proscribed by § 4. Allen v. State Board of Elections, p. 544.

13. *Voting Rights Act of 1965—Three-judge courts.*—In light of the extraordinary nature of the Act and its effect on federal-state relationships, and the unique approval requirements of § 5, which also provides that "[a]ny action under this section shall be heard and determined by a court of three judges," disputes involving the coverage of § 5 should be determined by three-judge courts. Allen v. State Board of Elections, p. 544.

PROMOTIONS. See **Jurisdiction**, 2; **Procedure**, 3.

PROPERTY. See **Constitutional Law**, II, 4; **Mootness**, 1.

PROPERTY DISPUTES. See **Constitutional Law**, III, 1.

PROSECUTION. See **Judicial Review**, 4; **Selective Service Act**, 3.

PROSECUTORS. See **Constitutional Law**, II, 2.

PROSPECTIVITY. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965**, 1–3.

PROTESTS. See **Constitutional Law**, III, 4–5.

PROXIES. See **Securities and Exchange Commission**, 1–3.

PUBLIC HOUSING. See also **Constitutional Law**, I, 2–3.

Eviction of tenant—Directive to local housing authorities—Procedure.—Authorities of federally assisted public housing projects must follow the requirements of the Department of Housing and Urban Development's circular providing for notice to tenants of the reasons for eviction and an opportunity for explanation or reply before evicting any tenant residing in such projects on the date of this decision. Thorpe v. Housing Authority, p. 268.

PUBLIC OFFICIALS. See **Extortion.**

PUBLIC PLACES. See **Constitutional Law**, IV, 2–3.

PUBLIC RALLIES. See **Constitutional Law**, III, 3; **Injunctions; Mootness**, 3.

PUBLIC SCHOOL CURRICULUMS. See **Constitutional Law**, III, 2.

PUBLIC SCHOOLS. See **Constitutional Law**, III, 4–5.

PUERTO RICO. See **Arbitration.**

PUPILS. See **Constitutional Law**, III, 4–5.

PURCHASES. See **Securities and Exchange Commission**, 1–3.

QUALIFICATIONS FOR VOTING. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965**, 1–3.

RACIAL DISCRIMINATION. See **Constitutional Law**, II, 4; **Mootness**, 1.

RAILROAD ADJUSTMENT BOARD. See **Jurisdiction**, 2; **Procedure**, 3.

RAILROAD EMPLOYEES. See **Jurisdiction**, 2; **Procedure**, 3.

RAILROADS. See also **Constitutional Law**, II, 5; **Interstate Commerce Commission**, 1–2.

Full-crew laws—Legislative judgment—Railroad safety.—Whether full-crew laws are necessary to railroad safety is for legislative determination. Here the District Court erred in rejecting the legislative judgment that such laws promote railroad safety and that cost of additional crewmen is justified by the safety such laws might achieve. Firemen v. Chicago, R. I. & P. R. Co., p. 129.

RAILWAY LABOR ACT. See **Jurisdiction**, 2; **Procedure**, 3.

RALLIES. See **Constitutional Law**, III, 3; **Injunctions; Mootness**, 3.

RATE DIVISIONS. See **Interstate Commerce Commission**, 1–2.

REAL PROPERTY. See **Constitutional Law**, II, 4; **Mootness**, 1.

REASONABLENESS. See **Constitutional Law**, VI; **Procedure**, 11.

RECIPROCITY. See **Antitrust Acts**, 1.

REFUSAL TO SIGN CONTRACT. See **Administrative Procedure**, 2; **National Labor Relations Act.**

REGISTRATION CERTIFICATES. See **Judicial Review**, 2; **Selective Service Act**, 1–2.

REGULATIONS. See **Antitrust Acts**, 2; **Constitutional Law**, III, 4–5; **Habeas Corpus**, 2; **Mootness**, 2; **Prisoners.**

REGULATORY JURISDICTION. See **District of Columbia; Secretary of the Interior; Transportation.**

RELIGION. See **Constitutional Law**, III, 2.

RELIGIOUS DISCRIMINATION. See **Constitutional Law**, II, 4; **Mootness**, 1.

RELIGIOUS DOCTRINES. See **Constitutional Law**, III, 1.

REMEDIES. See **Administrative Procedure**, 2; **Jurisdiction**, 2; **National Labor Relations Act**; **Procedure**, 3; **Securities and Exchange Commission**, 1–3.

RENTS. See **Constitutional Law**, I, 2–3; **Public Housing.**

RES JUDICATA. See **Habeas Corpus**, 1, 3; **Procedure**, 4.

RESTRAINING ORDERS. See **Constitutional Law**, III, 3; **Injunctions**; **Mootness**, 3.

RETROACTIVITY. See **Constitutional Law**, I, 4–5; **Federal Communications Act**; **Procedure**, 1, 6–7; **Witnesses.**

REVOCATION OF PROBATION. See **Constitutional Law**, I, 4; **Procedure**, 6.

RIGHT TO COUNSEL. See **Constitutional Law**, I, 4–5; **Procedure**, 6–7.

RIGHT TO VOTE. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

SAFETY. See **Constitutional Law**, II, 5; **Railroads.**

SALES. See **Antitrust Acts**, 2; **Mootness**, 2.

SALES COMMISSIONS. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

SCHOOL BOOKS. See **Constitutional Law**, III, 2.

SCHOOLS. See **Constitutional Law**, III, 4–5.

SCHOOL TEACHERS. See **Constitutional Law**, III, 2, 4–5.

SCIENTIFIC THEORY. See **Constitutional Law**, III, 2.

SEARCH AND SEIZURE. See **Constitutional Law**, IV.

SECRETARY OF THE INTERIOR. See also **District of Columbia**; **Transportation.**

Jurisdiction—Bus service on the Mall—District of Columbia.—When Congress established the Washington Metropolitan Area Transit Commission it did not intend to create dual regulatory jurisdiction by divesting the Secretary of the Interior of his long-standing "exclusive charge and control" over the Mall. D. C. Transit System's franchise does not protect it against competition from petitioner's leisurely sightseeing service on the Mall outside WMATC jurisdiction. Shuttle Corp. v. Transit Comm'n, p. 186.

SECURITIES AND EXCHANGE COMMISSION.

1. *Arizona's regulation of insurance companies—McCarran-Ferguson Act—Federal securities regulation.*—Arizona's statutory regulation insofar as it applies to the relationship between insurance companies and their stockholders does not come within the scope of the McCarran-Ferguson Act and does not render the federal securities laws inapplicable. SEC v. National Securities, Inc., p. 453.

2. *McCarran-Ferguson Act — Fraudulent misrepresentations — Remedies.*—The Act does not bar the remedies, including return to the *status quo ante,* which the SEC is seeking, as the complaint is based on fraudulent misrepresentations and not on the illegality of the merger; any "impairment" of the state insurance laws is very indirect; and the paramount federal interest in protecting shareholders is compatible with the paramount state interest in protecting policyholders. SEC v. National Securities, Inc., p. 453.

3. *Securities Exchange Act—Exchange of shares—"Purchases."*—Deception alleged here has affected stockholders' decisions in a way not unlike that involved in typical cash sale or share exchange and in light of the broad antifraud purposes of § 10 (b) of the Act and SEC Rule 10b–5, which apply "in connection with the purchase or sale of any security," exchanges of old stock for shares in the new merged company are "purchases" within the meaning of that statutory language. SEC v. National Securities, Inc., p. 453.

SECURITIES EXCHANGE ACT. See **Securities and Exchange Commission.**

SELECTIVE SERVICE ACT. See also **Judicial Review,** 2, 4.

1. *Draft registrants—Theological students—Deprivation of exemption.*—There is no legislative authority to deny an unequivocal statutory exemption to a registrant who has qualified for one because of conduct unrelated to merits of granting or continuing the exemption, and delinquency proceedings cannot be used for that purpose. Oestereich v. Selective Service Bd., p. 233.

2. *Draft registrants—Theological students—Pre-induction judicial review.*—Pre-induction judicial review is not precluded in this case, as § 10 (b) (3) of the Military Selective Service Act of 1967 cannot be construed to impair the clear mandate of § 6 (g) of the Selective Service Act governing the exemption for theological students. Oestereich v. Selective Service Bd., p. 233.

3. *Pre-induction judicial review—Conscientious objectors—Draft Board discretion.*—The draft Board had exercised its statutory discretion evaluating the evidence regarding appellee's claim to classification as a conscientious objector, and had rejected that claim.

SELECTIVE SERVICE ACT—Continued.

Congress may constitutionally require that a registrant's challenges to such decisions be deferred until after induction, when remedy of habeas corpus would be available, or until defense of criminal prosecution, should he refuse to submit to induction. Clark v. Gabriel, p. 256.

SENTENCES. See **Constitutional Law**, I, 4; **Procedure**, 6.

SERVICE STATIONS. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

SEVENTH AMENDMENT. See **Constitutional Law**, VI; **Procedure**, 11.

"SHAKE DOWN." See **Extortion.**

SHERMAN ACT. See **Antitrust Acts**, 2; **Mootness**, 2.

SHIPOWNER. See **Constitutional Law**, VI; **Procedure**, 11.

SIGHTSEEING SERVICES. See **District of Columbia**; **Secretary of the Interior**; **Transportation.**

SIXTH AMENDMENT. See **Constitutional Law**, V; **Procedure**, 8; **Witnesses.**

SOCIALIST LABOR PARTY. See **Constitutional Law**, II, 3.

SOMERSET COUNTY. See **Constitutional Law**, III, 3; **Injunctions**; **Mootness**, 3.

SOUTHEASTERN UNITED STATES. See **Antitrust Acts**, 1.

SOVEREIGNTY. See **Constitutional Law**, V, 2; **Procedure**, 8.

SPEEDY TRIAL. See **Constitutional Law**, V, 2; **Procedure**, 8.

STABILIZATION OF PRICES. See **Antitrust Acts**, 1.

STATE CRIMINAL TRIALS. See **Constitutional Law**, V, 2; **Procedure**, 8.

STATE INSURANCE REGULATION. See **Securities and Exchange Commission**, 1–3.

STATE STATUTES. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

STATE TAXES. See **Interstate Commerce**; **Taxes**, 2.

STATUTORY EXEMPTIONS. See **Judicial Review**, 2; **Selective Service Act**, 1–2.

STEVEDORES. See **Constitutional Law**, VI; **Procedure**, 11.

STOCKHOLDERS. See **Securities and Exchange Commission**, 1–3; **Taxes**, 1.

STUDENTS. See **Constitutional Law**, III, 4–5.

SUBCONTRACTORS. See **Arbitration.**

SUBMISSIONS. See **Voting Rights Act of 1965**, 1–3.

SUPERINTENDENTS OF EDUCATION. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts**; **Voting Rights Act of 1965**, 1–3.

SUPREME COURT. See also **Jurisdiction**, 1; **Procedure**, 2.

1. Assignment of Mr. Justice Reed (retired) to United States Court of Claims, p. 1113.

2. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Second Circuit, p. 1113.

SURVEILLANCE. See **Constitutional Law**, IV, 1.

TAX AVOIDANCE. See **Taxes**, 1.

TAXES. See also **Corporations**; **Federal Power Commission**; **Interstate Commerce**; **Judicial Review**, 3.

1. *Accumulated earnings tax—Tax avoidance—Dominant motive.*—Tax imposed on accumulated earnings of a corporation "formed or availed of for the purpose of avoiding the income tax with respect to shareholders" applies if such tax avoidance was one of the purposes of an unreasonable accumulation of corporate earnings even though it was not the dominant, controlling, or impelling motive for the accumulation. United States v. Donruss Co., p. 297.

2. *License tax on photographers—Interstate commerce—Discrimination.*—Appellant was engaged in the essentially local activity of taking pictures and could constitutionally be made subject to Alabama license tax on that local activity. The tax does not discriminate against interstate commerce, since it is levied equally on interstate and intrastate transient photographers and on the record here the tax on out-of-state photographers is not so disproportionate to the tax on fixed-location photographers as to come within the condemnation of the Constitution. Dunbar-Stanley Studios v. Alabama, p. 537.

TEACHERS. See **Constitutional Law**, III, 2, 4–5.

TELEGRAMS. See **Federal Communications Act**; **Procedure**, 1.

TELEPHONES. See **Constitutional Law**, IV, 1.

TELEVISION STATIONS. See **Constitutional Law**, II, 1; **Corporations.**

TENANTS. See **Constitutional Law**, I, 2–3; **Public Housing.**

TENNESSEE. See **Habeas Corpus**, 2; **Prisoners.**

TERRITORIAL COSTS. See **Interstate Commerce Commission**, 1–2.

TESTIMONY. See **Constitutional Law**, V, 1; **Witnesses.**

TESTS OR DEVICES. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965**, 1–3.

TEXAS. See **Constitutional Law**, V, 2; **Procedure**, 8.

TEXTBOOKS. See **Constitutional Law**, III, 2.

THEOLOGICAL STUDENTS. See **Judicial Review**, 2; **Selective Service Act**, 1–2.

THREE-JUDGE COURTS. See also **Jurisdiction**, 1, 3; **Procedure**, 2, 10, 12–13; **Voting Rights Act of 1965**, 1–3.

Voting Rights Act of 1965—Procedure.—In light of the extraordinary nature of the Act and its effect on federal-state relationships, and the unique approval requirements of § 5, which also provides that "[a]ny action under this section shall be heard and determined by a court of three judges," disputes involving the coverage of § 5 should be determined by three-judge courts. Allen v. State Board of Elections, p. 544.

TIPS. See **Constitutional Law**, IV, 1–3.

TIRES. See **Administrative Procedure**, 1; **Federal Trade Commission**, 1–2.

TOURS. See **District of Columbia; Secretary of the Interior; Transportation.**

TRAIN CREWS. See **Constitutional Law**, II, 5; **Railroads.**

TRANSCRIPTS OF HEARINGS. See **Constitutional Law**, II, 2.

TRANSIENT PHOTOGRAPHERS. See **Interstate Commerce; Taxes**, 2.

TRANSIT SYSTEMS. See **District of Columbia; Secretary of the Interior; Transportation.**

TRANSPORTATION. See also **Constitutional Law**, II, 5; **District of Columbia; Interstate Commerce Commission**, 1–2; **Railroads; Secretary of the Interior.**

Bus service on the Mall—District of Columbia—Jurisdiction.—When Congress established the Washington Metropolitan Area Transit Commission it did not intend to create dual regulatory jurisdiction by divesting the Secretary of the Interior of his long-standing "exclusive charge and control" over the Mall. D. C. Transit System's franchise does not protect it against competition from petitioner's leisurely sightseeing service on the Mall outside WMATC jurisdiction. Shuttle Corp. v. Transit Comm'n p. 186.

TRAVEL ACT. See **Extortion.**

TRIAL BY JURY. See **Constitutional Law,** VI; **Procedure,** 11.

TRIALS. See **Constitutional Law,** I, 1; V, 2; **Procedure,** 8–9.

TRUST OF CHURCH PROPERTY. See **Constitutional Law,** III, 1.

UNAVAILABILITY OF WITNESSES. See **Constitutional Law,** V, 1; **Witnesses.**

UNFAIR COMPETITION. See **Administrative Procedure,** 1; **Federal Trade Commission.**

UNFAIR LABOR PRACTICES. See **Administrative Procedure,** 2; **National Labor Relations Act.**

UNIDENTIFIED INFORMERS. See **Constitutional Law,** IV, 2–3.

UNIFORM CODE OF MILITARY JUSTICE. See **Courts-Martial; Judicial Review,** 1.

UNIONS. See **Administrative Procedure,** 2; **Jurisdiction,** 2; **National Labor Relations Act; Procedure,** 3.

UNITED STATES ARBITRATION ACT. See **Arbitration.**

UNITED STATES COMMISSIONERS. See **Constitutional Law,** IV, 1.

UNREASONABLE ACCUMULATIONS. See **Taxes,** 1.

VENTILATING SYSTEM. See **Constitutional Law,** VI; **Procedure,** 11.

VIETNAM. See **Constitutional Law,** III, 4–5; **Judicial Review,** 2; **Selective Service Act,** 1–2.

VIRGINIA. See **Jurisdiction,** 3; **Procedure,** 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965,** 1–3.

VOTING. See **Constitutional Law,** II, 3.

VOTING RIGHTS ACT OF 1965. See also **Jurisdiction,** 3; **Procedure,** 10, 12–13; **Three-Judge Courts.**

1. *Approval requirements—State statutes and regulations.*—State statutes involved here are subject to § 5's approval requirements as the Act, which gives a broad interpretation to the right to vote and recognizes that voting includes "all actions necessary to make a vote effective," was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of race. Allen v. State Board of Elections, p. 544.

2. *Approval requirements — Submission to Attorney General.* — The Act requires that the State must in some unambiguous and recordable manner submit any legislation or regulation to the Attor-

VOTING RIGHTS ACT OF 1965—Continued.

ney General with a request for his consideration, and there is no "submission" when the Attorney General merely becomes aware of the legislation or when briefs are served on him. Allen v. State Board of Elections, p. 544.

3. *Denial of right to vote—Private litigants.*—Private litigants may invoke the jurisdiction of the district courts to obtain relief under § 5, to insure the Act's guarantee that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to that section. Allen v. State Board of Elections, p. 544.

WAGERING. See **Constitutional Law**, IV, 1.

WAIVERS. See **Habeas Corpus**, 1, 3; **Procedure**, 4.

WAR. See **Judicial Review**, 2; **Selective Service Act**, 1–2.

WARRANTLESS SEARCH. See **Constitutional Law**, IV, 2–3.

WARRANTS. See **Constitutional Law**, IV, 1.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION. See **District of Columbia; Secretary of the Interior; Transportation.**

WEBB-POMERENE ACT. See **Antitrust Acts**, 2; **Mootness**, 2.

WHITE SUPREMACISTS. See **Constitutional Law**, III, 3; **Injunctions; Mootness**, 3.

WITNESSES. See also **Constitutional Law**, V, 1.

Absence from jurisdiction—Good-faith effort to secure—Retroactivity.—The holding in *Barber* v. *Page*, 390 U. S. 719, that absence of witness from the jurisdiction would not justify use at trial of preliminary hearing testimony unless State had made good-faith effort to secure witness' presence, should be given retroactive application. Berger v. California, p. 314.

WORDS.

1. *"Business of insurance."* McCarran-Ferguson Act, § 2 (b), 15 U. S. C. § 1012 (b). SEC v. National Securities, Inc., p. 453.

2. *"Extortion."* 18 U. S. C. § 1952. United States v. Nardello, p. 286.

3. *"Purchase and sale of any security."* Securities Exchange Act, § 10 (b), 15 U. S. C. § 78j (b). SEC v. National Securities, Inc., p. 453.

WRITE-IN VOTES. See **Jurisdiction**, 3; **Procedure**, 10, 12–13; **Three-Judge Courts; Voting Rights Act of 1965**, 1–3.

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