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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1969

FEBRUARY 24 THROUGH MAY 14, 1970

HENRY PUTZEL, jr.
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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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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.
THURGOOD MARSHALL, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

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For the First Circuit, William J. Brennan, Jr., 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, Warren E. Burger, 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.

(For next previous allotment, see 389 U. S., p. v.)

TRIBUTE TO MR. JUSTICE BLACK

SUPREME COURT OF THE UNITED STATES

THURSDAY, FEBRUARY 26, 1970

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

THE CHIEF JUSTICE said:

Before addressing ourselves to the regular duties of the Court, I have a privilege accorded me by my colleagues, or I should say six of them, and it is a privilege which gives me a great, great pleasure.

This Court commonly does not take note of birthdays of Justices, but our Brother, JUSTICE HUGO BLACK, is a very uncommon man. Therefore we will break whatever precedents may be in the way to note today the birthday he will have tomorrow.

There is no need, of course, to speak of the work of JUSTICE BLACK as a member of this Court or his impact on our times and on our country. That record is written in very nearly 100 volumes of this Court's United States Reports.

Today we simply wish to take note, so that it may be recorded on the journal of the Court of the profound esteem and the very deep and warm affection that each of us bears for this very remarkable American.

We wish you, MR. JUSTICE BLACK, many, many more years of the kind of health and vigor and wisdom with which the Lord so richly endowed you.

In short, Happy Birthday, Sir. And, I may add, I am authorized by the Court to say this is unanimous; there are no dissents.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1969

UNITED STATES *v.* KORDEL ET AL.

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

No. 87. Argued November 20, 1969—Decided February 24, 1970

Respondents are corporate officers who, with the corporation, were convicted of violating the Federal Food, Drug, and Cosmetic Act. An *in rem* action against two corporate products had been begun in June 1960, and interrogatories routinely prepared by the Food and Drug Administration (FDA) were submitted to the corporation in January 1961. Later that month the corporation and respondents were notified, pursuant to § 305 of the Act, that the FDA contemplated a criminal proceeding against them respecting the transactions that were the subject of the civil action. In June 1961 the District Court denied the corporation's motion to stay further proceedings in the civil action or to extend the time for answering the interrogatories until after disposition of any criminal proceeding. The FDA recommended criminal prosecution prior to the September answer to the interrogatories by the corporation through respondent Feldten. No one associated with the corporation asserted his privilege against self-incrimination. The Court of Appeals reversed respondents' convictions on the ground that use of interrogatories to obtain evidence in a nearly contemporaneous civil condemnation proceeding operated to violate their Fifth Amendment privilege. *Held:*

1. The Court of Appeals erred in holding that the answers to the interrogatories were involuntarily given. Pp. 6–11.

(a) Respondent Feldten, who was not barred from asserting his privilege against self-incrimination because the corporation had no privilege of its own or because the proceeding was civil rather than criminal, failed to assert his privilege and cannot now complain that he was forced to testify against himself. Pp. 7–10.

(b) Respondent Kordel, who answered no interrogatories and did not assert the privilege, can hardly claim compulsory self-incrimination; and Kordel cannot claim that his right to confrontation was violated by use in the criminal case against him of his codefendant Feldten's admissions, which were never introduced in evidence. Pp. 10–11.

2. On the record here the respondents have not established a violation of due process or a departure from proper standards in the administration of justice requiring the exercise of the Court's supervisory power. Pp. 11–13.

407 F. 2d 570, reversed and remanded.

Lawrence G. Wallace argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley.*

Solomon H. Friend argued the cause for respondents. With him on the brief was *Sheldon S. Lustigman.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents are the president and vice president, respectively, of Detroit Vital Foods, Inc. They were convicted in the United States District Court for the Eastern District of Michigan, along with the corporation, for violations of the Federal Food, Drug, and Cosmetic Act.[1] The Court of Appeals for the Sixth Circuit reversed the respondents' convictions on the ground that the Government's use of interrogatories to obtain evi-

[1] 52 Stat. 1040, 21 U. S. C. § 301 *et seq.*

dence from the respondents in a nearly contemporaneous civil condemnation proceeding operated to violate their Fifth Amendment privilege against compulsory self-incrimination.[2] We granted certiorari to consider the questions raised by the Government's invocation of simultaneous civil and criminal proceedings in the enforcement of federal law.[3]

In March 1960 the Division of Regulatory Management of the Food and Drug Administration (hereafter FDA) instructed the agency's Detroit office to investigate the respondents' possible violations of the Food, Drug, and Cosmetic Act. Within a month the Detroit office recommended to the Division a civil seizure of two of the respondents' products, "Korleen" and "Frutex"; within another month the Division similarly recommended seizure to the FDA's General Counsel. On June 6, 1960, the General Counsel requested the United States Attorney for the Eastern District of Michigan to commence an *in rem* action against these products of the corporation, and the United States Attorney filed a libel three days later. The corporation, appearing as the claimant, answered the libel on September 12, 1960. An FDA official in the Division of Regulatory Management then prepared extensive interrogatories to be served on the corporation in this civil action. The United States Attorney filed the agency's interrogatories on January 6, 1961, pursuant to Rule 33 of the Federal Rules of Civil Procedure.[4]

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[2] *United States* v. *Detroit Vital Foods, Inc.*, 407 F. 2d 570. The Court of Appeals initially reversed the judgments of conviction of all three defendants, but on the Government's petition for rehearing it affirmed with respect to the corporation.

[3] 395 U. S. 932.

[4] Rule 33 provides in pertinent part: "Any party may serve upon any adverse party written interrogatories to be answered by the

After the Division official had drafted the interrogatories, he recommended that pursuant to § 305 of the Food, Drug, and Cosmetic Act the FDA serve upon the corporation and the respondents a notice that the agency contemplated a criminal proceeding against them with respect to the transactions that were the subject of the civil action.[5] On January 9, 1961, three days after the filing of the interrogatories in the civil action, the Detroit office received an instruction from the Division to serve the statutory notice. The Detroit office complied 10 days later, and on March 8, 1961, the agency held a hearing on the notice.

On April 10, the corporation, having received the FDA's interrogatories but not yet having answered them, moved to stay further proceedings in the civil action or, in the alternative, to extend the time to answer the interrogatories until after disposition of the criminal proceeding signaled by the § 305 notice. The motion was accompanied by the affidavit of counsel. The moving papers urged the District Court to act under Rule 33 "in the interest of substantial justice" and as a "balancing

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party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party."

[5] Section 305 of the Act, 21 U. S. C. § 335, provides:

"Before any violation of [the Act] . . . is reported by the Secretary [of the Department of Health, Education, and Welfare] to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding." Service of the statutory notice did not necessarily mean that a criminal prosecution would follow; the testimony before the District Court on the respondents' pretrial motion to suppress evidence indicated that fewer than 10% of the matters involving a § 305 notice reach the stage of either indictment or information.

of hardship and equities of the respective parties . . . ." Permitting the Government to obtain proof of violations of the Act by resort to civil discovery procedures, the movant urged, would be "improper" and would "work a grave injustice against the claimant"; it would also enable the Government to have pretrial discovery of the respondents' defenses to future criminal charges. Counsel expressly disavowed any "issue of a self-incrimination privilege in favor of the claimant corporation." And nowhere in the moving papers did counsel raise a claim of the Fifth Amendment privilege against compulsory self-incrimination with respect to the respondents.

On June 21, 1961, the District Court denied the motion upon finding that the corporation had failed to demonstrate that substantial prejudice and harm would result from being required to respond to the interrogatories. The court reasoned that the § 305 notice did not conclusively indicate the Government would institute a criminal proceeding, that six to 12 months could elapse from the service of the statutory notice to initiation of a criminal prosecution, and that the Government could obtain data for a prosecution from the testimony in the civil action or by subpoenaing the books and records of the corporation. Accordingly, the court concluded, the interests of justice did not require that the Government be denied the information it wanted simply because it had sought it by way of civil-discovery procedures. On September 5, 1961, in compliance with the court's directive, the corporation, through the respondent Feldten, answered the Government's interrogatories.

On July 28, 1961, five weeks after the District Court's order but more than a month before receipt of the answers to the interrogatories, the Director of the FDA's Detroit office recommended a criminal prosecution to the Division. The Division forwarded the recommendation

to the General Counsel on August 31, 1961, still prior to receipt of Feldten's answers. While the matter was pending in the General Counsel's office, the Division officer who had originally drafted the proposed interrogatories recommended that additional violations of the statute be alleged in the indictment. On June 13, 1962, the Department of Health, Education, and Welfare requested the Department of Justice to institute a criminal proceeding, and about two months after that the latter department instructed the United States Attorney in Detroit to seek an indictment. The civil case, still pending in the District Court, proceeded to settlement by way of a consent decree in November 1962, and eight months later the Government obtained the indictment underlying the present judgments of conviction.

I

At the outset, we assume that the information Feldten supplied the Government in his answers to the interrogatories, if not necessary to the proof of the Government's case in the criminal prosecution, as the Court of Appeals thought, at least provided evidence or leads useful to the Government.[6] However, the record amply supports the express finding of the District Judge who presided at the criminal trial, and who held an extensive evidentiary hearing on the respondents' pretrial motion to suppress evidence, that the Government did not act in bad faith in filing the interrogatories. Rather, the testimony before the trial court demonstrated that the Division of Regulatory Management regularly prepares such interrogatories upon the receipt of claimants' answers to civil libels, and files them in over three-fourths of such cases, to hasten their disposition by securing

[6] Compare 407 F. 2d, at 575, with *id.*, at 572.

admissions and laying the foundation for summary judgments.

The Court of Appeals thought the answers to the interrogatories were involuntarily given. The District Judge's order denying the corporation's motion to defer the answers to the interrogatories, reasoned the court, left the respondents with three choices: they could have refused to answer, thereby forfeiting the corporation's property that was the subject of the libel; they could have given false answers to the interrogatories, thereby subjecting themselves to the risk of a prosecution for perjury; or they could have done just what they did—disclose the requested information, thereby supplying the Government with evidence and leads helpful in securing their indictment and conviction.[7]

In this analysis we think the Court of Appeals erred. For Feldten need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination.[8] Surely Feldten was not barred from asserting his privilege simply because the corporation had no privilege of its own,[9] or because the proceeding in

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[7] *Id.*, at 573.

[8] *Wilson* v. *United States*, 221 U. S. 361, 377, 385; *Boyd* v. *United States*, 116 U. S. 616, 633–635; cf. *United States* v. *42 Jars . . . "Bee Royale Capsules,"* 162 F. Supp. 944, 946, aff'd, 264 F. 2d 666.

[9] *Curcio* v. *United States*, 354 U. S. 118, 124; *Wilson* v. *United States, supra,* at 385; *United States* v. *3963 Bottles . . . of . . . "Enerjol Double Strength,"* 265 F. 2d 332, 335–336, cert. denied, 360 U. S. 931; *United States* v. *30 Individually Cartoned Jars . . . "Ahead Hair Restorer . . . ,"* 43 F. R. D. 181, 187; cf. *Shapiro* v. *United States*, 335 U. S. 1, 27. That the corporation has no privilege is of course long established, and not disputed here. See *George Campbell Painting Corp.* v. *Reid*, 392 U. S. 286, 288–289; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 196, 208, 209–210; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726–727;

which the Government sought information was civil rather than criminal in character.[10]

To be sure, service of the interrogatories obliged the corporation to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." [11] The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. "It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." [12] Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.[13]

The respondents press upon us the situation where no one can answer the interrogatories addressed to the

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Essgee Co. v. *United States,* 262 U. S. 151, 155–156; *Wheeler* v. *United States,* 226 U. S. 478, 489–490; *Baltimore & Ohio R. Co.* v. *ICC,* 221 U. S. 612, 622–623; *Hale* v. *Henkel,* 201 U. S. 43, 74–75; cf. *Curcio* v. *United States, supra; United States* v. *White,* 322 U. S. 694, 698, 705.

[10] *Gardner* v. *Broderick,* 392 U. S. 273, 276; *McCarthy* v. *Arndstein,* 266 U. S. 34, 40; *Counselman* v. *Hitchcock,* 142 U. S. 547, 562, 563–564; *Boyd* v. *United States, supra; United States* v. *Saline Bank,* 1 Pet. 100, 104; 8 J. Wigmore, Evidence § 2257, pp. 339–340 (McNaughton rev. 1961); C. McCormick, Evidence § 123, p. 259 (1954).

[11] *United States* v. *3963 Bottles . . . of . . . "Enerjol Double Strength," supra,* at 336; cf. *United States* v. *48 Jars . . . "Tranquil*ease," 23 F. R. D. 192, 195, 196; 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 651, p. 101 (Wright ed. 1961).

[12] *United States* v. *3963 Bottles . . . of . . . "Enerjol Double Strength," supra,* at 336.

[13] Cf. *George Campbell Painting Corp.* v. *Reid, supra,* at 289; *Hale* v. *Henkel, supra,* at 69–70.

corporation without subjecting himself to a "real and appreciable" risk of self-incrimination.[14] For present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30 (b), postponing civil discovery until termination of the criminal action.[15] But we need not decide this troublesome question. For the record before us makes clear that even though the respondents had the burden of showing that the Government's interrogatories were improper,[16] they never even asserted, let alone demonstrated, that there was no authorized person who could answer the interrogatories without the possibility of compulsory self-incrimination.[17] To the contrary, the record shows that nobody associated with the corporation asserted his privilege at all. The respondents do not sug-

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[14] Cf. *Minor* v. *United States,* 396 U. S. 87, 98; *Leary* v. *United States,* 395 U. S. 6, 16; *Marchetti* v. *United States,* 390 U. S. 39, 48; *Mason* v. *United States,* 244 U. S. 362, 365.

[15] See *Paul Harrigan & Sons* v. *Enterprise Animal Oil Co.,* 14 F. R. D. 333.

[16] *Lucy* v. *Sterling Drug, Inc.,* 240 F. Supp. 632, 634; *Glick* v. *McKesson & Robbins, Inc.,* 10 F. R. D. 477, 479, 480; *Bowles* v. *Safeway Stores, Inc.,* 4 F. R. D. 469, 470; *Blanc* v. *Smith,* 3 F. R. D. 182, 183. The respondents, urging that the Government had the burden of establishing the availability of an agent to answer for the corporation, rely upon the decision of the Court of Appeals for the District of Columbia Circuit in *Communist Party* v. *United States,* 118 U. S. App. D. C. 61, 331 F. 2d 807, cert. denied, 377 U. S. 968. But there the court departed from the customary allocation of the burden on the ground that the mere act of volunteering the information sought, or even of showing that an effort had been made to find someone who would answer, was itself potentially incriminatory. *Id.,* at 68–69, 331 F. 2d, at 814–815.

[17] See *United States* v. *American Radiator & Standard Sanitary Corp.,* 388 F. 2d 201, 204, cert. denied, 390 U. S. 922; *United States* v. *Simon,* 373 F. 2d 649, 653, cert. granted *sub nom. Simon* v. *Wharton,* 386 U. S. 1030, vacated as moot, 389 U. S. 425; but see *National Discount Corp.* v. *Holzbaugh,* 13 F. R. D. 236, 237.

gest that Feldten, who answered the interrogatories on behalf of the corporation, did so while unrepresented by counsel or without appreciation of the possible consequences. His failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself.[18]

Kordel's claim of compulsory self-incrimination is even more tenuous than Feldten's. Not only did Kordel never assert the privilege; he never even answered any interrogatories. The Court of Appeals nevertheless reversed his conviction because it thought it "clear from the record that Detroit Vital Foods, Inc., was merely the corporate device through which Kordel sold his products. The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant personality in the corporation." [19] We disagree. The Government brought its libel against the goods; the corporation, not Kordel, appeared as claimant. The Government subsequently prosecuted Kordel as an officer of the company. If anyone has sought to cut through the corporate facade so far as the Fifth Amendment privilege is concerned, it is Kordel: he has, in effect, attempted to fashion a self-incrimination claim by combining testimony that he never gave and an assertion of the privilege that he never made with another assertion of the privilege that his company never had.

The Court of Appeals thought that Kordel must go free in any event because the Government had used Feldten's admissions in proving its criminal case against both respondents, in violation of the rule in *Bruton* v.

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[18] *Gardner* v. *Broderick,* 392 U. S. 273, 276; *Rogers* v. *United States,* 340 U. S. 367, 372–375; *United States* v. *Monia,* 317 U. S. 424, 427; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113; *Brown* v. *Walker,* 161 U. S. 591, 597.

[19] 407 F. 2d, at 575.

United States.[20] This too was error. Feldten's admissions were never introduced in evidence at the trial, and thus Kordel cannot maintain that the reception in evidence of a codefendant's inculpatory statements violated his Sixth Amendment right to confrontation.[21]

II

The respondents urge that even if the Government's conduct did not violate their Fifth Amendment privilege against compulsory self-incrimination, it nonetheless reflected such unfairness and want of consideration for justice as independently to require the reversal of their convictions. On the record before us, we cannot agree that the respondents have made out either a violation of due process or a departure from proper standards in the administration of justice requiring the exercise of our supervisory power. The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.[22]

We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for

[20] 391 U. S. 123. See 407 F. 2d, at 575.

[21] See *Bruton* v. *United States, supra,* at 126.

[22] Cf. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 51–52 (Sherman Act).

its criminal prosecution [23] or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; [24] nor with a case where the defendant is without counsel [25] or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; [26] nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.[27]

Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against a corporate defendant in the ordinary course of a civil proceeding would always

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[23] Cf. *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683–684; *United States* v. *Pennsalt Chemicals Corp.*, 260 F. Supp. 171; and see *United States* v. *Thayer*, 214 F. Supp. 929; *Beard* v. *New York Central R. Co.*, 20 F. R. D. 607.

[24] See *Smith* v. *Katzenbach*, 122 U. S. App. D. C. 113, 114–116, 351 F. 2d 810, 811–813; *United States* v. *Lipshitz*, 132 F. Supp. 519, 523; *United States* v. *Guerrina*, 112 F. Supp. 126, 128.

[25] Cf. *Nelson* v. *United States*, 93 U. S. App. D. C. 14, 19, 21, and n. 19, 208 F. 2d 505, 510, 512, and n. 19, cert. denied, 346 U. S. 827.

[26] Cf. *United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F. 2d 201, 204–205, cert. denied, 390 U. S. 922.

[27] Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution, *Campbell* v. *Eastland*, 307 F. 2d 478, cert. denied, 371 U. S. 955; *United States* v. *Bridges*, 86 F. Supp. 931, 933; *United States* v. *30 Individually Cartoned Jars . . . "Ahead Hair Restorer . . . ,"* 43 F. R. D. 181, 187 n. 8; *United States* v. *One 1964 Cadillac Coupe DeVille*, 41 F. R. D. 352, 353–354; *United States* v. *$2,437 United States Currency*, 36 F. R. D. 257; *United States* v. *Steffes*, 35 F. R. D. 24; *United States* v. *Maine Lobstermen's Assn.*, 22 F. R. D. 199; *United States* v. *Cigarette Merchandisers Assn.*, 18 F. R. D. 497; *United States* v. *Linen Supply Institute*, 18 F. R. D. 452; sometimes at the request of the defense, *Kaeppler* v. *Jas. H. Matthews & Co.*, 200 F. Supp. 229; *Perry* v. *McGuire*, 36 F. R. D. 272; cf. *Nichols* v. *Philadelphia Tribune Co.*, 22 F. R. D. 89, 92.

immunize the corporation's officers from subsequent criminal prosecution. The Court of Appeals was correct in stating that "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property." [28] But on this record there was no such violation of the Constitution, and no such departure from the proper administration of criminal justice.

Accordingly, 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 BLACK did not take part in the decision of this case.

[28] 407 F. 2d, at 575–576.

UNITED STATES *v.* REYNOLDS ET UX.

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

No. 88. Argued January 14, 1970—Decided February 24, 1970

The right to a jury trial afforded by Fed. Rule Civ. Proc. 71A (h) in a federal eminent domain proceeding on the issue of just compensation, does not extend to the question whether the condemned "lands were probably within the scope of the project from the time the Government was committed to it" (either by the original plans or during the course of planning or original construction), and that question is for the trial judge to decide. Pp. 15–21.

404 F. 2d 303, vacated and remanded.

Assistant Attorney General Kashiwa argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Raymond N. Zagone,* and *Robert S. Lynch.*

Erwin S. Solomon argued the cause and filed a brief for respondents.

MR. JUSTICE STEWART delivered the opinion of the Court.

The United States brought this suit in the United States District Court for the Western District of Kentucky to condemn more than 250 acres of the respondents' land for a federal development known as the Nolin Reservoir Project located in that State. An important issue in the case was raised by the respondents' claim that 78 acres of the land, taken for construction of recreational facilities adjacent to the reservoir, had not been within the original scope of the project.[1] A jury

[1] Congress authorized the Nolin Reservoir Project in 1938 as part of a comprehensive flood control plan for the Ohio and Mississippi Rivers. See Act of June 28, 1938, § 4, 52 Stat. 1217. Congress

awarded the respondents $20,000 as just compensation for all the land taken. Upon an appeal by the respondents, the Court of Appeals for the Sixth Circuit reversed the judgment and ordered a new trial, finding that the District Judge in his instructions to the jury had erroneously referred to matters disclosed outside the jury's presence.[2] The trial and appellate courts were in agreement, however, in rejecting the Government's contention that the "scope-of-the-project" issue was for the trial judge to decide and should not, therefore, have been submitted to the jury at all. There being a conflict between the circuits on this question,[3] we granted certiorari to consider a recurring problem of importance in federal condemnation proceedings. 396 U. S. 814.

The Fifth Amendment provides that private property shall not be taken for public use without just compensa-

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first appropriated funds for the planning stage of the project in 1956. See Public Works Appropriation Act of 1957, 70 Stat. 479. In July 1958 the Chief of Army Engineers approved a general design memorandum contemplating the construction of recreational areas in connection with the project, but evidently not specifying where they would be. The first funds for construction were appropriated in 1958. See Public Works Appropriation Act of 1959, 72 Stat. 1573. Construction began in January 1959.

Most of the respondents' acreage condemned by the Government was taken because it would be inundated by the reservoir, and there is no question that this land was within the original scope of the project. But 78 acres of the tract were taken for the construction of recreational facilities adjacent to the reservoir itself. These 78 acres were not referred to in a design memorandum submitted in June 1959. They were, however, designated for taking in a memorandum approved in October of that year. It has been Government policy to build recreational areas in conjunction with federal reservoir projects since 1944. Act of December 22, 1944, § 4, 58 Stat. 889.

[2] *United States* v. *811.92 Acres of Land,* 404 F. 2d 303.

[3] The Court of Appeals for the Fifth Circuit has held that the "scope-of-the-project" issue is to be determined by the trial judge. *Wardy* v. *United States,* 402 F. 2d 762, 763.

tion. And "just compensation" means the full monetary equivalent of the property taken.[4] The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.[5] In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property [6] at the time of the taking.[7] But this basic measurement of compensation has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee. It is one of these refinements that is in controversy here.

The Court early recognized that the "market value" of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary.[8] And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation" that the Constitution requires.[9] On the other hand, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be

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[4] *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326.

[5] *United States* v. *New River Collieries Co.,* 262 U. S. 341, 343; *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299, 304.

[6] *New York* v. *Sage,* 239 U. S. 57, 61; *Boom Co.* v. *Patterson,* 98 U. S. 403, 408.

[7] *Kerr* v. *South Park Commissioners,* 117 U. S. 379, 386.

[8] *Shoemaker* v. *United States,* 147 U. S. 282, 304–305.

[9] *United States* v. *Virginia Electric & Power Co.,* 365 U. S. 624, 635–636; *United States* v. *Cors,* 337 U. S. 325, 332–334.

wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.[10]

In *United States* v. *Miller,* 317 U. S. 369, the Court gave full articulation to these principles:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.
>
> "The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought

[10] *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 81; *Boom Co.* v. *Patterson, supra.*

> not to gain by speculating on probable increase in value due to the Government's activities." 317 U. S., at 376–377.

There is no controversy in the present case regarding these basic principles. The parties agree that if the acreage in issue was "probably within the scope of the project from the time the Government was committed to it," substantially less compensation is due than if it was not. For if the property was probably within the project's original scope, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage was outside the original scope of the project, its compensable value is properly measurable in terms of its economic potential as lakeside residential or recreational property.

The issue between the parties is simply whether the "scope-of-the-project" question is to be determined by the trial judge or by the jury. There is no claim that the issue is of constitutional dimensions. For it has long been settled that there is no constitutional right to a jury in eminent domain proceedings. See *Bauman* v. *Ross,* 167 U. S. 548, 593. As Professor Moore has put the matter:

> "The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain." [11]

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[11] 5 J. Moore, Federal Practice ¶38.32 [1], p. 239 (2d ed. 1969). (Footnote omitted.)

It is not, therefore, to the Seventh Amendment that we look in this case, but to the Federal Rules of Civil Procedure. Rule 71A (h) provides that, except in circumstances not applicable here, "any party" to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation," unless the court in its discretion orders that that issue "shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court." [12] The Rule thus provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented. The critical inquiry is thus whether "the issue of just compensation," as that phrase is used in the Rule, is broad enough to embrace the question whether the condemned property was probably within the scope of the federal project.[13]

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[12] The full text of Rule 71A (h) is as follows:

"If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

[13] In *United States* v. *Miller, supra,* it appears that that question was decided by the trial judge, who excluded all evidence of enhanced

Although the matter could be decided either way without doing violence to the language of Rule 71A (h), we think the Rule's basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge. The Rule gives the trial court discretion to eliminate a jury entirely. And when a jury is afforded, the sweeping language of the final sentence of the Rule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial. It is for him to decide "all issues" other than the precise issue of the amount of compensation to be awarded. It follows that it is for the judge to tell the jury the criteria it must follow in determining what amount will constitute just compensation, and that in order to do so he must decide the "scope-of-the-project" issue as a preliminary matter. We therefore approve and adopt the procedural rule announced by the Court of Appeals for the Fifth Circuit in *Wardy* v. *United States,* 402 F. 2d 762, and hold that it is for the judge and not the jury to decide whether the property condemned was probably within the project's original scope.[14]

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value attributable to the project. 317 U. S., at 372–373. While this Court's opinion in *Miller* approved of that procedure, it is to be remembered that the case was decided before the adoption of Rule 71A (h) in 1951, at a time when federal courts in condemnation proceedings followed the procedures of the States in which they were located. See Advisory Committee Notes to Rule 71A; 7 J. Moore, *supra,* ¶ 71A.03, p. 2716 (2d ed. 1968).

[14] "The question was whether appellants' 'lands were probably within the scope of the project from the time the Government was committed to it.' . . . Appellants contend that the jury should have been allowed to answer this question. Under rule 71A (h) the jury's function is limited to determining 'just compensation.' It is

Finally, the Government asks us to take this occasion to "clarify" the "scope-of-the-project" test. We think the test was stated with admirable clarity by a unanimous Court in *Miller:* if the "lands were probably within the scope of the project from the time the Government was committed to it," no enhancement in value attributable to the project is to be considered in awarding compensation. As with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment.[15] The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.

The judgment of the Court of Appeals is vacated, and the case is remanded to the United States District Court for the Western District of Kentucky for further proceedings consistent with this opinion.

It is so ordered.

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

All constitutional questions aside, there was in the present case a right to trial by jury on "the issue of just compensation" as provided in Rule 71A (h). I do not

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the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of 'just compensation.'" *Wardy* v. *United States,* 402 F. 2d, at 763. See also *Scott Lumber Co.* v. *United States,* 390 F. 2d 388, 392 (C. A. 9th Cir.); *United States* v. *91.69 Acres of Land,* 334 F. 2d 229, 231–232 (C. A. 4th Cir.).

[15] Compare *John L. Roper Lumber Co.* v. *United States,* 150 F. 2d 329, 332, with *Scott* v. *United States,* 146 F. 2d 131, 132–133.

see how "the issue of just compensation" can be decided without considering whether or not the property was probably within or not within the project's original scope. As the opinion of the Court makes plain, important questions of value turn on that decision. In this case it is seen in the difference between the value of the property as agricultural land and its value as potential lakeside residential or recreational property.

If it were certain beyond doubt that the property was within the original scope of the project, a different question might be presented. But there is nothing in this record to show that respondents' property was included in the original design. We deal here with probabilities or perhaps with possibilities. If the property were not within the original design, a purchaser could reasonably anticipate that he would be able to devote the land to its highest economic use reflected in part by its proximity to the Government's project. Henry George [1] would have it otherwise; but that has not been the direction of our economy. Hence what we are talking about is market value and that in turn includes all of the ingredients that make up price. The most central element of price in the area now litigated was the relation of the land to the original project and that issue was one of fact. The "issue of just compensation" [2] as used in Rule 71A (h)

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[1] Progress and Poverty, Book VI (50th Ann. ed. 1945).

[2] In *United States* v. *Certain Lands,* 144 F. Supp. 206, a road was taken and the question of "just compensation" turned on whether the construction of a substitute facility was necessary. The court held that that issue of necessity was properly left to the jury:

"In the average condemnation proceeding, many factors must be considered in arriving at just compensation, factors which are only established and available after the exercise of a fact-finding process. There appears to be no reason for introducing a trial by jury into condemnation proceedings unless the jury's province is broad enough to include the weighing of evidence which directly relates

truly cannot be resolved without considering that question.

There seems to be no reason why the jury chosen by Congress to decide the final issue of "just compensation" should be denied the power to determine the subordinate issues of fact upon which the jury's final verdict must rest.

There are powerful forces loose in this country that deprecate the use of juries. The Department of Justice and other federal agencies [3] often seem to dislike juries in

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to the issue of compensation. It would seem that in this case the determination as to whether any substitute facilities are required at all is indeed a part of the 'issue of just compensation,' one of the factors to be taken into account by the jury in reaching its verdict." *Id.*, at 214.

[3] The present Rule 71A, which in absence of an Act of Congress gives the courts discretion to have the issue of compensation decided by a commission of three, was inspired by the Act governing condemnations by the TVA which required the appointment of a commission in all cases, 48 Stat. 70. See Notes of Advisory Committee, 28 U. S. C., following Rule 71A. But that Act was amended in 1968. See 82 Stat. 885, 16 U. S. C. § 831x (1964 ed., Supp. IV). Under the bill as reported out of the Senate Committee on Public Works either party had on demand "an absolute right to a jury trial." S. Rep. No. 930, 90th Cong., 1st Sess., 2. "Proponents of the legislation indicated that no landowner should be denied his basic right to a trial by jury involving the condemnation of his property. In addition, it was indicated that the absence of a right to a jury trial had generated friction between TVA and landowners which was seriously affecting the public relations of that agency." *Ibid.*

The Senate Committee stated: "While the committee makes no judgment as to the benefits of either the commissioner or jury-trial system, it does feel that a right to trial-by-jury is basic to our American way of life, and accordingly recommends adoption of this legislation." *Id.*, at 3.

That bill was amended on the floor of the Senate to modify the provision for an absolute right to jury trial by making Rule 71A applicable to TVA condemnation proceedings. The discussion in support of this amendment, however, again stressed the general

condemnation cases. In my Circuit, juries have unexpectedly risen up in favor of homeowners and against Washington, D. C., and granted "just compensation" in large sums, in retaliation, it is believed, against hard-nosed officials who, with all the power of the central government, seek to plow them under. At other times the jury has acted differently and cut down the award.[4] Juries in these condemnation cases perform, in other words, an historic restraint on both executive and judicial power. See *Bushell's Case.* 6 How. St. Tr. 999, decided in 1670.

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dissatisfaction with the commission system, and emphasized the right to jury trial in all but the most "extraordinary circumstances." 113 Cong. Rec. 36979–36981.

[4] See *John L. Roper Lumber Co.* v. *United States,* 150 F. 2d 329, where the jury refused the land owner any increment of value occasioned by the land's proximity to the project.

CZOSEK ET AL. *v.* O'MARA ET AL.

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

No. 234. Argued January 13, 1970—Decided February 24, 1970

Employees of the Erie Lackawanna Railroad Co., who were furloughed and never recalled, filed suit against the railroad, their union, and subordinate organizations and officers of the union, alleging that the railroad had wrongfully discharged them and that the union defendants had been "guilty of gross nonfeasance and hostile discrimination" in refusing to process their claims. They sought damages from the railroad, the union defendants, or both. The District Court dismissed the complaint against the railroad for failure to exhaust the Railway Labor Act's administrative remedies and for lack of diversity jurisdiction, and against the union for failure adequately to allege a breach of duty and because the plaintiffs could have processed their own grievances. The Court of Appeals reversed with respect to the action against the union defendants, holding that the complaint adequately alleged a breach of the union's duty of fair representation. It affirmed dismissal of the complaint against the railroad, but held that on remand the employees could maintain their action against the railroad if they amended the complaint to allege that the employer was implicated in the union's discrimination. *Held:*

1. The complaint against the union was sufficient to survive a motion to dismiss. The claim for breach of the union's duty of fair representation is a discrete claim, being distinct from the right of individual employees under the Railway Labor Act to pursue their employer before the Adjustment Board. Pp. 27–28.

2. The union can be sued alone for breach of its duty, and it cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each where the union and the employer have independently caused damage to the employees. Pp. 28–29.

407 F. 2d 674, affirmed.

Richard R. Lyman argued the cause for petitioners. With him on the brief was *Clarence M. Mulholland.*

James P. Shea argued the cause for respondents O'Mara et al. On the brief was *William B. Mahoney. Richard F. Griffin* argued the cause for respondent Erie Lackawanna Railroad Co. With him on the brief were *Thomas G. Rickert* and *Courtland R. LaVallee.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1960, the corporate respondent, Erie Lackawanna Railroad Company, was formed by the merger of the Erie Railroad and the Delaware, Lackawanna & Western Railroad. Thereafter, the individual respondents, former employees of the Delaware Lackawanna, continued as employees of the Erie Lackawanna until 1962, when they were furloughed; after the 1962 furlough, the respondent employees were never recalled by the railroad. Deeming the furlough a final discharge, the individual respondents brought suit in the District Court for the Western District of New York against the Erie Lackawanna and against the International Brotherhood of Firemen and Oilers, subordinate organizations within the union, and local and national officers of the union. The allegations were that the railroad had wrongfully discharged the plaintiffs in violation of § 5 *et seq.* of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 5 *et seq.*, the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, and the agreement between the Erie Lackawanna and its employees entered into to implement the 1960 merger of the Erie and the Delaware Lackawanna; and that the union defendants had been "guilty of gross nonfeasance and hostile discrimination" in arbitrarily and capriciously refusing to process the claims of plaintiffs, who had "been replaced by 'pre-merger' employees of the Erie Railroad." Damages in the sum of $160,000 were sought against the railroad, the union defendants, or both. The District Court

dismissed the complaint against the railroad for failure to exhaust administrative remedies under the Railway Labor Act and for lack of diversity jurisdiction; the court dismissed the complaint against the union because the complaint failed adequately to allege a breach of duty and because the employees could have processed their own grievances.

On appeal, the Court of Appeals for the Second Circuit reversed the District Court's decision with respect to the action against the union defendants. *O'Mara* v. *Erie Lackawanna R. Co.*, 407 F. 2d 674 (1969). The Court of Appeals held that the complaint was adequate to allege a breach by the union of its duty of fair representation subject to vindication in the District Court without resort to administrative remedies. Dismissal of the complaint against the railroad was affirmed; but on remand the individual respondents were to be granted leave to maintain their action against the railroad if they should choose to amend their complaint to allege that the employer was somehow implicated in the union's discrimination.

We granted certiorari, 396 U. S. 814 (1969), and we affirm the judgment of the Court of Appeals. Although the complaint was not as specific with regard to union discrimination as might have been desirable, we deem the complaint against the union sufficient to survive a motion to dismiss. As the Court of Appeals indicated, "where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation," complaints should be construed to avoid dismissals and the plaintiff at the very least "should be given the opportunity to file supplemental pleadings unless it appears 'beyond doubt' that he cannot state a good cause of action." 407 F. 2d, at 679. See *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). And surely it is

beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. *Glover* v. *St. Louis-S. F. R. Co.*, 393 U. S. 324 (1969); *Conley* v. *Gibson, supra.* The claim against the union defendants for the breach of their duty of fair representation is a discrete claim quite apart from the right of individual employees expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board.[1]

Neither the individual respondents nor the railroad sought review here of the Court of Appeals' judgment insofar as it sustained the dismissal of the complaint against the railroad absent allegations implicating the railroad in the union's claimed breach of duty. The petitioning union defendants, however, challenge this aspect of the Court of Appeals' decision, insisting that they may not be sued alone for breach of duty when the damage to employees had its roots in their discharge by the railroad prior to the union's alleged refusal to process grievances. Apparently fearing that if sued alone they may be forced to pay damages for which the

[1] Section 3 First (i) of the Railway Labor Act, 45 U. S. C. § 153 First (i), authorizes reference to the Adjustment Board of 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 . . . ." Section 3 First (j) of the Act, 45 U. S. C. § 153 First (j), provides that "[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . . ." The individual employee's rights to participate in the processing of his grievances "are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 740 n. 39 (1945), adhered to on rehearing, 327 U. S. 661 (1946).

employer is wholly or partly responsible, the petitioners claim error in the Court of Appeals' affirmance of the dismissal of the suit against the railroad. These fears are groundless. The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer was in any other way implicated in the union's alleged discriminatory action.[2] If these allegations are not made and the employer is not a party defendant, judgment against petitioners can in any event be had only for those damages that flowed from their own conduct.[3] Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.

Since the petitioning union defendants will not be materially prejudiced by the possible absence of the respondent railroad as a codefendant at trial and since neither the railroad nor the aggrieved employees sought review of the Court of Appeals' judgment, we have no occasion to consider whether under federal law, which

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[2] See *Glover* v. *St. Louis-S. F. R. Co.*, 393 U. S. 324 (1969); *Cunningham* v. *Erie R. Co.*, 266 F. 2d 411 (C. A. 2d Cir. 1959); *Richardson* v. *Texas & N. O. R. Co.*, 242 F. 2d 230 (C. A. 5th Cir. 1957). See also *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (C. A. 2d Cir. 1961).

[3] See *Vaca* v. *Sipes*, 386 U. S. 171, 196–198 (1967).

governs in cases like these, the employer may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation or whether, as the Court of Appeals held, when there are no allegations tying union and employer together, the union is suable in the District Court for breach of duty but resort must be had to the Adjustment Board for a remedy against the employer.

Affirmed.

THE CHIEF JUSTICE would dismiss the writ of certiorari as improvidently granted.

JONES *v.* STATE BOARD OF EDUCATION OF TENNESSEE ET AL.

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

No. 731. Argued January 19–20, 1970—Decided February 24, 1970

Writ of certiorari to determine if indefinite suspension from university where petitioner was a student violated his First Amendment rights *held* improvidently granted since (as developed after the writ was granted) the suspension was partly based on a finding that he lied at the hearing on the charges against him.

407 F. 2d 834, certiorari dismissed.

Reber F. Boult, Jr., argued the cause for petitioner. With him on the briefs were *Charles Morgan, Jr., Richard Bellman, Melvin L. Wulf,* and *Eleanor H. Norton.*

Robert H. Roberts, Assistant Attorney General of Tennessee, argued the cause for respondents. With him on the brief were *David M. Pack,* Attorney General, and *Thomas E. Fox,* Deputy Attorney General.

PER CURIAM.

Petitioner Jones was suspended indefinitely as a student at Tennessee A. & I. State University in the summer of 1967. His indefinite suspension was confirmed after a hearing in September of that year, in which charges against him were specified, evidence taken, and findings made. He, along with two other suspended students, brought suit in the United States District Court for the Middle District of Tennessee, seeking to set aside the suspension on First Amendment and due process grounds. After a hearing, the District Court granted judgment on the merits to defendants with an opinion. 279 F. Supp.

190 (1968). On appeal the Court of Appeals for the Sixth Circuit affirmed. 407 F. 2d 834 (1969). We granted certiorari, 396 U. S. 817 (1969), primarily to consider the issues raised by Jones' claim that he had been separated from the university solely because of his distribution of leaflets urging a boycott of fall registration.

After oral argument, and on closer review of the record, it emerges—as it did not from the certiorari papers or the opinions of the District Court and the Court of Appeals—that Jones' indefinite suspension was based in part on a finding that he lied at the hearing on the charges against him. This fact sufficiently clouds the record to render the case an inappropriate vehicle for this Court's first decision on the extent of First Amendment restrictions upon the power of state universities to expel or indefinitely suspend students for the expression of views alleged to be disruptive of the good order of the campus. Accordingly the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BLACK, for reasons set out in the above opinion and others stated in his dissent in *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 515–526, would affirm the judgment below.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Petitioner, a student at Tennessee A. & I. State University, was dismissed from the school on charges preferred by a Faculty Advisory Committee and heard by it. One of the charges read as follows:

> "You are charged with distributing literature and soliciting students, all of which was designed to

> boycott the registration at the University for the Fall Quarter 1967. This occurred during the Summer of 1967."

The literature urging a boycott of registration was a pamphlet which is printed in the Appendix to this opinion.

Petitioner, being suspended indefinitely, brought this suit in the District Court for an injunction and other relief. That court denied relief, 279 F. Supp. 190, and the Court of Appeals affirmed. 407 F. 2d 834. Our failure to reverse is a serious setback for First Amendment rights in a troubled field.

The leaflet now censored may be ill-tempered and in bad taste. But we recognized in *Terminiello* v. *Chicago,* 337 U. S. 1, that even strongly abusive utterances or publications, not merely polished and urbane pronouncements of dignified people, enjoy First Amendment protection. We said in *Terminiello:*

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.,* at 4.

Students are certainly entitled to enjoy First Amendment rights. *West Virginia* v. *Barnette,* 319 U. S. 624, 637; *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250. This does not mean that free speech can be used with impunity as an excuse to break up classrooms, to destroy the quiet and decorum of convocations, or to bar the constitutional privileges of others to meet together in

matters of common concern. But the campus, where this leaflet was distributed, is a fitting place for the dissemination of a wide spectrum of ideas.

Moreover, it is far too late to suggest that since attendance at a state university is a "privilege," not a "right," there are no constitutional barriers to summary withdrawal of the "privilege." Such labeling does not resolve constitutional questions, as we recently noted in *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6. The doctrine that a government, state or federal, may not grant a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights is now well established. *E. g., Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 894; *Sherbert* v. *Verner,* 374 U. S. 398, 404; *Speiser* v. *Randall,* 357 U. S. 513, 519–520; *Garrity* v. *New Jersey,* 385 U. S. 493, 499–500; *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 597–598; *Frost & Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583, 593–594; see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1445–1454 (1968); Comment, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968). As stated in *Homer* v. *Richmond,* 292 F. 2d 719, 722:

> "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."

This does not mean that the whole panoply of the Bill of Rights is applicable to student dismissal proceedings. It does mean, however, that where there are "constitutional restraints upon state and federal governments" in dealing with the persons subject to their supervision, the persons in question have "a constitutional right to notice and a hearing before they can be removed." *Cafeteria Workers* v. *McElroy, supra,* at 898.

Judge Rives, speaking for the Court of Appeals for the Fifth Circuit, stated in *Dixon* v. *Alabama State Board,* 294 F. 2d 150, 157: "[No] one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value." Judge Rives went on to hold that such "privilege" or "right" could not be taken away without notice and hearing. *Id.,* at 158. Thus the dissent of Judge Clark in *Steier* v. *New York State Education Comm'r,* 271 F. 2d 13, 22–23, became the law. See Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1028–1034 (1969).

When we look at the present proceeding we learn that there was notice and that there were hearings. The charge was circulating the leaflet, which clearly was a First Amendment right. As we said in *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 506:

> "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."

At the very least the suspension raises a serious constitutional question in the absence of provision for a timely judicial determination of the First Amendment claims. Cf. *Freedman* v. *Maryland,* 380 U. S. 51.

The circulation did not disrupt a classroom or any other university function. It would seem, therefore, that it is immune from punishment, censorship, and any form of retaliatory action.

"Neither the state in general, nor the state university in particular, is free to prohibit any kind of expression

because it does not like what is being said." Wright, *supra,* at 1039.

The suspension of petitioner was based in part on distributing the literature and in part on the committee's conclusion that, when petitioner at the hearing denied that he "passed out such literature," he "did not tell the truth."

But lying to school authorities was no part of the charges leveled against petitioner. If he is to be expelled for lying, he is entitled to notice and opportunity to be heard on that charge. We said in a case involving the disbarment of a lawyer, "The charge must be known before the proceedings commence." *In re Ruffalo,* 390 U. S. 544, 551. In that case one of the grounds of disbarment was petitioner's employment of one Orlando as an investigator. That was not included in any charge made prior to the disbarment hearing. Petitioner was not aware that it would be considered as a disbarment offense until after both he and Orlando testified on all aspects of that phase of the case. We said that disbarment proceedings

> "become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> "How the charge would have been met had it been originally included in those leveled against petitioner . . . no one knows.
>
> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.,* at 551–552.

Procedural due process in the present case requires that if petitioner is to be deprived of an education at Tennessee A. & I. for lying, he be given notice of that precise charge and an opportunity to be heard.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

"In the early years of the civil rights movement in America, college students in Nashville's black universities were in the forefront of the struggle. Today, a new vanguard has formed and once again, students at Tennessee State University are called to the helm.

"The great white fathers downtown have given the ultimatum to the administrators of this school. They've begun the conspiracy to seize total control of the puppet administrators and the entire student body. For their own security, and in the vested interest of the MAN, the Juda administration has sold out the student body by directing the following atrocities against us:

> "1. Students whose names appeared in the Nashville rags—namely the Banner and the Tennessean—in connection with the April 'disturbances' have been dismissed from this university without pre-warning of their dismissal, and without the opportunity to appear before the student senate to hear the charges brought against them, and to appeal their cases.
>
> "COMMENT: If the puppets want to adopt the uncivilized tactics used by the MAN, we must move to correct these erroneously acting, educated TOMS.
>
> "2. Legislation has been taken to decrease the number of out-of-state students by increasing out-of-state fees, and adopting rigid academic standards.
>
> "COMMENT: The puppet fools have taken this action to remove academic freedom, and student dissent from university life. Thus they secure their own shaky jobs, and their positions in the circus of white man's society. These people are too blind to see that the MAN initiated these moves so that he may 'morally' proceed to infiltrate our black

university with his teachers and students who are more adept in perpetuating his culture than the puppets who are already here.

"3. Non-city students have been required to move on campus with an increase in dormitory fees.

"COMMENT: Thus the campus will become a concentration camp controlled and contained by the legislation of the *racist dogs* downtown, the acts of the *puppet administrators,* the billy clubs and guns of *Nashville's racist cops,* and ultimately the gestapo tactics of the *honorable national guard,* whose pale faces have already been seen in Memphis, Nashville, Chattanooga.

"No longer can we as intelligent human beings allow others to make a charade of democratic principle by submitting to the tyranny of a dictatorial administration. Let it be resolved that . . .

"1. We as students of this university will not allow ourselves to be herded into concentration camps disguised as the 'university campus.'

"2. We, as intelligent black students, will not be guarded by trembling, powerless idiots who call themselves administrators.

"3. We, as black human beings will not be recorded in the pages of history as an ununified race of people, exterminated by the guns of submission and hate.

"A generation of inactivity has given today's black students [a] responsibility of informing and uniting our fellow classmates so that we can fight to remove the injustices directed against us as black people.

"CAST YOUR VOTE FOR *STUDENT POWER ! ! !* BOYCOTT REGISTRATION SEPTEMBER 23 AND FOR AS LONG AS THE PUPPET ADMINISTRATION REFUSES TO ACKNOWLEDGE THAT THIS IS *OUR* UNIVERSITY!

SNCC."

CONTRACTORS CARGO CO. *v.* UNITED STATES ET AL.

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

No. 912. Decided February 24, 1970

299 F. Supp. 287, affirmed.

William P. Sullivan and *William P. Jackson, Jr.*, for appellant.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, and *Nahum Litt* for the United States et al., and *Wyman C. Knapp* for Dealers Transit, Inc., et al., appellees.

PER CURIAM.

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

TURNER ET AL. *v.* CLAY ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 982. Decided February 24, 1970

253 S. C. 209, 169 S. E. 2d 617, appeal dismissed.

Harry M. Lightsey, Jr., for appellants.

Huger Sinkler for Clay et al., and *Daniel R. McLeod*, Attorney General of South Carolina, and *C. Tolbert Goolsby, Jr.*, Assistant Attorney General, for Thornton, Secretary of State of South Carolina, appellees.

PER CURIAM.

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

PRE-FAB TRANSIT CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 988. Decided February 24, 1970

306 F. Supp. 1247, affirmed.

Edward K. Wheeler, Robert G. Seaks, and *Robert E. Joyner* for appellant.

Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Robert W. Ginnane, Fritz R. Kahn, and *Nahum Litt* for the United States et al., *Martin J. Leavitt* for Miami Transportation Co., Inc., et al., and *James E. Wilson* and *Edward G. Villalon* for Hennis Freight Lines, Inc., appellees.

PER CURIAM.

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

LOCKE *v.* CALIFORNIA

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

No. 1008. Decided February 24, 1970

Appeal dismissed and certiorari denied.

Julian Herndon, 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.

CHEMICAL LEAMAN TANK LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 880. Decided February 24, 1970

301 F. Supp. 258, affirmed.

Phineas Stevens, Thomas E. James, and *Harry C. Ames, Jr.,* for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Fritz R. Kahn, and *Jerome E. Sharfman* for the United States et al., and *Earl T. Thomas* for Bell, dba Bell Transport Co., appellees.

PER CURIAM.

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

KELLER *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA

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

No. 1009. Decided February 24, 1970

Appeal dismissed and certiorari denied.

Burton Marks 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.

ASSOCIATED TRUCK LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

No. 997. Decided February 24, 1970

304 F. Supp. 1094, affirmed.

Conrad A. Bradshaw, Peter T. Beardsley, R. Edwin Brady, Albert B. Rosenbaum, Roland Rice, and *Richard R. Sigmon* for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Robert W. Ginnane, and *Fritz R. Kahn* for the United States et al., and *Edward A. McCabe* for National Furniture Traffic Conference, Inc., appellees.

PER CURIAM.

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

KELLY ET UX. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

APPEAL FROM THE SUPREME COURT OF IDAHO

No. 1077. Decided February 24, 1970

93 Idaho 226, 459 P. 2d 349, appeal dismissed and certiorari denied.

Gilbert M. Westa 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.

UNITED STATES *v.* WIERNICK

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

No. 937. Decided February 24, 1970

Vacated and remanded.

Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit, and *Edward Fenig* for the United States.

Raymond J. Smith for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Illinois for further consideration in light of *Buie* v. *United States,* 396 U. S. 87.

SUSSMAN *v.* UNITED STATES

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

No. 226. Decided February 24, 1970

Certiorari granted; 409 F. 2d 219, vacated and remanded.

William J. Evans and *L. Keith Simmer, Jr.,* for petitioner.

Solicitor General Griswold for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Turner* v. *United States,* 396 U. S. 398.

BURRUSS ET AL. *v.* WILKERSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

No. 864. Decided February 24, 1970

Affirmed.

Carl Rachlin, Melvin L. Wulf, and *Eleanor Holmes Norton* for appellants.

Robert Y. Button, Attorney General of Virginia, *Richard N. Harris,* Assistant Attorney General, *John S. Davenport III,* and *Henry T. Wickham* for appellees.

Briefs of *amici curiae* in support of appellants were filed by *Ramsey Clark, David Rubin,* and *John W. Douglas* for the National Education Association et al., and by *Joseph L. Rauh, Jr., John Silard, J. Albert Woll, Thomas E. Harris, Stephen I. Schlossberg,* and *David A. Binder* for the American Federation of Labor—Congress of Industrial Organizations et al.

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 and the case set for oral argument.

UNITED STATES *v.* COTTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 1022. Decided February 24, 1970

Appeal dismissed.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Mervyn Hamburg* for the United States.

William M. Kunstler for appellees.

PER CURIAM.

The motion of the appellees for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the appeal is dismissed for failure to docket the case within the time prescribed by Rule 13.

MR. JUSTICE DOUGLAS, dissenting.

The requirement for filing the record in an appeal within the time prescribed by Rule 13 is not jurisdictional. Rather it is a provision of our own Rule which we often waive in the interests of justice. We should waive it here. The appeal now dismissed was solely protective under 18 U. S. C. § 3731. The main remedy sought was mandamus in the Court of Appeals, and the record naturally went to that court, not here. The issue tendered by the appeal now dismissed is whether the District Court properly dismissed the indictment, because there could be no "fair trial" in the district at that time and that if a continuance was granted, appellees would be denied a speedy trial guaranteed by the Constitution.

That is an important question we should hear and decide.

UNITED STATES *v.* SANTOS ET AL.

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

No. 861. Decided February 24, 1970*

Certiorari granted; No. 861, 417 F. 2d 340, and No. 873, vacated and remanded.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Mervyn Hamburg* for the United States in both cases.

Julius Lucius Echeles for respondent Santos in No. 861. *Maurice J. Walsh* and *Carl M. Walsh* for respondent in No. 873.

PER CURIAM.

The motion of respondent Ward, for leave to proceed *in forma pauperis* in No. 861, is granted.

The petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Buie* v. *United States,* 396 U. S. 87.

*Together with No. 873, *United States* v. *Perlman,* also on petition for writ of certiorari to the same court.

KOLDEN *v.* SELECTIVE SERVICE LOCAL BOARD NO. 4

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

No. 70. Decided February 24, 1970*

Certiorari granted; No. 70, 406 F. 2d 631; No. 331, 408 F. 2d 622; No. 449, 410 F. 2d 492; and Nos. 73, 164, and 183, vacated and remanded.

Melvin L. Wulf, Chester Bruvold, and *Lynn Castner* for petitioner in No. 70. *John J. Abt* for petitioner in No. 73. *Stanley Faulkner* for petitioner in No. 164. *Mr. Wulf* for petitioner in No. 183. *Robert Eugene Smith* for petitioner in No. 331. *Sheldon M. Meizlish* for petitioners in No. 449.

Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander, and *Ralph A. Fine* for respondents in Nos. 70, 164, and 183. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Mr. Hollander* for respondents in No. 73. *Solicitor General Griswold* for respondents in Nos. 331 and 449.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded

*Together with No. 73, *Chaikin* v. *Selective Service Local Board No. 66 et al.;* No. 164, *Faulkner* v. *Laird, Secretary of Defense, et al.;* No. 183, *Osher* v. *Selective Service Local Board No. 6 et al.,* on petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit; No. 331, *Kraus* v. *Selective Service System Local 25 et al.,* on petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit; and No. 449, *Anderson et al.* v. *Hershey, National Director, Selective Service System, et al.,* on petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

to the respective United States Courts of Appeals for further consideration in light of *Breen* v. *Selective Service Board,* 396 U. S. 460.

MR. JUSTICE HARLAN would reverse the judgments in these cases and remand them on the basis of his concurring opinion in *Breen* v. *Selective Service Board,* 396 U. S., at 468, and the Court's opinion in *Gutknecht* v. *United States,* 396 U. S. 295.

TROUTMAN *v.* UNITED STATES

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

No. 623. Decided February 24, 1970*

Certiorari granted; No. 623, 412 F. 2d 810, and No. 411, Misc., 409 F. 2d 910, vacated and remanded.

George C. Pontikes for petitioner in No. 623. *Howard Moore, Jr.,* for petitioner in No. 411, Misc.

Solicitor General Griswold, Assistant Attorney General Wilson, and *Philip R. Monahan* for the United States in No. 623. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome Feit,* and *Edward Fenig* for the United States in No. 411, Misc.

PER CURIAM.

The motion to proceed *in forma pauperis* in No. 411, Misc., is granted. The petitions for writs of certiorari are granted, the judgments are vacated, and the cases remanded to the respective United States Courts of Appeals for further consideration in light of *Gutknecht* v. *United States,* 396 U. S. 295.

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*Together with No. 411, Misc., *Battiste* v. *United States,* on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK *v.* BOWENS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT AND SOUTHERN DISTRICT OF NEW YORK

No. 866. Decided February 24, 1970*

304 F. Supp. 717, affirmed.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Maria L. Marcus,* Assistant Attorney General, for appellant in No. 866. *Leonard C. Koldin* for appellant in No. 874.

Sydney M. Spector and *Richard A. Ellison* for appellees in both cases.

PER CURIAM.

The motion of the appellees for leave to proceed *in forma pauperis* is granted. The motions to affirm are granted and the judgments are affirmed. *Shapiro* v. *Thompson,* 394 U. S. 618 (1969).

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted and the cases set for oral argument.

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*Together with No. 874, *Lascaris, Commissioner of Onondaga County Department of Social Services* v. *Bowens et al.,* on appeal from the United States District Court for the Northern District of New York.

HADLEY ET AL. *v.* JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI

No. 37. Argued November 10, 1969—Decided February 25, 1970

Appellants, residents and taxpayers of the Kansas City School District, one of eight school districts constituting the Junior College District of Metropolitan Kansas City, brought this suit claiming that their right to vote for trustees of the district was unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment since their separate district contains approximately 60% of the total apportionment basis of the entire junior college district, but the state statutory formula results in the election of only 50% of the trustees from their district. The trial court's dismissal of the suit was upheld by the Missouri Supreme Court, which held the "one man, one vote" principle inapplicable. *Held:* Whenever a state or local government by popular election selects persons to perform public functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter have an equal opportunity to participate in the election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that as far as practicable will insure that equal numbers of voters can vote for proportionally equal numbers of officials. *Avery* v. *Midland County,* 390 U. S. 474. Pp. 52–59.

432 S. W. 2d 328, reversed and remanded.

Irving Achtenberg argued the cause and filed a brief for appellants.

William J. Burrell argued the cause for appellees Junior College District of Metropolitan Kansas City et al. With him on the brief were *Clarence H. Dicus* and *Heywood H. Davis.* *Louis C. DeFeo, Jr.,* Assistant Attorney General of Missouri, argued the cause for appellee the Attorney General of Missouri. With him on the brief was *John C. Danforth,* Attorney General, *pro se.*

Solicitor General Griswold, Assistant Attorney General Leonard, and *Francis X. Beytagh, Jr.,* filed a brief for the United States as *amicus curiae* urging reversal.

Louis J. Lefkowitz, Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Daniel M. Cohen,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the extent to which the Fourteenth Amendment and the "one man, one vote" principle apply in the election of local governmental officials. Appellants are residents and taxpayers of the Kansas City School District, one of eight separate school districts that have combined to form the Junior College District of Metropolitan Kansas City. Under Missouri law separate school districts may vote by referendum to establish a consolidated junior college district and elect six trustees to conduct and manage the necessary affairs of that district.[1] The state law also provides that these trustees shall be apportioned among the separate school districts on the basis of "school enumeration," defined as the number of persons between the ages of six and 20 years, who reside in each district.[2] In the case of the Kansas City School District this apportionment plan results in the election of three trustees, or 50% of the total number, from that district. Since that district contains approximately 60% of the total school enumeration in the junior college district,[3] appel-

[1] Mo. Rev. Stat. §§ 178.800, 178.820 (Cum. Supp. 1967).

[2] Mo. Rev. Stat. § 167.011 (Cum. Supp. 1967).

[3] For the years 1963 through 1967, the actual enumeration in the Kansas City School District varied between 63.55% and 59.49%. App. 38.

lants brought suit claiming that their right to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. The Missouri Supreme Court upheld the trial court's dismissal of the suit, stating that the "one man, one vote" principle was not applicable in this case. 432 S. W. 2d 328 (1968). We noted probable jurisdiction of the appeal, 393 U. S. 1115 (1969), and for the reasons set forth below we reverse and hold that the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.

In *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), we held that the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.,* at 7–8. Because of this requirement we struck down a Georgia statute which allowed glaring discrepancies among the populations in that State's congressional districts. In *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and the companion cases,[4] we considered state laws that had apportioned state legislatures in a way that again showed glaring discrepancies in the number of people who lived in different legislative districts. In an elaborate opinion in *Reynolds* we called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted. *Ex parte Siebold,* 100 U. S. 371 (1880); *Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Mosley,* 238 U. S. 383 (1915); *Guinn* v. *United States,*

[4] *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964); *Maryland Committee* v. *Tawes,* 377 U. S. 656 (1964); *Davis* v. *Mann,* 377 U. S. 678 (1964); *Roman* v. *Sincock,* 377 U. S. 695 (1964); *Lucas* v. *Colorado Gen. Assembly,* 377 U. S. 713 (1964).

238 U. S. 347 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *United States* v. *Classic,* 313 U. S. 299 (1941). Applying the basic principle of *Wesberry,* we therefore held that the various state apportionment schemes denied some voters the right guaranteed by the Fourteenth Amendment to have their votes given the same weight as that of other voters. Finally, in *Avery* v. *Midland County,* 390 U. S. 474 (1968), we applied this same principle to the election of Texas county commissioners, holding that a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised "general governmental powers over the entire geographic area served by the body." *Id.,* at 485.

Appellants in this case argue that the junior college trustees exercised general governmental powers over the entire district and that under *Avery* the State was thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college,[5] their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery.* We feel that these powers, while not fully as broad as those of the Midland County Commissioners,[6] certainly show that the trustees

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[5] Mo. Rev. Stat. §§ 167.161, 171.011, 177.031, 177.041, 178.770, 178.850–178.890 (Cum. Supp. 1967).

[6] The Midland County Commissioners established and maintained the county jail, appointed numerous county officials, made contracts, built roads and bridges, administered the county welfare system, performed duties in connection with elections, set the

perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.

This Court has consistently held in a long series of cases,[7] that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor—these officials are elected by popular vote.

When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the elec-

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county tax rate, issued bonds, adopted the county budget, built and ran hospitals, airports, and libraries, fixed school district boundaries, established a housing authority, and determined the election districts for county commissioners. *Avery, supra,* at 476–477.

[7] *Wesberry, supra; Reynolds, supra;* cases cited n. 4, *supra; Avery, supra; Gray* v. *Sanders,* 372 U. S. 368 (1963); *Burns* v. *Richardson,* 384 U. S. 73 (1966); *Swann* v. *Adams,* 385 U. S. 440 (1967).

tion. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in "important" elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one. This is so because in our country popular election has traditionally been the method followed when government by the people is most desired.

It has also been urged that we distinguish for apportionment purposes between elections for "legislative" officials and those for "administrative" officers. Such a suggestion would leave courts with an equally unman-

ageable principle since governmental activities "cannot easily be classified in the neat categories favored by civics texts," *Avery, supra,* at 482, and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds, supra,* might not be required, but certainly we see nothing in the present case that indicates that the activities of these trustees fit in that category. Education has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term.

In this particular case the "one man, one vote" principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has 33⅓% or more of the total enumeration of the junior college district, then all six trustees are elected at large. If, however, one or more districts has between 33⅓% and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts.

Similarly, if one district has between 50% and 66⅔% of the enumeration it elects three trustees, and if one district has more than 66⅔% it elects four trustees.[8] This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33⅓%, 50%, or 66⅔% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitles that district to only 50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case.[9] We would be faced with a dif-

[8] Mo. Rev. Stat. § 178.820 (Cum. Supp. 1967).

[9] There is some question in this case whether school enumeration figures, rather than actual population figures, can be used as a basis of apportionment. Cf. *Burns* v. *Richardson,* 384 U. S. 73,

ferent question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required, *Wesberry, supra,* at 18, *Reynolds, supra,* at 577, but a plan that does not automatically discriminate in favor of certain districts is.

In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme that required that candidates be residents of certain districts that did not contain equal numbers of people. *Dusch* v. *Davis,* 387 U. S. 112 (1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment.[10] We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not "represent" the same number of people does not deny those people equal protection of the laws. *Sailors* v. *Board of Education,* 387 U. S. 105 (1967); cf. *Fortson* v. *Morris,* 385 U. S. 231 (1966). And a State may, in certain cases, limit the

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90–95 (1966). There is no need to decide this question at this time since, even if school enumeration is a permissible basis, the present statute fails to apportion trustees constitutionally.

[10] The statute involved in this case provides that trustees who are elected from component districts rather than at large must be residents of the district from which they are elected. Mo. Rev. Stat. § 178.820 (2) (Cum. Supp. 1967).

right to vote to a particular group or class of people. As we said before, "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." *Sailors, supra,* at 110–111. But once a State has decided to use the process of popular election and "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Gray* v. *Sanders,* 372 U. S. 368, 381 (1963).

For the reasons set forth above the judgment below is reversed and the case is remanded to the Missouri Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

Today's decision demonstrates, to a degree that no other case has, the pervasiveness of the federal judicial intrusion into state electoral processes that was unleashed by the "one man, one vote" rule of *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

Reynolds established that rule for the apportionment of state legislatures, thereby denying States the right to take into account in the structuring of their legislatures any historical, geographical, economic, or social considerations, or any of the many other practical and subtle factors that have always been recognized as playing a legitimate part in the practice of politics.

Four years later, in *Avery* v. *Midland County,* 390 U. S. 474 (1968), the "one man, one vote" rule was extended to many kinds of local governmental units, thereby affecting to an unknown extent the organi-

zational integrity of some 80,000 such units throughout the country, and constricting the States in the use of the electoral process in the establishment of new ones.

And today, the Court holds the "one man, one vote" rule applicable to the various boards of trustees of Missouri's junior college system, and the case forebodes, if indeed it does not decide, that the rule is to be applied to every elective public body, no matter what its nature.

While I deem myself bound by *Reynolds* and *Avery*—despite my continued disagreement with them as constitutional holdings (see my dissenting opinions in *Reynolds,* 377 U. S., at 589, and in *Avery,* 390 U. S., at 486)—I do not think that either of these cases, or any other in this Court, justifies the present decision. I therefore dissent, taking off from *Avery* in what is about to be said.

I

In *Avery* the Court acknowledged that "the states' varied, pragmatic approach in establishing governments" has produced "a staggering number" of local governmental units. The Court noted that, "while special-purpose organizations abound . . . , virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs." The Midland County Commissioners Court, the body whose composition was challenged in *Avery,* was found to possess a broad range of powers that made it "representative of most of the general governing bodies of American cities, counties, towns, and villages," and the Court was at pains to limit its holding to such general bodies. 390 U. S., at 482–485. Today the Court discards that limitation, stating that "there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." *Ante,* at 54–55. I believe, to the contrary, that the need to preserve flexibility in the design of local

governmental units that serve specialized functions and that must meet particular local conditions, furnishes a powerful reason to refuse to extend the *Avery* ruling beyond its original limits. If local units having general governmental powers are to be considered, like state legislatures, as having a substantial identity of function that justifies imposing on them a uniformity of elective structure, it is clear that specialized local entities are characterized by precisely the opposite of such identity. From irrigation districts to air pollution control agencies to school districts, such units vary in the magnitude of their impact upon various constituencies and in the manner in which the benefits and burdens of their operations interact with other elements of the local political and economic picture. Today's ruling will forbid these agencies from adopting electoral mechanisms that take these variations into account.

In my opinion, this ruling imposes an arbitrary limitation on the ways in which local agencies may be constituted. The Court concedes that the States may use means other than apportionment "to insure that legitimate political goals of representation are achieved." For example, officials elected at large may be required to be residents of particular areas that do not contain equal numbers of people, *Dusch* v. *Davis,* 387 U. S. 112 (1967); the right to vote may be denied outright to persons whose interest in the function performed by the agency is nonexistent or slight, cf. *Kramer* v. *Union Free School District,* 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); or the State may in many instances abandon the elective process altogether and allow members of an official body to be appointed, without any regard for the equal-population principle, *Sailors* v. *Board of Education,* 387 U. S. 105 (1967). Since the Court recognizes the States' need for flexibility in structuring local units, I am unable to see any basis for its selectively

denying to them one of the means to achieve such flexibility. If, as the Court speculates, other means will prove as effective as apportionment in the adaptation of local agencies to meet specific needs, presumably those other means will also enable the States just as effectively to accomplish whatever evils the Court thinks it is preventing by today's decision. The Court has not shown that, under the supervision of state legislatures that are apportioned according to *Reynolds*, flexible methods of apportionment of local official bodies carry any greater danger of abuse than these other means of achieving the desirable goal of specialization. The Court's imposition of this arbitrary limitation on the States can be justified only in the name of mathematical nicety.

I do not believe that, even after *Avery*, such a result is compelled by the absence of "judicially manageable standards" for the "difficult job of distinguishing between various elections." *Ante*, at 55. Before today, the Court's rule was that "one man, one vote" applied only to local bodies having "general governmental powers over the entire geographic area served by the body." 390 U. S., at 485. The Court in *Avery* professed no temerity about concluding that the Midland County Commissioners Court was such a body. The Court's mere recitation of the powers of that entity, *ante*, at 53–54, n. 6, suffices to establish that conclusion. At the same time, it cannot be argued seriously that the Junior College District of Metropolitan Kansas City is the general governing body for the people of its area. The mere fact that the trustees can, with restrictions, levy taxes, issue bonds, and condemn property for school purposes does not detract from the crucial consideration that the sole purpose for which the district exists is the operation of a junior college. If the Court adhered to the *Avery* line, marginal cases would of course arise in which the courts would face difficulty in determining whether a particular

entity exercised general governmental powers, but such a determination would be no different in kind from many other matters of degree upon which courts must continually pass. The importance of ensuring flexibility in the organization of specialized units of government, and the uncertainty whether the rule announced today will further any important countervailing interest, convince me that the Court should not proceed further into the political thicket than it has already gone in *Avery*.

II

The facts of this case afford a clear indication of the extent to which reasonable state objectives are to be sacrificed on the altar of numerical equality. We are not faced with an apportionment scheme that is a historical relic, with no present-day justification, or one that reflects the stranglehold of a particular group that, having once attained power, blindly resists a redistribution. The structure of the Junior College District of Metropolitan Kansas City is based upon a state statute enacted in 1961. Prior to that date, the individual school boards had the power to create their own junior colleges, as they still do, but there was apparently no authorization for cooperation among districts. The 1961 statute was enacted out of concern on the part of the legislature that Missouri's public educational facilities were not expanding at a satisfactory rate, see *Three Rivers Junior College District* v. *Statler*, 421 S. W. 2d 235, 237 (Mo. 1967).[1]

[1] Counsel for appellees informed the Court at oral argument that prior to the passage of this statute, when the law merely authorized each school district in the State to establish its own junior college, there were only seven such junior colleges, with a total enrollment of approximately 5,000 students. Today there are 12 junior college districts, in which nearly 120 individual school districts participate, with a total enrollment of over 30,000 students.

The provisions of the statute evidence a legislative determination of the most effective means to encourage expansion through cooperation between districts.

The statutory provision for election of the six-man board of trustees, summarized by the Court, reflects a careful balancing of the desirability of population-based representation against the practical problems involved in the creation of new educational units. The statute does not by its own force create any junior college districts; this is left to the initiative of the residents of particular areas who are interested in providing public junior-college education for their children. In recognition of the fact that individual school districts may lack the funds or the population to support a junior college of their own, the state legislature has authorized them to make voluntary arrangements with their neighbors for joint formation of a junior college district. If one of the cooperating school districts greatly preponderates in size, it enters into the arrangement knowing that its representation on the board of trustees, while large, will be somewhat smaller than it would be if based strictly on relative school enumeration.

The features of this system are surely sensibly designed to facilitate creation of new educational bodies while guaranteeing to small school districts that they will not be entirely swallowed up by a large partner. The small districts are free to avoid alliance with a highly populated neighbor, if they prefer to link with enough others of their own size to provide a viable base for a junior college. At the same time, a very large school district is probably capable of forming a junior college on its own if it prefers not to consolidate, on the terms set by statute, with smaller neighbors. On the other hand, large and small districts may work together if they find this the

most beneficial arrangement.[2] The participation, as here, of seven smaller and one larger school district in the joint formation of a junior college district, represents a pragmatic choice by all concerned from among a number of possible courses of action.

I find it bizarre to conclude that such a voluntary arrangement effects an unconstitutional "dilution" of the votes of residents of the largest school district. When the Court, in *Reynolds*, rejected a proposed analogy between state legislatures and the Federal Congress, it relied heavily on the fact that state legislative districts "are merely involuntary political units of the State created by statute to aid in the administration of state government." 377 U. S., at 548. In contrast, the National Government was created by the union of "a group of formerly independent States." The system of representation in Congress was "conceived out of compromise and concession" between the larger and smaller States. *Id.*, at 574. The system struck down today shares much of this same character of voluntary compromise. It is true that the analogy would be even closer if the legislature had left the school districts free to negotiate their own apportionment terms, rather than imposing a uniform scale; but as I read the Court's opinion today, it would strike down the apportionment in this case even if the terms had resulted from an entirely free agreement among the eight school districts. Insistence upon a simplistic mathematical formula as the measure of compliance with the Equal Protection

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[2] At the time this suit was filed, nine junior college districts had been formed pursuant to the statutory procedures. Of these, three did not contain a component district large enough to bring into play the fractional formula; the remaining six did contain such a district.

Clause in cases involving the electoral process has resulted in this instance in a total disregard of the salutary purposes underlying the statutory scheme.

III

Finally, I find particularly perplexing the portion of the Court's opinion explaining why the apportionment involved in this case does not measure up even under the "one man, one vote" dogma. The Court holds that the voters of the Kansas City School District, who elect 50% of the trustees, are denied equal protection of the laws because that district contains about 60% of the school enumeration. This is so because the statutory formula embodies a "built-in discrimination against voters in large districts." *Ante,* at 57. The Court seems to suggest that the same discrepancy among districts might pass muster if it could be shown to be mathematically unavoidable in the apportionment of the small number of trustees among the component districts; but the discrepancy is not permissible where it simply reflects the legislature's choice of a means to foster a legitimate state goal. This reasoning seems hard to follow and also disturbing on two scores.

First, to apply the rule with such rigor to local governmental units, especially single-function units, is to disregard the characteristics that distinguish such units from state legislatures. As I noted in my dissent in *Avery,* 390 U. S., at 488–490, there is a much smaller danger of abuse through malapportionment in the case of local units because there exist avenues of political redress that are not similarly available to correct malapportionment of state legislatures. Further, as noted above, the greater diversity of functions performed by local governmental units creates a greater need for flexi-

bility in their structure. If these considerations are inadequate to stave off the extension of the *Reynolds* rule to units of local government, they at least provide a persuasive rationale for applying that rule so as to allow local governments much more play in the joints.

Such an approach is not foreclosed by the previous cases. In *Reynolds,* 377 U. S., at 577–581, the Court catalogued a number of considerations indicating that "[s]omewhat more flexibility" might be permissible in state legislative apportionment than in congressional districting. Compare *Swann* v. *Adams,* 385 U. S. 440 (1967), with *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U. S. 542 (1969). The need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity.

The disparities of representation in *Avery* were of an entirely different order from those here. In that case, each of the four districts elected one commissioner to the Comissioners Court, despite the fact that the population of one district was 67,906, while those of the remaining three were 852, 414, and 828. I think that the *Avery* rule, born in an extreme case, is being applied here with a rigidity that finds no justification in the considerations that gave it birth. Cf. *Wells* v. *Rockefeller,* 394 U. S., at 553 (WHITE, J., dissenting). In this case, the disparity of representation is relatively minor. Even more important, it is not an unexplained and unjustified deviation from equality, see *Swann* v. *Adams,* 385 U. S., at 445–446, but reflects an enlightened state policy of encouraging individual school districts to join together voluntarily to expand the State's public junior college facilities.

Second, the Court leaves unexplored the premises underlying its conclusion that the apportionment here does not achieve equality, "as far as practicable." *Ante,* at 57. Missouri is forbidden to use the statutory formula employed in this case because the percentage categories it creates will, in particular instances, only approximate equality, and because whatever discrepancy exists will always favor residents of the smaller districts. The Court does not suggest how a formula could be devised that would provide a general rule for application to all the various junior college districts but would not share these alleged faults. If a large district falling within a given percentage range were allocated the number of trustees corresponding to the top, rather than the bottom, of the range, that would also produce, on the Court's theory, a "built-in discrimination" against voters in *small* districts.

Thus, the result of the Court's holding may be that Missouri is forbidden to establish *any* formula of general application for apportionment of trustees, but must instead provide for the improvisation of an individual apportionment scheme for each junior college district after the contours of the district have been settled. But surely a State could reasonably determine that the mechanics of operating such a system would be so unduly burdensome that it would be better to apportion according to a statewide formula. Would not such considerations justify a conclusion that the statewide formula achieves equality "as far as practicable"? While the Court does not discuss the problem, its invalidation of this statutory formula seems to be based on the premise that such practical considerations, like a State's desire to encourage cooperation among districts, are constitutionally inadequate to justify any divergence from voting "equality."

The Court does not, however, spell out any rationale for concluding that such matters of administrative convenience deserve no weight in determining what is "practicable." This is especially incongruous in light of the Court's unexplained conclusion that deference can be be given to legislative determinations that the boards should have a small number of trustees and that the trustees in some instances should represent component school districts. Why does the Court not require that the number of trustees be increased from six, in order to reduce the roughness with which equality is approximated? Would a three-man board be unconstitutionally small? Why is the Court willing to accept inequality that derives from a desire to give representation to component school districts, when similar inequality in state legislative districting could probably not be justified by a desire to give representation to counties? Cf. *Reynolds* v. *Sims,* 377 U. S., at 579–581; *Swann* v. *Adams,* 385 U. S., at 444. If equality cannot be achieved when representation is by component districts, why does the "as far as practicable" standard not require at-large election of trustees? Is there something about these considerations that gives them a status under the Equal Protection Clause that is not possessed by a legislative desire to apportion by a formula of statewide application?

It seems to me that beneath the surface of the Court's opinion lie unspoken answers to these and other similar questions, questions that I can characterize only as matters of political judgment. The Court's adoption of a rigid, mathematical rule turns out not to have saved it from having to balance and judge political considerations, concluding that one does merit some weight in an apportionment scheme while another does not. The fact that the courts, rather than the legislatures, now are the final arbiters of such matters will continue, I fear,

after the present decision to be the inevitable consequence of the shallow approach to the Equal Protection Clause represented by the "one man, one vote" theory. The Court could at least lessen the disruptive impact of that approach at the local level by approving this relatively minor divergence from strict equality on the ground that the legislature could reasonably have concluded that it was necessary to accomplish legitimate state interests.

I would affirm the judgment of the Supreme Court of Missouri. What our Court has done today seems to me to run far afield of the values embodied in the scheme of government ordained by the Constitution.

MR. CHIEF JUSTICE BURGER, dissenting.

I concur fully in the opinion of MR. JUSTICE HARLAN. I add this comment to emphasize the subjective quality of a doctrine of constitutional law that has as its primary standard "a general rule, [that] whenever a state or local government decides to select persons by popular election . . . ," the Constitution commands that each qualified voter must be given a vote which is equally weighted with the votes cast by all other electors.

The failure to provide guidelines for determining when the Court's "general rule" is to be applied is exacerbated when the Court implies that the stringent standards of "mathematical exactitude" that are controlling in apportionment of federal congressional districts need not be applied to smaller specialized districts such as the junior college district in this case. This gives added relevance to MR. JUSTICE HARLAN's observation that "[t]he need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity." *Ante,* at 67. Yet the Court has given almost no indication of which non-

population interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local, specialized unit of government.

Ultimately, only this Court can finally apply these "general rules" but in the interim all other judges must speculate as best they can when and how to apply them. With all deference I suggest the Court's opinion today fails to give any meaningful guidelines.

COLONNADE CATERING CORP. *v.* UNITED STATES

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

No. 108. Argued January 15, 1970—Decided February 25, 1970

Congress, which has broad authority to fashion standards of reasonableness for searches and seizures respecting the liquor industry, has made it an offense under 26 U. S. C. § 7342 for a liquor licensee to refuse admission to a federal inspector, a sanction that precludes forcible entries without a warrant. Pp. 72–77.

410 F. 2d 197, reversed.

O. John Rogge argued the cause for petitioner. With him on the briefs was *Jerome M. Stember.*

Jerome M. Feit argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Lawrence G. Wallace,* and *Charles Ruff.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a licensee in New York authorized to serve alcoholic beverages and also the holder of a federal retail liquor dealer's occupational tax stamp, 26 U. S. C. § 5121 (a), brought this suit to obtain the return of seized liquor and to suppress it as evidence. The District Court granted the relief. The Court of Appeals reversed. 410 F. 2d 197. The case is here on a petition for writ of certiorari which we granted, 396 U. S. 814, to review the decision in light of *Camara* v. *Municipal Court,* 387 U. S. 523, and *See* v. *City of Seattle,* 387 U. S. 541.

Petitioner runs a catering establishment. A federal agent, a member of the Alcohol and Tobacco Tax Divi-

sion of the Internal Revenue Service, was a guest at a party on petitioner's premises and noted a possible violation of the federal excise tax law. When federal agents later visited the place, another party was in progress. They noticed that liquor was being served. Without the manager's consent, they inspected the cellar. Then they asked the manager to open the locked liquor storeroom. He said that the only person authorized to open that room was one Rozzo, petitioner's president, who was not on the premises. Later Rozzo arrived and refused to open the storeroom. He asked if the agents had a search warrant and they answered that they did not need one. When Rozzo continued to refuse to unlock the room, an agent broke the lock and entered. Then they removed the bottles of liquor now in controversy which they apparently suspected of being refilled contrary to the command of 26 U. S. C. § 5301 (c).

It is provided in 26 U. S. C. § 5146 (b)[1] and in 26 U. S. C. § 7606[2] that the Secretary of the Treasury or

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[1] 26 U. S. C. § 5146 (b) provides:

"The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

[2] 26 U. S. C. § 7606 provides:

"(a) Entry during day.

"The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

"(b) Entry at night.

"When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties."

his delegate has broad authority to enter and inspect the premises of retail dealers in liquors.[3] And in case of the refusal of a dealer to permit the inspection, it is provided in 26 U. S. C. § 7342:

> "Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500."

The question is whether the imposition of a fine for refusal to permit entry—with the attendant consequences that violation of inspection laws may have in this closely regulated industry—is under this statutory scheme the exclusive sanction, absent a warrant to break and enter.

In *Frank* v. *Maryland,* 359 U. S. 360, 366–367, a case involving an inspection under a municipal code, we said:

> "[The] inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant."

Frank v. *Maryland* was overruled in *Camara* v. *Municipal Court, supra,* insofar as it permitted warrantless searches or inspections under municipal fire, health, and housing codes. The dictum that the provision for a fine on refusal to allow inspection made the use of force improper when there was no warrant was not disturbed; and the question is whether that dictum contains the controlling principle[4] for this case.

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[3] As defined in 26 U. S. C. § 5122 (a).

[4] And see *United States* v. *Frisch,* 140 F. 2d 660, 662.

The Government, emphasizing that the Fourth Amendment bans only "unreasonable searches and seizures," [5] relies heavily on the long history of the regulation of the liquor industry during pre-Fourth Amendment days, first in England and later in the American Colonies. It is pointed out, for example, that in 1660 the precursor of modern-day liquor legislation was enacted in England [6] which allowed commissioners to enter, on demand, brewing houses at all times for inspection. Massachusetts had a similar law in 1692.[7] And in 1791, the year in which the Fourth Amendment was ratified, Congress imposed an excise tax on imported distilled spirits and on liquor distilled here,[8] under which law federal officers had broad powers to inspect distilling premises and the premises of the importer [9] without a warrant. From these and later laws and regulations governing the liquor industry, it is argued that Congress has been most solicitous in protecting the revenue against various types of fraud and to that end has repeatedly granted federal agents power to make warrantless searches and seizures of articles under the liquor laws.

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[5] The Fourth Amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] 12 Car. 2, c. 23, § 19.

[7] Act of June 24, 1692, Mass. Acts and Resolves, Vol. 1, 1692–1714, p. 33, c. 5, § 8.

[8] Act of March 3, 1791, 1 Stat. 199.

[9] Section 29 of the Act of March 3, 1791, 1 Stat. 206, provided:

"That it shall be lawful for the officers of inspection of each survey at all times in the daytime, upon request, to enter into all and every the houses, store-houses, ware-houses, buildings and places which shall have been [registered] in manner aforesaid, and by tasting, gauging or otherwise, to take an account of the quantity, kinds and proofs of the said spirits therein contained; and also to take samples thereof, paying for the same the usual price."

The Court recognized the special treatment of inspection laws of this kind in *Boyd* v. *United States,* 116 U. S. 616, 624:

> "[I]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment."

And it added:

> "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Id.*, at 623.

We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See* v. *City of Seattle, supra,* at 545—"that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure"—is therefore not applicable here. In *See,*

we reserved decision on the problems of "licensing programs" requiring inspection, saying they can be resolved "on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.*, at 546.

Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. We said in the *See* case:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *Id.*, at 543.

What was said in *See* reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors. We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

Reversed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACK and MR. JUSTICE STEWART join, dissenting.

I join in the dissenting opinion of MR. JUSTICE BLACK; however, since my position goes somewhat beyond his discussion I add my views separately.

I assume we could all agree that the search in question must be held valid, and the contraband discovered subject to seizure and forfeiture, unless (a) it is "unreasonable" under the Constitution or (b) it is prohibited by a statute imposing restraints apart from those in the Constitution. The majority sees no constitutional violation; I agree.

The controlling statutes set out in notes 1 and 2 of the majority opinion affirmatively define the conditions and times when agents may enter premises and inspect. Under 26 U. S. C. § 5146 (b) agents may enter to inspect "any distilled spirits, wines, or beer kept or stored by such dealer on such premises." The time when this may be done is fixed as "during business hours." Section 7606 of 26 U. S. C., set forth in note 2 of the majority opinion, provides that agents may enter any building where taxable articles are kept, "so far as it may be necessary for the purpose of examining said articles or objects."

The government agents needed neither a warrant nor these statutes to secure entry to this place of business since it was as open as any business establishment that seeks to sell goods and services to the public. The agents need to rely on the statutes only to carry out their duty to inspect after accomplishing entry. This was recognized implicitly by Congress in limiting the inspection to "business hours" and daytime. Congress went beyond mere entry; it provided for *inspection.* Inspection authorization would be meaningless if the agents could not open lockers, cabinets, closets, and storerooms and indeed pry open cases of liquor to see the contents.

Surely Congress was not unaware that purveyors of liquor do not leave their wares or stores or reserve supplies lying casually about; on the contrary they keep supplies under lock in various ways, including lockers, cabinets, closets, or storerooms; this practice is so universal it can be judicially noticed.

Here the agents acted explicitly under statutes containing the language "so far as it may be necessary"; this is simple and clear and for me it is plainly broad enough to permit inspection of all spirits "kept or stored . . . on such premises" whether in lockers, cabinets, closets, or storerooms. Congress having prescribed this as a reasonable means of enforcing the inspection necessary to tax collection, I see no basis for any court to say it cannot be done.

That Congress provided an added penalty for those who refuse access for inspection is irrelevant. We can assume this was to encourage licensed purveyors to comply promptly to facilitate inspections. The majority views the $500 fine as the Government's exclusive remedy for the non-cooperation of the taxpayer. Congress could hardly be so naive as to give to the licensee the option to choose between the risk of a $500 fine against the certain discovery, if he is in violation, of a large store of liquor subject to forfeiture. At current prices $500 would represent four or five cases of spirits. The alternative of securing a warrant touches on the constitutional issues which the majority does not rely on. We should note, of course, that the majority holding eliminates any basis for a forfeiture of the contraband liquor and leaves the Government to another lawsuit to collect a $500 fine.

With deference I submit the majority has needlessly complicated a relatively simple issue of statutory construction with undertones of constitutionally limited searches. The words "so far as it may be necessary" are quite plain and we all agree no issue of constitutional dimensions is presented.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

Petitioner brought proceedings under the Federal Rules of Criminal Procedure for the return of liquor seized by federal agents. One of those rules provides that "[a]

person aggrieved by an *unlawful* search and seizure may move the district court . . . for the return of the property . . . so obtained on the ground that (1) the property was *illegally* seized without warrant . . . ." Fed. Rule Crim. Proc. 41 (e). (Emphasis added.) As I read that provision, it requires petitioner to show that the seizure in this case was illegal, either because it violated the Fourth Amendment, or because it was in violation of some law passed by Congress. In my opinion neither requirement has been met and therefore petitioner is not entitled to a return of the seized liquor.

There can be no doubt that places that sell liquor to the public have historically been subjected to strict governmental scrutiny for many centuries both in this country and in England. The Court sets out a little of the history of that regulation in its opinion. I therefore agree that there is nothing unreasonable, as that term is used in the Fourth Amendment, in permitting officers to go into an establishment that provides alcoholic beverages to the public, and upon finding something that indicates a flagrant violation of the law to pursue their examination to see whether a violation is actually occurring. The officers did just that in this case, and I see no reason on earth why any man should hold that conduct unreasonable. This Court certainly should not prevent faithful officers, when they see the law being violated practically before their very eyes, from taking the steps necessary to stop and prove that violation.

The majority, far from finding this search unreasonable and therefore illegal under the Fourth Amendment, holds only that it was not authorized by 26 U. S. C. §§ 5146 (b), 7606 (a),[1] and that therefore the liquor must be returned. While these statutes do not in express terms authorize forcible breaking and entering to seize liquor kept in

[1] Set forth *ante*, at 73 nn. 1, 2.

violation of federal law, it is perfectly clear that they do not in express terms declare such seizure illegal, and in my opinion those provisions impliedly authorize exactly the type of official conduct involved here. I am confident that when Congress said that federal liquor agents could search without a warrant and further provided for fines if the owner refused to permit such a search,[2] it also intended to authorize forcible entry and seizure if that became necessary. I do not think Congress needed to speak any more clearly than it already has. Since I cannot conclude that this search and seizure was illegal under either the Fourth Amendment or any Act of Congress, but was to the contrary carried out pursuant to congressional authorization, I would affirm the judgment below and hold that petitioner was not entitled to a return of the liquor.

[2] 26 U. S. C. § 7342, *ante*, at 74.

REETZ, COMMISSIONER OF FISH AND GAME OF ALASKA, ET AL. *v.* BOZANICH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. 185. Argued January 13, 1970—
Decided February 25, 1970

Appellees brought this action challenging, under the Equal Protection Clause of the Fourteenth Amendment and under certain provisions of the Alaska Constitution relating to fish resources, the constitutionality of an Alaska statute and regulations limiting commercial salmon fishing licensees to defined groups of persons. Appellants' motion to dismiss or alternatively to stay the proceedings pending state-court determination with respect to the Alaska constitutional provisions (which have never been interpreted by an Alaska court) was denied and appellees' motion for summary judgment was granted, the three-judge District Court holding the Act and regulations invalid under both the Federal and State Constitutions. *Held:* The District Court should have abstained from deciding the case on the merits pending resolution of the state constitutional questions by the state courts, a procedure that could conceivably avoid any decision under the Fourteenth Amendment and any possible irritant in the federal-state relationship. *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639. Pp. 85–87.

297 F. Supp. 300, vacated and remanded.

Charles K. Cranston, Assistant Attorney General of Alaska, argued the cause for appellants. With him on the brief were *G. Kent Edwards,* Attorney General, and *Robert L. Hartig,* Assistant Attorney General.

Robert Boochever argued the cause for appellees. With him on the brief was *Seth Warner Morrison III.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge District Court, convened under 28 U. S. C. §§ 2281, 2284, declaring certain fishing laws of Alaska and regulations under them unconstitutional and enjoining their enforcement. 297 F. Supp. 300. We noted probable jurisdiction. 396 U. S. 811.

The laws in question, passed in 1968, concern salmon net gear licenses for commercial fishing, not licenses for other types of salmon fishing. They are challenged because they limit licensees to a defined group of persons. The Act in material part provides: [1]

> "Persons eligible for gear licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who
>
> "(1) has previously held a salmon net gear license for that specific salmon registration area; or
>
> "(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The regulations [2] provide that except in cases of "extreme hardship [3] . . . a salmon net gear license for a

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[1] Alaska Stat. § 16.05.536 (1968). Subd. (b) of that section specifies the data to be supplied in applications for a gear license. Section 16.05.540 provides that the licensee shall "personally operate or assist in the operation of the licensed fishing gear"; that he shall "personally own or lease the licensed fishing gear"; and that the license is "transferable."

[2] Alaska Commercial Fishing Regulations § 102.09 (a) (1969).

[3] As defined in the regulations, *id.*, § 102.09 (a) (2).

specific salmon registration area may be issued only to a person who:

> "(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or
>
> "(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

Appellees are nonresidents who applied for commercial salmon net gear licenses. They apparently are experienced net gear salmon fishermen but they cannot qualify for a salmon net gear license to fish in any of the 12 regions or areas described in the Act and the regulations.[4]

Appellees filed a motion for summary judgment on the grounds that the Act and regulations deprived them of their rights under the Equal Protection Clause of the Fourteenth Amendment and also their rights under the Alaska Constitution. That constitution provides in Art. VIII, § 3:

> "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

And it provides in Art. VIII, § 15:

> "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

Appellants filed a motion to dismiss or alternatively to stay the proceedings in the District Court pending

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[4] While the original complaint challenged the 1968 regulations, it was amended to challenge the 1968 Act and the 1969 regulations under it, which regulated the 1969 fishing season.

the determination of the Alaska constitutional question by an Alaska court.

Appellants' motion to dismiss or to stay was denied. Appellees' motion for summary judgment was granted, the three-judge District Court holding that the Act and regulations in question were unconstitutional both under the Equal Protection Clause of the Fourteenth Amendment and under the Constitution of Alaska. 297 F. Supp., at 304–307.

This case is virtually on all fours with *City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639, where a single district judge in construing a Mississippi statute held that it violated both the Federal and the State Constitutions. The Court of Appeals affirmed and we vacated its judgment and remanded to the District Court with directions to hold the case while the parties repaired to a state tribunal "for an authoritative declaration of applicable state law." *Id.,* at 640.

We said:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . That is especially desirable where the questions of state law are enmeshed with federal questions. . . . Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. . . . In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *Id.,* at 640–641.

We are advised that the provisions of the Alaska Constitution at issue have never been interpreted by an Alaska court. The District Court, feeling sure of its grounds on the merits, held, however, that this was not a proper case for abstention, saying that "if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable." 297 F. Supp., at 304. The three-judge panel was a distinguished one, two being former Alaska lawyers. And they felt that prompt decision was necessary to avoid the "grave and irreparable" injury to the "economic livelihood" of the appellees which would result, if they could not engage in their occupation "during this year's forthcoming fishing season." *Ibid.*

It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law, the classic case being *Meredith* v. *Winter Haven,* 320 U. S. 228, where federal jurisdiction was based on diversity only. Abstention certainly involves duplication of effort and expense and an attendant delay. See *England* v. *Louisiana State Board,* 375 U. S. 411. That is why we have said that this judicially created rule which stems from *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, should be applied only where "the issue of state law is uncertain." *Harman* v. *Forssenius,* 380 U. S. 528, 534. Moreover, we said in *Zwickler* v. *Koota,* 389 U. S. 241, 248, that abstention was applicable "only in narrowly limited 'special circumstances,' " citing *Propper* v. *Clark,* 337 U. S. 472, 492. In *Zwickler,* a state statute was attacked on the ground that on its face it was repugnant to the First Amendment; and it was conceded that state court construction could not render unnecessary a decision of the First Amendment question. 389 U. S., at 250. A state court decision here, however,

could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship.

The *Pullman* doctrine was based on "the avoidance of needless friction" between federal pronouncements and state policies. 312 U. S., at 500. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution. The constitutional provisions relate to fish resources, an asset unique in its abundance in Alaska. The statute and regulations relate to that same unique resource, the management of which is a matter of great state concern. We appreciate why the District Court felt concern over the effect of further delay on these plaintiffs, the appellees here; but we have concluded that the first judicial application of these constitutional provisions should properly be by an Alaska court.

We think the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions. We accordingly vacate the judgment of the District Court and remand the case for proceedings consistent with this opinion.

It is so ordered.

ARKANSAS *v.* TENNESSEE

ON BILL OF COMPLAINT

No. 33, Orig. Argued January 19, 1970—
Decided February 25, 1970

The Special Master's Report, recommending that a disputed area between Arkansas and Tennessee along the Mississippi River be declared part of Tennessee, is adopted, and the Master is appointed as Commissioner to have the boundary line surveyed and submitted to the Court for approval.

Don Langston, Assistant Attorney General of Arkansas, argued the cause for plaintiff on exceptions to the Report of the Special Master. With him on the brief was *Joe E. Purcell,* Attorney General.

Heard H. Sutton argued the cause for defendant in support of the Report of the Special Master. With him on the brief were *David Pack,* Attorney General of Tennessee, *C. Hayes Cooney,* Assistant Attorney General, *Harry W. Laughlin, James L. Garthright, Jr.,* and *J. Martin Regan.*

PER CURIAM.

This original action was commenced on October 13, 1967, by the State of Arkansas to settle a boundary dispute with the State of Tennessee. The disputed area extends six miles laterally along the west (Arkansas side) bank of the Mississippi River and encompasses some five thousand acres. This Court's jurisdiction arises under Art. III, § 2, of the Constitution of the United States. On January 15, 1968, we appointed, 389 U. S. 1026, Hon. Gunnar H. Nordbye, Senior United States Judge of the District of Minnesota, as Special Master to determine the state line in the disputed area

known as Cow Island Bend in the Mississippi River located between Crittenden County, Arkansas, and Shelby County, Tennessee. After conducting an evidentiary hearing and viewing the area, the Master filed his Report with this Court recommending that all of the disputed area be declared part of the State of Tennessee. We affirm the Master's Report.

The parties agree that the state line is the thalweg, that is, the steamboat channel of the Mississippi River as it flows west and southward between these States. The Master heard evidence and was presented exhibits and maps which showed that the migration of the Mississippi River northward and west continued until about 1912. At this time an avulsion occurred leaving Tennessee lands on the west or Arkansas side of the new or avulsive river channel. The Master found that thereafter, because of the avulsion, the water in the thalweg became stagnant and erosion and accretion no longer occurred. At this time the boundary between Arkansas and Tennessee became fixed in the middle of the old abandoned channel.

This is a classic example of the situation referred to in an earlier case between these States, *Arkansas* v. *Tennessee,* 246 U. S. 158, 173, where we said,

> "It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the

> resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel."

And, again, *id.*, at 175,

> "An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion."

The exceptions of the State of Arkansas are overruled and the Report of the Special Master is adopted.

It is ordered that the Hon. Gunnar H. Nordbye be, and he is hereby, appointed as Commissioner in this case with power to engage and supervise a competent surveyor, or surveyors, to survey the boundary line as recommended in the Master's Report. The boundary line determined by such survey shall be submitted to the Court by the Commissioner and, if approved, shall be the boundary line between the two States.

The costs of this proceeding shall be divided equally between the parties.

ARKANSAS *v.* TENNESSEE

No. 33, Orig. Decided February 25, 1970—
Decree entered February 25, 1970

Opinion reported: *Ante,* p. 88.

DECREE

1. It is ordered, adjudged, and decreed that the boundary line between the States of Arkansas and Tennessee in the area in controversy shall be fixed in the middle of the old abandoned Cow Island Bendway Channel as partially reflected in the 1953 survey of one R. L. Cooper (Defendant's Exhibit 42, attached to the decree in *Brown* v. *Brakensiek,* in the Chancery Court of Shelby County, Tennessee), said abandoned channel extending from its upper or up-river end to the lower or down-river end of Ike Chute as far as that survey goes, thence downstream in a southerly direction passing down the middle of a water drain or creek now running between the lower end of Ike Chute and the upper end of 96 Chute, thence continuing downstream in a southerly direction down the middle of 96 Chute and coming out of 96 Chute on a continuing straight line to the point where it joins the present navigation channel of the Mississippi River, all as indicated by a broken line marked "State Line" on the annexed reduced copy of the 1965 aerial photograph of the area in controversy, Joint Exhibit A, marked Appendix A–I, and also as reflected by a broken line marked "State Line" on a reduced copy of Defendant's Exhibit 39, the 1937 map of the United States Engineers and hereto annexed as Appendix A–II.

2. It is ordered that the Hon. Gunnar H. Nordbye be, and he is hereby, appointed Commissioner in this case with power to engage and supervise a com-

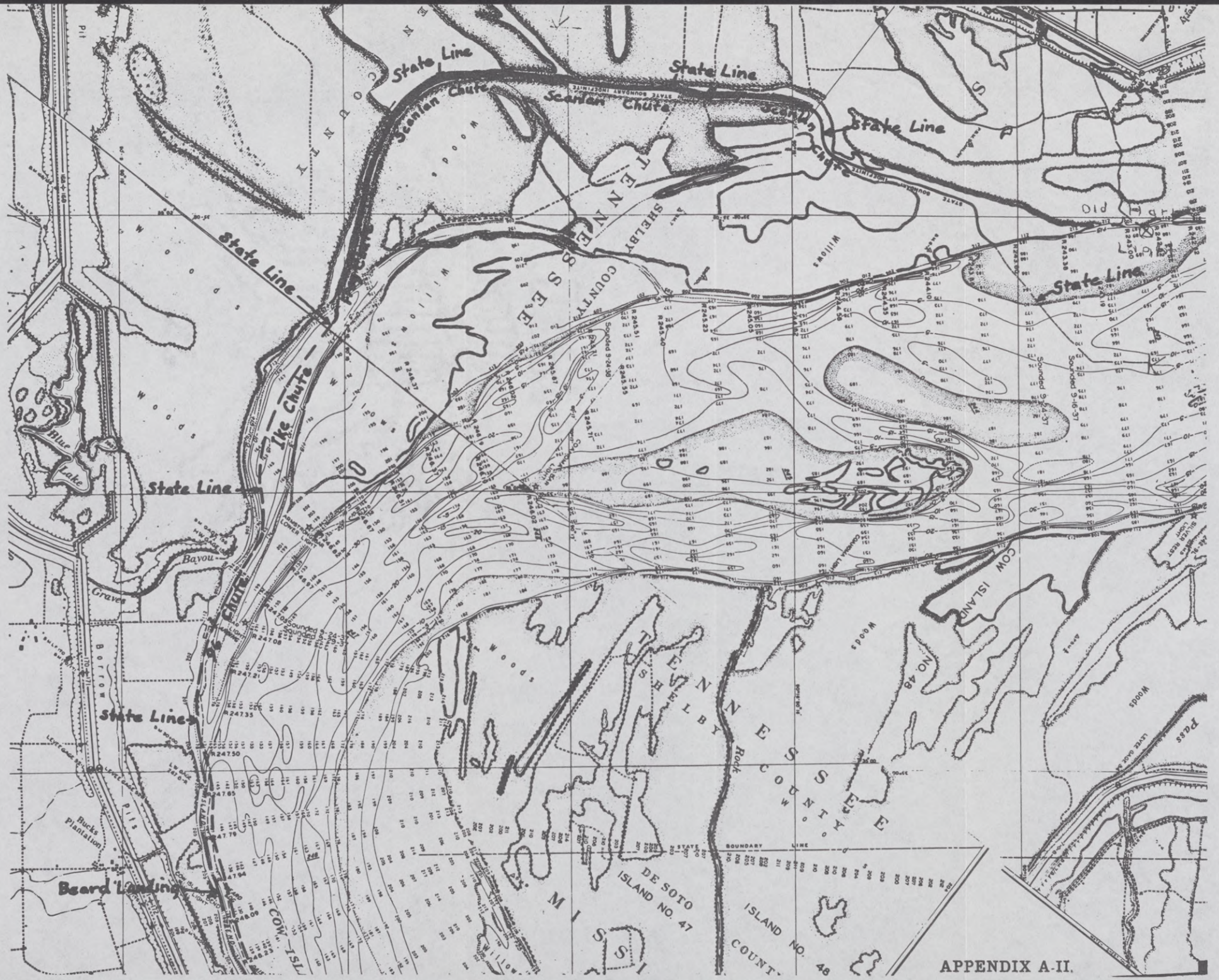
petent surveyor, or surveyors, to survey the boundary line as provided in this decree. The boundary line determined by such survey shall be submitted to the Court by the Commissioner and, if approved, shall be the boundary line between the two States.

3. The costs of this proceeding shall be divided equally between the parties.

[Appendixes A–I and A–II follow this page.]

APPENDIX A-I.

364-749 O - 70 - (Faces. p. 92) No1



APPENDIX A-II.

364-749 O - 70 - (Faces. p. 92) No. 2

HALL *v.* BAUM, CHAIRMAN OF STATE DEMOCRATIC EXECUTIVE COMMITTEE OF TEXAS

APPEAL FROM THE SUPREME COURT OF TEXAS

No. 1218. Decided February 27, 1970

452 S. W. 2d 699, appeal dismissed.

William H. Allen, John Vanderstar, John L. Hill, Henry D. Akin, Jr., and *Mark Martin* for appellant.

PER CURIAM.

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

UNITED STATES ET AL. *v.* GIFFORD-HILL-AMERICAN, INC., ET AL.

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

No. 515. Decided February 27, 1970

413 F. 2d 1244, vacated and remanded.

Solicitor General Griswold and *Assistant Attorney General McLaren* for the United States et al.

Stanley E. Neely for Gifford-Hill-American, Inc., and *Julian O. von Kalinowski* for United Concrete Pipe Corp., respondents.

PER CURIAM.

Upon consideration of the suggestion of mootness filed by the Solicitor General, and upon an examination of the entire record, the judgment of the United States Court of Appeals for the Fifth Circuit is vacated and the case is remanded to that court with instructions to dismiss the mandamus proceedings as moot.

SHAFFER *v.* BRIDGES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 535, Misc. Decided February 27, 1970

295 F. Supp. 869, appeal dismissed.

James Robertson and *Lawrence A. Aschenbrenner* for appellant.

A. F. Summer, Attorney General of Mississippi, and *Will S. Wells,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion of the appellant for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the case is dismissed as moot.

MATTHEWS ET AL. *v.* LITTLE, CITY CLERK OF THE CITY OF ATLANTA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1225, Misc. Decided February 27, 1970

Appeal dismissed.

Frederic S. Le Clercq for appellants.

Henry L. Bowden and *John E. Dougherty* for appellee.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The motion to dismiss is also granted and the appeal is dismissed as moot.

LUJAN *v.* CALIFORNIA

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 200, Misc. Decided February 27, 1970

Appeal dismissed and certiorari denied.

Thomas C. Lynch, Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Michael J. Phelan,* 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.

DURHAM ET UX. *v.* INDEPENDENCE HOMES, INC.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 1062. Decided February 27, 1970

Appeal dismissed and certiorari denied.

Thomas B. McNeill for appellants.

Burton Y. Weitzenfeld and *John F. McClure* for appellee.

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

PARKER *v.* UNITED STATES

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

No. 992, Misc. Decided February 27, 1970

Certiorari granted; 411 F. 2d 1067, vacated and remanded.

Walter L. Gerash for petitioner.

Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney, and *Lee B. Anderson* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted.

Upon consideration of the suggestion of mootness filed by the Solicitor General, and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Tenth Circuit is vacated and the case is remanded to that court with instructions to dismiss the appeal as moot.

YOUNG *v.* UNITED STATES

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

No. 579, Misc. Decided February 27, 1970

Certiorari granted; vacated and remanded.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Roger A. Pauley* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit with directions to appoint counsel for the petitioner. If thereafter counsel is unable to present any nonfrivolous issue on appeal, the Court of Appeals would then be free to dismiss the appeal as legally insubstantial.

THE CHIEF JUSTICE is of the opinion that the petition for a writ of certiorari should be denied.

NEW YORK FEED CO., INC., ET AL. *v.* LEARY ET AL.

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

No. 992. Decided February 27, 1970*

305 F. Supp. 288, affirmed.

Herald Price Fahringer for appellants in No. 992. *Ralph J. Schwarz, Jr.,* and *Albert B. Gerber* for appellants in No. 998.

J. Lee Rankin and *Stanley Buchsbaum* for appellee Leary in both cases, and *Frank S. Hogan, pro se,* and *Michael R. Juviler* for appellee Hogan in both cases. *Louis J. Lefkowitz,* Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Charles A. La Torella, Jr.,* Assistant Attorney General, filed a motion to dismiss or affirm for the Attorney General of New York.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the cases set for oral argument.

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*Together with No. 998, *Milky Way Productions, Inc., et al.* v. *Leary et al.,* also on appeal from the same court.

Syllabus

H. K. PORTER CO., INC., DISSTON DIVISION-DANVILLE WORKS *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 230. Argued January 15, 1970—Decided March 2, 1970

Following protracted collective-bargaining negotiations between respondent union and the petitioner revolving mainly around the union's desire to have the company "check off" the dues owed to the union by its members, the National Labor Relations Board (NLRB) made a finding, which the Court of Appeals approved, that the company's refusal to bargain about the checkoff was not made in good faith but solely to frustrate the making of a collective-bargaining agreement. Thereafter the NLRB ordered the petitioner to grant the union a contract checkoff clause. The Court of Appeals affirmed the order, concluding that § 8 (d) of the National Labor Relations Act did not forbid the NLRB to compel agreement. *Held:* Though the NLRB has power under the Act to require employers and employees to negotiate, it does not have the power to compel either to agree to any substantive contractual provision of a collective-bargaining agreement. Pp. 102–109.

134 U. S. App. D. C. 227, 414 F. 2d 1123, reversed and remanded.

Donald C. Winson argued the cause for petitioner. With him on the brief were *Paul R. Obert, Thomas P. Luscher,* and *William Alvah Stewart.*

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Griswold, Joseph J. Connolly, Arnold Ordman,* and *Dominick L. Manoli. George H. Cohen* argued the cause for respondent United Steelworkers of America, AFL–CIO. With him on the brief were *Elliot Bredhoff, Michael H. Gottesman,* and *Bernard Kleiman.*

Lawrence M. Cohen argued the cause for the Chamber of Commerce of the United States as *amicus curiae* urging reversal. With him on the briefs was *Milton A. Smith.*

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

After an election respondent United Steelworkers Union was, on October 5, 1961, certified by the National Labor Relations Board as the bargaining agent for certain employees at the Danville, Virginia, plant of the petitioner, H. K. Porter Co. Thereafter negotiations commenced for a collective-bargaining agreement. Since that time the controversy has seesawed between the Board, the Court of Appeals for the District of Columbia Circuit, and this Court. This delay of over eight years is not because the case is exceedingly complex, but appears to have occurred chiefly because of the skill of the company's negotiators in taking advantage of every opportunity for delay in an act more noticeable for its generality than for its precise prescriptions. The entire lengthy dispute mainly revolves around the union's desire to have the company agree to "check off" the dues owed to the union by its members, that is, to deduct those dues periodically from the company's wage payments to the employees. The record shows, as the Board found, that the company's objection to a checkoff was not due to any general principle or policy against making deductions from employees' wages. The company does deduct charges for things like insurance, taxes, and contributions to charities, and at some other plants it has a checkoff arrangement for union dues. The evi-

dence shows, and the court below found, that the company's objection was not because of inconvenience, but solely on the ground that the company was "not going to aid and comfort the union." Efforts by the union to obtain some kind of compromise on the checkoff request were all met with the same staccato response to the effect that the collection of union dues was the "union's business" and the company was not going to provide any assistance. Based on this and other evidence the Board found, and the Court of Appeals approved the finding, that the refusal of the company to bargain about the checkoff was not made in good faith, but was done solely to frustrate the making of any collective-bargaining agreement. In May 1966, the Court of Appeals upheld the Board's order requiring the company to cease and desist from refusing to bargain in good faith and directing it to engage in further collective bargaining, if requested by the union to do so, over the checkoff. *United Steelworkers* v. *NLRB*, 124 U. S. App. D. C. 143, 363 F. 2d 272, cert. denied, 385 U. S. 851.

In the course of that opinion, the Court of Appeals intimated that the Board conceivably might have required petitioner to agree to a checkoff provision as a remedy for the prior bad-faith bargaining, although the order enforced at that time did not contain any such provision. 124 U. S. App. D. C., at 146–147, and n. 16, 363 F. 2d, at 275–276, and n. 16. In the ensuing negotiations the company offered to discuss alternative arrangements for collecting the union's dues, but the union insisted that the company was required to agree to the checkoff proposal without modification. Because of this disagreement over the proper interpretation of the court's opinion, the union, in February 1967, filed a motion for clarification of the 1966 opinion. The motion was denied by the court on March 22, 1967, in an

order suggesting that contempt proceedings by the Board would be the proper avenue for testing the employer's compliance with the original order. A request for the institution of such proceedings was made by the union, and, in June 1967, the Regional Director of the Board declined to prosecute a contempt charge, finding that the employer had "satisfactorily complied with the affirmative requirements of the Order." App. 111. The union then filed in the Court of Appeals a motion for reconsideration of the earlier motion to clarify the 1966 opinion. The court granted that motion and issued a new opinion in which it held that in certain circumstances a "checkoff may be imposed as a remedy for bad faith bargaining." *United Steelworkers* v. *NLRB,* 128 U. S. App. D. C. 344, 347, 389 F. 2d 295, 298 (1967). The case was then remanded to the Board and on July 3, 1968, the Board issued a supplemental order requiring the petitioner to "[g]rant to the Union a contract clause providing for the checkoff of union dues." 172 N. L. R. B. No. 72, 68 L. R. R. M. 1337. The Court of Appeals affirmed this order, *H. K. Porter Co.* v. *NLRB,* 134 U. S. App. D. C. 227, 414 F. 2d 1123 (1969). We granted certiorari to consider whether the Board in these circumstances has the power to remedy the unfair labor practice by requiring the company to agree to check off the dues of the workers. 396 U. S. 817. For reasons to be stated we hold that while the Board does have power under the National Labor Relations Act, 61 Stat. 136, as amended, to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.

Since 1935 the story of labor relations in this country has largely been a history of governmental regulation of the process of collective bargaining. In that year Con-

gress decided that disturbances in the area of labor relations led to undesirable burdens on and obstructions of interstate commerce, and passed the National Labor Relations Act, 49 Stat. 449. That Act, building on the National Industrial Recovery Act, 48 Stat. 195 (1933), provided that employees had a federally protected right to join labor organizations and bargain collectively through their chosen representatives on issues affecting their employment. Congress also created the National Labor Relations Board to supervise the collective-bargaining process. The Board was empowered to investigate disputes as to which union, if any, represented the employees, and to certify the appropriate representative as the designated collective-bargaining agent. The employer was then required to bargain together with this representative and the Board was authorized to make sure that such bargaining did in fact occur. Without spelling out the details, the Act provided that it was an unfair labor practice for an employer to refuse to bargain. Thus a general process was established that would ensure that employees as a group could express their opinions and exert their combined influence over the terms and conditions of their employment. The Board would act to see that the process worked.

The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its

own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." [1]

The discussions on the floor of Congress consistently reflected this same understanding.[2]

The Act was passed at a time in our Nation's history when there was considerable legal debate over the con-

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[1] S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

[2] "Let me say that the bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees. . . .

. . . . . .

"Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern any working condition in any establishment or place of employment.

. . . . . .

"A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded." Remarks of Senator Walsh, 79 Cong. Rec. 7659; see also 79 Cong. Rec. 9682, 9711.

stitutionality of any law that required employers to conform their business behavior to any governmentally imposed standards. It was seriously contended that Congress could not constitutionally compel an employer to recognize a union and allow his employees to participate in setting the terms and conditions of employment. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), this Court, in a 5-to-4 decision, held that Congress was within the limits of its constitutional powers in passing the Act. In the course of that decision the Court said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Id.*, at 45.

In 1947 Congress reviewed the experience under the Act and concluded that certain amendments were in order. In the House committee report accompanying what eventually became the Labor Management Relations Act, 1947, the committee referred to the above-quoted language in *Jones & Laughlin* and said:

> "Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . .
>
> . . . . . .
>
> "[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to

> carry this process still further and seek to control more and more the terms of collective-bargaining agreements." [3]

Accordingly Congress amended the provisions defining unfair labor practices and said in § 8 (d) that:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*" [4]

In discussing the effect of that amendment, this Court said it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB* v. *American Ins. Co.,* 343 U. S. 395, 404 (1952). Later this Court affirmed that view stating that "it remains clear that § 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *NLRB* v. *Insurance Agents,* 361 U. S. 477, 487 (1960). The parties to the instant case are agreed that this is the first time in the 35-year history of the Act that the Board has ordered either an employer or a union to agree to a substantive term of a collective-bargaining agreement.

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[3] H. R. Rep. No. 245, 80th Cong., 1st Sess., 19–20 (1947).

[4] 29 U. S. C. § 158 (d) (emphasis added).

Recognizing the fundamental principle "that the National Labor Relations Act is grounded on the premise of freedom of contract," 128 U. S. App. D. C., at 349, 389 F. 2d, at 300, the Court of Appeals in this case concluded that nevertheless in the circumstances presented here the Board could properly compel the employer to agree to a proposed checkoff clause. The Board had found that the refusal was based on a desire to frustrate agreement and not on any legitimate business reason. On the basis of that finding the Court of Appeals approved the further finding that the employer had not bargained in good faith, and the validity of that finding is not now before us. Where the record thus revealed repeated refusals by the employer to bargain in good faith on this issue, the Court of Appeals concluded that ordering agreement to the checkoff clause "may be the only means of assuring the Board, and the court, that [the employer] no longer harbors an illegal intent." 128 U. S. App. D. C., at 348, 389 F. 2d, at 299.

In reaching this conclusion the Court of Appeals held that § 8 (d) did not forbid the Board from compelling agreement. That court felt that "[s]ection 8 (d) defines collective bargaining and relates to a determination of *whether* a . . . violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." 128 U. S. App. D. C., at 348, 389 F. 2d, at 299. We may agree with the Court of Appeals that as a matter of strict, literal interpretation that section refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8 (d). It is implicit in the entire structure of the

Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8 (d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself.[5] One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act,[6] allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

In reaching its decision the Court of Appeals relied extensively on the equally important policy of the Act that workers' rights to collective bargaining are to be secured. In this case the court apparently felt that

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[5] "If . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U. S. C. § 160 (c).

[6] For example, the employer is not free to choose any employee representative he wants, and the representative designated by the majority of the employees represents the minority as well. The Act itself prohibits certain contractual terms relating to refusals to deal in the goods of others, 29 U. S. C. § 158 (e). Various practices in enforcing the Act may to some extent limit freedom to contract as the parties desire. See generally Wellington, Freedom of Contract and the Collective Bargaining Agreement, 112 U. Pa. L. Rev. 467 (1964).

the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most important demand. Perhaps the court, fearing that the parties might resort to economic combat, was also trying to maintain the industrial peace that the Act is designed to further. But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.

The judgment is reversed and the case is remanded to the Court of Appeals for further action consistent with this opinion.

Reversed and remanded.

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

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

MR. JUSTICE HARLAN, concurring.

I join in the Court's opinion on the understanding that nothing said therein is meant to disturb or question the primary determination made by the Board and sus-

tained by the Court of Appeals, that petitioner did not bargain in "good faith," and thus may be subjected to a bargaining order enforceable by a citation for contempt if the Board deems such a proceeding appropriate.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The Court correctly describes the general design and main thrust of the Act. It does not encompass compulsory arbitration; the Board does not sit to impose what it deems to be the best conditions for the collective-bargaining agreement; the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." § 8 (d) of the Act.

Yet the Board has the power, where one party does not bargain in good faith, "to take such affirmative action . . . as will effectuate the policies" of the Act. § 10 (c) of the Act.

Here the employer did not refuse the checkoff for any business reason, whether cost, inconvenience, or what not. Nor did the employer refuse the checkoff as a factor in its bargaining strategy, hoping that delay and denial might bring it in exchange favorable terms and conditions. Its reason was a resolve to avoid reaching any agreement with the union.

In those narrow and specialized circumstances, I see no answer to the power of the Board in its discretion to impose the checkoff as "affirmative action" necessary to remedy the flagrant refusal of the employer to bargain in good faith.

The case is rare, if not unique, and will seldom arise. I realize that any principle once announced may in time gain a momentum not warranted by the exigencies of its creation. But once there is any business consideration

that leads to a denial of a demand or any consideration of bargaining strategy that explains the refusal, the Board has no power to act. Its power is narrowly restricted to the clear case where the refusal is aimed solely at avoidance of any agreement. Such is the present case. Hence, with all respect for the strength of the opposed view, I dissent.

TOUSSIE *v.* UNITED STATES

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

No. 441. Argued January 14, 1970—Decided March 2, 1970

Petitioner, who was required to register for the draft between June 23 (his 18th birthday) and June 28, 1959, in accordance with a presidential proclamation issued pursuant to § 3 of the Universal Military Training and Service Act, did not register at any time. Section 3 makes it "the duty of every male citizen . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration" at the time and place and in such manner "as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder." Petitioner was indicted in May 1967 for failing to register and was convicted. The District Court held that the Act imposes a continuing duty to register which lasts until age 26 and thus the prosecution was not barred by the five-year statute of limitations in 18 U. S. C. § 3282. The Court of Appeals affirmed. *Held:* The offense is not a continuing one but was committed by petitioner's failure to register in 1959, when the statute of limitations began to run. Pp. 114–124.

410 F. 2d 1156, reversed.

Murray I. Gurfein argued the cause for petitioner. With him on the briefs was *Jacob W. Heller.*

Francis X. Beytagh, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner Robert Toussie was convicted, after a jury trial, of failing to register for the draft. His conviction was affirmed by the Court of Appeals, 410 F. 2d 1156

(C. A. 2d Cir.), and we granted certiorari, 396 U. S. 875 (1969). For the reasons hereafter set forth we conclude that this prosecution was barred by the statute of limitations and therefore reverse the conviction.

Section 3 of the Universal Military Training and Service Act, 65 Stat. 76, provides that:

> "Except as otherwise provided in this title, it shall be the duty of every male citizen . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder." [1]

The applicable presidential proclamation provides that "[p]ersons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." [2] Since Toussie, an American citizen, was born on June 23, 1941, he was required to register sometime between June 23 and June 28, 1959. He did not do so during that period or at any time thereafter. On May 3, 1967, he was indicted for failing to register and that indictment led to the conviction under review.

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[1] 50 U. S. C. App. § 453. This Act was amended by the Military Selective Service Act of 1967, 81 Stat. 100, but those amendments did not change this provision. Failure to perform this duty is punishable by fine, imprisonment, or both. 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV).

[2] Proclamation No. 2799, July 20, 1948, 62 Stat. 1531. The Proclamation was first issued under the authority of the Selective Service Act of 1948, 62 Stat. 604, but it was continued after the passage of the Universal Military Training and Service Act by Proclamation No. 2942, August 30, 1951, 65 Stat. c35.

Before trial Toussie moved to dismiss the indictment, arguing that prosecution was barred by the statute of limitations which provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U. S. C. § 3282. Since there is no express provision to the contrary in the Draft Act, Toussie argued that his crime was complete in 1959, and it could not be the subject of a prosecution based on an indictment returned in 1967—eight years thereafter. The Government agreed that the crime was complete in 1959, but argued that it continued to be committed each day that Toussie did not register. The District Court held that the Act imposes a continuing duty to register which lasts until age 26 and that prosecution for failing to perform that duty before the man becomes 26 is timely if the indictment is returned before the defendant becomes 31 years old—in this case any time prior to June 23, 1972. 280 F. Supp. 473, 474 (D. C. E. D. N. Y. 1967). The Court of Appeals agreed. 410 F. 2d, at 1157–1158. If the offense is a continuing one the prosecution was timely, but, if not, the District Court erred in not dismissing the indictment.

In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment

because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' *United States* v. *Scharton,* 285 U. S. 518, 522 (1932)." *United States* v. *Habig,* 390 U. S. 222, 227 (1968). We have also said that "[s]tatutes of limitations normally begin to run when the crime is complete." *Pendergast* v. *United States,* 317 U. S. 412, 418 (1943); see *United States* v. *Irvine,* 98 U. S. 450, 452 (1879). And Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 U. S. C. § 3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." 410 F. 2d, at 1158. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

The statute in this case provides that all young men, with certain exceptions, between the ages of 18 and 26 shall register "at such time or times and place or places" as the President may prescribe. The Government refers to a regulation promulgated under the Act which pro-

vides that "[t]he duty of every person subject to registration . . . shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration . . . ." 32 CFR § 1611.7 (c). It is urged that this regulation only makes explicit what Congress implicitly said in the Act itself, that is that registration is a duty that continues until age 26 and failure to register before then is a criminal offense that can be punished as late as five years after the 26th birthday.

The statute admittedly might be construed as the Government urges, but in light of the history of the draft laws and the principle that continuing offenses are not to be too readily found, we do not feel this particular Act incorporates such a doctrine. The draft law of 1917 provided in § 5 that certain persons were subject to registration and that "upon proclamation by the President . . . stating the time and place of such registration it shall be the duty of all [such] persons . . . to present themselves for and submit to registration." 40 Stat. 80. Pursuant to that authority the President proclaimed June 5, 1917, as the first registration day,[3] and on that day approximately 10,000,000 young men were registered.[4] There were no more general draft registrations until August 24, 1918, when the President required all those men who had become subject to registration since June 5, 1917, to come in and register.[5] Later that year Congress amended the statute, expanded the age group subject to registration,[6] and provided that "upon

[3] Proclamation of May 18, 1917, 40 Stat. 1664.

[4] U. S. Selective Service System, Registration and Selective Service 11 (1946).

[5] Proclamation of August 13, 1918, 40 Stat. 1834.

[6] The first registration was of all men between the ages of 21 and 30. 40 Stat. 80. In 1918 Congress expanded the group to all those between the ages of 18 and 45. 40 Stat. 955.

proclamation by the President . . . stating the time or times and place or places of . . . registration, it shall be the duty of all persons of the designated ages . . . to present themselves for and submit to registration . . . ." 40 Stat. 955–956. Although this provision seemingly would have authorized registrations on different days, the President again issued a proclamation designating a single day, September 12, 1918, as registration day for all those so subject.[7] That registration was the last under the World War I draft. It is thus clear that throughout the administration of the first draft law, registration was thought of as a single, instantaneous act to be performed at a given time, and failure to register at that time was a completed criminal offense.

As events developed prior to what became World War II, Congress again decided to draft young men for service in the Armed Forces. In the Selective Training and Service Act of 1940 it was provided that men subject to registration were to register "at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder." 54 Stat. 885. While this language would again have authorized registration on different days for different men, the first proclamation under the new Act set a uniform date, October 16, 1940, for the registration of all men.[8] It was not until two years later that the President first issued a proclamation setting forth different dates for the registration of different groups of men, and in that same proclamation the President established the basic registration procedure of the present system, that all young men shall register on their 18th birthday.[9]

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[7] Proclamation of August 31, 1918, 40 Stat. 1840.

[8] Proclamation No. 2425, September 16, 1940, 54 Stat. 2739.

[9] Proclamation No. 2572, November 17, 1942, 56 Stat. 1982.

After the 1940 Act expired on March 31, 1947, Congress again decided to register men for the draft and declared that men between the ages of 18 and 26 would be subject to registration. Selective Service Act of 1948, 62 Stat. 604. Since the authority to register under the 1940 Act had expired, it was necessary to provide for the initial registration of the entire group of men between 18 and 26. In language identical to that found in the statute involved in this case,[10] Congress again left the administrative details to the President and authorized registration "at such time or times and place or places" as he might designate. We do not think the imposition of the duty to register on men between 18 and 26 and the provision for registration at different times was intended to indicate that the statute of limitations did not begin to run when the crime was first complete. Since at the time of the initial registration under the 1948 Act there were men of various ages who had to be registered, the Act was phrased generally in terms of a duty imposed on the entire group. Under this authority the President in fact required registration of all men between 18 and 26 during the month of September 1948. Persons of different ages were required to register on different days, and all those born after September 19, 1930, were required to register "on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." [11] The registration provisions of that Act have remained in force since 1948, and there has thus been a continual registration of 18-year-olds shortly after their birthday. With the exception of a few men who are not subject to registration when they are 18 but may become

[10] See *supra*, at 113.

[11] See *supra*, at 113, and Proclamation No. 2799, July 20, 1948, 62 Stat. 1531.

so later on,[12] the effect of these provisions has been to eliminate the necessity for registrations of men older than 18. Viewed in the light of history we do not think the Act intended to treat continued failure to register as a renewal of the original crime or the repeated commission of new offenses, but rather perpetuated the conception of the first registration that a man must register at a particular time and his failure to do so at that time is a single offense. That time will not be the same day for all as it was in 1917, and from the Selective Service System's viewpoint the process of registration is a "continuing" one. But from the registrant's viewpoint the obligation arises at a specific time. In Toussie's case it arose when he turned 18. He was allowed a five-day period in which to fulfill the duty, but when he did not do so he then and there committed the crime of failing to register.

The Government points out that the "continuing duty" regulation has been in existence since before the passage of the 1948 Act,[13] and that most lower federal courts have held that failing to register is a continuing offense for purposes of applying the statute of limitations.[14] It is suggested that since Congress has legislated

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[12] For example, students at certain military colleges are exempted from registration. 50 U. S. C. App. § 456 (a)(1) (1964 ed., Supp. IV). If a student in such an institution withdraws, he would presumably be required to register since the Act specifically states that "[n]o exemption from registration . . . shall continue after the cause therefor ceases to exist." 50 U. S. C. App. § 456 (k). Thus such a student may not be required to register until some time after his 18th birthday.

[13] The regulation was first promulgated under the 1940 Act on June 4, 1941. Selective Service System Regulations Vol. 2, § IX, 205 (d), 6 Fed. Reg. 2747.

[14] See *Fogel* v. *United States,* 162 F. 2d 54 (C. A. 5th Cir.), cert. denied, 332 U. S. 791 (1947); *Gara* v. *United States,* 178 F. 2d 38, 40 (C. A. 6th Cir. 1949), aff'd by an equally divided Court,

several times in this field, its failure to indicate that the crime should not be treated as a continuing offense supports the Government's argument that it is. Petitioner on the other hand suggests that Congress has on occasion explicitly stated that a certain offense will be deemed a continuing one,[15] and its failure to do so in this statute indicates that it did not intend to adopt that theory. Since there is no specific evidence that Congress actually was aware of this limitations question when it acted—whatever weight such evidence might deserve—and since we are reluctant to imply a continuing offense except in limited circumstances, we conclude that any argument based on congressional silence is stronger in favor of not construing this Act as incorporating a continuing-offense theory.

Unlike other instances in which this Court has held that a particular statute describes a continuing offense, there is no language in this Act that clearly contemplates a prolonged course of conduct.[16] While it is true that

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340 U. S. 857 (1950); *McGregor* v. *United States,* 206 F. 2d 583 (C. A. 4th Cir. 1953); cf. *United States* v. *Guertler,* 147 F. 2d 796 (C. A. 2d Cir. 1945). But cf. *United States* v. *Salberg,* 287 F. 208 (D. C. N. D. Ohio 1923).

[15] Congress has provided that concealment of a bankrupt's assets shall "be deemed to be a continuing offense . . . and the period of limitations shall not begin to run until . . . final discharge or denial of discharge." 18 U. S. C. § 3284.

[16] Cf. *United States* v. *Cores,* 356 U. S. 405 (1958), in which the Court held, for venue purposes, that the statute prohibiting alien crewmen from remaining in the United States after their permits expired contemplated that the offense would continue as long as the crewman remained in this country and the statute of limitations did not start to run when he first overstayed his permit. In that case we stated that "[s]ection 252 (c) punishes '[a]ny alien crewman who willfully remains in the United States in excess of the number of days allowed.' The conduct proscribed is the affirmative act of willfully remaining, and the crucial word 'remains' permits no connotation other than continuing presence." *Id.,* at 408. See also *Armour*

the regulation does in explicit terms refer to registration as a continuing duty, we cannot give it the effect of making this criminal offense a continuing one. Since such offenses are not to be implied except in limited circumstances, and since questions of limitations are fundamentally matters of legislative not administrative decision, we think this regulation should not be relied upon effectively to stretch a five-year statute of limitations into a 13-year one, unless the statute itself, apart from the regulation, justifies that conclusion.[17]

Packing Co. v. *United States,* 209 U. S. 56 (1908), in which we held that, for venue purposes, violations of the Elkins Act, 32 Stat. 847, were continuing offenses. In that case the statute specifically provided that "[e]very violation . . . shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted . . . ." *Id.,* at 73. Both of these cases dealt with venue and did not involve the statute of limitations question presented in this case.

[17] It is significant that the courts that have concluded that failure to register is a continuing offense have done so by relying explicitly on the regulation. See *Fogel* v. *United States, supra,* at 55; *McGregor* v. *United States, supra,* at 584; *Gara* v. *United States, supra,* at 39; and the opinions below in this case, 280 F. Supp., at 474, 410 F. 2d, at 1157. It is equally significant that the only court that concluded that the offense was not a continuing one did so at a time when there was no "continuing-duty" regulation issued to implement the registration provisions. *United States* v. *Salberg, supra,* interpreting the 1917 Draft Act, held that failure to register was not a continuing offense. The first continuing-duty regulation was promulgated in 1941. See n. 13, *supra.* These decisions support our conclusion that the statute itself, apart from any reliance on the administrative regulation, does not require that it be construed to incorporate a continuing-offense theory. We do not hold, as the dissent seems to imply, *post,* at 127, that the continuing-duty regulation is unauthorized by the Act. All we hold is that neither the regulation nor the Act itself requires that failure to register be treated as the type of offense that effectively extends the statute of limitations.

There is also nothing inherent in the act of registration itself which makes failure to do so a continuing crime. Failing to register is not like a conspiracy which the Court has held continues as long as the conspirators engage in overt acts in furtherance of their plot. See *United States* v. *Kissel,* 218 U. S. 601 (1910), *Grunewald* v. *United States,* 353 U. S. 391 (1957). It is in the nature of a conspiracy that each day's acts bring a renewed threat of the substantive evil Congress sought to prevent. The fact that the first draft registrations clearly were viewed as instantaneous events and not a continuing process indicates that there is nothing inherent in the nature of failing to register that makes it a continuing offense.

We do not mean that the argument in support of implying a continuing offense in this case is insubstantial, but it is at best highly equivocal. Basically we are faced with the task of construing a somewhat ambiguous statute in one of two ways. One way would limit institution of prosecution to a period of five years following the initial violation, while the other could effectively extend the final date for prosecution until as late as 13 years after the crime is first complete. As we have said before:

> "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal Corp.,* 344 U. S. 218, 221–222 (1952).

Not insignificantly those remarks were also made in the context of considering the continuing-offense doctrine. In light of all these considerations we conclude that the

draft law does not intend to permit criminal prosecution for failing to register as late as 13 years after the initial failure. Consequently the statute of limitations begins to run at the initial failure to register as required by law. Since the facts in this case clearly show that Toussie failed in his legal obligation when he did not register prior to June 28, 1959, the statute began to run at that time and prosecution based on an indictment returned almost eight years later was barred.

It should be emphasized that this conclusion does not mean that the gravity of this offense is in any way diminished. Failure to register is subject to heavy criminal penalties. The only question is whether those penalties must result from a prosecution begun within five years or whether they can be delayed for a longer period. We are not convinced that limiting prosecution to a period of five years following the initial failure to register will significantly impair either the essential function of raising an army or the prosecution of those who fail to register. We do feel that the threat of criminal punishment and the five-year statute of limitations is a sufficient incentive to encourage compliance with the registration requirements. If Congress had felt otherwise it could easily have provided for a longer period of limitations. It has not yet done so.

There is no doubt that the jury found that Toussie willfully failed to register and thereby subject himself to the same possibility of military service that faces other young men who fully comply with their legal obligations. There is some cause to feel that dismissal of the indictment in such a case is an injustice in a society based on full and equal application of the laws. But while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations. "Every statute of limitations, of course, may permit a rogue to escape," *Pendergast* v. *United States,*

317 U. S. 412, 418 (1943), but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished." The judgment of conviction in this case must therefore be

Reversed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN join, dissenting.

The general statute of limitations provides in pertinent part that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U. S. C. § 3282. The majority holds that this statute bars petitioner's prosecution, shortly before his 26th birthday, for failing ever to have registered for the draft. That conclusion, I submit, is supported by neither the language, the purpose, nor the history of the applicable Selective Service Acts.

It is at once clear that nothing is gained by stressing that the general statute of limitations applies "[e]xcept as otherwise expressly provided by law." The question in this case is not whether the five-year statute applies, but when it begins to run. That question in turn depends on what the "offense" is for which petitioner is being tried, and when it was that he committed that offense. In the typical case, an offense is complete as soon as every element in the crime occurs, and the statute of limitations begins to run from that date. But in the case of a "continuing offense," the crime is not exhausted for purposes of the statute of limitations as long as the proscribed course of conduct continues. *United States* v. *Cores,* 356 U. S. 405, 409 (1958); *United States* v. *Kissel,* 218 U. S. 601, 607 (1910); see Model Penal Code

§ 1.07, Comment (Tent. Draft No. 5, 1956). The question into which category a given offense falls has long been held to be entirely a matter of statutory interpretation. See, *e. g., United States* v. *Cores, supra; Pendergast* v. *United States,* 317 U. S. 412, 419–421 (1943); *Bramblett* v. *United States,* 97 U. S. App. D. C. 330, 332, 231 F. 2d 489, 491, cert. denied, 350 U. S. 1015 (1956).

In this case, the offense derives from 50 U. S. C. App. §§ 453 and 462 (a) (1964 ed. and Supp. IV). The latter section makes it a crime to evade registration or to "neglect or refuse to perform any duty" required by the Selective Service laws. The former section—453—spells out the "duty" that petitioner is charged with failing to perform here:

> "[I]t shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

By any natural reading of this language, at least where the President has established "times" and "places" for continually accepting registrations, the "offense" created is the offense of being at one and the same time, unregistered after having been required to register, and being between the ages of 18 and 26. Indeed, coupled with § 462's provision for punishment of anyone who "evades" registration, this crime is very similar to the crime committed by an alien who unlawfully "remains" in the country. See *United States* v. *Cores, supra;* majority

opinion, *ante*, at 120 n. 16. Under this view of the Act, the only question that the statute of limitations raises is whether, at any time within five years preceding the indictment, those two characteristics—being unregistered and between the specified age limits—accurately described the accused.

The majority concludes, however, that the only duty prescribed by § 453 is a duty to register on those specific days—and those days only—declared by the President for initial registrations. In this case, by presidential proclamation, persons not yet 18 in 1948 were to "be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." According to the majority, once the fifth day has passed, the unregistered 18-year-old, although he has indeed committed an offense, is no longer under any further obligation to register. That conclusion is wholly at odds with the purposes of the Selective Service Act as a whole and this section in particular, as well as with the regulations, longstanding administrative interpretation, and the presidential proclamation itself.

Since 1941, Selective Service regulations, issued under authority explicitly granted the President, 50 U. S. C. App. § 460 (1964 ed. and Supp. IV); 32 CFR pt. 1611 (invoking authority under § 460), have provided that:

> "The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be." 32 CFR § 1611.7 (c).

If there was any doubt as to whether the duty imposed by § 453 extends beyond the fifth day after petitioner's

birthday, this regulation surely sets that issue at rest.[1] Indeed, the Court apparently concedes as much since it decides to fall back on the theory that the regulation is not authorized by the Act.[2]

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[1] Despite the majority's assertion to the contrary, the quoted regulation is neither the first nor the only regulation reflecting the expectation that registration was to occur, even though it was "late" registration. Even under the 1917 Act, the regulations "prescribed by the President under the authority vested in him by the terms of the Selective Service Law," U. S. War Dept., Selective Service Regulations, p. i (2d ed. 1918), provided for registration "other than on Registration Day . . . irrespective of the date on which [the applicant] was required to register." *Id.*, § 54; see U. S. War Dept., Selective Service Regulations § 54 (1917) ("Local Boards will accomplish the registration of persons subject to registration who, *for any reason,* have not been registered on or since [Registration Day]") (emphasis added). Similarly, under the 1940 Act, procedures were described for registering "[a]ll persons who present themselves for registration, *including persons who should have registered on a previous registration day . . . .*" 32 CFR § 613.11 (b) (Cum. Supp. 1944) (emphasis added). And the current regulations provide that "[t]he Director of Selective Service shall also arrange for and supervise the registration of persons who present themselves for registration at times other than on the day or days fixed for any registration." 32 CFR § 1612.1.

It is incongruous, to say the least, to admit that local boards have a duty and responsibility to register late applicants, see also 32 CFR § 1611.6, but that such applicants have no corresponding duty to cooperate with the board. Presumably under the majority's view, an unregistered male, discovered by the local board after the time for his initial registration had passed, could not be punished if he "refuses to cooperate or is inclined to evade, refuses to answer, or answers falsely . . . ." See 32 CFR § 1613.16 (provision for dealing with "recalcitrants").

[2] The majority seems concerned to distinguish the "limitations question," *ante,* at 120, from the question of whether the duty in this case is continuing, *ante,* at 121 n. 17. But the Court cannot have it both ways. If the duty continues, as the regulation prescribes, the limitations question has been settled: the definition of the "offense" was not yet exhausted when this indictment was brought. *United States* v. *Cores,* 356 U. S. 405, 409 (1958); *United States* v. *Kissel,* 218 U. S. 601, 607 (1910). If, on the other hand, the

That position, however, is simply untenable. In addition to the general authorization to the President in § 460 (b) "to prescribe the necessary rules and regulations to carry out the provisions of this title," § 453 itself expressly requires registration "at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder." The majority's reference to the 1917 Act, if it proves anything, proves just the opposite of the Court's conclusion. Under that Act, the President prescribed one day when registration was to take place, utilizing local election precincts and a registration system that were not well adapted to take registrations on any other day.[3] By 1942, the system had been

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statute has run, then the "continuing-duty" regulation must be invalid. While I can sympathize with the Court's discomfort over the position it is thus forced to assume, I view that unease as simply an additional indication that the regulations involved in this case are fully within the scope of the powers given the President under the Act.

[3] The first registration is described in U. S. Selective Service System, Registration and Selective Service 10–11 (1946):

"The basic idea was to follow the general organization and the administrative units of the election machinery. The Governors in the States, the County Clerks, or other designated persons in the county and in registration precincts were selected or appointed registrars. The ordinary place of registration was the ordinary place for voting. Thus the normal processes of Government were utilized for this extraordinary activity."

Although it appears that late registration by local boards after Registration Day was authorized by the President, see n. 1, *supra*, until World War II and the 1940 Act, the local boards' "primary functions [were] not registration but classification and induction." *Id.*, at 23. Once Registration Day had passed, and the emergency machinery had been dismantled, special procedures were required for accomplishing late registration, see U. S. War Dept., Selective Service Regulations § 54 (b) (2d ed. 1918), and "local boards had difficulty with the proper entry or handling of registrations which, too often

streamlined to the point where local boards were open every day for the purpose of accepting new registrations. The current regulations are nothing more or less than a setting of "times" and "places" (your nearest local board during the usual business hours)[4] for late as well as timely registrations. Within five years prior to the bringing of this indictment, petitioner—in the words of the statute—had a "time" and a "place" to register, "determined by proclamation of the President and by rules and regulations prescribed" by the President.

Despite the majority's implication to the contrary, *ante*, at 120, there is specific evidence that Congress actually was aware of this question when it acted, and that Congress did not expect that the duty to register would cease merely because the times set for initial registration had passed. During the hearings on the 1940 Act, Senator Reynolds asked then-Major Hershey whether a person could avoid his duty to register altogether by, for example, joining the National Guard—which would give him an exemption—and then getting out as soon as registration day had passed. Major Hershey replied that such persons would have to register as soon as they lost their exempt status, and he persisted in that answer

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for insufficient reason, were received late." U. S. Selective Service System, *supra*, at 91. Significantly, during subsequent registration days under the 1917 Act, when the boards once again had the help of special machinery, tens of thousands of tardy registrations were effected. *Id.*, at 15. By 1941, the boards were equipped to handle late registrations as a matter of course, resulting in the issuance of the "continuing-duty" regulation. See *id.*, at 42, 91–92.

[4] See, for example, in addition to the "continuing-duty" regulation, the following regulation designating the "Place and time of registration":

"Any person required to be registered may present himself for and submit to registration at any designated place of registration or at the office of any local board during the hours for registration specified in the Presidential proclamation *or during the usual business hours*." 32 CFR § 1613.1 (a) (emphasis added).

despite the Senator's puzzlement (like the majority's) over the fact that the registration period would seem to have expired. The Senator finally accepted Major Hershey's explanation after assuring himself that "your registration boards are at all times in session . . . [a]nd they would be given the opportunity to register." [5] Even the relevant presidential proclamation, wholly apart from the "continuing-duty" regulation, accords with this view that the duty to register is not defined solely in terms of the setting of the sun on the day originally fixed for registration. The proclamation declares that a person unable to register on the day fixed for his registration "because of circumstances beyond his control . . . shall do so as soon as possible after the cause for such inability ceases to exist." [6] Apparently, the majority concedes that in what it calls these few "exceptions," the Act does impose a valid duty to register on a day other than the initial date. That being the case, it is inconceivable to me that Congress can be said to have authorized the President to require late registration of those with a good excuse for their tardiness, but not to have similarly authorized him to require late registration of those with a bad excuse or no excuse at all.

The "continuing-duty" view of § 453 receives support from an appraisal of the section's purpose in the context

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[5] Hearings on S. 4164 before the Senate Committee on Military Affairs, 76th Cong., 3d Sess., 385 (1940). See also the exchange between Senator Reynolds—by then Chairman of the Committee—and General Hershey during hearings a year later on an amendment to the 1940 Act, pointing out that the Act "gives a broad discretion to call these men in as the Army sees fit . . . [a]nd to register them as they see fit." Hearings on S. 2126 before the Senate Committee on Military Affairs, 77th Cong., 1st Sess., 34 (1941).

[6] Proclamation No. 2799, July 20, 1948, 62 Stat. 1531, 13 Fed. Reg. 4173. Similar language is contained in the Supplementing Proclamation, No. 2942, August 30, 1951, 65 Stat. c36.

of the statute considered as a whole. Immediately following the registration requirement, § 454 declares that "every male citizen . . . who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to [§ 453] shall be liable for training and service in the Armed Forces . . . ." Since even under the majority's view, petitioner was at one time a person "required to register," this section, by its literal terms, made him still liable for induction at the time this indictment was brought. But if he still had a duty to serve, then it is completely illogical to conclude that he did not also still have a duty to register. The whole purpose of the registration section is to provide a manpower pool from which inductees can be selected; registration is but the necessary first step in the congressional scheme for processing, classifying, and selecting individuals for training.[7] See *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968). And the instant regulation, declaring that the duty to register "shall continue at all times," is but one of numerous provisions and regulations in the Selective Service Act that reflect the concept that continuing duties are essential if this orderly induction process is to take

[7] This view of the registration provisions, relating them to the induction provisions as a reservoir to a pipeline, was repeatedly emphasized in the hearings on the 1940 Act and amendments thereto. See, *e. g.,* Hearings on H. R. 10132 before the House Committee on Military Affairs, 76th Cong., 3d Sess., 10–11, 15, 116 (1940); Hearings on S. 2126 before the Senate Committee on Military Affairs, 77th Cong., 1st Sess., 83 (1941) ("if you do not coordinate registration and induction, you are going to run into embarrassment"); U. S. Selective Service System, *supra,* n. 3, at 1–2 ("[t]he object . . . of registration is . . . to know where available manpower is and to be able to reach it . . .").

place.[8] Even apart from the settled rule that the "interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute," *e. g., Zemel* v. *Rusk,* 381 U. S. 1, 11 (1965), it seems clear to me that the regulation merely spells out an intent already inherent in the statutory scheme.[9] Yet

[8] See 32 CFR §§ 1617.1, 1623.5 (registration and classification certificates must be kept in one's personal possession "at all times"); 32 CFR § 1641.7 (duty to keep local board informed of current status); 32 CFR § 1641.3 (duty "to keep [the registrant's] local board advised at all times of the address where mail will reach him"). The latter regulation was long ago interpreted as imposing a continuing duty to advise the local board of a change of address in a decision that rejected a claim similar to petitioner's that the then three-year statute of limitations barred prosecution, because the address was changed more than three years before the indictment was brought. *United States* v. *Guertler,* 147 F. 2d 796 (C. A. 2d Cir. 1945). Presumably under the majority's theory that "continuing duties" can only be created by express provision in the statute, this decision is overruled, and the continuing duty imposed by this regulation is brushed aside—all in the face of a statute that Congress knew "wouldn't be worth a dime to us in 2 years" if registration information and lists were not "kept up to date." Hearings on S. 2126 before the Senate Committee on Military Affairs, 77th Cong., 1st Sess., 37, 38 (1941).

[9] In the Military Selective Service Act of 1967, enacted June 30, 1967, 81 Stat. 100, Congress added to § 454 (a) a provision that registrants who failed or refused to report for induction were "to remain liable for induction and when available shall be immediately inducted." 50 U. S. C. App. § 454 (1964 ed., Supp. IV). Petitioner relies on this provision as an indication that Congress did not intend to impose continuing duties except where, as here, it used express language to that effect. The legislative history shows just the opposite to be the case. Congress assumed that, even without express language, liability for induction would continue until age 26; the amendment was prompted solely in order to "insure that a registrant who prolongs litigation of his draft classification beyond age 26" (when he would "no longer [be] liable for military service") "would nonetheless remain liable for induction, regardless of age . . . ." H. R. Rep. No. 267, 90th Cong., 1st Sess., 30 (1967). There is not

the majority holds that when dawn breaks on the unregistered male, six days after his 18th birthday, his crime is complete and ended; though the Act specifically declares that he is still liable for induction, he has no obligation to take the step that makes that induction possible. I for one cannot ascribe such inconsistent intent to Congress.

The Court does not even have the excuse that its construction is required in order to avoid a serious constitutional problem. Petitioner has argued that if his duty to register continues, he cannot be punished for failing to comply since late registration would necessarily be incriminating. See *Leary* v. *United States,* 395 U. S. 6 (1969); *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968). But the Court of Appeals below drew dead aim on the defect in this argument, and the Court's opinion wisely refrains from relying on the suggested Fifth Amendment problem. For if this is a continuing offense, petitioner—as the Government concedes—is subject to only one prosecution based on his single uninterrupted course of conduct. See Model Penal Code, § 1.08, Comment 33–34 (Tent. Draft No. 5, 1956). Petitioner was subject to that prosecution six days after his 18th birthday; his continued failure to register did not subject him to any additional penalty beyond what he had already risked. Thus, though it may be conceded that late registration would have been incriminating, the statute here, unlike the statutes in *Marchetti, Grosso,* and *Leary* does not *compel* incrimination. Petitioner had nothing to gain in the form of avoiding an addi-

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the slightest suggestion that Congress suspected that the registration and liability provisions of §§ 453 and 454—interrelated provisions which must fairly be read *in pari materia*—ever created anything other than continuing duties until the specified 26-year age limit was reached.

tional penalty by registering and revealing that his registration was late. The only possible "incentive" in this case stems from the fact that by registering, petitioner would have caused the statute of limitations to commence running, thus giving the Government only five years in which to prosecute instead of leaving prosecution open until age 31.[10] To suggest that this possibility of starting the statute running is sufficiently "attractive" to amount to "compulsion" for purposes of the Fifth Amendment is purest fancy.

The "continuing offense" is hardly a stranger to American jurisprudence. The concept has been extended to embrace such crimes as embezzlement,[11] conspiracy,[12] bigamy,[13] nuisance,[14] failure to provide support,[15] re-

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[10] Petitioner has suggested that if the duty to register is continuing, there is no logical stopping place for bounding the duty, so that "a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen." Brief for Petitioner 17. But the paraded horrible overlooks the fact that the same provisions that create the duty, also indicate that the duty ends at age 26—the age beyond which no one was ever required to register under this Act and this proclamation, and beyond which no one would normally have been liable for induction. See nn. 6, 8, *supra;* S. Rep. No. 1268, 80th Cong., 2d Sess., 6 (1948) ("[r]egistration is not required of persons who have reached the age of 26").

[11] See *State* v. *Thang,* 188 Minn. 224, 246 N. W. 891 (1933).

[12] See *Grunewald* v. *United States,* 353 U. S. 391 (1957); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253 (1940); *United States* v. *Kissel,* 218 U. S. 601 (1910).

[13] See *Cox* v. *State,* 117 Ala. 103, 23 So. 806 (1898); compare *People* v. *Brady,* 257 App. Div. 1000, 13 N. Y. S. 2d 789 (1939), with *Commonwealth* v. *Ross,* 248 Mass. 15, 142 N. E. 791 (1924).

[14] *E. g., State* v. *Dry Fork R. Co.,* 50 W. Va. 235, 40 S. E. 447 (1901).

[15] *Richardson* v. *State,* 30 Del. (7 Boyce) 534, 109 A. 124 (Ct. Gen. Sess. 1920); *Towns* v. *State,* 24 Ga. App. 265, 100 S. E. 575 (1919).

peated failure to file reports,[16] failure to register under the Alien Registration Act,[17] failure to notify the local board of a change in address,[18] and, until today, failure to register for the draft.[19] Since the continuing-offense concept too freely applied can lead to tension with the purposes of a statute of limitations, we should undoubtedly approach the task of statutory interpretation with "a presumption against a finding that an offense is a continuing one . . . ." Model Penal Code § 1.07, Comment (Tent. Draft No. 5, 1956). But the presumption is by its nature rebuttable; if it is ever to give way, it must surely do so in a case such as this where every other guide to statutory interpretation points to a contrary legislative intent. To hold otherwise—to erect as the majority does an absolute bar to finding a continuing offense in the absence of express statutory language—is to shirk our judicial responsibility of interpreting Acts of Congress as they come to us, without insisting that Congress make our task easier by using some particular form of words to express its intent.[20] Our own cases dis-

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[16] See *Hanf* v. *United States,* 235 F. 2d 710 (C. A. 8th Cir.), cert. denied, 352 U. S. 880 (1956).

[17] *United States* v. *Franklin,* 188 F. 2d 182 (C. A. 7th Cir. 1951).

[18] *United States* v. *Guertler,* 147 F. 2d 796 (C. A. 2d Cir. 1945); see n. 8, *supra.*

[19] See *Fogel* v. *United States,* 162 F. 2d 54 (C. A. 5th Cir.), cert. denied, 332 U. S. 791 (1947); *Gara* v. *United States,* 178 F. 2d 38, 40 (C. A. 6th Cir. 1949), aff'd by an equally divided Court, 340 U. S. 857 (1950); *McGregor* v. *United States,* 206 F. 2d 583 (C. A. 4th Cir. 1953). But cf. *United States* v. *Salberg,* 287 F. 208 (D. C. N. D. Ohio 1923) (holding the duty under the 1917 Act not to be continuing).

[20] Similarly, the requirement that criminal statutes be strictly construed in determining the substantive offense in order to prevent problems of fair warning, cf. *United States* v. *Universal Corp.,* 344 U. S. 218 (holding that defendant's acts constituted a continuing course of conduct, subject only to one prosecution), does not lead to the majority's *per se* rule in deciding what type of offense is

tinguish the "instantaneous" from the "continuing" offense on the theory that in the former case, the illegal aim is attained as soon as every element of the crime has occurred, whereas in the latter case, the unlawful course of conduct is "set on foot by a single impulse and operated by an unintermittent force," until the ultimate illegal objective is finally attained. *United States* v. *Midstate Co.*, 306 U. S. 161, 166 (1939); see also *United States* v. *Universal Corp.*, 344 U. S. 218, 224 (1952). The latter definition fits this case precisely. By his own testimony, petitioner admits that he set out to evade registration and liability for the draft. That aim could only be accomplished by remaining unregistered until he was past 26—the age of prime liability. If he had succeeded in reaching 26 and escaping liability, the Government should have its five years to detect and punish his illegal course of conduct. As it is, the Court holds that petitioner not only succeeded in his aim, but was immune from prosecution for his unlawful conduct at the age of 23. While all around him, young men were being inducted, 26-year-olds first, petitioner at 18 years and 6 days is forever free of any duty—and at 23 is forever free from prosecution for his initial failure—to place himself, like them, into the pool from which inductees are selected. I cannot agree. I would affirm.

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involved for purposes of the statute of limitations. Given the explicit provisions of § 453, the "continuing-duty" regulation, and the consistent administrative interpretation of the Act, there can be no suggestion that petitioner did not have fair warning that he was required to register, or that petitioner was unfairly led into thinking that repose would be his when he reached 23.

PIKE *v.* BRUCE CHURCH, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 301. Argued January 13, 1970—
Decided March 2, 1970

Appellee company grows cantaloupes of superior quality in Parker, Arizona. Since the company lacks packing sheds in Parker, it transports the cantaloupes to its nearby facilities in California, where they are sorted, inspected, packed, and shipped in containers that bear the name of the California packer. Appellant official, acting under the Arizona Fruit and Vegetable Standardization Act, which is designed to prevent deceptive packaging, entered an order prohibiting the company from shipping its cantaloupes outside the State unless they were packed in containers in a manner approved by appellant. Appellant contends that his order is necessary to ensure that the cantaloupes be identified as of Arizona origin. Appellee brought this suit for injunctive relief challenging the constitutionality of the order, which would have the effect of requiring appellee to build packing facilities in or near Parker at a cost of about $200,000. A three-judge District Court issued an injunction, holding that the order constituted an unlawful burden on interstate commerce. *Held:*

1. Appellant's order burdens interstate commerce since the cantaloupes were destined to be shipped from Arizona to an ascertainable location in California immediately after harvest, and application of the challenged statute would require an operation now conducted outside the State to be performed within the State so it can be regulated there. Pp. 140–142.

2. The burden on interstate commerce imposed by appellant's order is unconstitutional since Arizona's minimal interest in identifying the origin of appellee's cantaloupes to enhance the reputation of Arizona producers cannot justify subjecting appellee to the substantial capital expenditure of building and operating in Arizona a packing plant that it does not need. Pp. 142–146.

Affirmed.

Rex E. Lee argued the cause for appellant. With him on the briefs were *Gary K. Nelson,* Attorney General of Arizona, and *Thomas A. Miller,* Assistant Attorney General.

Jacob Abramson argued the cause and filed briefs for appellee.

George C. Lyon filed a brief for the Western Growers Association as *amicus curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee is a company engaged in extensive commercial farming operations in Arizona and California. The appellant is the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act.[1] A provision of the Act requires that, with certain exceptions, all cantaloupes grown in Arizona and offered for sale must "be packed in regular compact arrangement in closed standard containers approved by the supervisor . . . ." [2] Invoking his authority under that provision, the appellant issued an order prohibiting the appellee company from transporting uncrated cantaloupes from its Parker, Arizona, ranch to nearby Blythe, California, for packing and processing. The company then brought this action in a federal court to enjoin the order as unconstitutional. A three-judge court was convened. 28 U. S. C. §§ 2281, 2284. After first granting temporary relief, the court issued a permanent injunction upon the ground that the challenged order constituted an unlawful burden upon interstate commerce. This appeal followed. 28 U. S. C. § 1253. 396 U. S. 812.

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[1] Ariz. Rev. Stat. Ann., Tit. 3, c. 3, Art. 4.

[2] Ariz. Rev. Stat. Ann. § 3-503 C (Supp. 1969).

The facts are not in dispute, having been stipulated by the parties. The appellee company has for many years been engaged in the business of growing, harvesting, processing, and packing fruits and vegetables at numerous locations in Arizona and California for interstate shipment to markets throughout the Nation. One of the company's newest operations is at Parker, Arizona, where, pursuant to a 1964 lease with the Secretary of the Interior, the Colorado River Indian Agency, and the Colorado River Indian Tribes, it undertook to develop approximately 6,400 acres of uncultivated, arid land for agricultural use. The company has spent more than $3,000,000 in clearing, leveling, irrigating, and otherwise developing this land. The company began growing cantaloupes on part of the land in 1966, and has harvested a large cantaloupe crop there in each subsequent year. The cantaloupes are considered to be of higher quality than those grown in other areas of the State. Because they are highly perishable, cantaloupes must upon maturity be immediately harvested, processed, packed, and shipped in order to prevent spoilage. The processing and packing operations can be performed only in packing sheds. Because the company had no such facilities at Parker, it transported its 1966 Parker cantaloupe harvest in bulk loads to Blythe, California, 31 miles away, where it operated centralized and efficient packing shed facilities. There the melons were sorted, inspected, packed, and shipped. In 1967 the company again sent its Parker cantaloupe crop to Blythe for sorting, packing, and shipping. In 1968, however, the appellant entered the order here in issue, prohibiting the company from shipping its cantaloupes out of the State unless they were packed in containers in a manner and of a kind approved by the appellant. Because cantaloupes in the quantity involved can be so packed only

in packing sheds, and because no such facilities were available to the company at Parker or anywhere else nearby in Arizona, the company faced imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $700,000. It was to prevent this unrecoverable loss that the District Court granted preliminary relief.[3]

After discovery proceedings, an agreed statement of facts was filed with the court. It contained a stipulation that the practical effect of the appellant's order would be to compel the company to build packing facilities in or near Parker, Arizona, that would take many months to construct and would cost approximately $200,000. After briefing and argument, the court issued a permanent injunction, finding that "the order complained of constitutes an unlawful burden upon interstate commerce." [4]

The appellant's threshold contention here is that even though the challenged order expressly forbids the interstate bulk shipment of the company's cantaloupes, it imposes no burden upon interstate commerce. If the Arizona Act is complied with, he argues, all that will be regulated will be the intrastate packing of goods destined for interstate commerce. Articles being made ready for interstate movement are not necessarily yet in interstate commerce, which, he says, begins only when the articles are delivered to the interstate shipper. In making this argument, the appellant relies on this Court's

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[3] In view of the emergency situation presented, and the fact that only a narrow and specific application of the Act was challenged as unconstitutional, the court was fully justified in not abstaining from the exercise of its jurisdiction pending litigation in the state courts. Compare *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 329 with *Reetz* v. *Bozanich, ante,* p. 82.

[4] The opinion of the District Court is unreported.

decisions in *Federal Compress Co.* v. *McLean,* 291 U. S. 17, and *Chassaniol* v. *City of Greenwood,* 291 U. S. 584. Both of those cases involved taxes imposed by Mississippi on a cotton warehouse and compress business located within that State. The taxes were nondiscriminatory and were levied both on the warehoused cotton itself and on certain processes necessary to ready it for subsequent resale. The taxes were challenged as unlawful burdens on interstate commerce, since most of the taxed cotton was ultimately to be shipped to out-of-state buyers. The Court upheld the constitutionality of the Mississippi taxes. It is not entirely clear from the Court's opinions whether their rationale was that the taxes were imposed before interstate commerce had begun, or that the burden upon commerce was at the most indirect and remote.

But in any event, the decisions do not support the argument that the order in the present case does not affect interstate commerce. In the first place, those cases involved cotton that had come to rest in Mississippi, and "[b]efore shipping orders [were] given, it [had] no ascertainable destination without the state." 291 U. S., at 21. Here, by contrast, the perishable cantaloupes were destined to be shipped to an ascertainable location in California immediately upon harvest. Even more to the point, the taxes in *Federal Compress* and *Chassaniol* were imposed on goods and operations within the State, whereas the application of the statute at issue here would require that an operation now carried on outside the State must be performed instead within the State so that it can be regulated there. If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge. Yet such stat-

utes have been consistently invalidated by this Court under the Commerce Clause. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1; *Johnson* v. *Haydel,* 278 U. S. 16; *Toomer* v. *Witsell,* 334 U. S. 385. See also *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189. Thus it is clear that the appellant's order does affect and burden interstate commerce, and the question then becomes whether it does so unconstitutionally.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit,* 362 U. S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens. See, *e. g., Shafer* v. *Farmers Grain Co., supra.*

At the core of the Arizona Fruit and Vegetable Standardization Act are the requirements that fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not "materially

misrepresent" the quality of the lot as a whole.[5] The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced. It was to prevent this that the Act was passed in 1929. The State has stipulated that its primary purpose is to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging.

We are not, then, dealing here with "state legislation in the field of safety where the propriety of local regulation has long been recognized," [6] or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State. These are surely legitimate state interests. *Sligh* v. *Kirkwood,* 237 U. S. 52, 61. We have upheld a State's power to require that produce packaged in the State be packaged in a particular kind of receptacle, *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176. And we have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. *Parker* v. *Brown,* 317 U. S. 341. Therefore, as applied to Arizona growers who package their produce in Arizona, we may assume the constitutional validity of the Act. We may further assume that Arizona has full constitutional power to forbid the misleading use of its name on produce that was grown or packed elsewhere. And, to the extent the Act forbids the shipment of contaminated or unfit produce, it clearly rests on sure footing. For, as the Court has said, such produce is "not the legiti-

[5] Ariz. Rev. Stat. Ann. §§ 3–481 (7) and (8).

[6] *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 796 (DOUGLAS, J., dissenting).

mate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution." *Sligh* v. *Kirkwood, supra,* at 60; *Baldwin* v. *Seelig,* 294 U. S. 511.

But application of the Act through the appellant's order to the appellee company has a far different impact, and quite a different purpose. The cantaloupes grown by the company at Parker are of exceptionally high quality. The company does not pack them in Arizona and cannot do so without making a capital expenditure of approximately $200,000. It transports them in bulk to nearby Blythe, California, where they are sorted, inspected, packed, and shipped in containers that do not identify them as Arizona cantaloupes, but bear the name of their California packer.[7] The appellant's order would forbid the company to pack its cantaloupes outside Arizona, not for the purpose of keeping the reputation of its growers unsullied, but to enhance their reputation through the reflected good will of the company's superior produce. The appellant, in other words, is not complaining because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged. As the appellant's brief puts the matter, "It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona." [8]

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[7] California Agric. Code § 45691. The California Fruit, Nut and Vegetable Standardization Act, California Agric. Code, Division 17, is virtually identical to the Arizona Act. Each statute has the same primary purpose of preventing deceptive packs, and it is stipulated that the standard containers required for cantaloupes in the two States are exactly the same.

[8] Appellant's Brief 43.

Although it is not easy to see why the other growers of Arizona are entitled to benefit at the company's expense from the fact that it produces superior crops, we may assume that the asserted state interest is a legitimate one. But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1; *Johnson* v. *Haydel,* 278 U. S. 16; *Toomer* v. *Witsell,* 334 U. S. 385.

The appellant argues that the above cases are different because they involved statutes whose express or concealed purpose was to preserve or secure employment for the home State, while here the statute is a regulatory one and there is no hint of such a purpose. But in *Toomer* v. *Witsell, supra,* the Court indicated that such a burden upon interstate commerce is unconstitutional even in the absence of such a purpose. In *Toomer* the Court held invalid a South Carolina statute requiring that owners of shrimp boats licensed by the State to fish in the maritime belt off South Carolina must unload and pack their catch in that State before "shipping or transporting it to another State." What we said there applies to this case as well:

> "There was also uncontradicted evidence that appellants' costs would be materially increased by the

> necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." 334 U. S., at 403–404.[9]

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

The judgment is affirmed.

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[9] Because of the State's recognized common-law property interest in its fish and wild game, *Toomer* presented an especially strong case for state control.

GILHOOL ET AL. *v.* CHAIRMAN, PHILADELPHIA COUNTY BOARD OF ELECTIONS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 1069. Decided March 2, 1970

306 F. Supp. 1202, affirmed.

Paul Bender for appellants.

Levy Anderson for Chairman, Philadelphia County Board of Elections, et al., and *Edward R. Becker* and *William Austin Meehan* for the Republican City Committee et al., appellees.

PER CURIAM.

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

KOZEROWITZ *v.* STACK ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 1087. Decided March 2, 1970

226 So. 2d 682, appeal dismissed and certiorari denied.

Shalle Stephen Fine for appellant.

Curtis B. Goff 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.

LAIKIND *v.* ATTORNEY GENERAL OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 68. Decided March 2, 1970

22 N. Y. 2d 346, 239 N. E. 2d 550, appeal dismissed.

Victor Konow for appellant.

Louis J. Lefkowitz, Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Warren M. Goidel,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a final judgment.

MR. JUSTICE DOUGLAS is of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits.

MADDOX ET AL. *v.* FORTSON ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 1181. Decided March 2, 1970

226 Ga. 71, 172 S. E. 2d 595, appeal dismissed and certiorari denied.

Tully M. Bond, Jr., and *T. Malone Sharpe* for appellants.

Arthur K. Bolton, Attorney General of Georgia, *pro se, Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *William L. Harper* and *Robert J. Castellani,* Assistant Attorneys General, for Fortson et al.; *Lamar W. Sizemore* for Gray et al., and *William C. O'Kelley* and *Earl J. Van Gerpen* for the Republican Party of Georgia et al., appellees.

PER CURIAM.

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

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

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

No. 85. Argued November 18, 1969—
Decided March 3, 1970

Petitioners, which provide data processing services to businesses generally, challenge a ruling by the Comptroller of the Currency permitting national banks, such as respondent bank, as an incident to their banking services, to make data processing services available to other banks and bank customers. The District Court dismissed the complaint, holding that petitioners lacked standing to bring the suit, and the Court of Appeals affirmed. *Held:*

1. Petitioners have standing to maintain the action. Pp. 151–156, 157.

(a) Petitioners satisfy the "case" or "controversy" test of Article III of the Constitution, as they allege that the banks' competition causes them economic injury. Pp. 152–153.

(b) The interest sought to be protected by petitioners is arguably within the zone of interests to be protected or regulated by the statute and petitioners are "aggrieved" persons under § 702 of the Administrative Procedure Act. Pp. 153–156, 157.

2. Congress did not preclude judicial review of the Comptroller's rulings as to the scope of activities statutorily available to national banks. Pp. 156–157.

406 F. 2d 837, reversed and remanded.

Bert M. Gross argued the cause for petitioners. With him on the brief were *Milton R. Wessel* and *Felix M. Phillips.*

Alan S. Rosenthal argued the cause for respondents. With him on the brief for respondent Camp were *Solici-*

tor General Griswold, Assistant Attorney General Ruckelshaus, and *Peter L. Strauss. Fallon Kelly* filed a brief for respondent American National Bank & Trust Co.

Matthew P. Mitchell and *Leland R. Selna, Jr.,* filed a brief for the Sierra Club as *amicus curiae* urging reversal.

Matthew Hale filed a brief for the American Bankers Association as *amicus curiae* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners sell data processing services to businesses generally. In this suit they seek to challenge a ruling by respondent Comptroller of the Currency that, as an incident to their banking services, national banks, including respondent American National Bank & Trust Company, may make data processing services available to other banks and to bank customers. The District Court dismissed the complaint for lack of standing of petitioners to bring the suit. 279 F. Supp. 675. The Court of Appeals affirmed. 406 F. 2d 837. The case is here on a petition for writ of certiorari which we granted. 395 U. S. 976.

Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to "cases" and "controversies." As we recently stated in *Flast* v. *Cohen,* 392 U. S. 83, 101, "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be

adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* was a *taxpayer's* suit. The present is a *competitor's* suit. And while the two have the same Article III starting point, they do not necessarily track one another.

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test. The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services. The petitioners' suit was brought not only against the American National Bank & Trust Company, but also against the Comptroller of the Currency. The Comptroller was alleged to have caused petitioners injury in fact by his 1966 ruling which stated:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." Comptroller's Manual for National Banks ¶ 3500 (October 15, 1966).

The Court of Appeals viewed the matter differently, stating:

> "[A] plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, . . .

> (2) a legal interest by reason of statutory protection, . . . or (3) a 'public interest' in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public . . . ." 406 F. 2d, at 842–843.[1]

Those tests were based on prior decisions of this Court, such as *Tennessee Power Co.* v. *TVA,* 306 U. S. 118, where private power companies sought to enjoin TVA from operating, claiming that the statutory plan under which it was created was unconstitutional. The Court denied the competitors' standing, holding that they did not have that status "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.,* at 137–138.

The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U. S. C. § 702

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[1] The first two tests applied by the Court of Appeals required a showing of a "legal interest." But the existence or non-existence of a "legal interest" is a matter quite distinct from the problem of standing. *Barlow* v. *Collins, post,* p. 159. The third test mentioned by the Court of Appeals, which rests on an explicit provision in a regulatory statute conferring standing and is commonly referred to in terms of allowing suits by "private attorneys general," is inapplicable to the present case. See *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470; *Associated Industries* v. *Ickes,* 134 F. 2d 694, vacated on suggestion of mootness, 320 U. S. 707.

(1964 ed., Supp. IV). That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values. *Scenic Hudson Preservation Conf.* v. *FPC,* 354 F. 2d 608, 616; *Office of Communication of United Church of Christ* v. *FCC,* 123 U. S. App. D. C. 328, 334–340, 359 F. 2d 994, 1000–1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District* v. *Schempp,* 374 U. S. 203. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is "likely to be financially" injured, *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case.

Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a "rule of self-restraint." *Barrows* v. *Jackson,* 346 U. S. 249, 255. Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise. *Muskrat* v. *United States,* 219 U. S. 346.

Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend. In a closely analogous case we held that an existing entrepreneur had standing to challenge the legality of the entrance of a newcomer into the business, because the established business was allegedly protected by a valid city ordinance that protected it from unlawful competition. *Chicago* v. *Atchison, T. & S. F. R. Co.,*

357 U. S. 77, 83–84. In that tradition was *Hardin* v. *Kentucky Utilities Co.,* 390 U. S. 1, which involved a section of the TVA Act designed primarily to protect, through area limitations, private utilities against TVA competition. We held that no explicit statutory provision was necessary to confer standing, since the private utility bringing suit was within the class of persons that the statutory provision was designed to protect.

It is argued that the *Chicago* case and the *Hardin* case are relevant here because of § 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U. S. C. § 1864, which provides:

> "No bank service corporation may engage in any activity other than the performance of bank services for banks."

The Court of Appeals for the First Circuit held in *Arnold Tours, Inc.* v. *Camp,* 408 F. 2d 1147, 1153, that by reason of § 4 a data processing company has standing to contest the legality of a national bank performing data processing services for other banks and bank customers:

> "Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' S. Rep. No. 2105, [87th Cong., 2d Sess., 7–12] (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.' (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against."

We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it.

That leaves the remaining question, whether judicial review of the Comptroller's action has been precluded. We do not think it has been. There is great contrariety among administrative agencies created by Congress as respects "the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action." *Stark* v. *Wickard,* 321 U. S. 288, 312 (Frankfurter, J., dissenting). The answer, of course, depends on the particular enactment under which review is sought. It turns on "the existence of courts and the intent of Congress as deduced from the statutes and precedents." *Id.,* at 308.

The Administrative Procedure Act provides that the provisions of the Act authorizing judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U. S. C. § 701 (a) (1964 ed., Supp. IV).

In *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 51, we referred to "the generous review provisions" of that Act; and in that case as well as in others (see *Rusk* v. *Cort,* 369 U. S. 367, 379–380) we have construed that Act not grudgingly but as serving a broadly remedial purpose.

We read § 701 (a) as sympathetic to the issue presented in this case. As stated in the House Report:

> "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.

> The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41.

There is no presumption against judicial review and in favor of administrative absolutism (see *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140), unless that purpose is fairly discernible in the statutory scheme. Cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297.

We find no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act [2] sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under those statutes. Both Acts are clearly "relevant" statutes within the meaning of § 702. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of "aggrieved" persons who, under § 702, are entitled to judicial review of "agency action."

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[2] Petitioners allege that the Comptroller's ruling violates the National Bank Act, Rev. Stat. § 5136, 12 U. S. C. § 24 Seventh, which provides that national banks have power to exercise "all such incidental powers as shall be necessary to carry on the business of banking."

We intimate no view, under the decisions rendered today here and in *Barlow* v. *Collins, supra,* on the issue of standing involved in No. 835, *National Association of Securities Dealers* v. *SEC,* and No. 843, *Investment Company Institute* v. *Camp,* now pending on petitions for writs of certiorari.

Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a "legal interest" that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.

We hold that petitioners have standing to sue and that the case should be remanded for a hearing on the merits.

Reversed and remanded.

[For opinion of MR. JUSTICE BRENNAN, see *post*, p. 167.]

Syllabus

BARLOW ET AL. *v.* COLLINS, EXECUTIVE DIRECTOR, ALABAMA AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ET AL.

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

No. 249. Argued November 19, 1969—Decided March 3, 1970

Petitioners, who are tenant farmers eligible for payments under the upland cotton program, enacted as part of the Food and Agriculture Act of 1965, challenge the validity of an amended regulation issued by the Secretary of Agriculture in 1966. The program incorporates § 8 (g) of the Soil Conservation and Domestic Allotment Act, thereby permitting participating farmers to assign payments only "as security for cash or advances to finance making a crop." The 1966 amendment changed the definition of "making a crop" to permit assignments to secure "the payment of cash rent for land used." Petitioners seek a declaratory judgment holding the amended regulation invalid and an injunction prohibiting respondent federal officials from permitting assignments to petitioners' landlord, claiming that he can now demand assignments as a condition of leasing and that the tenants, who lack any other source of cash or credit, are reduced to obtaining all other necessities from the landlord at high prices and rates of interest. The District Court held that petitioners lacked standing to maintain the action and the Court of Appeals affirmed. *Held:*

1. Petitioners have standing to maintain this suit. *Data Processing Service* v. *Camp, ante,* p. 150. Pp. 164–167.

(a) Petitioners have the personal stake and interest that impart the concrete adverseness required by Article III of the Constitution. P. 164.

(b) Petitioners are clearly within the zone of interests protected by the Food and Agriculture Act, and they are persons "aggrieved by agency action within the meaning of a relevant statute," as set forth in § 702 of the Administrative Procedure Act. Pp. 164–165.

2. The statutory scheme evinces a congressional intent that there may be judicial review of the Secretary's action. Pp. 165–167.

District Court judgment and 398 F. 2d 398, vacated and remanded.

Harold Edgar argued the cause for petitioners *pro hac vice*. With him on the briefs were *Lee A. Albert* and *Jonathan Weiss*.

Peter L. Strauss argued the cause for respondents. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Norman G. Knopf*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question to be decided in this case is whether tenant farmers eligible for payments under the upland cotton program enacted as part of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U. S. C. § 1444 (d) (1964 ed., Supp. IV), have standing to challenge the validity of a certain amended regulation promulgated by the respondent Secretary of Agriculture in 1966.

The upland cotton program incorporates a 1938 statute, § 8 (g) of the Soil Conservation and Domestic Allotment Act, as amended, 52 Stat. 35 and 205, 16 U. S. C. § 590h (g), thereby permitting participants in the program to assign payments only "as security for cash or advances to finance making a crop."[1] The regulation

[1] The Secretary of Agriculture is authorized by 7 U. S. C. § 1444 (d) (5) (1964 ed., Supp. IV) to pay a farmer in advance of the growing season up to 50% of the estimated benefits due him. Section 1444 (d) (13) (1964 ed., Supp. IV) authorizes the farmer to assign such benefits subject to the limitations of § 8 (g) added by the 1938 Act, 16 U. S. C. § 590h (g). Section 8 (g) as enacted in 1938 and as it read in 1965 established an exception to the general prohibition against assignment of federal monies in the Anti-Assignment Act, 31 U. S. C. § 203. Section 8 (g) provided:

"A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security

of the respondent Secretary of Agriculture in effect until 1966 defined "making a crop" to exclude assignments to secure "the payment of the whole or any part of a cash . . . rent for a farm." 20 Fed. Reg. 6512 (1955).[2] Following passage of the 1965 Act, however, and before any payments were made under it, the Secretary deleted the exclusion and amended the regulation expressly to define "making a crop" to include assignments to secure

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for cash or advances *to finance making a crop*. Such assignment shall be signed by the farmer and witnessed by a member of the county or other local committee . . . . Such assignment shall include the statement that the assignment is not made to pay or secure any preexisting indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary . . . if payment to the farmer is made without regard to the existence of any such assignment." 52 Stat. 35 and 205, 16 U. S. C. § 590h (g) (emphasis added).

Section 8 (g) was amended by 80 Stat. 1167 (1966) to permit assignments not only to finance "making a crop" but also to fund "handling or marketing an agricultural commodity, or performing a conservation practice." 16 U. S. C. § 590h (g) (1964 ed., Supp. IV).

[2] 20 Fed. Reg. 6512 (1955) provided:

"*Payment may be assigned to finance making a crop.* A payment which may be made to a farmer . . . under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm."

"the payment of cash rent for land used [for planting, cultivating, or harvesting]." 31 Fed. Reg. 2815 (1966).[3]

Petitioners, cash-rent tenant farmers suing on behalf of themselves and other farmers similarly situated, filed this action in the District Court for the Middle District of Alabama. They sought a declaratory judgment that the amended regulation is invalid and unauthorized by statute, and an injunction prohibiting the respondent federal officials from permitting assignments pursuant to the amended regulation.[4] Their complaint

[3] 32 Fed. Reg. 14921 (1967), 7 CFR § 709.3 (1969) now provides:

"*Purposes for which a payment may be assigned.*

"(a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any preexisting indebtedness of any nature whatsoever.

"(b) To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor, or (2) to provide food, clothing, and other necessities required by the producer or persons dependent upon him.

"(c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm."

[4] The respondents, in addition to the Secretary of Agriculture, are the State Executive Director of the Agricultural Stabilization and Conservation Service in Alabama, and the administrator of that Service in the U. S. Department of Agriculture. The complaint also included counts against petitioners' landlord alleging that he acted improperly to deprive them of their right to receive subsidy payments, and, further, that some of the petitioners had been illegally evicted because of their participation in litigation with respect to the cotton program, and, in the case of one petitioner, because of his candidacy for Alabama Agricultural Stabilization and Conservation Service county committeeman. The District Court denied the landlord's motion to dismiss these counts and transferred them for trial to the Southern District of Alabama. That ruling is not before us.

alleged that the petitioners are suffering irreparable injury under the amended regulation because it provides their landlord "with the opportunity to demand that [they] and all those similarly situated assign the [upland cotton program] benefits in advance as a condition to obtaining a lease to work the land." [5] As a result, the complaint stated, the tenants are required to obtain financing of all their other farm needs—groceries, clothing, tools, and the like—from the landlord as well, since prior to harvesting the crop they lack cash and any source of credit other than the landlord. He, in turn, the complaint alleges, levies such high prices and rates of interest on these supplies that the tenants' crop profits are consumed each year in debt payments. Petitioners contend that they can attain a "modest measure of economic independence" if they are able to use their "advance subsidy payments . . . [to] form cooperatives to buy [supplies] at wholesale and reasonable prices in lieu of the excessive prices demanded by [the landlord] of . . . captive consumers with no funds to purchase elsewhere." Thus, petitioners allege that they suffer injury in fact from the operation of the amended regulation.

The District Court, in an unreported opinion, held that the petitioners "lack standing to maintain this action against these [respondent] governmental officials," because the latter "have not taken any action which directly invades any legally protected interest of the plaintiffs." The Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. 398 F. 2d 398. It held that petitioners lacked standing not only because they alleged

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[5] The complaint stated that some of the petitioners "were denied the right to work the land" when they refused to execute assignments to their landlord. The complaint also alleged that "[p]laintiffs have been tenant farmers on this land from eleven to sixty-one years . . . and [two of them] have been on this land all their lives."

no invasion of a legally protected interest but also because petitioners "have not shown us, nor have we found, any provision of the Food and Agriculture Act of 1965 which either expressly or impliedly gives [petitioners] standing to challenge this administrative regulation or gives the Courts authority to review such administrative action." *Id.*, at 402. We granted certiorari. 395 U. S. 958.

Our decision in *Data Processing Service* v. *Camp, ante,* p. 150, leads us to reverse here.

First, there is no doubt that in the context of this litigation the tenant farmers, petitioners here, have the personal stake and interest that impart the concrete adverseness required by Article III.

Second, the tenant farmers are clearly within the zone of interests protected by the Act.

Implicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of tenant farmers. Both of the relevant statutes expressly enjoin the Secretary to do so. The Food and Agriculture Act of 1965 states that "[t]he Secretary shall provide adequate safeguards to protect the interests of tenants . . . ." 79 Stat. 1196, 7 U. S. C. § 1444 (d)(10) (1964 ed., Supp. IV).[6] Title 7 U. S. C. § 1444 (d)(13) (1964 ed., Supp. IV), as noted earlier, incorporates by reference § 8 (g), as amended, 52 Stat. 35 and 205, 16 U. S. C. § 590h (g). Section 8 (b) of that Act, in turn, provides that "the Secretary shall, as far as practicable, protect the interests of tenants . . . ." 52 Stat. 32, 16 U. S. C. § 590h (b). The legislative history of the "making a crop" provision, though sparse, similarly indicates a congressional intent

[6] In connection with the amended regulations, the Secretary issued under § 1444 (d)(10) various rules designed to ensure that tenants receive their fair share of the federal payments. 31 Fed. Reg. 4887–4888; 7 CFR §§ 722.817, 794.3.

to benefit the tenants.[7] They are persons "aggrieved by agency action within the meaning of a relevant statute" as those words are used in 5 U. S. C. § 702 (1964 ed., Supp. IV).

Third, judicial review of the Secretary's action is not precluded. The Court of Appeals rested its holding on the view that no provision of the Food and Agriculture Act of 1965 "expressly or impliedly . . . gives the Courts authority to review such administrative action." 398 F. 2d, at 402. Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.

The Administrative Procedure Act, 5 U. S. C. § 701 (a) (1964 ed., Supp. IV), allows judicial review of agency action except where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The amended regulation here under challenge was promulgated under 16 U. S. C. § 590d (3) which authorizes the Secretary to "prescribe such regulations, as he may deem proper to carry out the provisions of this chapter." Plainly this provision does not expressly preclude judicial review, nor does any other provision in either the 1938 or 1965 Act. Nor does the authority to promulgate such regulations "as he may

[7] See the remarks of Representative Fulmer, 82 Cong. Rec. 844 (1937), and of Senator Adams, *id.*, at 1756. The fact that assignments could be made at all indicated a congressional concern for the farmers' welfare, in light of the general statutory prohibition on assignment of federal claims embodied in the Anti-Assignment Act, 31 U. S. C. § 203. This concern was noted in a letter from the Secretary of Agriculture to the President of the Senate in January 1952, in which the Secretary stated that § 8 (g) "was enacted for the purpose of creating additional credit to farmers to assist them in financing farming operations." S. Rep. No. 1305, 82d Cong., 2d Sess., 3.

deem proper" in § 590d (3) constitute a commitment of the task of defining "making a crop" entirely to the discretionary judgment of the Executive Branch without the intervention of the courts. On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See *Texas Gas Transmission Corp.* v. *Shell Oil Co.,* 363 U. S. 263, 268–270. "The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. '[W]here the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." *Hardin* v. *Kentucky Utilities Co.,* 390 U. S. 1, 14 (HARLAN, J., dissenting). Therefore the permissive term "as he may deem proper," by itself, is not to be read as a congressional command which precludes a judicial determination of the correct application of the governing canons.

The question then becomes whether nonreviewability can fairly be inferred. As we said in *Data Processing Service,* preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom* v. *Kyne,* 358 U. S. 184; *Harmon* v. *Brucker,* 355 U. S. 579; *Stark* v. *Wickard,* 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94. Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. In *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140, we held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of

Congress." A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories* v. *Gardner, supra,* at 141. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. See the *Chicago Junction Case,* 264 U. S. 258; *Hardin* v. *Kentucky Utilities, supra.*

We hold that the statutory scheme at issue here is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action.

The judgments of the Court of Appeals and of the District Court are vacated and the case is remanded to the District Court for a hearing on the merits.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, concurring in the result and dissenting.*

I concur in the result in both cases but dissent from the Court's treatment of the question of standing to challenge agency action.

The Court's approach to standing, set out in *Data Processing,* has two steps: (1) since "the framework of Article III . . . restricts judicial power to 'cases' and 'controversies,' " the first step is to determine "whether

*[This opinion applies also to No. 85, *Association of Data Processing Service Organizations, Inc., et al.* v. *Camp, Comptroller of the Currency, et al., ante,* p. 150.]

the plaintiff alleges that the challenged action has caused him injury in fact"; (2) if injury in fact is alleged, the relevant statute or constitutional provision is then examined to determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

My view is that the inquiry in the Court's first step is the only one that need be made to determine standing. I had thought we discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in *Flast* v. *Cohen,* 392 U. S. 83 (1968). By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.[1] *Barlow* is a typical illustration of the harm that resulted from that requirement. The only substantial issue in that case goes to the merits: does the statutory language "making a crop" create a legally protected interest for tenant farmers in the form of a prohibition against the assignment of their federal benefits to secure cash rent? By confusing the merits with the plaintiffs' standing to challenge the Secretary's action, both the District Court and the Court of Appeals denied the farmers the focused and careful decision on the merits to which they are clearly entitled. Although

[1] Cf. the language in *Associated Industries* v. *Ickes,* 134 F. 2d 694, 700 (C. A. 2d Cir. 1943): "In a suit in a federal court by a citizen against a government officer, complaining of alleged past . . . unlawful conduct by the defendant, there is no justiciable 'controversy'. . . unless the citizen shows that such conduct . . . invades . . . a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a 'recognized' character, at 'common law' or a substantive private legally protected interest created by statute [or Constitution]."

this Court properly reverses the Court of Appeals on that account, it encourages more *Barlow* decisions by engrafting its wholly unnecessary and inappropriate second step upon the constitutional requirement for standing.

Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made, not to determine *standing,* but to determine an aspect of *reviewability,* that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff.[2] The Court in the present cases examines the statutory materials for just this purpose but only after making the same examination during the second step of its standing inquiry. Thus in *Data Processing* the Court determines that the petitioners have standing because they alleged injury in fact and because "§ 4 [of the Bank Service Corporation Act of 1962] arguably brings a competitor within the zone of interests protected by it." The Court then determines that the Comptroller's action is reviewable at the instance of the plaintiffs because "[b]oth [the Bank Service Corporation Act and the National Bank Act] are clearly 'relevant' statutes within the meaning of [the Administrative Procedure Act, 5 U. S. C. § 702 (1964 ed., Supp. IV)]. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily

[2] Reviewability has often been treated as if it involved a single issue: whether agency action is conclusive and beyond judicial challenge by anyone. In reality, however, reviewability is equally concerned with a second issue: whether the *particular* plaintiff then requesting review may have it. See the Administrative Procedure Act, 5 U. S. C. §§ 701 (a) and 702 (1964 ed., Supp. IV). Both questions directly concern the extent to which persons harmed by agency action may challenge its legality.

identifiable. It is clear that petitioners, as competitors of national banks that are engaging in data processing services, are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.' " Again in *Barlow,* the plaintiff tenant farmers are found to have standing because they alleged injury in fact and because "tenant farmers are . . . within the zone of interests protected by the Act." Examination of the same statutory materials subsequently leads the Court to the conclusion that the tenant farmers are entitled to judicial review of the Secretary's action because "the statutory scheme . . . is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action."

I submit that in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such.

I

STANDING

Although *Flast* v. *Cohen* was not a case challenging agency action, its determination of the basis for standing should resolve that question for all cases. We there confirmed what we said in *Baker* v. *Carr,* 369 U. S. 186, 204 (1962), that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . ques-

tions." "In other words," we said in *Flast,* "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue" and not whether the controversy is otherwise justiciable,[3] or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action invaded. 392 U. S., at 99–100. The objectives of the Article III standing requirement are simple: the avoidance of any use of a "federal court as a forum [for the airing of] generalized grievances about the conduct of government," and the creation of a judicial context in which "the questions will be framed with the necessary specificity, . . . the issues . . . contested with the necessary adverseness and . . . the litigation . . . pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.,* at 106. Thus, as we held in *Flast,*

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[3] Other elements of justiciability are, for instance, ripeness, *e. g., Poe* v. *Ullman,* 367 U. S. 497 (1961), mootness, *e. g., United States* v. *W. T. Grant Co.,* 345 U. S. 629 (1953), and the policy against friendly or collusive suits, *e. g., Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339 (1892); *United States* v. *Johnson,* 319 U. S. 302 (1943). "Justiciability" is also the term of art used to refer to the constitutional necessity that courts not deal with certain issues lest they "intrude into areas committed to the other branches of government." *Flast, supra,* at 95. The political-question doctrine has its analogue in the sphere of administrative law in the concept of nonreviewability. See, *e. g., Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U. S. 103 (1948); *Schilling* v. *Rogers,* 363 U. S. 666 (1960). And, of course, federal courts may not decide questions over which they lack jurisdiction, *e. g., Brown Shoe Co.* v. *United States,* 370 U. S. 294, 305 (1962); *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6, 17–18 (1951). Thus, on many grounds other than an absence of standing, a court may dismiss a lawsuit without proceeding to the merits to determine whether the plaintiff presents a claim upon which relief may be granted, and, if so, whether he has borne his burden of proof.

"the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.*, at 101.[4] See also *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83–84 (1958).

In light of *Flast*, standing exists when the plaintiff alleges, as the plaintiffs in each of these cases alleged, that the challenged action has caused him injury in fact, economic or otherwise.[5] He thus shows that he has the requisite "personal stake in the outcome" of his suit. *Baker* v. *Carr*, *supra*, at 204. We may reasonably expect that a person so harmed will, as best he can, frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vig-

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[4] It is true, of course, that in certain types of litigation parties may properly request judicial resolution of issues not "presented in an adversary context." See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 607 (1968). But in most instances, among them private challenges to agency action, the plaintiff must establish his adverseness to obtain standing.

[5] Thus, for purposes of standing, it is sufficient that a plaintiff allege *damnum absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant's action. Injury in fact has generally been economic in nature, but it need not be. See, *e. g.*, *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608 (C. A. 2d Cir. 1965); *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994 (1966). The more "distinctive or discriminating" the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the constitutional test. See L. Jaffe, Judicial Control of Administrative Action 501 (1965). The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to the agency action. Thus, I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public.

orously.[6] Recognition of his standing to litigate is then consistent with the Constitution, and no further inquiry is pertinent to its existence.

II

REVIEWABILITY

When the legality of administrative action is at issue, standing alone will not entitle the plaintiff to a decision on the merits. Pertinent statutory language, legislative history, and public policy considerations must be examined to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs. Under the Administrative Procedure Act (APA), "statutes [may] preclude judicial review" or "agency action [may be] committed to agency discretion by law." 5 U. S. C. § 701 (a) (1964 ed., Supp. IV). In either case, the plaintiff is out of court, not because he had no standing to enter, but because Congress has stripped

[6] Past decisions of this Court indicate that a person who has suffered injury in fact meets the relevant Article III requirement. See, for example, *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 476–477 (1940); *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942). In these decisions the Court permitted parties economically harmed by administrative action to challenge it although no legal interest of the parties was found to have been invaded by the action. The Court stated in *Scripps-Howard Radio, supra,* at 14, that "[t]he Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402 (b) (2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action." Accordingly, since Congress cannot expand the Article III jurisdiction of federal courts, *Muskrat* v. *United States,* 219 U. S. 346 (1911), it follows that injury in fact renders a party adverse under the Constitution. Cf. K. Davis, 3 Administrative Law Treatise § 22.02, at 211 (1958); Jaffe, *supra,* n. 5, at 336.

the judiciary of authority to review agency action. Review may be totally foreclosed, as in *Schilling* v. *Rogers,* 363 U. S. 666 (1960), or, if permitted, it may nonetheless be denied to the plaintiff's class. But the governing principle laid down in *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967), is that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. § 702 (1964 ed., Supp. IV). Congressional intent that a particular plaintiff have review may be found either in express statutory language granting it to the plaintiff's class,[7] or, in the absence of such express language, in statutory indicia from which a right to review may be inferred.[8] Where, as in the instant cases, there is no express grant of review, reviewability has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim. See, for example, the *Chicago Junction Case,* 264 U. S. 258 (1924); *Hardin* v. *Kentucky Utilities Co.,* 390 U. S. 1

[7] See, *e. g.,* the Securities Act of 1933, which provides that "[a]ny person aggrieved by an order of the Commission may obtain a review," 15 U. S. C. § 77i (a), and the Federal Power Act, which grants review to "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding . . . ." 16 U. S. C. § 825*l* (b).

[8] Section 702 also provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." Though a person suffering such wrong is clearly entitled to review, he need not show the existence of a legally protected interest to establish either his standing or his right to review. The existence of that interest is a question of the merits.

(1968); *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (C. A. 2d Cir. 1968). In light of *Abbott Laboratories,* slight indicia that the plaintiff's class is a beneficiary will suffice to support the inference.[9]

III

THE MERITS

If it is determined that a plaintiff who alleged injury in fact is entitled to judicial review, inquiry proceeds to the merits—to whether the specific legal interest claimed by the plaintiff is protected by the statute and to whether the protested agency action invaded that interest.[10] It is true, of course, that matters relevant to the merits will already have been touched tangentially in the determination of standing and, in some cases, in the determination of reviewability. The aspect of the merits touched in establishing standing is the identification of injury in fact, the existence of which the plaintiff must prove. The merits are also touched in establishing reviewability in cases where the plaintiff's right to review must be inferred from evidence that his class is a statutory beneficiary. The same statutory indicia that afford the plaintiff a right to review also bear on the merits, because they provide evidence that the statute protects his class, and thus that he is entitled to relief if he can show that the challenged agency action violated the statute. Evidence that the plaintiff's class is a statutory beneficiary, however, need not be as strong for the purpose of obtaining review as

[9] This is particularly the case when the plaintiff is the only party likely to challenge the action. Refusal to allow him review would, in effect, commit the action wholly to agency discretion, thus risking frustration of the statutory objectives.

[10] If the alleged legal interest is clearly frivolous, or proof to substantiate the alleged injury in fact is wholly lacking, the plaintiff can be hastened from court by summary judgment.

for the purpose of establishing the plaintiff's claim on the merits. Under *Abbott Laboratories,* slight beneficiary indicia will suffice to establish his right to have review and thus to reach the merits.

IV

To reiterate, in my view alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of "standing." The books are full of opinions that dismiss a plaintiff for lack of "standing" when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest that he claimed,[11] or on his failure to prove that the challenged agency action was reviewable at his instance.[12]

The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing. Today's decisions, however, will only compound present confusion and breed even more litigation over standing. In the first place, the Court's formula-

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[11] *E. g., Tennessee Power Co.* v. *TVA,* 306 U. S. 118 (1939); *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 406 F. 2d 837, 843 (C. A. 8th Cir. 1969); *Barlow* v. *Collins,* 398 F. 2d 398, 401 (C. A. 5th Cir. 1968).

[12] *E. g., Association of Data Processing Service Organizations, Inc.* v. *Camp, supra,* at 843; *Barlow* v. *Collins, supra,* at 401–402; *Harrison-Halsted Community Group, Inc.* v. *Housing & Home Finance Agency,* 310 F. 2d 99 (C. A. 7th Cir. 1962).

tion of its nonconstitutional element of standing is obscure. What precisely must a plaintiff do to establish that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute"? How specific an "interest" must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest? When, too, is his interest "arguably" within the appropriate "zone"? Does a mere allegation that it falls there suffice? If more than an allegation is required, is the plaintiff required to argue the merits? And what is the distinction between a "protected" and a "regulated" interest? Is it possible that a plaintiff may challenge agency action under a statute that unquestionably regulates the interest at stake, but that expressly excludes the plaintiff's class from among the statutory beneficiaries?

In the second place, though the Court insists that its nonconstitutional standing inquiry does not involve a determination of the merits, I have grave misgivings on this score. The formulation of the inquiry most certainly bears a disquieting similarity to the erroneous notion that a plaintiff has no standing unless he can establish the existence of a legally protected interest. Finally, assuming that the inquiry does not, in fact, focus on the merits, then surely it serves only to determine whether the challenged agency action is reviewable at the instance of the plaintiff in cases where there is no express statutory grant of review to members of his class.[13] And, if this is so, it has no place in the determination of standing. In terms of treating related questions with one another, this inquiry is best made

[13] In cases involving statutes that do expressly grant the plaintiff a right to review, there would be no need for the Court's second standing inquiry—unless it serves to provide a preview of the merits.

in the reviewability context. The Constitution requires for standing only that the plaintiff allege that actual harm resulted to him from the agency action. Investigation to determine whether the constitutional requirement has been met has nothing in common with the inquiry into statutory language, legislative history, and public policy that must be made to ascertain whether Congress has precluded or limited judicial review.[14] More fundamentally, an approach that treats separately the distinct issues of standing, reviewability, and the merits, and decides each on the basis of its own criteria, assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done. The Court's approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits. The Court's approach must trouble all concerned with the function of the judicial process in today's world. As my Brother DOUGLAS has said: "The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done . . . it is abdication for courts to close their doors." *Flast* v. *Cohen, supra,* at 111 (concurring opinion).

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[14] I would apply my view that all examination of statutory language and congressional intent, as they bear on the right of the plaintiff to challenge agency action, should be made only in the reviewability context even if the pertinent statutory material speaks of "standing" or "statutory aid to standing." Statutory materials, of course, would be properly consulted in the determination of standing if they purport to define what constitutes injury in fact.

UNITED STATES *v.* W. M. WEBB, INC., ET AL.

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

No. 63. Argued November 17, 1969—Decided March 3, 1970

Respondents owned commercial fishing boats, the fishing being done through oral contractual arrangements with boat captains who staffed and provisioned the boats and managed their day-to-day operation. The captains, without an earnings guarantee if they failed to catch fish, agreed to make fishing trips for the season and to return the catches to plants designated by respondents. The plants paid respondents according to the volume of the catch and respondents paid the captains and crews on the same basis according to previously negotiated terms. Respondents filed tax returns as employers under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), and paid the employer's share of the taxes due on the earnings of the captains and crews. Those statutes define "employee" as any individual who has employee status under "the usual common law rules" applicable to a determination of the master-servant relationship. Respondents, after making refund claims, sued for refunds in the District Court, which determined that the captains and crews were not respondents' employees under those statutes, holding that the statutes' prescription of "common law rules" barred application of maritime standards. The Court of Appeals affirmed. *Held:* The status of the captains and crews under the FICA and FUTA must, in this instance, be determined under the standards of maritime law, which is the common law of seafaring men. Pp. 182–194.

402 F. 2d 956, reversed and remanded.

Solicitor General Griswold argued the cause for the United States. With him on the briefs were *Assistant Attorney General Walters, Harris Weinstein, Matthew J. Zinn, Louis M. Kauder,* and *Robert I. Waxman.*

Joseph J. Lyman argued the cause and filed a brief for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The respondents in this case, which was consolidated below, own boats that are used in commercial fishing in the Atlantic Ocean and the Gulf of Mexico. Their fishing is carried out through contractual arrangements, shaped by established custom, with boat captains, who man the boats and manage their day-to-day operation. The question before the Court is whether the captains and crewmen of the boats are the "employees" of the respondents within the provisions of the Federal Insurance Contributions Act (FICA) [1] and the Federal Unemployment Tax Act (FUTA),[2] which impose taxes on employers to finance government benefits for employees.

I

During the taxable periods involved here,[3] the respondents' vessels were engaged in fishing for menhaden, a nonedible fish that is processed and used for various industrial purposes. The owner of each vessel equipped the vessel and secured the services of an experienced fisherman to be captain. The captain then assembled a crew. The captain customarily served on the same vessel for a full season, and occasionally for several consecutive seasons, although the oral arrangements between owners and captains permitted either to terminate the relationship at the end of any fishing trip. The fishing trips lasted from one to several days.

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[1] 26 U. S. C. § 3101 *et seq.*

[2] 26 U. S. C. § 3301 *et seq.*

[3] The District Court found that the periods were, for different respondents, January 1, 1956, through December 31, 1956, and July 1, 1957, through December 1, 1958.

The vessels were operated from docking facilities owned by fish-processing plants, and discharged their catch at these plants upon the completion of each trip. The plants paid respondents for the fish according to the volume of the catch, and respondents paid the captains and crews on the same basis, following terms that had been negotiated in advance. Neither captains nor crews were guaranteed any earnings if they failed to catch fish. While respondents determined the plant to which the vessels would report and generally where and when the fishing would take place, the captains managed the details of the operation of the boats and the manner of fishing.

Respondents filed tax returns as employers under the FICA and the FUTA, and paid the employer's share of the taxes due on the earnings of the captains and crews. After making the appropriate claims for refunds, they sued for refunds in the District Court for the Eastern District of Louisiana. The District Court, sitting without a jury, determined after trial that the captains and crews were not respondents' employees for the purposes of these tax statutes. The trial court noted that both the FICA and the FUTA define "employee" as any individual who has employee status under "the usual common law rules" applicable to a determination of the master-servant relationship. It found "without merit" the Government's contention "that the common-law governing the relationship of the taxpayer and the fishermen in pursuing fishing ventures in the Gulf of Mexico and the Atlantic Ocean is the general maritime law." 271 F. Supp. 249, 257 (1967). The court found further that the degree of control exercised by respondents over these fishing activities was not sufficient, under the common-law standards governing land-based occupa-

tions, to create the relationship of employer and employee between respondents and the captains and crews. Respondents were thus held entitled to their refunds.

On appeal, the Court of Appeals for the Fifth Circuit affirmed. It reviewed the facts and observed that "it is clear that under maritime law the captain is the agent of the owner . . . and the crew hands are employees," and that "[i]f we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court." 402 F. 2d 956, 959 (1968).[4] However, the Court of Appeals agreed with the District Court that the statutes' prescription of "common law rules" barred application of maritime standards.

This conclusion conflicts with the approach of the Court of Claims in *Cape Shore Fish Co.* v. *United States,* 165 Ct. Cl. 630, 330 F. 2d 961 (1964). In that decision the court found scallop fishermen, operating under arrangements similar to those here, to be employees of the shipowner for the purposes of these statutes. It reached this conclusion by applying to the facts the standards of maritime law. We granted certiorari in this case, 394 U. S. 996 (1969), to resolve this conflict, and to clarify the application to maritime workers of these important federal statutes.

II

The parties agree that both the FICA and the FUTA impose taxes on employers measured by the compensation paid to employees, and that in terms of this case the two statutes define "employee" identically. In the FICA "employee" is defined to include "any individual

[4] We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeals' statement on this score.

who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee," and the language of the FUTA is to the same effect.[5] These definitions were not included in the original Social Security Act as it was adopted in 1935, which defined "employee" merely by specifying that it "includes an officer of a corporation," [6] but were added by amendment in 1948. We must consider the events that prompted the amendment.

In 1935 the draftsmen of the Social Security Act apparently thought it unnecessary to elucidate the meaning of "employee" because they assumed that the term, as it was applied to varying factual situations, would be given the "usual" meaning it bore at common law. See S. Rep. No. 1255, 80th Cong., 2d Sess., 3–4 (1948). However, over the years of applying the Act to a myriad of work relationships, the lower federal courts developed

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[5] The definitions provide:

"For purposes of [the FICA], the term 'employee' means—(1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or (3) [any member of several specific occupations, not including fishing, when certain conditions are satisfied]." 26 U. S. C. § 3121 (d).

"For purposes of [the FUTA], the term 'employee' includes an officer of a corporation, but such term does not include—(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules." 26 U. S. C. § 3306 (i).

[6] Social Security Act § 1101 (a)(6), 49 Stat. 647. The language of § 1101 (a)(6) was carried over to §§ 1426 (c) and 1607 (h) of the Internal Revenue Code of 1939, the predecessors of present §§ 3121 (d) and 3306 (i) of Title 26, respectively. See 53 Stat. 178, 188.

somewhat varying approaches, certain courts relying more heavily on common-law precedents and others attempting to discern a special meaning for the term from the purposes of the legislation.[7] In addition, the courts tended to look to local precedents to determine the common-law standards, producing different results for similar factual situations in various parts of the country.[8] This divergence of views led this Court, in 1947, to render two decisions in an attempt to clarify the governing standards. *United States* v. *Silk,* 331 U. S. 704; *Bartels* v. *Birmingham,* 332 U. S. 126.

In *Silk,* the Court upheld the lower courts' determination that certain truck drivers were, under the circumstances, independent contractors rather than employees, but it upset a similar ruling with respect to a group of men who unloaded coal from railroad cars. In *Bartels* the Court, reversing the Court of Appeals, held that the members of certain dance bands were not employees of the owners of the dance halls at which they were engaged, despite contractual provisions characterizing them as employees. While the Court's opinions in these cases stressed many of the factors that had been important in common-law determinations of employee status, they also contained language that could be read to detach the ques-

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[7] Compare, *e. g., Jones* v. *Goodson,* 121 F. 2d 176 (C. A. 10th Cir. 1941); *Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715 (C. A. 2d Cir. 1943); *United States* v. *Mutual Trucking Co.,* 141 F. 2d 655 (C. A. 6th Cir. 1944); *McGowan* v. *Lazeroff,* 148 F. 2d 512 (C. A. 2d Cir. 1945); *United States* v. *Wholesale Oil Co.,* 154 F. 2d 745 (C. A. 10th Cir. 1946), with *United States* v. *Vogue, Inc.,* 145 F. 2d 609 (C. A. 4th Cir. 1944); *United States* v. *Aberdeen Aerie,* 148 F. 2d 655 (C. A. 9th Cir. 1945); *Grace* v. *Magruder,* 80 U. S. App. D. C. 53, 148 F. 2d 679 (1945).

[8] See S. Rep. No. 1255, *supra,* at 6.

tion of statutory coverage from the common-law tests.[9] The Court stated, in *Bartels,* that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U. S., at 130.

Acting upon this language, the executive agencies set about replacing their original regulation, which had defined the employment relation in terms of the incidents of employment at common law,[10] with a new regulation that would embody the test of "economic reality." [11] However, the proposed new regulation never took effect.

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[9] In *Silk,* the Court said:

"As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. . . .

". . . When [the problem of differentiating between employee and independent contractor] arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.' The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. . . . We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.' . . . *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 120, 123, 124, 128, 129, 131.

"Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case." 331 U. S., at 712–714.

[10] 1 Fed. Reg., pt. 2, at 1764 (1936), promulgated November 9, 1936 (Treasury Department); 2 Fed. Reg., pt. 1, at 1276 (1937), promulgated July 20, 1937 (Social Security Board).

[11] 12 Fed. Reg. 7966 (1947).

Within two months of its announcement, a resolution was introduced in both the House of Representatives and the Senate calling for "a reassertion of congressional intent regarding the application of the act." S. Rep. No. 1255, *supra*, at 7. This resolution, which was finally passed over the President's veto, added to the statutes the present definitions of "employee." [12]

The report of the Senate Finance Committee on the resolution makes clear a congressional purpose to disapprove the proposed regulation and to reaffirm that determinations of employee status were to be based on the traditional legal tests. The Committee seems to have thought that the *Silk* and *Bartels* decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach. However, noting that the Treasury Department claimed support in those decisions for its contemplated new departure, the Committee declared: "But if it be contended that the Supreme Court has invented new law for determining an 'employee' under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied." *Id.*, at 2.

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[12] H. J. Res. 296, 62 Stat. 438; see H. R. Doc. No. 711, 80th Cong., 2d Sess. (veto message of President Truman). This 1948 amendment put the definitions in both statutes in the negative form now found in 26 U. S. C. § 3306 (i), see n. 5, *supra*. The Social Security Act Amendments of 1950 restyled the predecessor of § 3121 (d), giving it the form now possessed by that provision, without changing the applicable principles except to extend coverage to specified classes of workers irrespective of their common-law status. § 205, 64 Stat. 536; see H. R. Rep. No. 2771, 81st Cong., 2d Sess., 104 (1950); cf. S. Rep. No. 1669, 81st Cong., 2d Sess., 17–18 (1950); H. R. Rep. No. 1300, 81st Cong., 1st Sess., 80–91, 189–207 (1949).

The causes of congressional dissatisfaction with the proposed regulation were twofold. As a fiscal matter, the Committee cited testimony that the new regulation would extend social security benefits to between 500,000 and 750,000 new workers, who had not been covered previously and had not contributed to the trust fund from which benefits would be paid, thus endangering the integrity of the fund. More generally, the Committee was fearful of the uncertainty that would be created by the new regulation, and the discretion it would give to the executive agencies in determining the applicability of the statutes. The report stated:

> "In a word, by unbounded and shifting criteria, [the proposed regulation] would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act any person whom they might decide to be, or might decide not to be, an 'employee'; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an 'employer.'
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> . . . . . .
>
> "The *proposed* regulation discards the common-law rules for distinguishing the employer-employee relationship distilled from many decisions by many courts out of many insights of real situations, for a new rule of nebulous character.
>
> "Under the *proposed* regulation an 'employee' is 'an individual in a service relationship who is dependent as a matter of economic reality upon the business to which he renders service and not upon his own business as an independent contractor.'
>
> "The rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world

> engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? . . .
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> . . . . . .
>
> "[T]he *proposed* regulation concerns itself mainly, as was stated to your committee by a witness at the hearings: '. . . with making it abundantly clear that on virtually no state of facts may anyone be certain whether or not he has a tax liability until the Commissioner has made up his mind about it.' " *Id.*, at 7, 10, 11.

The Committee stated that, in contrast to the proposed regulation, whose "basic principle . . . is a dimensionless and amorphous abstraction," the existing regulation was "not devoid of uncertainty, but its basis is in established standards of law which frame and limit its application." *Id.*, at 12. The conclusions stated in the House Report were similar. H. R. Rep. No. 1319, 80th Cong., 2d Sess. (1948).[13] By the resolution, Congress unequivocally tied the coverage of these tax provisions to the body of decisional law defining the employer-employee relationship in various occupations.

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[13] In a report published just two weeks before the enactment of the resolution (commenting on H. R. 6777, a bill that contained the same amendment ultimately accomplished by the resolution), the House Committee on Ways and Means stated:

"Our failure to act may be further construed as conferring upon the administrative agencies and the courts an unbridled license to say, at will, whether an individual is an employee or an independent contractor . . . .

. . . . . .

"[T]he basic, controlling factor is whether the policy of the Congress shall be to cover as employees only those who are employees under the common-law rule, or to cover a broader class of individuals under some nebulous hypothesis with no bounds to its application." H. R. Rep. No. 2168, 80th Cong., 2d Sess., 9 (1948).

In none of the discussions of the 1948 resolution was there any discussion of maritime employees. The respondents argue that, by failing to make specific provision for the application of maritime law to seagoing occupations, Congress impliedly decreed that those occupations should be gauged by the standards of the "common law" applicable to land-based activities. They rely in part on the fact that the phrase "common law" is sometimes used in contradistinction to the "maritime law" traditionally applied in courts of admiralty, and they also point to the fact that the Senate Report stressed the degree of the employer's control over the employee's work as central to the Committee's understanding of the common-law tests of employment. The Senate Report quoted with approval the then-existing regulation, substantially identical to the one now in effect,[14] which stated:

> "Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done." S. Rep. No. 1255, *supra,* at 3.

Respondents argue that this language indicates a congressional intent that, where the maritime nature of a

[14] 26 CFR § 31.3121 (d)–1–(c).

vocation makes impracticable the degree of control generally exercised by land-based employers over their employees, the land-based standards must nevertheless be applied, with the result that no "employment" exists for the purposes of those statutes.

III

We do not think Congress intended the anomalous result of having maritime activities subject to standards, for social security tax purposes, other than those that are relevant to seafaring enterprises. Such a result is not necessary to accomplish the dual concerns underlying the 1948 amendment. Application of maritime standards to determine the status of members of fishing ventures will not open brand new areas of social security coverage. To the contrary, the employee status of captains and crewmen engaged in fishing operations similar to these is supported by a Treasury Department interpretation, applying maritime standards, that was issued in 1940, immediately after maritime employees were first brought within the coverage of the Social Security Act by amendment in 1939. S. S. T. 387, 1940–1 Cum. Bull. 192; see Social Security Act Amendments of 1939, §§ 606, 614, 53 Stat. 1383, 1392, as amended, 26 U. S. C. §§ 3121 (b), 3306 (c). This ruling, which the Social Security Administration has accepted for purposes of paying benefits to claimants, had existed for eight years before Congress added the present definitions of "employee" to the statutes. It was not mentioned at the time of the 1948 amendment. Since the ruling represented the accepted view of both the taxing and paying agencies, Congress could have had no concern that payment of benefits to

maritime employees would constitute an uncompensated drain on the social security fund.[15]

More important, the chief concern behind the 1948 amendment—avoiding the uncertainty of the proposed "economic reality" test—is wholly satisfied if seafaring work relationships are tested against the standards of maritime, rather than land-based, decisional law. Congress' fearfulness of the "nebulous" nature of the proposed regulation indicates that it used the phrase "usual common law rules" in a generic sense, to mean the standards developed by the courts through years of adjudication, rather than in a technical sense to mean those standards developed by "common law" courts as opposed to courts of admiralty. Maritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea, just as land-based decisional law provides a body of rules adapted to the various forms of domestic employment. The goal of minimizing uncertainty can be accomplished, in the maritime field, by resort to the "usual" rules of maritime jurisprudence.[16]

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[15] Subsequent amendments to the social security laws make it now even clearer that classification of some maritime workers as employees will not threaten the social security fund. The Social Security Act Amendments of 1950 extended benefits coverage to the self-employed for the first time. 64 Stat. 502, 540; see H. R. Rep. No. 1300, 81st Cong., 1st Sess., 9–10 (1949). Benefits for the self-employed are financed by taxes paid by them under the Self-Employment Contributions Act, 26 U. S. C. § 1401 *et seq.*; see H. R. Rep. No. 1300, *supra,* at 135–145; S. Rep. No. 1669, 81st Cong., 2d Sess., 153–166 (1950). Therefore, the captains and crewmen are eligible for social security benefits whether they are considered employees or self-employed.

[16] A conclusion that maritime standards could not be applied might frustrate Congress' evident expectation that the FICA and

This conclusion is not weakened by the emphasis given, both in the Senate Report and in the regulation, to the factor of control. Control is probably the most important factor under maritime law,[17] just as it is under the tests of land-based employment. It may be true that, in most maritime relationships, the workers enjoy discretion that is unusually broad if measured by land-based standards—a discretion dictated by the seafaring nature of the activity. However, except where there is nearly total relinquishment of control through a bareboat, or demise, charter, the owner may nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer. See, *e. g., The Norland,* 101 F. 2d 967 (C. A. 9th Cir. 1939); G. Gilmore & C. Black, The Law of Admiralty § 4–23 (1957). Congress' stress on the importance of control reflects the primacy of that factor in the rules governing the most common, land-based vocations,[18] which were certainly foremost in the congressional mind at the time of the

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FUTA legislation would apply to seamen, and specifically to fishermen. As noted above, the 1939 amendments extended the statutes to cover maritime employees. Additionally, 26 U. S. C. § 3121 (b)(4) provides an exemption for service by aliens on foreign vessels, and § 3306 (c)(17) exempts fishermen on vessels that do not exceed 10 tons in displacement. These provisions raise the inference that fishermen on larger vessels were expected to be covered, under the general "common law rules" provision. However, if shipowners were relieved of the employers' tax liabilities unless their relationship with the captains and crews were of the sort that would constitute an employer-employee relationship in a land-based activity, application of the statutes to fishermen might be seriously limited.

[17] See, *e. g., Cape Shore Fish Co.* v. *United States,* 165 Ct. Cl. 630, 637–641, 330 F. 2d 961, 965–968 (1964); G. Gilmore & C. Black, The Law of Admiralty § 4–21 (1957).

[18] See, *e. g., Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715, 717–718 (C. A. 2d Cir. 1943).

1948 amendment. It does not preclude the application, in different areas, of decisional rules that vary in the precise degree of control that is required. Cf. *Deecy Products Co.* v. *Welch,* 124 F. 2d 592, 598–599 (C. A. 1st Cir. 1941); *McGuire* v. *United States,* 349 F. 2d 644 (C. A. 9th Cir. 1965).[19]

The guidelines in the regulation also allow for such flexibility, as is attested by the existence, for nearly 30 years, of the Treasury ruling, S. S. T. 387, confirming the employee status of fishermen such as those involved here. Now, as in 1948, the regulation proceeds, after the language already quoted, to elaborate some of the factors other than control that may be important:

> "The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services." 26 CFR § 31.3121 (d)–1 (c)(2).[20]

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[19] See H. R. Rep. No. 2168, *supra,* n. 13, at 9–10:

"Ample flexibility is possible under [the common-law] rule to accommodate peculiar or unusual employment relationships so frequently found in our complex economic system.

. . . . . .

"The common-law concept of master and servant, of course, is no more fixed and immutable than the common law itself. Hence it will produce in practice varying results under varying circumstances and in different jurisdictions. But such variations will not offend the common-law rule itself. . . .

". . . There is nothing to fear from differences in the application of the common-law tests, but there is much to fear from the abandonment of recognized common-law principles in resolving such questions of fact. Such abandonment would simply amount to reliance upon no recognized body of legal principles."

[20] Other factors that may have significance are discussed in *United States* v. *Silk,* 331 U. S. 704 (1947); *Enochs* v. *Williams Packing Co.,*

It is clear that this brief sketch of relevant factors cannot be intended to provide a workable test, complete in itself, displacing the complex of common-law rules Congress so carefully tried to preserve. Rather, the regulation provides a summary of the principles of the common law, intended as an initial guide for the determination, required by the first sentence of the regulation, whether a relationship "is the legal relationship of employer and employee." The thrust of both statute and regulation is that the standards that are to govern in any field are those that the courts customarily apply to define this "legal relationship." [21]

We conclude that the Court of Appeals erred in declining to judge the status of the captains and crewmen against the standards of maritime law. Accordingly, the judgment is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

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370 U. S. 1 (1962); *Kirkconnell* v. *United States,* 171 Ct. Cl. 43, 347 F. 2d 260 (1965); *Illinois Tri-Seal Products, Inc.* v. *United States,* 173 Ct. Cl. 499, 353 F. 2d 216 (1965).

[21] We find no support for a contrary conclusion in the fact that, shortly after the District Court's decision in this case, the Treasury Department unsuccessfully sought an amendment to § 3121 (d) (3) defining "employee" to include the captains and crews of commercial fishing vessels without regard to their status under the general definition in § 3121 (d) (2), see n. 5, *supra.* See the bill that became the Social Security Amendments of 1967, H. R. 12080, §§ 504 (b) (1), (2) (as amended by the Senate); S. Rep. No. 744, 90th Cong., 1st Sess., 203–205, 320–324 (1967); H. R. Rep. No. 1030, 90th Cong., 1st Sess., 74 (1967) (Conference Report deleting the amendment). That the Treasury also chose to proceed on the legislative front does not impair the argument put forth by the United States here, and Congress' failure to adopt the amendment is a dubious indication of the position of Congress in 1967 on the question before us, let alone the position of a different Congress in 1948. Cf. *United States* v. *Price,* 361 U. S. 304, 310–312 (1960); *United States* v. *Wise,* 370 U. S. 405, 411 (1962).

Syllabus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, AFL–CIO *v.* ARIADNE SHIPPING CO., LTD., ET AL.

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

No. 231. Argued January 13, 1970—
Decided March 9, 1970

Respondents, a Liberian corporation and a Panamanian corporation, employed foreign crews to operate cruise ships to the Caribbean from Florida. When the vessels berthed at Florida ports the ships' crews in part and outside labor in part performed the loading, which the petitioner union picketed, protesting that the longshore work was being done at substandard wage rates. Respondents obtained injunctive relief against the picketing from the Florida courts, which held that the picketing was beyond the jurisdiction of the National Labor Relations Board (NLRB) and could be enjoined as violative of Florida law. *Held:* Since this dispute centered on wages to be paid American longshoremen working on American docks and did not concern the ships' "internal discipline and order," it was not within the scope of "maritime operations of foreign-flag ships," which are outside the jurisdiction of the NLRB. Petitioner's peaceful primary picketing arguably constituted protected activity under § 7 of the National Labor Relations Act and thus the NLRB's jurisdiction was exclusive and pre-empted that of the Florida courts. Pp. 198–201.

215 So. 2d 51, reversed.

Seymour M. Waldman argued the cause for petitioner. With him on the briefs were *Louis Waldman, Martin Markson,* and *Seymour A. Gopman.*

Richard M. Leslie argued the cause for respondents. With him on the brief was *Thomas H. Anderson.*

Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, and *Norton J. Come* filed a memorandum for the National Labor Relations Board as *amicus curiae.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented here is whether the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, pre-empts state jurisdiction to enjoin peaceful picketing protesting substandard wages paid by foreign-flag vessels to American longshoremen working in American ports. The Florida courts held that there was no pre-emption, citing *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963), and *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963). We granted certiorari. 396 U. S. 814 (1969). We reverse.

In 1966 the respondents, a Liberian corporation and a Panamanian corporation, operated cruise ships to the Caribbean from Port Everglades and Miami, Florida. Respondent Ariadne Shipping Company operated the S. S. *Ariadne,* of Liberian registry, with a crew subject to Liberian ship's articles. Respondent Evangeline Steamship Company operated S. S. *Bahama Star,* of Panamanian registry, with a crew subject to Panamanian ship's articles. The uncontradicted evidence showed that "[l]oading of the ship, stowage and loading of automobiles, loading cargo and ship stowage" occurred whenever either vessel berthed at Port Everglades or Miami, "[p]art of it [performed] by employees of the ship and some of it by outside labor." The petitioner is a labor organization representing longshoremen in the Miami area. Although none of those doing the longshore work for the ships belonged to the union, whenever either vessel docked at Port Everglades or Miami in May 1966, petitioner stationed a picket near the vessel to patrol with a placard protesting that the longshore

work was being done under substandard wage conditions.[1] Respondents obtained temporary injunctive relief against the picketing from the Circuit Court for Dade County.[2] That court rejected petitioner's contention that the subject matter was pre-empted, holding that under *McCulloch* the picketing was beyond the reach of the regulatory power of the National Labor Relations Board, and hence could be enjoined, since it violated Florida law. The temporary injunction was affirmed by the District Court of Appeal for the Third District of Florida in a brief *per curiam* order citing *McCulloch* and *Incres.* 195 So. 2d 238 (1967). Thereafter the Circuit Court, without further hearing, made the injunction permanent. The District Court of Appeal again affirmed, although noting that the testimony "tended to show" that the picketing was carried on to protest against the substandard wages paid for the longshore work. 215 So. 2d 51,

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[1] A picket was also stationed in front of the terminal through which passengers embarked and disembarked. This picket carried a sign alleging that the ships were unsafe, and passed out handbills to the same effect.

[2] The injunctive order was in four paragraphs. Paragraphs 1 and 2 prohibited picketing with signs, or distributing handbills stating, alleging, or inferring that the vessels were unsafe. The petitioner abandoned its appeal from these provisions and they are not before us. Paragraph 4 was set aside on appeal. See n. 3, *infra.* Paragraph 3 therefore is the only provision under review in this Court. It prohibits petitioner from:

"Picketing or patrolling with signs or placards indicating or inferring that a labor dispute exists between [respondents] and [petitioner], by any statement, legend or language alleging [that respondents] pay their employees substandard wages."

Initially petitioner directed the picketing not at respondents' ships but at Eastern Steamship Lines, Inc., a Florida corporation that acted as respondents' general agent. Eastern obtained a temporary injunction, 193 So. 2d 73 (1966), whereupon petitioner shifted the picketing to the ships themselves.

53 (1968).[3] The Supreme Court of Florida denied review in an unreported order.

McCulloch and *Incres* construed the National Labor Relations Act to preclude Board jurisdiction over labor disputes concerning certain maritime operations of foreign-flag vessels. Specifically, *Incres,* 372 U. S., at 27, held that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2 (6) [of the Act]." See also *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957). This construction of the statute, however, was addressed to situations in which Board regulation of the labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel, an intervention thought likely to "raise considerable disturbance not only in the field of maritime law but in our international relations as well." *McCulloch,* 372 U. S., at 19.

In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable conditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. In *McCulloch* an American seamen's union petitioned for a representation election among the foreign crew members of a Honduran-flag vessel who were already represented by a Honduran union, certified under Honduran labor law. Again, in *Incres* the picketing was by an American union formed "for the primary purpose of organizing foreign seamen on foreign-flag ships." 372 U. S., at 25–26. In these cases, we concluded that, since the Act primarily concerns strife between

[3] The Court of Appeal set aside paragraph 4 of the injunction which prohibited "[b]y any manner or by any means, including picketing or the distribution of handbills, inducing or attempting to induce customers and potential customers of [respondents] to cease doing business with [respondents]." 215 So. 2d, at 52 n. 1.

American employers and employees, we could reasonably expect Congress to have stated expressly any intention to include within its coverage disputes between foreign ships and their foreign crews. Thus we could not find such an intention by implication, particularly since to do so would thrust the National Labor Relations Board into "a delicate field of international relations," *Benz,* 353 U. S., at 147. Assertion of jurisdiction by the Board over labor relations already governed by foreign law might well provoke "vigorous protests from foreign governments and . . . international problems for our Government," *McCulloch,* 372 U. S., at 17, and "invite retaliatory action from other nations," *id.,* at 21. Moreover, to construe the Act to embrace disputes involving the "internal discipline and order" of a foreign ship would be to impute to Congress the highly unlikely intention of departing from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," a principle frequently recognized in treaties with other countries. *Ibid.*

The considerations that informed the Court's construction of the statute in the cases above are clearly inapplicable to the situation presented here. The participation of some crew members in the longshore work does not obscure the fact that this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law.[4] They were American residents, hired to work exclusively on American docks as long-

[4] We put to one side situations in which the longshore work, although involving activities on an American dock, is carried out entirely by a ship's foreign crew, pursuant to foreign ship's articles.

shoremen, not as seamen on respondents' vessels. The critical inquiry then is whether the longshore activities of such American residents were within the "maritime operations of foreign-flag ships" which *McCulloch, Incres,* and *Benz* found to be beyond the scope of the Act.

We hold that their activities were not within these excluded operations. The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' "internal discipline and order." Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. We therefore find that these longshore operations were in "commerce" within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board.[5]

The jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities that are "arguably subject" to regulation under § 7 or § 8 of the Act. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 245 (1959). The activities of petitioner in this case met that test. The union's peaceful primary

[5] The Board has reached the same conclusion in similar situations. See, *e. g., International Longshoremen's & Warehousemen's Union, Local 13,* 161 N. L. R. B. 451 (1966); *Marine Cooks & Stewards Union,* 156 N. L. R. B. 753 (1966); *New York Shipping Assn., Inc.,* 116 N. L. R. B. 1183 (1956). Cf. *Uravic* v. *Jarka Co.,* 282 U. S. 234 (1931).

Our conclusion makes it unnecessary to consider petitioner's further contention that in the absence of any evidence of an illegal objective, prohibition of peaceful picketing to publicize substandard wages deprived petitioner of freedom of speech in violation of the First and Fourteenth Amendments.

picketing to protest wage rates below established area standards arguably constituted protected activity under § 7. See *Steelworkers* v. *NLRB,* 376 U. S. 492, 498–499 (1964); *Garner* v. *Teamsters Union,* 346 U. S. 485, 499–500 (1953).

Reversed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring.

I agree with the majority that the Florida courts were in error in concluding that the National Labor Relations Act does not govern relations between the operators of foreign-flag vessels and the American longshoremen who work on such vessels while they are in American ports. However, I would not rest reversal on the conclusion that the union's conduct in this case was " 'arguably subject' to regulation under § 7 or § 8 of the Act." The union's picketing was clearly not proscribed by any part of § 8 of the Act. The only possible dispute could be over whether the picketing was activity protected by § 7 of the Act or whether the picketing was neither protected nor prohibited by the Act and therefore was subject to state regulation or prohibition. If the National Labor Relations Act provided an effective mechanism whereby an employer could obtain a determination from the National Labor Relations Board as to whether picketing is protected or unprotected, I would agree that the fact that picketing is "arguably" protected should require state courts to refrain from interfering in deference to the expertise and national uniformity of treatment offered by the NLRB. But an employer faced with "arguably protected" picketing is given by the present federal law no adequate means of obtaining an evaluation of the picketing by the NLRB. The employer may not himself seek a determination from the Board and is

left with the unsatisfactory remedy of using "self help" against the pickets to try to provoke the union to charge the employer with an unfair labor practice.

So long as employers are effectively denied determinations by the NLRB as to whether "arguably protected" picketing is actually protected except when an employer is willing to threaten or use force to deal with picketing, I would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), should be reconsidered. I concur in the Court's judgment in this case because in my view the record clearly indicates that the peaceful, nonobstructive picketing on the public docks near the ships was union activity protected under the National Labor Relations Act. See *Garner* v. *Teamsters Union,* 346 U. S. 485, 499–500 (1953).

UNITED STATES *v.* SECKINGER, TRADING AS M. O. SECKINGER CO.

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

No. 395. Argued January 14, 1970—
Decided March 9, 1970

An employee of respondent contractor was injured while engaging in work that respondent was performing for the Government under a fixed-price contract providing that the private contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence . . . ." In a suit against the Government under the Federal Tort Claims Act the employee was awarded damages based upon the Government's negligence. Thereafter the Government brought this action for indemnification, alleging that the contractor's negligence was solely responsible for the employee's injuries. The District Court granted respondent's motion to dismiss, in part on the ground, thereafter sustained by the Court of Appeals, that the contract clause was not broad enough to permit indemnification of the Government for its own negligence, which had substantially contributed to the injury. *Held:* Though the Government under the contract clause involved here cannot recover for its own negligence, it is entitled to indemnity on a comparative basis to the extent that it can prove that respondent's negligence contributed to the employee's injuries. Pp. 209–217.

408 F. 2d 146, reversed and remanded.

James van R. Springer argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Peter L. Strauss,* and *Robert V. Zener.*

John G. Kennedy argued the cause for respondent. With him on the brief was *Frank S. Cheatham, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case concerns the construction of a provision common to fixed-price government construction contracts that states that the private contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence . . . ." The Court of Appeals for the Fifth Circuit held that the provision could not be construed to allow the Government to recover from the contractor damages suffered by the Government on account of its own negligence. 408 F. 2d 146 (1969). We granted certiorari because of the large amount of litigation that this contract clause has produced [1] and because of the divergent results that the lower courts have reached in construing the same or similar provisions.[2] 396 U. S. 815 (1969). We reverse.

I

The United States had entered into a contract with the Seckinger Company for the performance of certain plumbing work at a United States Marine base in South Carolina. While working on this project, one of Seckinger's employees was directed by his foreman to assist a fellow employee on a particular section of pipe that had been partially constructed above a street. About four or five feet above the place where the employee was working, there was an electric wire that carried 2,400 volts of electricity. The employee accidentally

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[1] In the petition for certiorari, the Solicitor General advised that there are presently pending 200 government suits involving the same or similar clauses.

[2] Compare, *e. g., Fisher* v. *United States,* 299 F. Supp. 1 (D. C. E. D. Pa. 1969), and *United States* v. *Accrocco,* 297 F. Supp. 966 (D. C. D. C. 1969), with, *e. g.,* the decision of the Court of Appeals in the instant case.

came into contact with the wire, was thrown to the ground 18 feet below, and was seriously injured.

The injured employee recovered benefits under South Carolina's workmen's compensation law, S. C. Code Ann. §§ 72–1 to 72–504 (1962), and then commenced a suit in the Eastern District of South Carolina against the United States under the Federal Tort Claims Act, 28 U. S. C. §§ 2671–2680, on the theory that his injuries had been sustained as the proximate result of the Government's negligence. The United States, relying on the contract clause, moved to implead Seckinger as a third-party defendant. This motion was denied on the ground that the addition of Seckinger would "unnecessarily and improperly complicate the issues." [3]

On the merits, the South Carolina District Court found that the United States had customarily de-energized its electric wires whenever Seckinger employees were required to work dangerously near them. The court therefore held that the United States had been grossly negligent in failing to de-energize the wire in this particular case. Alternatively, the Government was held to have been negligent in failing to advise Seckinger's employees that the electric wire had not been de-energized. Concluding also that the employee had in no way contributed to his injury, the District Judge ordered that he recover a judgment against the United States in the amount of $45,000 plus costs. No appeal was taken from this judgment of the District Court.[4]

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[3] The third-party complaint was therefore dismissed "with leave to . . . the United States . . . to take such further action at an appropriate time." The order was not appealed, and we imply no view concerning the propriety of the District Court's action.

[4] The District Court concluded, *inter alia,* that the negligence of the United States was the "sole cause" of the employee's injuries. We do not pause to consider what effect, if any, under

Thereafter, the United States proceeded to the District Court for the Southern District of Georgia and commenced the instant suit against Seckinger. The complaint alleged that Seckinger's negligence was solely responsible for its employee's injuries [5] and that therefore the United States should be fully indemnified for the judgment which it had satisfied. In a second count, the Government alleged that Seckinger, having undertaken to perform its contract with the United States, was obligated "to perform the work properly and safely and to provide workmanlike service in the performance of said work."

The District Court granted Seckinger's motion to dismiss the complaint on the alternative grounds, first, that the suit was barred by the prior litigation in South Carolina and, second, that the contractual language was not sufficiently broad to permit the Government to recover indemnification for its own negligence. The Court of Appeals rejected the first ground of decision,[6] but sus-

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all the circumstances of this case, the South Carolina judgment could properly have in the instant case. The effect of the prior judgment was not raised below except as a defense contention that it constituted an absolute bar to the instant proceedings.

[5] Specifically, the United States alleged that Seckinger was negligent in that it (1) failed to request that the power distribution line be de-energized; (2) failed to request that the wires at the place where the accident occurred be insulated; (3) failed to provide safety insulation on the wires; (4) permitted, and in fact directed, the subsequently injured employee to work in close proximity to the wires; and (5) failed to prevent the employee from proceeding in a manner that was dangerous and that caused him to be injured.

[6] The Court of Appeals held that the Government's suit was not barred by principles of *res judicata* because the South Carolina District Court expressly left open the option of the United States to pursue its claim against Seckinger at a later time. We agree with this conclusion of the Court of Appeals.

tained the holding that any recovery on the contract was foreclosed to the United States because its negligence had contributed substantially to the injury. The Court of Appeals held that, under the "majority rule," an indemnitee cannot recover for his own negligence in the absence of a contractual provision which unmistakably authorizes this result. Since the contract here did not unequivocally command that the Government be indemnified for its own negligence, and because the injuries in question were thought to have been caused by the "active direct negligence" of the Government with no more than a "slight dereliction" on the part of Seckinger, no recovery whatsoever on the contract would be permitted to the United States.[7]

In the Government's view, this construction of the clause renders it a nullity, for the United States can never be held liable in tort under the Tort Claims Act or otherwise in the absence of negligence on the part of its agents. Thus, so the argument goes, the contractual provision in question can have meaning only in a context in which both the United States and the contractor are jointly negligent.[8] In that circumstance, the contractor would be obligated to sustain the full burden of ultimate liability for the injuries produced. Alternatively, the Government suggests that it is en-

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[7] In the present state of the record, we neither accept nor reject this characterization of the relative degrees of fault of Seckinger and the United States.

[8] The Government, therefore, does not take issue with those authorities that exhibit reluctance to permit a negligent indemnitee to recover from a faultless indemnitor unless this intention appeared with particular clarity from the contract. See, *e. g., Associated Engineers, Inc.* v. *Job,* 370 F. 2d 633, 651 (C. A. 8th Cir. 1966), cert. denied *sub nom. Troy Cannon Const. Co.* v. *Job,* 389 U. S. 823 (1967).

titled to indemnity on a comparative basis to the extent that the negligence of Seckinger contributed to its employee's injuries.

II

In the posture in which this case reaches us, the historical background of the clause [9] and evidence concerning the actual intention of these particular parties with respect to that provision are sparsely presented. We do know that the clause was required in government fixed-price construction contracts as early as 1938.[10] This fact merely precipitates confusion, however, because it was not until the passage of the Tort Claims Act in 1946, §§ 401–424, 60 Stat. 842, as amended, 28 U. S. C. §§ 2671–2680, that the United States permitted recovery in tort against itself for the negligent acts of its agents. Viewed in the pre-Tort Claims Act context, the purpose of the clause is totally unclear except, perhaps, as an exercise in caution on the part of the government draftsmen, or, conceivably, as an attempt to insulate government agents from liability in their private capacities if their negligence arguably combined with that of the contractor to produce a given injury.

In *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446 (1947), we had before us a contractual provision that was similar to that involved here. There we noted that

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[9] In context, the clause in question appears as follows:

"11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

"The Contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. He shall also be responsible for all materials delivered and work performed until completion and final acceptance, except for any completed unit thereof which theretofore may have been finally accepted."

[10] See, *e. g.,* 41 CFR §§ 11.1, 11.3, 12.23, Art. 10 (1938).

the clause was susceptible of several different constructions, 330 U. S., at 457–458, and remanded the case to the District Court to ascertain the intention of the parties with respect to the clause. It does not appear that a similar course of action would be fruitful in the instant case. In *Porello* there were clear indications from the parties that further evidentiary proceedings in the District Court would shed light on the actual intention of the parties.[11] Here, by contrast, there is not only no representation that further proceedings would aid in clarifying the intentions of the parties, but there is at least tacit agreement that the background of the clause has been explored as thoroughly as possible. In these circumstances, we have no alternative but to proceed directly to the contractual construction problem.

III

Preliminarily, we agree with the Court of Appeals that federal law controls the interpretation of the contract. See *United States* v. *County of Allegheny,* 322 U. S. 174, 183 (1944);[12] *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943). This conclusion results from the fact that the contract was entered into pursuant to authority

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[11] The objective of the remand was frustrated when no additional evidence was presented to the District Court. That court merely adhered to the construction of the contract that had been adopted by the Court of Appeals, 153 F. 2d 605 (C. A. 2d Cir. 1946), namely, that the United States was entitled to full indemnity from a stevedoring contractor although both the United States and the contractor were found to have been negligent. *Porello* v. *United States,* 94 F. Supp. 952 (D. C. S. D. N. Y. 1950).

[12] "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." 322 U. S., at 183.

conferred by federal statute and, ultimately, by the Constitution.[13]

In fashioning a federal rule we are, of course, guided by the general principles that have evolved concerning the interpretation of contractual provisions such as that involved here. Among these principles is the general maxim that a contract should be construed most strongly against the drafter, which in this case was the United States.[14] The Government seeks to circumvent this principle by arguing that it is inapplicable unless there is ambiguity in the contractual provisions in dispute and there exists an alternative interpretation that is, "under all the circumstances, a reasonable and practical one." *Gelco Builders & Burjay Const. Co.* v. *United States*, 177 Ct. Cl. 1025, 1035, 369 F. 2d 992, 999–1000 (1966). The Government itself, however, has proffered two mutually inconsistent interpretations of the contract clause. To be sure, one of them is pressed with considerably more enthusiasm than the other. The Government, nevertheless, must be taken implicitly to have

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[13] Congress has provided extensive arrangements for the procurement, management, and disposal of government property. See generally 40 U. S. C. §§ 471–535 (1964 ed. and Supp. IV). As part of this statutory scheme, the Administrator of General Services is authorized to issue regulations necessary to perform his various managerial functions. 40 U. S. C. § 486 (c). Pursuant to this authority, various form contracts, one of which includes the provision that is the subject of this suit, have been promulgated for official use. 41 CFR §§ 1–16.401 to 1–16.404, 1–16.901–23A, Art. 12 (1969). See generally State Bar of California, Committee on Continuing Education of the Bar, Government Contracts Practice § 13.93 (1964).

[14] See, *e. g.*, *Sternberger* v. *United States*, 185 Ct. Cl. 528, 543, 401 F. 2d 1012, 1021 (1968); *Sun Shipbuilding & Drydock Co.* v. *United States*, 183 Ct. Cl. 358, 372, 393 F. 2d 807, 816 (1968); *Jones* v. *United States*, 304 F. Supp. 94, 103 (D. C. S. D. N. Y. 1969).

conceded (a) that the clause is not without ambiguity and (b) that there is an alternative construction of the clause that is both "reasonable and practical." Even in the Government's view of the matter, therefore, there is necessarily room for the construction-against-drafter principle to operate.

More specifically, we agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions.[15] The

[15] A number of courts take the view, frequently in a context in which the indemnitee was solely or principally responsible for the damages, that there can be indemnification for the indemnitee's negligence only if this intention is explicitly stated in the contract. See, *e. g., Freed* v. *Great A. & P. Tea Co.,* 401 F. 2d 266 (C. A. 6th Cir. 1968) (intention of parties must be "clear and unambiguous" necessitating a clause such as "including damage from indemnitee's own negligence"); *Brogdon* v. *Southern R. Co.,* 384 F. 2d 220 (C. A. 6th Cir. 1967) (same); *City of Beaumont* v. *Graham,* 441 S. W. 2d 829 (Tex. 1969) (indemnitor's promise to indemnify for *his* negligent acts does not extend to indemnification for indemnitee's negligence); *Young* v. *Anaconda American Brass Co.,* 43 Wis. 2d 36, 168 N. W. 2d 112 (1969) (indemnitor not liable for such portion of total liability attributable to act of indemnitee unless indemnity contract by express provision and strict construction so provides); cases collected in Annot., 175 A. L. R. 8, 29–38 (1948).

Other cases do not require that indemnification for the indemnitee's negligence be specifically or expressly stated in the contract if this intention otherwise appears with clarity. See, *e. g., Auto Owners Mut. Ins. Co.* v. *Northern Ind. Pub. Serv. Co.,* 414 F. 2d 192 (C. A. 7th Cir. 1969); *Eastern Gas & Fuel Associates* v. *Midwest-Raleigh, Inc.,* 374 F. 2d 451 (C. A. 4th Cir. 1967); *Unitec Corp.* v. *Beatty Safway Scaffold Co.,* 358 F. 2d 470 (C. A. 9th Cir. 1966); *Batson-Cook Co.* v. *Industrial Steel Erectors,* 257 F. 2d 410 (C. A. 5th Cir. 1958).

traditional reluctance of courts to cast the burden of negligent actions upon those who were not actually at fault [16] is particularly applicable to a situation in which there is a vast disparity in bargaining power and economic resources between the parties, such as exists between the United States and particular government contractors. See *United States* v. *Haskin*, 395 F. 2d 503, 508 (C. A. 10th Cir. 1968).

In short, if the United States expects to shift the ultimate responsibility for its negligence to its various contractors, the mutual intention of the parties to this effect should appear with clarity from the face of the contract. We can hardly say that this intention is manifested by the formulation incorporated into the present contract.[17] By its terms Seckinger is clearly liable for *its* negligence, but the contractual language cannot readily

[16] Several earlier cases declared clauses that purported to indemnify for the indemnitee's negligence void as contrary to public policy. See, *e. g.*, *Sternaman* v. *Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763 (1902); *Johnson's Administratrix* v. *Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829 (1890). See also *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955); *Otis Elevator Co.* v. *Maryland Cas. Co.*, 95 Colo. 99, 33 P. 2d 974 (1934).

[17] An example of an indemnification clause that makes specific reference to the effect of the negligence of the indemnitee is the following recommendation of the American Institute of Architects:

"4.18. INDEMNIFICATION

"4.18.1. The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable,

be stretched to encompass the Government's negligence as well.[18]

On the other hand, we must not fail to accord appropriate consideration to Seckinger's clear liability under the contract for "*all* damages" that resulted from its "fault or negligence." (Emphasis added.) The view adopted by the Court of Appeals, and now urged by Seckinger, would drain this clause of any significant meaning or protection for the Government, and, indeed, would tend to insulate Seckinger from potential liability

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regardless of whether or not it is caused in part by a party indemnified hereunder." AIA Document A 201, Sept. 1967.

We specifically decline to hold that a clause that is intended to encompass indemnification for the indemnitee's negligence must include an "indemnify and hold harmless" clause or that it must explicitly state that indemnification extends to injuries occasioned by the indemnitee's negligence. Thus, contrary to the view apparently adopted in the dissenting opinion, we assign no talismanic significance to the absence of a "hold harmless" clause. Our approach is, in this respect, consistent with *American Stevedores, Inc.* v. *Porello,* 330 U. S., at 457–458. Contract interpretation is largely an individualized process, with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention. Consequently, we hold only that, in this case, the clause that provides that Seckinger will be responsible for all damages resulting from its negligence is insufficiently broad to encompass responsibility for injuries resulting from the negligence of the Government. And, of course, the Government is entitled to no recovery unless it establishes that Seckinger was negligent. Thus the dissenting opinion mischaracterizes the scope of our holding when it states that Seckinger must "reimburse the Government for losses *it* incurs resulting from *its* negligence."

[18] See, *e. g., United States* v. *Haskin,* 395 F. 2d 503 (C. A. 10th Cir. 1968); *Brogdon* v. *Southern R. Co.,* 384 F. 2d 220 (C. A. 6th Cir. 1967); *Shamrock Towing Co.* v. *City of New York,* 16 F. 2d 199 (C. A. 2d Cir. 1926); *Williams* v. *Midland Constructors,* 221 F. Supp. 400 (D. C. E. D. Ark. 1963); *City of Beaumont* v. *Graham,* 441 S. W. 2d 829 (Tex. 1969); *Young* v. *Anaconda American Brass Co.,* 43 Wis. 2d 36, 168 N. W. 2d 112 (1969).

in any circumstance in which any negligence is also attributable to the United States. Whatever may have been the actual intention of the parties with respect to the meaning of the clause, it is extremely difficult to believe that they sought to utilize this contractual provision to reduce Seckinger's potential liability under common law or statutory rules of contribution or indemnity.[19] Yet, that is arguably the result if the clause is

[19] An employer's liability for injuries suffered by his employees to which his negligence partially contributed varies from jurisdiction to jurisdiction. In the absence of workmen's compensation statutes, the employer and the third-party tortfeasor would be jointly and severally liable, under traditional principles, for the injuries produced. In a majority of jurisdictions, contribution or indemnity is available either by statute or common law, as a device for the redistribution of the burden among the joint tortfeasors. See generally W. Prosser, Law of Torts §§ 47, 48 (3d ed. 1964). In 1956, when Seckinger's employee was injured, South Carolina law was unclear in this respect, apparently permitting contribution or indemnity under some circumstances. See generally Comment, Indemnity Among Joint Tort-Feasors—As Affected by the Federal Employers Liability Act, 17 S. C. L. Rev. 423 (1965).

Workmen's compensation provisions, now enacted in all States, have considerable effect on the employer's potential liability to the third-party tortfeasor. However, these statutes vary greatly in the categories of employers and employees to which they apply, see generally, A. Reede, Adequacy of Workmen's Compensation (1947), and even today about two-thirds of the statutes provide that coverage is voluntary as to both employers and employees. 2 A. Larson, The Law of Workmen's Compensation § 67.10 (1969).

When a workmen's compensation plan does cover particular employers and employees, a third-party suit against an employer who was also negligent is barred by the majority rule, although recovery is not infrequently permitted on implied or quasi-contractual theories. See, *e. g., Associated Engineers, Inc.* v. *Job,* 370 F. 2d 633, 651 (C. A. 8th Cir. 1966); 2 A. Larson, *supra,* §§ 76.00–76.53. Whether such a suit is permitted under South Carolina law apparently has not been authoritatively determined. See generally *Burns* v. *Carolina Power & Light Co.,* 88 F. Supp. 769 (D. C. E. D. S. C. 1950).

interpreted to mean that Seckinger's liability is limited to situations in which it, as opposed to the United States, is the sole negligent party.

Furthermore, in this latter situation, it is perfectly clear that, both before and after the passage of the Tort Claims Act, the United States could not, in any event, be charged with liability in the absence of negligence on its part. In short, the construction of the clause adopted by the Court of Appeals tends to narrow Seckinger's potential liability and, also, limits its application to circumstances in which no doubt concerning Seckinger's sole liability existed. In the process, considerable violence is done to the plain language of the contract that Seckinger be responsible for *all* damages resulting from *its* negligence.

A synthesis of all of the foregoing considerations leads to the conclusion that the most reasonable construction of the clause is the alternative suggestion of the Government, that is, that liability be premised on the basis of comparative negligence.[20] In the first place, this interpretation is consistent with the plain language of the clause, for Seckinger will be required to indemnify the United States to the full extent that its negligence, if any, contributed to the injuries to the employee.

Secondly, the principle that indemnification for the indemnitee's own negligence must be clearly and unequivocally indicated as the intention of the parties is

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[20] A number of courts have reached comparable results. See, *e. g.*, *Brogdon* v. *Southern R. Co.*, 384 F. 2d 220 (C. A. 6th Cir. 1967); *Williams* v. *Midland Constructors*, 221 F. Supp. 400 (D. C. E. D. Ark. 1963); *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 256 S. W. 2d 337 (1953), after remand, 227 Ark. 321, 299 S. W. 2d 67 (1957); *Young* v. *Anaconda American Brass Co.*, 43 Wis. 2d 36, 168 N. W. 2d 112 (1969). See also *United States* v. *Haskin*, 395 F. 2d 502 (C. A. 10th Cir. 1968); *Shamrock Towing Co.* v. *City of New York*, 16 F. 2d 199 (C. A. 2d Cir. 1926).

preserved intact. In no event will Seckinger be required to indemnify the United States to the extent that the injuries were attributable to the negligence, if any, of the United States. In short, Seckinger will be responsible for the damages caused by its negligence; similarly, responsibility will fall upon the United States to the extent that it was negligent.

Finally, our interpretation adheres to the principle that, as between two reasonable and practical constructions of an ambiguous contractual provision, such as the two proffered by the Government, the provision should be construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations.[21]

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[21] While it is true that the interpretation adopted by the Court of Appeals is even less favorable to the Government than that which we adopt, we have concluded, for reasons previously stated, that the Court of Appeals' view would drain the clause of any significant meaning and is decidedly contrary to its plain language.

A 1941 letter from the Comptroller General, 21 Comp. Gen. 149, relied upon in dissent, sheds no light whatever on the problem of contract construction before us. There the Comptroller General, in commenting upon a question that he said was "of first impression" suggested that, under some circumstances, a contractor under a *cost-plus-fixed-fee* contract may seek reimbursement from the Government, as an element of his actual costs, for damages that he sustained by reason of his negligence. Since the contract clause in question was introduced long before the 1941 letter, it obviously was not responsive to any issues raised by the Comptroller. Moreover, we deal in this case with a *fixed-price* construction contract, a type of contract with which the Comptroller General was in no way concerned. Thus, no support is provided for the facile assumption of the dissent that, merely because a *cost-plus* contractor may arguably seek reimbursement for additional costs produced by his own negligence, it follows that a contractor committed to

For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the District Court for further proceedings consistent with this opinion.[22]

Reversed and remanded.

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

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

The standard form that the Government uses for its fixed-price construction contracts has long contained a single sentence saying that the contractor "shall be re-

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complete a project for a *fixed price* also may seek reimbursement because of damage caused by his own negligent acts.

We agree with the dissenting opinion that the contract clause does mean exactly what it says. What it says is that Seckinger shall be "responsible for all damages" arising from its negligence, that is, that the burden of Seckinger's negligence may not be shifted to the United States. To be sure, the clause bars any attempt by Seckinger to obtain reimbursement from the Government for Seckinger's negligence. But an interpretation that limited the operation of the clause to this narrow situation would constitute an impermissible frustration of the contractual scheme, for such a construction would shift the burden of Seckinger's negligence to the United States through the medium of a recovery against the Government by the injured employee. The contractual objective—that liability for the contractor's negligence not be shifted to the United States—can be achieved in cases of concurrent negligence when there has been a prior recovery against the Government only by resort to the comparative negligence analysis that we have adopted, which requires Seckinger to indemnify the Government, but only to the extent that the Government was called upon, in the first instance, to respond in damages as a result of Seckinger's negligence.

[22] Because we have taken the view that the rights and liabilities of Seckinger and the United States *inter se* are governed by contract, we need not reach the Government's alternative theory, rejected by the Court of Appeals, that Seckinger breached an implied warranty of workmanlike service.

sponsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." [1] For more than 30 years it has evidently been understood that these words mean what they rather clearly say—that the contractor cannot hold the Government for losses he incurs resulting from his own negligence.[2] The provision, in short, is what the Court of Appeals called "a simple responsibility clause." 408 F. 2d 146, 148.[3] But today this innocuous boilerplate language is turned inside out. For the Court says that the provision really is a promise by the contractor to reimburse the Government for losses *it* incurs resulting from *its* negligence.

To be sure, the Court does not go quite so far as to hold that this obscure clause operates as a complete liability insurance policy. But the Court does hold that the clause requires the contractor to indemnify the Government "to the full extent that its negligence, if any, contributed to the injuries to the employee." The magnitude of the burden the Court imposes is well illus-

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[1] This sentence is contained in a paragraph entitled "Permits and Responsibility for Work, etc." See *ante,* at 208 n. 9.

[2] I have found no previous reported decision construing this clause as the Court construes it today.

[3] It will not do to say, as the Court says today, that this construction of the clause makes its purpose "totally unclear" or "would drain this clause of any significant meaning or protection for the Government . . . ." For without such a clause, there would surely be room for the contractor to claim reimbursement from the Government for unforeseen increased costs incurred on account of his negligence, particularly where the Government was jointly negligent. With respect to contracts *not* containing such a clause—cost-plus contracts, for example—the Comptroller General advised the Secretary of War almost 30 years ago that the Government may, indeed, be liable to the contractor under such circumstances. See 21 Comp. Gen. 149, 156–157 (1941).

trated by the circumstances of this case. Here an employee of the contractor was injured in the scope of his employment on plumbing work that the contractor was performing at the Paris Island Marine Depot in South Carolina. The employee recovered from the contractor the benefits to which he was entitled under the state workmen's compensation law. The employee then sued the Government under the Federal Tort Claims Act, claiming that his injuries had actually been caused by the Government's negligence. The Federal District Court agreed, finding that the negligence of the United States was the "sole cause" of the employee's injuries and awarding him $45,000 in damages. The Court today says that the United States can now recover an indeterminate portion of this $45,000 from the contractor, because the contractor has *agreed* to "indemnify the United States . . . ."

Despite intimations in the Court's opinion to the contrary, we do not deal here with "common law or statutory rules of contribution or indemnity." [4] The only question the Court decides is the meaning of the words of a clause in a government contract.[5] I think the

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[4] Under the law of South Carolina—which determines the Government's liability in tort to the injured employee, 28 U. S. C. § 1346 (b); *Richards* v. *United States,* 369 U. S. 1—the general rule is that there is no right to contribution among joint tortfeasors. *Atlantic Coast Line R. Co.* v. *Whetstone,* 243 S. C. 61, 68–70, 132 S. E. 2d 172, 175–176. Moreover, since the injured employee has accepted his award against Seckinger under the state workmen's compensation statute, he cannot hold Seckinger in tort. S. C. Code Ann. §§ 72–121, 72–123 (1962); *Adams* v. *Davison-Paxon Co.,* 230 S. C. 532, 545, 96 S. E. 2d 566, 572–573. So Seckinger can hardly be cast in the role of a tortfeasor in any event.

[5] The Court's conclusion that the Court of Appeals' construction of the clause might "reduce Seckinger's potential liability under common law or statutory rules of contribution or indemnity" seems

meaning attributed to that clause today is as unconscionable as it is inaccurate.

The clause first appeared in government contracts at least eight years before the enactment of the Federal Tort Claims Act in 1946. Before the passage of that Act the United States could not be sued in tort for personal injuries. Thus there was absolutely no reason for the Government to secure for itself a right to recovery over against an alleged joint tortfeasor. Yet we are asked to believe that the drafter of this clause was so prescient as to foresee the day of government tort liability nearly a decade in the future, and so ingenious as to smuggle a provision into a standard contract form that would, when that day arrived, allow the Government to shift its liability onto the backs of its contractors. This theory is nothing short of incredible.

In drafting its construction contracts the United States certainly has both the power and the resources to write contracts providing expressly that it will pass off onto its contractors, either in whole or in part, liability it incurs for damages caused by its own judicially determined negligence. The Government could require its contractors to hold it harmless without regard to fault on their part, or it could establish a proration of liability arising from the joint negligence of the parties. But the contractual provision before us does neither. It no more says that the contractor shall reimburse the Government for his share of joint negligence than that he shall be a liability insurer for the Government's sole negligence.

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wholly incorrect. The contractor's agreement not to seek reimbursement or contribution from the Government would have no bearing upon the question whether local "common law or statutory rules of contribution and indemnity" give the Government any right to recover from the contractor.

The Court nonetheless manages to discover that the clause amounts to a contribution agreement, relying for its conclusion upon cases involving, not the simple responsibility clause before us, but express indemnification agreements with "hold harmless" clauses.[6] This result is said to be desirable because it ensures a fair distribution of loss between those jointly responsible for the damage. But when Seckinger entered into this contract, it had every reason to expect that its liability for injuries to its employees would be limited to what is imposed by the South Carolina compensation law. That law relieved it of responsibility in tort in exchange for its guarantee that its employees would recover without regard to fault. Presumably its bid on the government project reflected its reasonable expectation that this would be the extent of its liability on account of employee accidents. Now the Court heaps an unforeseen federal contractual burden atop the requirement the State has already imposed.[7]

If the Government wants to impose additional liabilities upon those with whom it contracts to do its work, I would require it to do so openly, so that every bidder may clearly know the extent of his potential liability. Even in the domain of private contract law, the author of a standard-form agreement is required to state its terms with clarity and candor.[8] Surely no less is required

[6] These cases are cited in the Court's opinion, *ante,* at 215 n. 20.

[7] Under South Carolina law Seckinger has been subrogated to its injured employee's claim against the United States to the extent of its own compensation payment. S. C. Code Ann. § 72–124 (1962). But the Court today subjects Seckinger to the incremental risk of liability in contribution, in a yet-to-be-determined proportion, for the employee's added recovery in his tort suit against the Government.

[8] *E. g., Chrysler Corp.* v. *Hanover Ins. Co.,* 350 F. 2d 652, 655; *Riess* v. *Murchison,* 329 F. 2d 635, 642; Restatement of Contracts § 235 (e); 3 A. Corbin on Contracts § 559 (1960).

of the United States of America when it does business with its citizens.[9]

Mr. Justice Holmes once said that "[m]en must turn square corners when they deal with the Government." [10] I had always supposed this was a two-way street. The Government knows how to write an indemnification or contribution clause when that is what it wants. It has not written one here.

I would affirm the judgment.

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[9] *Sternberger* v. *United States*, 185 Ct. Cl. 528, 543, 401 F. 2d 1012, 1021; *Jones* v. *United States*, 304 F. Supp. 94, 101.

[10] *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143.

TAGGART ET AL. *v.* WEINACKER'S, INC.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 74. Argued January 12, 1970—
Decided March 9, 1970

Following the issuance of an injunction enjoining petitioners, who were picketing on the narrow sidewalk adjacent to the doorway of respondent's store, from trespassing and interfering with the right of ingress and egress, respondent ceased operating its business and leased the premises to other store operators. The Alabama Supreme Court, which affirmed the injunction, found that the picketing "obstructed customers using the entrances to the store," based on affidavits filed by respondent, petitioners not having filed counter-affidavits. *Held:* In light of the obscure record, the physical circumstances of the narrow sidewalk, and the state courts' finding of customer obstruction, together with the fact that only a bare remnant of the original controversy still exists, the writ of certiorari is dismissed as improvidently granted.

283 Ala. 171, 214 So. 2d 913, certiorari dismissed as improvidently granted.

Bernard Dunau argued the cause for petitioners. With him on the briefs were *Carl L. Taylor, Otto E. Simon,* and *James C. Wood.*

Shayle P. Fox argued the cause for respondent. With him on the brief were *Lawrence M. Cohen* and *Alan Raywid.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for the National Labor Relations Board, and by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

Brice I. Bishop and *Phil B. Hammond* filed a brief for the American Retail Foundation as *amicus curiae* urging affirmance.

Allen B. Gresham filed a brief for the Homart Development Co. as *amicus curiae.*

PER CURIAM.

The complaint in this case was filed January 21, 1965, and the state court issued a temporary injunction on January 22, 1965. After hearing, the state court on April 1, 1965, denied petitioners' motion to dissolve the temporary injunction and continued it in effect. On April 9, 1965, an appeal was taken to the Supreme Court of Alabama. Over three years later, on September 19, 1968, that court entered a judgment of affirmance. The petition for certiorari was filed here on March 28, 1969, and granted on October 13, 1969. 396 U. S. 813.

At the time the appeal was taken to the Supreme Court of Alabama, respondent operated a retail grocery and drug business on the premises that petitioners picketed. Late in 1966, while the appeal was pending in the Supreme Court of Alabama, respondent ceased to operate the grocery and drug business, leasing part of the space to Delchamps, Inc., for a retail grocery store, and part to Walgreen's, Inc., for a retail drug store. Respondent continues to own the land and the building at the site and maintains an office in the building. The injunction enjoins petitioners from "trespassing upon the property of the complainant and from further interfering with the complainant's property and right of ingress and egress to the complainant's property and place of business, until the further orders of this Court."

While the changed circumstances do not necessarily make the controversy moot, they are such that, if known at the time the petition for a writ of certiorari was acted

upon, we would not have granted it. For such small embers of controversy that may remain do not present the threat of grave state-federal conflict that we need sit to resolve.

In this connection one other circumstance should be noted. The Alabama Supreme Court found that this picketing "obstructed customers using the entrances to the store." Petitioners complain (a) that no evidentiary hearing to resolve that factual question was ever held; (b) that it rests solely on conclusory affidavits; (c) that that is a fundamentally infirm procedure for handling facts in the area of the First Amendment; and (d) that if there were obstruction the remedy is enjoining the obstruction, not picketing generally. Yet this phase of the case is overshadowed by the special facts of the case as they were finally clarified on oral argument. The picketing started on the public sidewalks around respondent's premises which are removed from respondent's store by a parking lot; but it soon was transferred to a sidewalk owned and maintained by respondent, a sidewalk from 4 feet to 5.5 feet wide and adjacent to the door of the store where the picketing took place. Even if under *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308, the union had a First Amendment right to picket on the property involved in this case, a matter that we need not decide, in final analysis we would come down to whether, in light of the physical circumstances of this narrow sidewalk at the store entrance, the following ruling in *Logan Valley,* 391 U. S., at 320–321, is applicable:

> "[T]he exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it."

While the finding of obstruction was based on affidavits filed by respondent, petitioners, though they had the right under Alabama procedure to do so, Ala. Code, Tit. 7, § 1055 (1958), filed no counter-affidavits prior to issuance of the temporary injunction.[1] Nor did they, as was their right under Tit. 7, § 1061, of the Alabama Code, submit any such affidavits on the hearing to dissolve the injunction.[2] They did, however, deny in their motion to dissolve that they were "obstructing customers from leaving or entering" respondent's place of business. But the only evidence before the Alabama courts on the issue of obstruction was in respondent's affidavits. That issue was critical, in light of the physical circumstances concerning the narrow sidewalk in front of the door where the picketing took place. Petitioners, however, chose to rest on jurisdictional grounds.

In light of the obscure record, the physical circumstances of this narrow sidewalk, and the finding of the Alabama courts on obstruction of customers, coupled with the fact that only a bare remnant of the original controversy remains, we conclude that the writ should be dismissed as improvidently granted.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would hold under *San Diego Building Trades Council* v. *Garmon*,

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[1] Section 1055 provides:

"Upon the hearing of the application for injunction, the sworn answer of the defendant may be considered as well as the bill, and both sides may introduce affidavits of themselves or other witnesses; and upon consideration, the judge must determine whether the injunction be granted or refused."

[2] Section 1061 provides:

"Upon the hearing of motion to dissolve an injunction, the court may consider the sworn bill and answer, whether the answer contains denials of the allegations of the bill or independent defensive matter, and also such affidavits as any party may introduce."

359 U. S. 236, that the State's jurisdiction in the case is pre-empted by the National Labor Relations Board's primary jurisdiction over labor disputes.

[For separate memorandum of MR. JUSTICE HARLAN, see *post*, p. 229.]

MR. CHIEF JUSTICE BURGER, concurring.

I am in accord with the Court's action in dismissing this petition as having been improvidently granted. As the opinion of the Court indicates, "the obscure record" and "the fact that only a bare remnant of the original controversy remains" cast serious doubt on whether we have enough before us to pass on the claim of the union that it had a First Amendment right to picket on the private premises of the employer.

The obscure record and the atrophied controversy now remaining have little if any impact—I think none—on the issue of whether the State's jurisdiction over this matter is "pre-empted" by the National Labor Relations Board's primary jurisdiction over labor disputes. In my view any contention that the States are pre-empted in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises.*

*See *People* v. *Goduto*, 21 Ill. 2d 605, 608–609, 174 N. E. 2d 385, 387, cert. denied, 368 U. S. 927 (1961); *Hood* v. *Stafford*, 213 Tenn. 684, 694–695, 378 S. W. 2d 766, 771 (1964); *Moreland Corp.* v. *Retail Store Employees, Local 444*, 16 Wis. 2d 499, 503, 114 N. W. 2d 876, 878 (1962); Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552, 555, 562–568 (1970).

Rather, it has acted against the backdrop of the general application of state trespass laws to provide certain protections to employees through § 7 of the NLRA, 61 Stat. 140, 29 U. S. C. § 157. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area.

Nothing in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. *Garmon* left to the States the power to regulate any matter of "peripheral concern" to the NLRA or that conduct that touches interests "deeply rooted in local feeling and responsibility." (359 U. S., at 243, 244.) Few concepts are more "deeply rooted" than the power of a State to protect the rights of its citizens. *Linn* v. *United Plant Guard Workers, Local 114,* 383 U. S. 53 (1966), applied the *Garmon* exceptions to allow state jurisdiction over malicious libel in union organizational literature, recognizing that if the States were precluded from acting, there would be an absence of any legal remedy. The Court there observed that:

> "The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands." 383 U. S., at 64 n. 6.

A holding that Congress pre-empted this entire area is as inappropriate here as it was in *Linn,* and for precisely the

same reasons. Cf. *International Longshoremen's Local 1416* v. *Ariadne Shipping Co., ante,* p. 201 (WHITE, J., concurring).

Separate memorandum of MR. JUSTICE HARLAN.

I am prompted by the concurring opinion of THE CHIEF JUSTICE in this case, and by the concurring opinion of MR. JUSTICE WHITE (joined by THE CHIEF JUSTICE and MR. JUSTICE STEWART) in *International Longshoremen's Local 1416* v. *Ariadne Shipping Co., ante,* p. 201, decided today, to amplify, with the following observations, my vote to grant certiorari and reverse the state judgment in the present case.

I would have thought this an easy case after *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), wherein the Court concluded, in the broadest terms, that conduct that is either "arguably protected" or "arguably prohibited" under the federal labor laws is not subject to regulation by the States. In such cases the Court held that federal law and federal remedies apply to the exclusion of any state rules, and that whether federal law does apply is to be decided in the first instance by the National Labor Relations Board in accordance with the policy of "primary jurisdiction" established by the National Labor Relations Act. It was concluded that the Board's jurisdiction was pre-emptive notwithstanding the fact that access to the Board was barred by its refusal to exercise jurisdiction because of failure to meet the dollar-amount requirements.

The picketing in the case before us occurred, as found by the Alabama trial court, in the context of a labor dispute, and ultimately took place on private sidewalks maintained by respondent in front of entrances to its building. The trial court also found that there was no violence or threat of violence. Thus, notwithstanding

my differences with the *Garmon* majority, see my concurring opinion, 359 U. S., at 249, as to whether States are pre-empted from regulating arguably "unprotected" activities, *id.*, at 253, I would reverse the decision below since the picketing in this case falls well within the range of what could be considered to be protected under the Act.

While I recognize THE CHIEF JUSTICE's and MR. JUSTICE WHITE's concern over the hiatus created when the Board does not or cannot assert its jurisdiction, see the concurring opinion of THE CHIEF JUSTICE, *ante,* p. 227, and the concurring opinion of MR. JUSTICE WHITE in *International Longshoremen's Local 1416* v. *Ariadne Shipping Co., ante,* p. 201; see also Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552 (1970), that consideration is foreclosed, correctly in my view, by *Garmon.* Congress in the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an experienced agency. Where conduct is "arguably protected," diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to "arguably protected activities," until the Board has acted, even if wrongs may occasionally go partially or wholly unredressed.

Nothing in *Linn* v. *United Plant Guard Workers, Local 114,* 383 U. S. 53 (1966), is to the contrary. The allusion there to the exacerbating effect of the vacuum created by the Board's inability to "redress" an "otherwise actionable wrong" was made in the context of an implicit holding that "malicious libel," even though pub-

lished during a labor campaign, was not "arguably protected" by the Act and the determination that it was a "merely peripheral concern of the Labor Management Relations Act." 383 U. S., at 61. *Linn* is far removed from the present case. Cf. *International Association of Machinists* v. *Gonzales,* 356 U. S. 617 (1958).

NORTHCROSS ET AL. *v.* BOARD OF EDUCATION OF THE MEMPHIS, TENNESSEE, CITY SCHOOLS ET AL.

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

No. 1136. Decided March 9, 1970

In May 1969 the District Court ordered the Memphis Board of Education to file a revised desegregation plan, and, by January 1, 1970, to file a map of proposed zone boundaries and enrollment figures by race within the revised zones, so as to enable the court to reconsider the adequacy of a transfer provision. The court found that the existing and supplemental plans did "not have real prospects for dismantling the state-imposed dual system at the 'earliest practicable date.'" The Court of Appeals denied petitioners' request, based on *Alexander* v. *Holmes County Board,* 396 U. S. 19, for an injunction requiring the Board to file by January 5, 1970, a plan for the operation of the schools as a unitary system for the current school year, on the ground that *Alexander* was inapplicable because the Board had converted the "dual system into a unitary system." *Held:* The Court of Appeals erred (1) in substituting its finding that the Board is not now operating a dual system for the District Court's contrary findings, which were based on substantial evidence; (2) in ruling prematurely that the Board had converted to a unitary system, since neither the revised plan nor the school zones and enrollment figures ordered to be filed by January 1, 1970, were properly before it for review; and (3) in holding that *Alexander* is inapplicable to this case.

Certiorari granted; Court of Appeals' remand of December 19, 1969, affirmed as modified; Court of Appeals' order of January 12, 1970, denying injunctive relief, affirmed; motion for injunction pending certiorari denied.

Jack Greenberg and *James M. Nabrit III* for petitioners.

Jack Petree for respondents.

PER CURIAM.

In 1966 the District Court for the Western District of Tennessee approved a plan of respondent Board of Education for the desegregation of the Memphis school system. In July 1968 petitioners made a motion that the court order the Board to adopt a new plan prepared with the assistance of the Title IV Center of the University of Tennessee. The Center is funded by the Department of Health, Education, and Welfare. The 1966 plan permitted unrestricted free transfers, and petitioners desired a plan without such a provision, and one that would also provide among other things for complete faculty desegregation. The District Court denied the motion as filed but on May 15, 1969, in an unreported opinion, directed respondent Board to file a revised plan which would incorporate the existing plan (as respondent proposed during the hearing to supplement it), and which also would contain a modified transfer provision, a provision for the appointment of a Director of Desegregation charged with responsibility to devise ways and means "of assisting the Board in its affirmative duty to convert to a unitary system in which racial discrimination will be eliminated root and branch," and provision for faculty desegregation. The court also directed that, prior to January 1, 1970, the Board file a map of proposed revised zone boundary lines and enrollment figures by race within the revised zones to enable the court then to "reconsider the adequacy of the transfer plan." The District Court expressly found that such further steps were necessary because, although the respondent Board "has acted in good faith," "the existing and proposed [supplemental] plans do not have real prospects for dismantling the state-imposed dual system at the 'earliest practicable date.' "

Petitioners appealed to the Court of Appeals for the Sixth Circuit. In June 1969 they filed a Motion for Summary Reversal and on November 3, 1969, after this Court's decision in *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969), a motion to require adoption of a unitary system now. Both motions were denied on December 19, 1969, and the case was remanded to the District Court; the Court of Appeals stated that action on its part would be premature "until the United States District Court has had submitted to it the ordered plan, and has had opportunity to consider and act upon it."

Petitioners thereupon filed in the Court of Appeals a motion for injunction pending certiorari which, in reliance upon *Alexander* v. *Holmes County Board,* sought an injunction requiring respondent Board "to prepare and file on or before January 5, 1970, in addition to the adjusted zone lines it is presently required to file, a plan for the operation of the City of Memphis public schools as a unitary system during the current 1969–70 school year." The motion was denied on January 12, 1970, on the ground that *Alexander* v. *Holmes County Board* was inapplicable to the case because "[the Court of Appeals is] satisfied that the respondent Board of Education of Memphis is not now operating a 'dual school system' and has, subject to complying with the present commands of the District Judge, converted its pre-*Brown* dual system into a unitary system 'within which no person is to be effectively excluded because of race or color.' "

Petitioners, on January 30, 1970, filed in this Court a petition for certiorari and a motion for injunction pending certiorari "requiring the preparation, with the assistance of H. E. W. or the H. E. W.-funded University of

Tennessee Title IV Center, of a plan of complete pupil and faculty integration affecting all phases of the operations of the Memphis public school system, for implementation during the 1969–70 school year in conformity with . . . *Alexander* v. *Holmes County Bd.* . . ."

The petition for certiorari is granted. We hold that the Court of Appeals erred in the following respects:

1. Since the findings of the District Court—that the state-imposed dual system had not been dismantled under the 1966 plan and that that plan and the Board's proposed supplemental plan did "not have real prospects for dismantling [it] . . . at the 'earliest practicable date' "—are supported by substantial evidence, the Court of Appeals erred in substituting its own finding that respondent Board "is not now operating a 'dual school system' . . . ."

2. Since it appears that neither the revised plan of desegregation filed on June 9, 1969, nor the revised school zones and updated enrollment figures which were ordered to be filed on or before January 1, 1970, were properly before the Court of Appeals for review, it was premature for the Court of Appeals to rule that the Board "has, subject to complying with the present commands of the District Judge, converted its pre-*Brown* dual system into a unitary system 'within which no person is to be effectively excluded because of race or color.' "

3. In holding that *Alexander* v. *Holmes County Board* is inapplicable to this case.

The Court of Appeals' order of remand of December 19, 1969, is affirmed, but with direction that the District Court proceed promptly to consider the issues before it and to decide the case consistently with *Alexander* v. *Holmes County Board.* The order of the Court of

Appeals of January 12, 1970, denying injunctive relief is affirmed. The motion for injunction pending certiorari filed in this Court is denied.

The judgment herein shall issue forthwith.

It is so ordered.

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

MR. CHIEF JUSTICE BURGER, concurring in the result.

Save for one factor, I would grant the petition and set the case for expedited argument at a special sitting, if necessary. The factor which is a barrier to taking this step now in this particular case is that one Justice would not be able to participate, thus limiting the Court to seven justices. I would do this on the basis that the time has come to clear up what seems to be a confusion, genuine or simulated, concerning this Court's prior mandates. By the time of No. 944, *Carter* v. *West Feliciana Parish School Board,* 396 U. S. 290 (1970), MR. JUSTICE STEWART and I indicated we preferred not to reach a decision without first hearing oral argument.

These school cases present widely varying factors: some records reveal plans for desegregating schools, others have no plans or only partial plans; some records reflect rezoning of school districts, others do not; some use traditional bus transportation such as began with consolidated schools where such transportation was imperative, others use school bus transportation for a different purpose and unrelated to the availability of a school as to which such transportation is not required.

The suggestion that the Court has not defined a unitary school system is not supportable. In *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19

(1969), we stated, albeit perhaps too cryptically, that a unitary system was one "within which no person is to be effectively excluded from any school because of race or color." From what is now before us in this case it is not clear what issues might be raised or developed on argument. As soon as possible, however, we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; and to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court. Other related issues may emerge.

However, for the reasons stated, namely that the Court is already disabled by one vacancy of long standing and further disabled in the particular case, I join in the result reached by the Court.

COLE, BOSTON STATE HOSPITAL SUPERINTENDENT, ET AL. *v.* RICHARDSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 679. Decided March 16, 1970*

300 F. Supp. 1321, vacated and remanded.

Robert H. Quinn, Attorney General of Massachusetts, *Mark L. Cohen,* Assistant Attorney General, and *Gregor I. McGregor,* Deputy Assistant Attorney General, for appellants in No. 679. *Messrs. Quinn, Cohen, McGregor,* and *Walter H. Mayo III,* Assistant Attorney General, for appellees in No. 774.

Ernest Winsor and *John F. Cogan, Jr.,* for appellee in No. 679 and appellant in No. 774.

PER CURIAM.

The judgment is vacated and the cases are remanded to the United States District Court for the District of Massachusetts to determine whether these cases have become moot.

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

The present appeals are from a single action commenced in the Federal District Court for the District of Massachusetts by Mrs. Richardson, challenging the validity of Mass. Gen. Laws Ann., c. 264, § 14 (1959).

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*Together with No. 774, *Richardson* v. *Cole, Boston State Hospital Superintendent, et al.,* also on appeal from the same court.

That law requires all public employees to subscribe to a loyalty oath which reads as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

Mrs. Richardson sought declaratory and injunctive relief against enforcement of the oath as a bar to her resuming employment with Boston State Hospital, and also sought damages for pay withheld by reason of her having refused to subscribe to the oath.

The District Court granted the requested declaratory and injunctive relief, but stated in its opinion, "We cannot grant her [Mrs. Richardson's] request for back pay." * Accordingly, the formal judgment contained no allusion to the back-pay request.

Dr. Cole, the hospital superintendent, and another official in No. 679 appeal from the award of declaratory and injunctive relief. Mrs. Richardson has cross-appealed from the denial of back pay and by way of response to the appeal moved for summary affirmance and suggested, in the alternative, that the appeal is moot since the particular job she held has been "discontinued." In reply, Dr. Cole has submitted an affidavit asserting that "[e]mployment consonant with [Mrs. Richardson's] abilities and qualifications has been

*It appears from Mrs. Richardson's jurisdictional statement in No. 774 that she stipulated in the District Court that after her formal termination of employment on November 25, 1968, for refusing to take the oath, she "volunteered to work full-time at Boston State Hospital . . . to continue her research project."

and is periodically available should she wish to apply for such employment."

I fail to understand today's wholly unexplained and extraordinary disposition of remanding to the lower court to determine if these cases are moot. Since appellants in No. 679 have not disputed Mrs. Richardson's specific statement that the job *she held* is no longer in existence, there may be some question as to whether a controversy continues to exist in that case, although I would have thought this question one to be resolved by this Court, without the necessity of a remand. Certainly, however, there can be no question that a live controversy exists over the damages question.

I am, however, content to acquiesce in the Court's action because of the manifest triviality of the impact of the oath under challenge, a factor that may, I suspect, underlie today's unusual disposition.

Whether or not one considers that the District Court erred in what perforce amounts to an exercise in semantics, I would suppose that the vagueness contentions in this instance can, depending on how one defines his terms, be characterized as at least colorable—for, as the opinion below aptly points out, almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel. I do not, however, consider it a provident use of the time of this Court to coach what amounts to little more than verbal calisthenics. Cf. S. Chase, The Tyranny of Words (1959); W. Empson, Seven Types of Ambiguity (1955). This kind of semantic inquiry, however interesting, should not occupy the time of federal courts unless fundamental rights turn on the outcome.

I think it can be fairly said that subscribing to the instant oath subjected Mrs. Richardson to no more than an amenity. No First Amendment considerations, in my

view, are at all involved in these cases. This oath does not impinge on conscience or belief, except to the extent that oath taking as such may offend particular individuals. I also think it safe to say that the signing of this oath triggered no serious possibility of prosecution for either perjury or failure to perform the obligations of the oath. Indeed, I consider it most unfortunate that our past decisions in this field can be construed even to require solemn convocation of three federal judges to deal with a matter of such practical inconsequence.

MR. JUSTICE DOUGLAS, dissenting.

The plaintiff Richardson brought this action before a three-judge District Court to declare unconstitutional a Massachusetts loyalty oath statute, to enjoin her superiors at the Boston State Hospital from prohibiting her from discharging her duties at the hospital, and to recover back pay. The District Court entered its opinion, granting the declaratory and injunctive relief but denying the claim for back pay, on June 26, 1969. 300 F. Supp. 1321. Appellants in No. 679 filed a notice of appeal from the grant of injunctive and declaratory relief in the District Court on July 30, 1969, and docketed a timely appeal in this Court on September 29, 1969. Notice of appeal from the denial of back pay was filed in No. 774 in the District Court on August 25, 1969, and a timely appeal was docketed in this Court on October 24, 1969.

On October 25, 1969, appellee in No. 679 filed a motion to affirm or dismiss on the grounds of mootness: "At the time this case was heard and argued in the district court the appellee's job at Boston State Hospital was still in existence, but at or before the time the appellants filed their present appeal such job had been discontinued."

In reply, appellants in No. 679 deny that the case is

moot and in support thereof submit an affidavit of Dr. Cole, Superintendent of the Boston State Hospital, which states:

> "1. At all times subsequent to the decision of the United States District Court in the above-entitled case on June 26, 1969 it has been, and at the present time is, open for the appellee Lucretia Peteros Richardson to apply for employment at Boston State Hospital and enjoy full consideration pursuant to the terms of the decision of the District Court;
>
> "2. Employment consonant with her abilities and qualifications has been and is periodically available should she wish to apply for such employment;
>
> "3. The project for which the appellee was hired is still on-going at Boston State Hospital."

I do not see how one can even arguably maintain that the cases are moot.

The question tendered is an important one. The state oath struck down by the District Court on the grounds of vagueness reads as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." Mass. Gen. Laws Ann., c. 264, § 14 (1959).

The District Court said:

> "A 'violation' of section 14, which presumably means a failure to 'live up' to the oath, since its phraseology is in the future tense, is a felony." 300 F. Supp., at 1322.

The unanimous opinion of the District Court holding the oath unconstitutional is earnestly challenged by appellants in No. 679, who maintain that the invalidation of the oath is an unwarranted federal invasion of the State's domain.

I would note probable jurisdiction on both appeals and put the cases down for oral argument.

MARTIN-TRIGONA *v.* STATE BOARD OF LAW EXAMINERS OF ILLINOIS

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 1360, Misc. Decided March 16, 1970

Appeal dismissed and certiorari denied.

PER CURIAM.

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

UNITED STATES *v.* OGLE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 737. Decided March 16, 1970

Judgment reversed and remanded on Count 1 of the indictment and affirmed on Count 2.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Mervyn Hamburg* for the United States.

PER CURIAM.

The judgment of the United States District Court for the Southern District of Indiana dismissing Count 1 of the indictment under 26 U. S. C. § 4742 (a) is reversed and the case is remanded to that court for trial on that count. *Minor* v. *United States,* 396 U. S. 87. The judgment of the same court dismissing Count 2 of the indictment under 26 U. S. C. § 4744 (a)(1) is affirmed.

HAMILTON ET AL. *v.* McKEITHEN, GOVERNOR OF LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 1046. Decided March 16, 1970

254 La. 683, 226 So. 2d 494, appeal dismissed.

C. Alvin Tyler for appellants.

Jack P. F. Gremillion, Attorney General of Louisiana, and *Sam H. Jones* for appellee and intervenors below.

PER CURIAM.

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

TRYON *v.* IOWA

APPEAL FROM THE SUPREME COURT OF IOWA

No. 1090. Decided March 16, 1970

Appeal dismissed and certiorari denied.

Donald E. O'Brien for appellant.

Richard C. Turner, Attorney General of Iowa, and *David A. Elderkin* and *Michael J. Laughlin,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

BRATCHER *v.* LAIRD, SECRETARY OF DEFENSE, ET AL.

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

No. 1391, Misc. Decided March 16, 1970

Certiorari granted; 415 F. 2d 760, vacated and remanded.

Solicitor General Griswold for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted.

Upon consideration of the suggestion of the Solicitor General and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded to that court in order that it may consider whether it wishes to adhere to its decision in light of the contrary position now adopted by respondents. If it decides not to adhere to its former ruling, the Court of Appeals may then determine whether it would be appropriate to remand the case to the District Court.

NORTHERN FREIGHT LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1100. Decided March 16, 1970

304 F. Supp. 536, affirmed.

Guy H. Postell, David A. Sutherlund, David Axelrod, Roland Rice, John S. Fessenden, Richard R. Sigmon, Peter T. Beardsley, R. Edwin Brady, Albert B. Rosenbaum, Donald E. Cross, Bryce Rea, Jr., Eugene T. Lüpfert, and *William O. Turney* for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Robert W. Ginnane, Fritz R. Kahn, and *Raymond M. Zimmet* for the United States et al., *John E. Robson* and *Arthur M. Wisehart* for Railway Express Agency, Inc., and *John J. C. Martin* for Drug & Toilet Preparation Traffic Conference et al., appellees.

PER CURIAM.

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

CITY OF NEW YORK *v.* UNITED STATES ET AL.

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

No. 1121. Decided March 16, 1970*

307 F. Supp. 617, affirmed in No. 1121, appeal dismissed in No. 1122.

J. Lee Rankin, Norman Redlich, John R. Thompson, and *David I. Shapiro* for appellant in No. 1121. *Benjamin F. Schwartz* and *Herbert A. Karzen* for appellants in No. 1122.

Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, and *Bernard M. Hollander* for the United States in both cases. *Carl J. Schuck, Wayne H. Knight, Fred D. Fagg III, Philip K. Verleger, Allyn O. Kreps, Julian O. Von Kalinowski, Lloyd N. Cutler, Howard P. Willens, James S. Campbell, Ross L. Malone,* and *Marcus Mattson* for Automobile Manufacturers Assn., Inc., et al., appellees in both cases.

Briefs of *amici curiae* in No. 1121 were filed by *Jerry S. Cohen, Harold E. Kohn, Aaron M. Fine,* and *William T. Coleman, Jr.,* for the City of Baltimore et al.; by *John H. Larson* for the County of Los Angeles et al.; and by *David Berger* and *Herbert B. Newberg* for the County of Lackawanna et al.

PER CURIAM.

In No. 1121 the motion to affirm is granted and the judgment is affirmed.

In No. 1122 the motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

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*Together with No. 1122, *Grossman et al.* v. *Automobile Manufacturers Assn., Inc., et al.,* also on appeal from the same court.

UNITED STATES *v.* VAN LEEUWEN

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

No. 403. Argued February 25, 1970—Decided March 23, 1970

Respondent mailed two 12-pound packages of coins at Mt. Vernon, Washington, near the Canadian border, to addresses in California and Tennessee, under circumstances arousing suspicion. The type of mailing was first class and thus the packages were not subject to discretionary inspection. A 29-hour detention of the packages, occasioned mainly by the time differential in obtaining information about the Tennessee addressee before a search warrant was obtained, caused the Court of Appeals to hold that the coins were improperly admitted in evidence against respondent who had been found guilty of illegally importing gold coins from Canada. *Held:* Under the facts of this case the 29-hour delay is not "unreasonable" under the Fourth Amendment. Pp. 251–253.

414 F. 2d 758, reversed.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson, Joseph J. Connolly, Beatrice Rosenberg,* and *Sidney M. Glazer.*

Craig G. Davis, by appointment of the Court, 396 U. S. 952, argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, at about 1:30 p. m. on Thursday, March 28, 1968, mailed two 12-pound packages at the post office in Mt. Vernon, Washington, a town some 60 miles from the Canadian border. One package was addressed to a post office box in Van Nuys, California, and the other to a post office box in Nashville, Tennessee. Respondent declared they contained coins. Each pack-

age was to be sent airmail registered and each was insured for $10,000, a type of mailing that the parties agree was first class, making them not subject to discretionary inspection.[1]

When the postal clerk told a policeman who happened to be present that he was suspicious of the packages, the policeman at once noticed that the return address on the packages was a vacant housing area of a nearby junior college, and that the license plates of respondent's car were British Columbia. The policeman called the Canadian police, who called customs in Seattle. At 3 o'clock that afternoon customs called Van Nuys and learned that the addressee of one package was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential, Seattle customs was unable to reach Nashville until the following morning, March 29, when Seattle was advised that the second addressee was also being investigated for the same crime. A customs official in Seattle thereupon filed an affidavit for a search warrant for both packages with a United States commissioner, who issued the search warrant at 4 p. m., and it was executed in Mt. Vernon at 6:30 p. m., 2½ hours later. Thereupon the packages were opened, inspected, resealed, and promptly sent on their way.

Other evidence showed that respondent had brought the two packages in from Canada without declaring them. He was tried for illegally importing gold coins in violation of 18 U. S. C. § 545 and found guilty and sentenced and fined. On appeal, the Court of Appeals reversed, holding that the coins were improperly admitted in evidence because a timely warrant had not been obtained. 414 F. 2d 758. The case is here on a petition for a writ of certiorari, 396 U. S. 885. We reverse.

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[1] 39 CFR § 131.2 describes "first class" mail as "matter closed against postal inspection," which follows the definition in 39 U. S. C. § 4251 (a).

It has long been held that first-class mail such as letters and sealed packages subject to letter postage—as distinguished from newspapers, magazines, pamphlets, and other printed matter—is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment. As stated in *Ex parte Jackson,* 96 U. S. 727, 733, decided in 1878:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

The course of events since 1878 has underlined the relevance and importance of the Post Office to our constitutional rights. Mr. Justice Holmes in *Milwaukee Pub. Co.* v. *Burleson,* 255 U. S. 407, 437 (dissenting opinion), said that "the use of the mails is almost as much a part of free speech as the right to use our tongues." We have emphasized over and over again that while Congress may classify the mail and fix the charges

for its carriage, it may not set up regimes of censorship over it, *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, or encumber its flow by setting "administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail" to him.[2] *Lamont* v. *Postmaster General,* 381 U. S. 301, 306. Yet even first-class mail is not beyond the reach of all inspection; and the sole question here is whether the conditions for its detention and inspection had been satisfied. We think they had been.

The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of respondent who made the mailings in this border town certainly justified detention, without a warrant, while an investigation was made. The "protective search for weapons" of a suspect which the Court approved in *Terry* v. *Ohio,* 392 U. S. 1, 20–27, even when probable cause for an arrest did not exist, went further than we need go here. The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically—and it is theory only that respondent has on his side—detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment. Detention for 1½ hours—from 1:30 p. m. to 3 p. m.—for an investigation certainly was not excessive; and at the end of that time probable cause existed for believing that the California package was part of an illicit project. A warrant could have been obtained that

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[2] The question as to the right of the addressee to stop deliveries is a separate and distinct one. See No. 399, *Rowan* v. *Post Office, post,* p. 728.

day for the one package; yet the mystery of the other package remained unsolved and federal officials in Tennessee could not be reached because of the time differential. The next morning they were reached and it was learned that the second package was also probably part of an illicit project. By 4 p. m.—or 26½ hours after the mailing in Mt. Vernon—a search warrant was obtained in Seattle and at 6:30 p. m., or 29 hours after the mailing, the search warrant reached Mt. Vernon, a speedy transmission considering the rush-hour time of day and the congested highway.

No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

The rule of our decisions certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection. We only hold that on the facts of this case—the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle—a 29-hour delay between the mailings and the service of the warrant cannot be said to be "unreasonable" within the meaning of the Fourth Amendment. Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.

Reversed.

GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK *v.* KELLY ET AL.

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

No. 62. Argued October 13, 1969—Decided March 23, 1970

Appellees are New York City residents receiving financial aid under the federally assisted Aid to Families with Dependent Children program or under New York State's general Home Relief program who allege that officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the welfare officials that the combination of the existing post-termination "fair hearing" and informal pre-termination review was sufficient. *Held:*

1. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. Pp. 261–263.

2. The interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. Pp. 264–266.

3. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. Pp. 264, 266–271.

(a) Such hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decision maker. Pp. 266–270.

(b) Counsel need not be furnished at the pre-termination hearing, but the recipient must be allowed to retain an attorney if he so desires. P. 270.

(c) The decisionmaker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for his determination and indicate the evidence he relied on. P. 271.

(d) The decisionmaker must be impartial, and although prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as decision maker, he should not have participated in making the determination under review. P. 271.

294 F. Supp. 893, affirmed.

John J. Loflin, Jr., argued the cause for appellant. With him on the briefs were *J. Lee Rankin* and *Stanley Buchsbaum.*

Lee A. Albert argued the cause for appellees. With him on the brief were *Robert Borsody, Martin Garbus,* and *David Diamond.*

Briefs of *amici curiae* were filed by *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States, and by *Victor G. Rosenblum* and *Daniel Wm. Fessler* for the National Institute for Education in Law and Poverty.

Mr. Justice Brennan delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New

York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program.[1] Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law.[2] At the time

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[1] AFDC was established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601–610 (1964 ed. and Supp. IV). It is a categorical assistance program supported by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education, and Welfare. See N. Y. Social Welfare Law §§ 343–362 (1966). We considered other aspects of AFDC in *King* v. *Smith*, 392 U. S. 309 (1968), and in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

Home Relief is a general assistance program financed and administered solely by New York state and local governments. N. Y. Social Welfare Law §§ 157–165 (1966), since July 1, 1967, Social Services Law §§ 157–166. It assists any person unable to support himself or to secure support from other sources. *Id.*, § 158.

[2] Two suits were brought and consolidated in the District Court. The named plaintiffs were 20 in number, including intervenors. Fourteen had been or were about to be cut off from AFDC, and six from Home Relief. During the course of this litigation most, though not all, of the plaintiffs either received a "fair hearing" (see *infra*, at 259–260) or were restored to the rolls without a hearing. However, even in many of the cases where payments have been resumed, the underlying questions of eligibility that resulted in the bringing of this suit have not been resolved. For example, Mrs. Altagracia Guzman alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. The record shows that payments to Mrs. Guzman have not been terminated, but there is no indication that the basic dispute over her duty to cooperate has been resolved, or that the alleged danger of termination has been removed. Home Relief payments to Juan DeJesus were terminated because he refused to accept counseling and rehabilitation for drug addiction. Mr. DeJesus maintains that he

the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so according to a procedure that conforms to either subdivision (a) or subdivision (b) of § 351.26 of the regulations as amended.[3] The City of New York

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does not use drugs. His payments were restored the day after his complaint was filed. But there is nothing in the record to indicate that the underlying factual dispute in his case has been settled.

[3] The adoption in February 1968 and the amendment in April of Regulation § 351.26 coincided with or followed several revisions by the Department of Health, Education, and Welfare of its regulations implementing 42 U. S. C. § 602 (a)(4), which is the provision of the Social Security Act that requires a State to afford a "fair hearing" to any recipient of aid under a federally assisted program before termination of his aid becomes final. This requirement is satisfied by a post-termination "fair hearing" under regulations presently in effect. See HEW Handbook of Public Assistance Administration (hereafter HEW Handbook), pt. IV, §§ 6200–6400. A new HEW regulation, 34 Fed. Reg. 1144 (1969), now scheduled to take effect in July 1970, 34 Fed. Reg. 13595 (1969), would require continuation of AFDC payments until the final decision after a "fair hearing" and would give recipients a right to appointed counsel at "fair hearings." 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 1356 (1969). For the safeguards specified at such "fair hearings" see HEW Handbook, pt. IV, §§ 6200–6400. Another recent regulation now in effect requires a local agency administering AFDC to give "advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." *Id.*, pt. IV, § 2300 (d)(5). This case presents no issue of the validity or con-

elected to promulgate a local procedure according to subdivision (b). That subdivision, so far as here pertinent, provides that the local procedure must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that "[a]ssistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later."

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68–18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination

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struction of the federal regulations. It is only subdivision (b) of § 351.26 of the New York State regulations and implementing procedure 68–18 of New York City that pose the constitutional question before us. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 641 (1969). Even assuming that the constitutional question might be avoided in the context of AFDC by construction of the Social Security Act or of the present federal regulations thereunder, or by waiting for the new regulations to become effective, the question must be faced and decided in the context of New York's Home Relief program, to which the procedures also apply.

of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses.[4] However, the letter does inform the recipient that he may request a post-termination "fair hearing."[5] This is a proceeding before an inde-

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[4] These omissions contrast with the provisions of subdivision (a) of § 351.26, the validity of which is not at issue in this Court. That subdivision also requires written notification to the recipient at least seven days prior to the proposed effective date of the reasons for the proposed discontinuance or suspension. However, the notification must further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at a time and place indicated before the official identified in the notice, who will review his case with him and allow him to present such written and oral evidence as the recipient may have to demonstrate why aid should not be discontinued or suspended. The District Court assumed that subdivision (a) would be construed to afford rights of confrontation and cross-examination and a decision based solely on the record. 294 F. Supp. 893, 906–907 (1968).

[5] N. Y. Social Welfare Law § 353 (2) (1966) provides for a post-termination "fair hearing" pursuant to 42 U. S. C. § 602 (a) (4). See n. 3, *supra*. Although the District Court noted that HEW had raised some objections to the New York "fair hearing" procedures, 294 F. Supp., at 898 n. 9, these objections are not at issue in this Court. Shortly before this suit was filed, New York State adopted a similar provision for a "fair hearing" in ter-

pendent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld.[6] HEW Handbook, pt. IV, §§ 6200–6500; 18 NYCRR §§ 84.2–84.23. A recipient whose aid is not restored by a "fair hearing" decision may have judicial review. N. Y. Civil Practice Law and Rules, Art. 78 (1963). The recipient is so notified, 18 NYCRR § 84.16.

I

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits.[7] The District Court held

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minations of Home Relief. 18 NYCRR §§ 84.2–84.23. In both AFDC and Home Relief the "fair hearing" must be held within 10 working days of the request, § 84.6, with decision within 12 working days thereafter, § 84.15. It was conceded in oral argument that these time limits are not in fact observed.

[6] Current HEW regulations require the States to make full retroactive payments (with federal matching funds) whenever a "fair hearing" results in a reversal of a termination of assistance. HEW Handbook, pt. IV, §§ 6200 (k), 6300 (g), 6500 (a); see 18 NYCRR § 358.8. Under New York State regulations retroactive payments can also be made, with certain limitations, to correct an erroneous termination discovered before a "fair hearing" has been held. 18 NYCRR § 351.27. HEW regulations also authorize, but do not require, the States to continue AFDC payments without loss of federal matching funds pending completion of a "fair hearing." HEW Handbook, pt. IV, § 6500 (b). The new HEW regulations presently scheduled to become effective July 1, 1970, will supersede all of these provisions. See n. 3, *supra*.

[7] Appellant does not question the recipient's due process right to evidentiary review *after* termination. For a general discussion of the provision of an evidentiary hearing prior to termination, see Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich. L. Rev. 112 (1969).

that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims. The court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." *Kelly* v. *Wyman,* 294 F. Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance . . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Id.,* at 901. Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of New York appealed. We noted probable jurisdiction, 394 U. S. 971 (1969), to decide important issues that have been the subject of disagreement in principle between the three-judge court in the present case and that convened in *Wheeler* v. *Montgomery,* No. 14, *post,* p. 280, also decided today. We affirm.

Appellant does not contend that procedural due process is not applicable to the termination of welfare bene-

fits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert* v. *Verner,* 374 U. S. 398 (1963); or to denial of a tax exemption, *Speiser* v. *Randall,* 357 U. S. 513 (1958); or to discharge from public employment, *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956).[9] The extent to which procedural due process

[8] It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

"[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L. J. 733 (1964).

[9] See also *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); *Hornsby* v. *Allen,* 326 F. 2d 605

must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah* v. *Larche,* 363 U. S. 420, 440, 442 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.[10]

(C. A. 5th Cir. 1964) (right to obtain a retail liquor store license); *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (C. A. 5th Cir.), cert. denied, 368 U. S. 930 (1961) (right to attend a public college).

[10] One Court of Appeals has stated: "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *R. A. Holman & Co.* v. *SEC,* 112 U. S. App. D. C. 43, 47, 299 F. 2d 127, 131, cert. denied, 370 U. S. 911 (1962) (suspension of exemption from stock registration requirement). See also, for example, *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306 (1908) (seizure of food not fit for human use); *Yakus* v. *United States,* 321 U. S. 414 (1944) (adoption of wartime price regulations); *Gonzalez* v. *Freeman,* 118 U. S. App. D. C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government). In *Cafeteria & Restaurant Workers Union* v. *McElroy, supra,* at 896, summary dismissal of a public employee was upheld

But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.[11] Cf. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 239 (1967). Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[12]

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic

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because "[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control," and because the case involved the Government's "dispatch of its own internal affairs." Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

[11] Administrative determination that a person is ineligible for welfare may also render him ineligible for participation in state-financed medical programs. See N. Y. Social Welfare Law § 366 (1966).

[12] His impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility. See Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Ford. L. Rev. 604, 610–611 (1969).

commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.[13] This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

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[13] See, *e. g.*, Reich, *supra*, n. 8, 74 Yale L. J., at 1255.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 294 F. Supp., at 904–905.

II

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient

with a full administrative review.[14] Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 343 (1969) (HARLAN, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a

[14] Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a "fair" hearing there will be no need for a preliminary hearing.

proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.[15]

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient *per se,* although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the

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[15] This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. See *FCC* v. *WJR,* 337 U. S. 265, 275–277 (1949).

capacities and circumstances of those who are to be heard.[16] It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, pt. IV, § 6400 (a).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g., ICC* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93–94 (1913); *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103–104 (1963). What we said in

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[16] "[T]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have." Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 342 (1966).

Greene v. *McElroy,* 360 U. S. 474, 496–497 (1959), is particularly pertinent here:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell* v. *Alabama,* 287 U. S. 45, 68–69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the

interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 13595 (1969).

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co.* v. *PUC,* 301 U. S. 292 (1937); *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 288–289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co.* v. *PUC,* 260 U. S. 48, 57–59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. *In re Murchison,* 349 U. S. 133 (1955); *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 45–46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Affirmed.

[For dissenting opinion of MR. CHIEF JUSTICE BURGER, see *post,* p. 282.]

[For dissenting opinion of MR. JUSTICE STEWART, see *post,* p. 285.]

MR. JUSTICE BLACK, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most

affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter.[1] Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

The dilemma of the ever-increasing poor in the midst of constantly growing affluence presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such. It was largely to escape just such pressing economic problems and attendant government repression that people from Europe, Asia, and other areas settled this country and formed our Nation. Many of those settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers

[1] This figure includes all recipients of Old-age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, and general assistance. In this case appellants are AFDC and general assistance recipients. In New York State alone there are 951,000 AFDC recipients and 108,000 on general assistance. In the Nation as a whole the comparable figures are 6,080,000 and 391,000. U. S. Bureau of the Census, Statistical Abstract of the United States: 1969 (90th ed.), Table 435, p. 297.

within written boundaries, which eventually became written constitutions.[2] They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: "Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free." [3]

Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments—Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention.[4] In my

[2] The goal of a written constitution with fixed limits on governmental power had long been desired. Prior to our colonial constitutions, the closest man had come to realizing this goal was the political movement of the Levellers in England in the 1640's. J. Frank, The Levellers (1955). In 1647 the Levellers proposed the adoption of An Agreement of the People which set forth written limitations on the English Government. This proposal contained many of the ideas which later were incorporated in the constitutions of this Nation. *Id.*, at 135–147.

[3] This command is expressed in the Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] It was proposed that members of the judicial branch would sit on a Council of Revision which would consider legislation and have the power to veto it. This proposal was rejected. J. Elliot, 1 Elliot's Debates 160, 164, 214 (Journal of the Federal Convention); 395, 398 (Yates' Minutes); vol. 5, pp. 151, 164–166, 344–349 (Madison's Notes) (Lippincott ed. 1876). It was also suggested that The Chief Justice would serve as a member of the President's executive council, but this proposal was similarly rejected. *Id.*, vol. 5, pp. 442, 445, 446, 462.

judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. True, *Marbury* v. *Madison*, 1 Cranch 137 (1803), held, and properly, I think, that courts must be the final interpreters of the Constitution, and I recognize that the holding can provide an opportunity to slide imperceptibly into constitutional amendment and law making. But when federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.

The more than a million names on the relief rolls in New York,[5] and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing" even

[5] See n. 1, *supra*.

though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. Cf. *Adamson* v. *California*, 332 U. S. 46, 71–72, and n. 5 (1947) (dissenting opinion). The Court, however, relies upon the Fourteenth Amendment and in effect says that failure of the government to pay a promised charitable instalment to an individual deprives that individual of *his own property,* in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior

hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing "the recipient's interest in avoiding" the termination of welfare benefits against "the governmental interest in summary adjudication." *Ante*, at 263. Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude on their own to be unfair or shocking to them.[6] Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare

[6] I am aware that some feel that the process employed in reaching today's decision is not dependent on the individual views of the Justices involved, but is a mere objective search for the "collective conscience of mankind," but in my view that description is only a euphemism for an individual's judgment. Judges are as human as anyone and as likely as others to see the world through their own eyes and find the "collective conscience" remarkably similar to their own. Cf. *Griswold* v. *Connecticut*, 381 U. S. 479, 518–519 (1965) (BLACK, J., dissenting); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 350–351 (1969) (BLACK, J., dissenting).

laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document.[7] A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to

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[7] To realize how uncertain a standard of "fundamental fairness" would be, one has only to reflect for a moment on the possible disagreement if the "fairness" of the procedure in this case were propounded to the head of the National Welfare Rights Organization, the president of the national Chamber of Commerce, and the chairman of the John Birch Society.

another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an *eligible* recipient of the very means by which to live while he waits," *ante,* at 264, I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these

people are too poor to hire their own advocates. Cf. *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

WHEELER ET AL. *v.* MONTGOMERY, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE OF CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 14. Argued October 13, 1969—Decided March 23, 1970

In a class action brought by recipients of old age benefits who are subject to California welfare termination provisions, a three-judge District Court upheld the California pre-termination review procedure in welfare cases, though it does not afford the recipient an evidentiary hearing at which he may personally appear to offer oral evidence and confront adverse witnesses. *Held:* Procedural due process requires a pre-termination evidentiary hearing before welfare payments may be discontinued or suspended. *Goldberg* v. *Kelly, ante,* p. 254. Pp. 281–282.

296 F. Supp. 138, reversed.

Peter E. Sitkin argued the cause for appellants. With him on the briefs were *Steven J. Antler* and *Charles Stephen Ralston.*

Elizabeth Palmer, Deputy Attorney General of California, argued the cause for appellees. With her on the brief were *Thomas C. Lynch,* Attorney General, *Richard L. Mayers,* Deputy Attorney General, *Thomas M. O'Connor,* and *Raymond D. Williamson, Jr.*

Solicitor General Griswold, Assistant Attorney General Ruckelshaus, and *Robert V. Zener* filed a brief for the United States as *amicus curiae* urging affirmance. *Thomas L. Fike* filed a brief for the Legal Aid Society of Alameda County as *amicus curiae.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a companion case to No. 62, *Goldberg* v. *Kelly, ante,* p. 254. It is a class action brought by all recipients

of old age benefits who are subject to California welfare termination provisions. A three-judge District Court for the Northern District of California held that the California procedure for pre-termination review in welfare cases satisfies the requirements of the Due Process Clause, 296 F. Supp. 138 (1968), and we noted probable jurisdiction, 394 U. S. 970 (1969). This procedure requires notice to the recipient of the proposed discontinuance or suspension at least three days prior to its effective date, together with reasons for the intended action and a statement of what information or action is required to re-establish eligibility, advice that the recipient may meet his caseworker before his benefits are terminated "[t]o discuss the entire matter informally for purposes of clarification and, where possible, resolution," and assurance that there will be "prompt investigation" of the case and restoration of payments "as soon as there is eligibility" to receive them.* The procedure does not, how-

*California State Department of Social Welfare, Public Social Services Manual, Reg. 44–325 (effective April 1, 1968). The pertinent provisions of the regulation state:

".43 . . . The recipient . . . shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date . . . and in no case less than three . . . mail delivery days prior to the usual delivery date of the warrant . . . . The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. . . . Every notification shall include:

".431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility . . . .

".432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient . . . if he so desires . . . .

. . . . .

".434 A statement that the recipient . . . may have the opportunity to meet with his caseworker . . . in the county department, at

ever, afford the recipient an evidentiary hearing at which he may personally appear to offer oral evidence and confront and cross-examine the witnesses against him. In *Goldberg* v. *Kelly, supra,* decided today, we held that procedural due process requires such an evidentiary pretermination hearing before welfare payments may be discontinued or suspended. Accordingly, the judgment of the District Court must be and is reversed on the authority of *Goldberg* v. *Kelly.*

Reversed.

MR. JUSTICE BLACK, for the reasons set forth in his dissenting opinion in No. 62, *Goldberg* v. *Kelly, ante,* p. 271, dissents and would affirm the judgment below.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACK joins, dissenting.*

Although I agree in large part with MR. JUSTICE BLACK's views in No. 62, *Goldberg* v. *Kelly, ante,* p. 271, there are additional factors I wish to mention in dissent from today's unwise and precipitous constitutional holdings.

The procedures for review of administrative action in the "welfare" area are in a relatively early stage of development; HEW has already taken the initiative by promulgating regulations requiring that AFDC pay-

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a specified time, or during a given time period which shall not exceed three . . . working days, and the last day of which shall be at least one . . . day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient . . .

"(a) To learn the nature and extent of the information on which the withholding action is based;

"(b) To provide any explanation or information, including, but not limited to that described in the notification . . . ;

"(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution."

*[This opinion applies also to No. 62, *Goldberg* v. *Kelly, ante,* p. 254.]

ments be continued until a final decision after a "fair hearing" is held.[1] The net effect would be to provide a hearing prior to a termination of benefits. Indeed, the HEW administrative regulations go far beyond the result reached today since they require that recipients be given the right to appointed counsel,[2] a position expressly rejected by the majority. As the majority notes, see *ante,* at 257 n. 3, these regulations are scheduled to take effect in July 1970. Against this background I am baffled as to why we should engage in "legislating" via constitutional fiat when an apparently reasonable result has been accomplished administratively.

That HEW has already adopted such regulations suggests to me that we ought to hold the heavy hand of constitutional adjudication and allow evolutionary processes at various administrative levels to develop, given their flexibility to make adjustments in procedure without long delays. This would permit orderly development of procedural solutions, aided as they would be by expert guidance available within federal agencies which have an overview of the entire problem in the 50 States. I cannot accept—indeed I reject—any notion that a government which pays out billions of dollars to nearly nine million welfare recipients is heartless, insensitive, or indifferent to the legitimate needs of the poor.

The Court's action today seems another manifestation of the now familiar constitutionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the invitation to find a constitutionally "rooted" remedy. If no provision is explicit on the point, it is then seen as "implicit" or commanded by the vague and nebulous concept of "fairness."

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[1] 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969).

[2] 45 CFR § 220.25, 34 Fed. Reg. 1356 (1969). See also HEW Handbook, pt. IV, §§ 2300 (d) (5), 6200–6400.

I can share the impatience of all who seek instant solutions; there is a great temptation in this area to frame remedies that seem fair and can be mandated forthwith as against administrative or congressional action that calls for careful and extended study. That is thought too slow. But, however cumbersome or glacial, this is the procedure the Constitution contemplated.

I would not suggest that the procedures of administering the Nation's complex welfare programs are beyond the reach of courts, but I would wait until more is known about the problems before fashioning solutions in the rigidity of a constitutional holding.

By allowing the administrators to deal with these problems we leave room for adjustments if, for example, it is found that a particular hearing process is too costly. The history of the complexity of the administrative process followed by judicial review as we have seen it for the past 30 years should suggest the possibility that new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing, and other living essentials.[3]

Aside from the administrative morass that today's decision could well create, the Court should also be cognizant of the legal precedent it may be setting. The majority holding raises intriguing possibilities concerning the right to a hearing at other stages in the welfare process which affect the total sum of assistance, even though the action taken might fall short of complete termination. For example, does the Court's holding

[3] We are told, for example, that Los Angeles County alone employs 12,500 welfare workers to process grants to 500,000 people under various welfare programs. The record does not reveal how many more employees will be required to give this newly discovered "due process" to every welfare recipient whose payments are terminated for fraud or other factors of ineligibility or those whose initial applications are denied.

embrace welfare reductions or denial of increases as opposed to terminations, or decisions concerning initial applications or requests for special assistance? The Court supplies no distinguishable considerations and leaves these crucial questions unanswered.

MR. JUSTICE STEWART, dissenting.*

Although the question is for me a close one, I do not believe that the procedures that New York and California now follow in terminating welfare payments are violative of the United States Constitution. See *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 894–897.

*[This opinion applies also to No. 62, *Goldberg* v. *Kelly*, *ante*, p. 254.]

UNITED STATES *v.* ESTATE OF DONNELLY ET AL.

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

No. 104. Argued January 12, 1970—
Decided March 23, 1970

Respondents Carlson made a bona fide purchase in 1960 of realty in Livingston County, Michigan, from one Donnelly against whom the Government had acquired a tax lien in 1950. Section 3672 of the Internal Revenue Code of 1939 provided that a federal tax lien became valid against a subsequent purchaser if notice of the lien had been filed (1) in a state office in which the filing of such notice was "authorized" by state law or (2) in the federal district court for the district where the property was located, if filing in a state office was not thus "authorized." Concluding that the state law, which imposed a more onerous requirement of content than federal law, did not "authorize" filing the federal notice with the state office within the meaning of § 3672, the federal tax authorities filed notice of the lien on the Livingston County land in the appropriate district court. The Government brought this action in 1966 to foreclose the tax lien on that property. The District Court granted summary judgment for the Carlsons against the Government's contention that the case was controlled by *United States* v. *Union Central Life Ins. Co.*, 368 U. S. 291 (1961), which held that the Michigan statute did not "authorize" the state filing of federal lien notices and that filing in the appropriate federal district court sufficed to give a lien priority over subsequent purchasers. The District Court held that *Union Central* should not be applied retroactively against a good-faith purchase antedating that decision since at the time of their purchase the Carlsons could have assumed from previous federal court decisions that the Michigan statute applied to the filing of federal tax lien notices. The Court of Appeals affirmed. *Held:* The Government's tax lien was properly filed in the District Court and was thus entitled to priority. Any reliance that the Carlsons may have placed on the lower courts' construction of § 3672 which the Government had never accepted and which this Court rejected in *United States* v. *Union Central Life Ins. Co.*,

supra, would not, on the facts of this case, foreclose applicability of that decision here. *Chicot Drainage District* v. *Baxter State Bank,* 308 U. S. 371, distinguished. Pp. 290–295.

406 F. 2d 1065, reversed and remanded.

Matthew J. Zinn argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Walters, Joseph J. Connolly,* and *Crombie J. D. Garrett.*

Daniel N. Pevos argued the cause and filed a brief for respondents.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In 1950, a tax liability of approximately $26,000 was assessed against the taxpayer Donnelly, a resident of Michigan. Upon assessment, a statutory lien was created in favor of the United States "upon all property and rights to property, whether real or personal" belonging to the taxpayer. Internal Revenue Code of 1939, § 3670. Under § 3672 of the 1939 Code, such a lien could become effective against subsequent purchasers of Donnelly's property in either of two ways: (1) by filing notice of the lien in the state office in which filing of such notice was authorized by state law; or (2) if filing in a state office was not authorized by state law, by filing notice of the lien in the United States District Court for the district in which the property was located.[1]

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[1] The Internal Revenue Code of 1939 provided:

"Sec. 3670. Property Subject to Lien.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real

A Michigan statute purported to authorize the filing of federal tax lien notices with the county register of deeds. However, the Michigan statute expressly required that notices of federal tax liens upon real property contain "a description of the land upon which a lien is claimed." [2] The standard tax lien notice form used by

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or personal, belonging to such person." 26 U. S. C. § 3670 (1940 ed.).

"Sec. 3672. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

"(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

"(1) *Under State or Territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

"(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory . . . ." 26 U. S. C. § 3672 (1946 ed.).

[2] Michigan Public Acts, 1923, No. 104, as amended by Michigan Public Acts, 1925, No. 13, repealed by Michigan Public Acts, 1956, No. 107, provided in pertinent part:

"Sec. 1. That whenever the collector of internal revenue for any district in the United States, or any tax collecting officers of the United States having charge of the collection of any tax payable to the United States, shall desire to acquire a lien in favor of the United States for any tax payable to the United States against any property real or personal, within the state of Michigan pursuant to section three thousand one hundred eighty-six of the revised statutes of the United States, he is hereby authorized to file a notice of lien, setting forth the name and the residence or business address of such taxpayer, the nature and the amount of such assessment, and a description of the land upon which a lien is claimed, in the office of the register of deeds in and for the county or counties in Michigan in which such property subject to such lien is situated; and such register of deeds shall, upon receiving a filing fee of fifty cents for such notice, file and index the same . . . ."

the Treasury Department made no provision for such a description, but was rather a blanket notice covering all property of the taxpayer in the county. The Department had taken the position that § 3672 permitted state law to dictate the place for filing the notice of lien, but not the form or content of the notice. Accordingly, the Department, believing that state law did not "authorize" filing of the standard federal notice with the register of deeds, filed its notice of lien on Donnelly's property in the United States District Court for the Eastern District of Michigan. The Eastern District includes the land involved in the case, which was held by Donnelly and his wife as tenants by the entirety. The question is whether the filing in federal court gave the United States priority against a subsequent good-faith purchaser of Donnelly's land.

The Department did not collect in full on Donnelly's tax liability nor did it foreclose its lien on any of his property. Rather, between 1950 and his death in 1963, it obtained waivers from him of the statute of limitations on the assessed liability, the last of which extended the time for collection to December 31, 1966. In the meantime, Donnelly's wife died and he became fee owner of the Livingston County land. Shortly thereafter, in August 1960, he sold the land to respondents Mr. and Mrs. Carlson, who are the real parties in interest in this case. An abstract of title, prepared for the Carlsons by the Livingston County abstract office, disclosed no tax liens affecting real property owned by Donnelly; the same abstract, however, disclaimed any examination of court records, state or federal. The United States concedes that the Carlsons had no actual notice of the lien on Donnelly's land.

After the Carlsons purchased the land, this Court decided in *United States* v. *Union Central Life Ins. Co.*, 368 U. S. 291 (1961), that the Department had been right in maintaining that it did not have to conform its

lien notices to the Michigan requirement that such notices must contain a description of the land upon which the lien is claimed. Thus, this Court held, the state law did not "authorize" state filing of federal lien notices, and the filing of a notice in the appropriate federal district court was sufficient to give the lien priority against subsequent purchasers.

In 1966, just before the last statutory waiver executed by Donnelly expired, the United States brought suit in federal court to foreclose its tax lien on the Livingston County property, now owned by the Carlsons. The District Court held that *Union Central, supra,* was distinguishable, and in any event should not be applied retroactively against a person making a good-faith purchase before its date of decision, and granted summary judgment for the Carlsons. 295 F. Supp. 557 (D. C. E. D. Mich. 1967). The Court of Appeals affirmed on the basis of the opinion of the District Court. 406 F. 2d 1065 (C. A. 6th Cir. 1969). We granted certiorari, 396 U. S. 814 (1969), to consider the apparent conflict with our decision in *Union Central, supra,* and we reverse.

The District Court distinguished *Union Central* on the ground that "an attempt had been made in [that case] to file notice with the Register of Deeds in 1954, which had been refused by the Register of Deeds pursuant to a Michigan Attorney General opinion rendered in 1953, which ruled that federal tax lien notices not containing a description of the property are not entitled to be recorded. In the instant case, there had been no attempt to file with the Register of Deeds." 295 F. Supp., at 559.

The attempted distinction is unsatisfactory for two reasons. First, nothing in this Court's opinion in *Union Central* or in the record of that case indicates that any attempt was made to file the notice of lien with the register of deeds. Second, whether or not such an attempt was made, state law barred the local office from

accepting the federal lien notice, which lacked the description of the land explicitly required by the state statute. The presence or absence of the legally futile act of tendering the noncomplying lien notice to the register of deeds could not be a factor determinative of the priority to be granted the federal lien.[3]

Further, the District Court held that when the Carlsons purchased Donnelly's land in 1960, they were entitled to rely on the law as it appeared at that time. As the court saw it, the prevailing interpretation of the federal statute in Michigan, stated in *Youngblood* v. *United States,* 141 F. 2d 912 (C. A. 6th Cir. 1944), required the Treasury Department to file a complying notice of lien with the register of deeds in order to gain priority against subsequent purchasers. Conceding that this Court rejected the *Youngblood* interpretation in its *Union Central* decision in 1961, the District Court nevertheless concluded that *Union Central* should not be applied retroactively to give the 1950 federal lien priority over the Carlsons' 1960 good-faith purchase of the same land, and thus to upset the Carlsons' allegedly justifiable expectation of unclouded title.

In its retroactivity determination, the District Court relied largely on this Court's decision in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371 (1940). The petitioner in that case had taken advantage of a federal statute that permitted readjustment of municipal debt, amounting to a reduction of that debt, upon a finding by a district court that the readjustment plan was fair and equitable and upon approval of the

[3] Nor is it significant that the lien notice here was filed in 1950, before the Michigan Attorney General's opinion referred to by the District Court (opinion of the Attorney General of Michigan, No. 1709, September 10, 1953), whereas the filing in *Union Central* came in 1954, after that opinion was rendered. The Attorney General's opinion merely declared what was already the law of Michigan.

plan by holders of two-thirds of the outstanding indebtedness. The respondents, holders of bonds issued by the petitioner, had been parties to that action, had raised no constitutional challenge to the statute, and had not appealed the final decree of the District Court approving the plan. Subsequently, in an unrelated proceeding, the statute was declared unconstitutional. *Ashton* v. *Cameron County District,* 298 U. S. 513 (1936). The respondents then brought suit on the original bonds, which had been canceled by the original decree, claiming that a decree obtained under an unconstitutional statute could not support a plea of *res judicata.* This Court held that *res judicata* barred the new action, stressing the fact that the respondents had not raised the constitutional claim in the original action. The Court noted generally that the actual existence of a statute, prior to determination of its unconstitutionality

> "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." 308 U. S., at 374.

The District Court here found that this Court's decision in *Union Central* amounted to an invalidation of the Michigan statute providing for local filing of federal tax lien notices, and that the Carlsons had justifiably relied upon the state statute, prior to its invalidation, in purchasing Donnelly's property without first searching the records of the federal court. Quoting the above language from *Chicot County* the court held that the Carlsons' reliance on the subsequently invalidated statute

was sufficient to give them priority over the earlier filed tax lien.

In our view, *Chicot County* does not support failure to apply *Union Central* here. In the first place, the *Union Central* decision did not invalidate any statute, state or federal. It merely construed § 3672, in accordance with the clear language of the statute, to authorize the filing of tax lien notices in federal court where the state law failed to provide for local filing. It determined, as the courts and other authorities who had considered the question had all agreed, that Michigan law did not authorize the filing of the standard federal lien notice, which lacked the description of the land required by the Michigan filing statute. Finally it held, in accordance with the will of Congress as expressed in the 1942 amendment to § 3672 and the accompanying legislative history, that state law imposing more onerous requirements of content on lien notices than federal law did not "authorize" state filing within the meaning of the federal statute.

Thus, the Carlsons did not rely on any statute subsequently declared unconstitutional by this Court. The most that can be said is that they may have failed to search for notices of tax lien in the federal court on the basis of a construction of § 3672 given by the Court of Appeals for the Sixth Circuit in *Youngblood* v. *United States, supra.* However, the *Youngblood* construction, which the Government never accepted and which it could not seek to have reviewed in this Court because the judgment in that case rested on independent grounds,[4] cannot be sufficient to deprive the Government

[4] In *Youngblood,* the United States sought an order in the nature of a writ of mandamus to compel a county register of deeds in Michigan to accept and file a standard federal lien notice, which lacked the description of the encumbered land required by the state statute. The Court of Appeals held that the order should not issue,

of the fruits of following what under the statute was the proper filing procedure.

Further, in *Chicot County* the petitioner did not merely rely on a federal statute later declared unconstitutional, but on a final judgment rendered in his favor in a proceeding in which the respondent did not even raise the constitutional issue. The analogous situation would be presented here only if the Carlsons had, before the decision in *Union Central,* obtained a decree of quiet title to their property in a proceeding to which the United States was a party and in which the United States had not raised the issue of the priority of its lien under § 3672. In short, this case lacks the element of *res judicata*—reliance by a party on a final judgment rendered in his favor—which was the decisive factor in *Chicot County*.

Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. Generally the United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment

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first, because United States district courts lack jurisdiction to issue original writs of mandamus or orders in the nature of mandamus; and second, because the law of Michigan clearly provided in terms that in order to be filed with the register of deeds, a federal tax lien notice had to contain a description of the land. The court went on, in apparent dictum, to confirm its earlier holding in *United States* v. *Maniaci,* 116 F. 2d 935 (1940), aff'g 36 F. Supp. 293 (D. C. W. D. Mich. 1939), that § 3672 required the United States to file in the local office lien notices conforming to the state law requirements as to content. In delivering this apparent dictum, the Court of Appeals ignored the clear legislative history, summarized in this Court's *Union Central* decision, 368 U. S., at 295–296, which showed that in enacting the 1942 amendment to § 3672, Congress had meant to disapprove the *Maniaci* holding.

in a particular case. Deviant rulings by circuit courts of appeals, particularly in apparent dictum, cannot generally provide the "justified reliance" necessary to warrant withholding retroactive application of a decision construing a statute as Congress intended it. In rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute, cf. *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 25 (1964), but this is not such a case.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings[5] not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I fully agree that the Government is entitled to prevail in this case, but I would rest that conclusion on a broader ground than the Court's opinion might be taken to evince. More especially, I fear that certain distinctions suggested by the Court's opinion—*e. g.*, between clear and ambiguous statutes, decisions construing statutes for the first time, decisions overruling prior constructions of statutes—may point in the direction of a retroactivity quagmire in civil litigation not unlike that in which the Court has become ensnared in the criminal field. See my dissenting opinion in *Desist* v. *United States*, 394 U. S. 244, 256 (1969).

The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet

[5] The Carlsons have raised additional defenses to the foreclosure suit brought by the United States, but as these defenses were not considered by the District Court or the Court of Appeals, we do not rule on them here.

once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, *supra,* so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata.* Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life.

These considerations, I believe, underlie the Court's holdings in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371 (1940), where the Court refused to upset a *judgment* based on a subsequent change in the law, and *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), where we held that municipal bonds, authorized by invalid referenda, would not be subject to challenge "where, under state law, the time for challenging the election result has . . . expired." 395 U. S., at 706.

To the extent that equitable considerations, for example, "reliance," are relevant, I would take this into account in the determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds him-

self able to avoid a once-valid contract under new notions of public policy. Cf. *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 25 (1964). Another instance, though apt to arise infrequently in federal court, would be where certain real property transactions fail to anticipate changes in principles governing land usage, for example, the enforceability of certain kinds of easements or covenants. In such instances it may be appropriate to withhold an equitable remedy and confine an award of damages to a limited period, or the like.* The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them.

On these premises I join the Court's opinion.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

Respondents are bona fide purchasers of real property located in Livingston County, Michigan. Their purchase was made in August 1960 from one Donnelly, against whom the United States had acquired a tax lien in 1950. By § 3672 of the Internal Revenue Code of 1939 that lien is not valid against a purchaser until notice thereof is filed in the office "authorized" by state law. Where state law "authorized" no such office, notice of lien was to be filed in the office of the United States District Court for the judicial district in which the land is located. *Ibid.* Michigan law authorized notice of a federal tax lien containing "a description of the land"

*I would not, of course, hold this view of retroactivity binding on state courts and a federal court would, in fact, be obligated to abide by the applicable state rule should a retroactivity question arise in a diversity case.

to be filed with the register of deeds in the county where the land was located.[1]

The United States refused to be bound by the requirement of Michigan law regarding a "description of the land" and filed notice of lien in the District Court.

Hence a title search in the accustomed way revealed no notice of lien clouding Donnelly's title. Hence respondents purchased the land innocently and in good faith. Thereafter, on March 20, 1961, the United States filed its notice of lien with the register of deeds of Livingston County, as required by Michigan law.[2]

On December 18, 1961, over a year after respondents' purchase, this Court held in *United States* v. *Union Central Life Ins. Co.*, 368 U. S. 291, that "Michigan law authorizing filing only if a description of the property was given" ran counter to the intent of § 3672, and consequently no real property filing requirement could be considered "authorized" by Michigan law. *Id.*, at 296. Therefore, the Court held, a notice of lien was properly filed in the District Court.

I dissent from a retroactive application of that holding so as to injure bona fide purchasers who had relied on the prior law to make their investments. The Michigan Act had at the time of the purchase been approved both by the District Court in *United States* v. *Maniaci*, 36 F. Supp. 293, and by the Court of Appeals for the Sixth Circuit in *Youngblood* v. *United States*, 141 F. 2d 912.

It seems manifestly unjust to deprive respondents of their property for the benefit of a lawless tax collector

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[1] Michigan Public Acts, 1923, No. 104, as amended, Michigan Public Acts, 1925, No. 13.

[2] Previously, on November 28, 1950, the United States had filed notice of its lien with the register of deeds of Wayne County.

who knowingly concealed his secret lien until after the purchase was made.[3]

It is true that later, in *Union Central,* we ruled that § 3672 did not require the Government to file pursuant to Michigan law. Yet this new ruling on federal preemption should not, in my view, be applied to undo everything done by those relying on the former construction, as upheld in *Youngblood.*

I would hold that the teaching of *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 374, as to statutes ruled unconstitutional, should be applied to the present situation:

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."

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[3] The Michigan statute requiring notices of liens to contain a description of real property upon which a lien was claimed was repealed in April 1956 by Act No. 107, Michigan Public Acts, 1956. The United States, however, did not thereafter promptly file its notice of lien in the state office as it was now authorized to do under Michigan law. Nor did it stand on its previous filing in the District Court. Instead, it waited until March 20, 1961, on which date it filed a notice of the lien with the register of deeds of Livingston County.

The majority of the Court in the present case narrowly confines that statement to the particular facts involved in *Chicot County*. The principle there involved, however, rooted deeply in considerations of fairness, clearly applies to the present case. I would hold that bona fide purchasers, whose purchases antedate our *Union Central* decision and who relied on the law as it had been previously construed, are protected in their investments. I dissent from the Court's holding to the contrary.

Syllabus

UNITED STATES *v.* DAVIS ET UX.

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

No. 282. Argued January 12, 1970—Decided March 23, 1970

Taxpayer organized a corporation with one Bradley who received 500 shares of common stock (later sold to taxpayer and divided between two of his children), taxpayer and his wife each receiving 250 shares. To increase the company's working capital and qualify for an RFC loan, taxpayer bought 1,000 shares of preferred stock, at a par value of $25 per share, which the company (in accordance with the original understanding) redeemed when the loan was paid. Taxpayer treated the transaction for income tax purposes as a sale of preferred stock, resulting in no gain to him since the stock's basis was $25,000. The Commissioner of Internal Revenue determined that the distribution of that sum was essentially equivalent to a dividend and reportable as ordinary income under §§ 301 and 316 of the Internal Revenue Code of 1954. That determination was premised on the Commissioner's finding that, by reason of the rules of attribution in § 318 (a) of the Code (under which a taxpayer is considered to own the stock owned by his spouse and children), the taxpayer here must be deemed the owner of all the company's stock immediately before and after the redemption. The taxpayer paid the resulting deficiency and brought this suit for a refund. The District Court ruled in the taxpayer's favor. The Court of Appeals affirmed, holding that the $25,000 received by the taxpayer was the final step in a course of action with a legitimate business purpose and thus "not essentially equivalent to a dividend" within the meaning of § 302 (b) (1) of the Code, which qualified the distribution as a "payment in exchange for the stock" and entitled it to capital gains rather than ordinary income treatment under § 302 (a). Taxpayer contends that the attribution rules do not apply for the purpose of § 302 (b) (1); that he should be considered to own only 25 percent of the corporation's common stock; and that the distribution would qualify under § 302 (b) (1) since it was not proportionate to his stock interest, the fundamental test of dividend equivalency. *Held:*

1. The attribution rules of § 318 (a) apply to all of § 302, and for the purpose of deciding whether the distribution here is

"not essentially equivalent to a dividend" under § 302 (b)(1), taxpayer must be deemed the owner of all 1,000 shares of the company's common stock. Pp. 304–307.

2. Regardless of business purpose, a redemption is always "essentially equivalent to a dividend" within the meaning of § 302 (b)(1) if it does not change the shareholder's proportionate interest in the corporation. Since taxpayer here (after application of the attribution rules) was the corporation's sole shareholder both before and after the redemption he did not qualify for capital gains treatment under that test. Pp. 307–313.

408 F. 2d 1139, reversed and remanded.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Walters, Matthew J. Zinn,* and *William L. Goldman.*

William Waller argued the cause for respondents. With him on the brief was *Robert G. McCullough.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In 1945, taxpayer [1] and E. B. Bradley organized a corporation. In exchange for property transferred to the new company, Bradley received 500 shares of common stock, and taxpayer and his wife similarly each received 250 such shares. Shortly thereafter, taxpayer made an additional contribution to the corporation, purchasing 1,000 shares of preferred stock at a par value of $25 per share.

The purpose of this latter transaction was to increase the company's working capital and thereby to qualify for a loan previously negotiated through the Reconstruction Finance Corporation. It was understood that the corporation would redeem the preferred stock when

[1] References in this opinion to "taxpayer" are to Maclin P. Davis. His wife is a party solely because joint returns were filed for the year in question.

the RFC loan had been repaid. Although in the interim taxpayer bought Bradley's 500 shares and divided them between his son and daughter, the total capitalization of the company remained the same until 1963. That year, after the loan was fully repaid and in accordance with the original understanding, the company redeemed taxpayer's preferred stock.

In his 1963 personal income tax return taxpayer did not report the $25,000 received by him upon the redemption of his preferred stock as income. Rather, taxpayer considered the redemption as a sale of his preferred stock to the company—a capital gains transaction under § 302 of the Internal Revenue Code of 1954 resulting in no tax since taxpayer's basis in the stock equaled the amount he received for it. The Commissioner of Internal Revenue, however, did not approve this tax treatment. According to the Commissioner, the redemption of taxpayer's stock was essentially equivalent to a dividend and was thus taxable as ordinary income under §§ 301 and 316 of the Code. Taxpayer paid the resulting deficiency and brought this suit for a refund. The District Court ruled in his favor, 274 F. Supp. 466 (D. C. M. D. Tenn. 1967), and on appeal the Court of Appeals affirmed. 408 F. 2d 1139 (C. A. 6th Cir. 1969).

The Court of Appeals held that the $25,000 received by taxpayer was "not essentially equivalent to a dividend" within the meaning of that phrase in § 302 (b)(1) of the Code because the redemption was the final step in a course of action that had a legitimate business (as opposed to a tax avoidance) purpose. That holding represents only one of a variety of treatments accorded similar transactions under § 302 (b)(1) in the circuit courts of appeals.[2] We granted certiorari, 396 U. S. 815 (1969),

[2] Only the Second Circuit has unequivocally adopted the Commissioner's view and held irrelevant the motivation of the redemption. See *Levin* v. *Commissioner,* 385 F. 2d 521 (1967); *Hasbrook*

in order to resolve this recurring tax question involving stock redemptions by closely held corporations. We reverse.

I

The Internal Revenue Code of 1954 provides generally in §§ 301 and 316 for the tax treatment of distributions by a corporation to its shareholders; under those provisions, a distribution is includable in a taxpayer's gross income as a dividend out of earnings and profits to the extent such earnings exist.[3] There are exceptions to the application of these general provisions, however, and among them are those found in § 302 involving certain distributions for redeemed stock. The basic question in this case is whether the $25,000 distribution by the corporation to taxpayer falls under that section—more specifically, whether its legitimate business motivation qualifies the distribution under § 302 (b)(1) of the Code.

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v. *United States*, 343 F. 2d 811 (1965). The First Circuit, however, seems almost to have come to that conclusion, too. Compare *Wiseman* v. *United States*, 371 F. 2d 816 (1967), with *Bradbury* v. *Commissioner*, 298 F. 2d 111 (1962).

The other courts of appeals that have passed on the question are apparently willing to give at least some weight under § 302 (b)(1) to the business motivation of a distribution and redemption. See, *e. g.*, *Commissioner* v. *Berenbaum*, 369 F. 2d 337 (C. A. 10th Cir. 1966); *Kerr* v. *Commissioner*, 326 F. 2d 225 (C. A. 9th Cir. 1964); *Ballenger* v. *United States*, 301 F. 2d 192 (C. A. 4th Cir. 1962); *Heman* v. *Commissioner*, 283 F. 2d 227 (C. A. 8th Cir. 1960); *United States* v. *Fewell*, 255 F. 2d 496 (C. A. 5th Cir. 1958). See also *Neff* v. *United States*, 157 Ct. Cl. 322, 305 F. 2d 455 (1962). Even among those courts that consider business purpose, however, it is generally required that the business purpose be related, not to the issuance of the stock, but to the redemption of it. See *Commissioner* v. *Berenbaum*, *supra*; *Ballenger* v. *United States*, *supra*.

[3] See, *e. g.*, *Commissioner* v. *Gordon*, 391 U. S. 83, 88–89 (1968). Taxpayer makes no contention that the corporation did not have $25,000 in accumulated earnings and profits.

Preliminarily, however, we must consider the relationship between § 302 (b)(1) and the rules regarding the attribution of stock ownership found in § 318 (a) of the Code.

Under subsection (a) of § 302, a distribution is treated as "payment in exchange for the stock," thus qualifying for capital gains rather than ordinary income treatment, if the conditions contained in any one of the four paragraphs of subsection (b) are met. In addition to paragraph (1)'s "not essentially equivalent to a dividend" test, capital gains treatment is available where (2) the taxpayer's voting strength is substantially diminished, (3) his interest in the company is completely terminated, or (4) certain railroad stock is redeemed. Paragraph (4) is not involved here, and taxpayer admits that paragraphs (2) and (3) do not apply. Moreover, taxpayer agrees that for the purposes of §§ 302 (b)(2) and (3) the attribution rules of § 318 (a) apply and he is considered to own the 750 outstanding shares of common stock held by his wife and children in addition to the 250 shares in his own name.[4]

Taxpayer, however, argues that the attribution rules do not apply in considering whether a distribution is essentially equivalent to a dividend under § 302 (b)(1).

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[4] Section 318 (a) provides in relevant part as follows:

"General rule.—For purposes of those provisions of this subchapter to which the rules contained in this section are expressly made applicable—

"(1) Members of family.—

"(A) In general.—An individual shall be considered as owning the stock owned, directly or indirectly, by or for—

"(i) his spouse (other than a spouse who is legally separated from the individual under a decree of divorce or separate maintenance), and

"(ii) his children, grandchildren, and parents."

In § 318 (b) the rules contained in subsection (a) are made specifically applicable to "section 302 (relating to redemption of stock)."

According to taxpayer, he should thus be considered to own only 25 percent of the corporation's common stock, and the distribution would then qualify under § 302 (b)(1) since it was not pro rata or proportionate to his stock interest, the fundamental test of dividend equivalency. See Treas. Reg. 1.302–2 (b). However, the plain language of the statute compels rejection of the argument. In subsection (c) of § 302, the attribution rules are made specifically applicable "in determining the ownership of stock for purposes of this section." Applying this language, both courts below held that § 318 (a) applies to all of § 302, including § 302 (b)(1)—a view in accord with the decisions of the other courts of appeals,[5] a longstanding treasury regulation,[6] and the opinion of the leading commentators.[7]

Against this weight of authority, taxpayer argues that the result under paragraph (1) should be different because there is no explicit reference to stock ownership as there is in paragraphs (2) and (3). Neither that fact, however, nor the purpose and history of § 302 (b)(1) support taxpayer's argument. The attribution rules—designed to provide a clear answer to what would otherwise be a difficult tax question—formed part of the tax bill that was subsequently enacted as the 1954 Code. As is discussed further, *infra*, the bill as passed by the House of Representatives contained no provision comparable to § 302 (b)(1). When that provision was added in the Senate, no purpose was evidenced to restrict the applicability of § 318 (a). Rather, the attribution rules

[5] See *Levin* v. *Commissioner*, 385 F. 2d 521, 526–527 (C. A. 2d Cir. 1967); *Commissioner* v. *Berenbaum*, 369 F. 2d 337, 342 (C. A. 10th Cir. 1966); *Ballenger* v. *United States*, 301 F. 2d 192, 199 (C. A. 4th Cir. 1962); *Bradbury* v. *Commissioner*, 298 F. 2d 111, 116–117 (C. A. 1st Cir. 1962).

[6] See Treas. Reg. 1.302–2 (b).

[7] See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 292 n. 32 (2d ed. 1966).

continued to be made specifically applicable to the entire section, and we believe that Congress intended that they be taken into account wherever ownership of stock was relevant.

Indeed, it was necessary that the attribution rules apply to § 302 (b)(1) unless they were to be effectively eliminated from consideration with regard to §§ 302 (b)(2) and (3) also. For if a transaction failed to qualify under one of those sections solely because of the attribution rules, it would according to taxpayer's argument nonetheless qualify under § 302 (b)(1). We cannot agree that Congress intended so to nullify its explicit directive. We conclude, therefore, that the attribution rules of § 318 (a) do apply; and, for the purposes of deciding whether a distribution is "not essentially equivalent to a dividend" under § 302 (b)(1), taxpayer must be deemed the owner of all 1,000 shares of the company's common stock.

II

After application of the stock ownership attribution rules, this case viewed most simply involves a sole stockholder who causes part of his shares to be redeemed by the corporation. We conclude that such a redemption is always "essentially equivalent to a dividend" within the meaning of that phrase in § 302 (b)(1) [8] and therefore do not reach the Government's alternative argument that in any event the distribution should not on the facts of this case qualify for capital gains treatment.[9]

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[8] Of course, this just means that a distribution in redemption to a sole shareholder will be treated under the general provisions of § 301, and it will only be taxed as a dividend under § 316 to the extent that there are earnings and profits.

[9] The Government argues that even if business purpose were relevant under § 302 (b)(1), the business purpose present here related only to the original investment and not at all to the necessity

The predecessor of § 302 (b)(1) came into the tax law as § 201 (d) of the Revenue Act of 1921, 42 Stat. 228:

> "A stock dividend shall not be subject to tax but if after the distribution of any such dividend the corporation proceeds to cancel or redeem its stock at such time and in such manner as to make the distribution and cancellation or redemption essentially equivalent to the distribution of a taxable dividend, the amount received in redemption or cancellation of the stock shall be treated as a taxable dividend . . . ."

Enacted in response to this Court's decision that pro rata stock dividends do not constitute taxable income, *Eisner* v. *Macomber,* 252 U. S. 189 (1920), the provision had the obvious purpose of preventing a corporation from avoiding dividend tax treatment by distributing earnings to its shareholders in two transactions—a pro rata stock dividend followed by a pro rata redemption—that would have the same economic consequences as a simple dividend. Congress, however, soon recognized that even without a prior stock dividend essentially the same result could be effected whereby any corporation, "especially one which has only a few stockholders, might be able to make a distribution to its stockholders which would have the same effect as a taxable dividend." H. R. Rep. No. 1, 69th Cong., 1st Sess., 5. In order to cover this situation, the law was amended to apply "(whether or not such stock was issued as a stock dividend)" whenever a distribution in redemption of stock was made "at such time and in such manner" that it was essentially equiv-

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for redemption. See cases cited, n. 2, *supra.* Under either view, taxpayer does not lose his basis in the preferred stock. Under Treas. Reg. 1.302–2 (c) that basis is applied to taxpayer's common stock.

alent to a taxable dividend. Revenue Act of 1926, § 201 (g), 44 Stat. 11.

This provision of the 1926 Act was carried forward in each subsequent revenue act and finally became § 115 (g)(1) of the Internal Revenue Code of 1939. Unfortunately, however, the policies encompassed within the general language of § 115 (g)(1) and its predecessors were not clear, and there resulted much confusion in the tax law. At first, courts assumed that the provision was aimed at tax avoidance schemes and sought only to determine whether such a scheme existed. See, *e. g.*, *Commissioner* v. *Quackenbos,* 78 F. 2d 156 (C. A. 2d Cir. 1935). Although later the emphasis changed and the focus was more on the effect of the distribution, many courts continued to find that distributions otherwise like a dividend were not "essentially equivalent" if, for example, they were motivated by a sufficiently strong nontax business purpose. See cases cited n. 2, *supra.* There was general disagreement, however, about what would qualify as such a purpose, and the result was a case-by-case determination with each case decided "on the basis of the particular facts of the transaction in question." *Bains* v. *United States,* 153 Ct. Cl. 599, 603, 289 F. 2d 644, 646 (1961).

By the time of the general revision resulting in the Internal Revenue Code of 1954, the draftsmen were faced with what has aptly been described as "the morass created by the decisions." *Ballenger* v. *United States,* 301 F. 2d 192, 196 (C. A. 4th Cir. 1962). In an effort to eliminate "the considerable confusion which exists in this area" and thereby to facilitate tax planning, H. R. Rep. No. 1337, 83d Cong., 2d Sess., 35, the authors of the new Code sought to provide objective tests to govern the tax consequences of stock redemptions. Thus, the tax bill passed by the House of Representa-

tives contained no "essentially equivalent" language. Rather, it provided for "safe harbors" where capital gains treatment would be accorded to corporate redemptions that met the conditions now found in §§ 302 (b)(2) and (3) of the Code.

It was in the Senate Finance Committee's consideration of the tax bill that § 302 (b)(1) was added, and Congress thereby provided that capital gains treatment should be available "if the redemption is not essentially equivalent to a dividend." Taxpayer argues that the purpose was to continue "existing law," and there is support in the legislative history that § 302 (b)(1) reverted "in part" or "in general" to the "essentially equivalent" provision of § 115 (g)(1) of the 1939 Code. According to the Government, even under the old law it would have been improper for the Court of Appeals to rely on "a business purpose for the redemption" and "an absence of the proscribed tax avoidance purpose to bail out dividends at favorable tax rates." See *Northup* v. *United States,* 240 F. 2d 304, 307 (C. A. 2d Cir. 1957); *Smith* v. *United States,* 121 F. 2d 692, 695 (C. A. 3d Cir. 1941); cf. *Commissioner* v. *Estate of Bedford,* 325 U. S. 283 (1945). However, we need not decide that question, for we find from the history of the 1954 revisions and the purpose of § 302 (b)(1) that Congress intended more than merely to re-enact the prior law.

In explaining the reason for adding the "essentially equivalent" test, the Senate Committee stated that the House provisions "appeared unnecessarily restrictive, particularly, in the case of redemptions of preferred stock which might be called by the corporation without the shareholder having any control over when the redemption may take place." S. Rep. No. 1622, 83d Cong., 2d Sess., 44. This explanation gives no indication that the purpose behind the redemption should affect the

result.[10] Rather, in its more detailed technical evaluation of § 302 (b)(1), the Senate Committee reported as follows:

> "The test intended to be incorporated in the interpretation of paragraph (1) is in general that currently employed under section 115 (g)(1) of the 1939 Code. Your committee further intends that in applying this test for the future . . . the inquiry will be devoted solely to the question of whether or not the transaction by its nature may properly be characterized as a sale of stock by the redeeming shareholder to the corporation. For this purpose the presence or absence of earnings and profits of the corporation is not material. Example: X, the sole shareholder of a corporation having no earnings or profits causes the corporation to redeem half of its stock. Paragraph (1) does not apply to such redemption notwithstanding the absence of earnings and profits." S. Rep. No. 1622, *supra,* at 234.

The intended scope of § 302 (b)(1) as revealed by this legislative history is certainly not free from doubt. However, we agree with the Government that by making the sole inquiry relevant for the future the narrow one whether the redemption could be characterized as a sale, Congress was apparently rejecting past court decisions that had also considered factors indicating the presence or absence of a tax-avoidance motive.[11] At least that is

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[10] See Bittker & Eustice, *supra,* n. 7, at 291: "It is not easy to give § 302 (b)(1) an expansive construction in view of this indication that its major function was the narrow one of immunizing redemptions of minority holdings of preferred stock."

[11] This rejection is confirmed by the Committee's acceptance of the House treatment of distributions involving corporate contractions—a factor present in many of the earlier "business purpose"

the implication of the example given. Congress clearly mandated that pro rata distributions be treated under the general rules laid down in §§ 301 and 316 rather than under § 302, and nothing suggests that there should be a different result if there were a "business purpose" for the redemption. Indeed, just the opposite inference must be drawn since there would not likely be a tax-avoidance purpose in a situation where there were no earnings or profits. We conclude that the Court of Appeals was therefore wrong in looking for a business purpose and considering it in deciding whether the redemption was equivalent to a dividend. Rather, we agree with the Court of Appeals for the Second Circuit that "the business purpose of a transaction is irrelevant in determining dividend equivalence" under § 302 (b)(1). *Hasbrook* v. *United States,* 343 F. 2d 811, 814 (1965).

Taxpayer strongly argues that to treat the redemption involved here as essentially equivalent to a dividend is to elevate form over substance. Thus, taxpayer argues, had he not bought Bradley's shares or had he made a subordinated loan to the company instead of buying preferred stock, he could have gotten back his $25,000 with favorable tax treatment. However, the difference between form and substance in the tax law

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redemptions. In describing its action, the Committee stated as follows:

"Your committee, as did the House bill, separates into their significant elements the kind of transactions now incoherently aggregated in the definition of a partial liquidation. Those distributions which may have capital-gain characteristics *because they are not made pro rata* among the various shareholders would be subjected, at the shareholder level, to the separate tests described in [§§ 301 to 318]. On the other hand, those distributions characterized by what happens solely at the corporate level by reason of the assets distributed would be included as within the concept of a partial liquidation." S. Rep. No. 1622, *supra,* at 49. (Emphasis added.)

is largely problematical, and taxpayer's complaints have little to do with whether a business purpose is relevant under § 302 (b)(1). It was clearly proper for Congress to treat distributions generally as taxable dividends when made out of earnings and profits and then to prevent avoidance of that result without regard to motivation where the distribution is in exchange for redeemed stock.

We conclude that that is what Congress did when enacting § 302 (b)(1). If a corporation distributes property as a simple dividend, the effect is to transfer the property from the company to its shareholders without a change in the relative economic interests or rights of the stockholders. Where a redemption has that same effect, it cannot be said to have satisfied the "not essentially equivalent to a dividend" requirement of § 302 (b)(1). Rather, to qualify for preferred treatment under that section, a redemption must result in a meaningful reduction of the shareholder's proportionate interest in the corporation. Clearly, taxpayer here, who (after application of the attribution rules) was the sole shareholder of the corporation both before and after the redemption, did not qualify under this test. The decision of the Court of Appeals must therefore be reversed and the case remanded to the District Court for dismissal of the complaint.

It is so ordered.

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

I agree with the District Court, 274 F. Supp. 466, and with the Court of Appeals, 408 F. 2d 1139, that respondent's contribution of working capital in the amount of $25,000 in exchange for 1,000 shares of preferred stock with a par value of $25 was made in order for the corporation to obtain a loan from the RFC and that the preferred stock was to be redeemed when the loan was

repaid. For the reasons stated by the two lower courts, this redemption was not "essentially equivalent to a dividend," for the bona fide business purpose of the redemption belies the payment of a dividend. As stated by the Court of Appeals:

> "Although closely-held corporations call for close scrutiny under the tax law, we will not, under the facts and circumstances of this case, allow mechanical attribution rules to transform a legitimate corporate transaction into a tax avoidance scheme." 408 F. 2d, at 1143–1144.

When the Court holds it was a dividend, it effectively cancels § 302 (b)(1) from the Code. This result is not a matter of conjecture, for the Court says that in the case of closely held or one-man corporations a redemption of stock is "always" equivalent to a dividend. I would leave such revision to the Congress.

ARNOLD TOURS, INC., ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

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

No. 128. Decided March 23, 1970

Certiorari granted; 408 F. 2d 1147, vacated and remanded.

Timothy J. Murphy for petitioners.

Solicitor General Griswold, Assistant Attorney General Ruckelshaus, and *Alan S. Rosenthal* for Camp, and *Douglas L. Ley* for South Shore National Bank, respondents.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the First Circuit is vacated. The case is remanded to that court for further consideration in light of *Association of Data Processing Service Organizations* v. *Camp, ante,* p. 150, and *Barlow* v. *Collins, ante,* p. 159.

HOGAN *v.* JAMES ET UX.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

No. 1055. Decided March 23, 1970

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.

MAKAH INDIAN TRIBE *v.* WASHINGTON

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 922. Decided March 23, 1970

76 Wash. 2d 485, 457 P. 2d 590, appeal dismissed.

Robert J. Pirtle and *Alvin J. Ziontz* for appellant.

Slade Gorton, Attorney General of Washington, and *Jane Dowdle Smith* and *Steven C. Way,* 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.

MARKS *v.* CHIEF OF POLICE OF THE CITY OF LOS ANGELES ET AL.

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

No. 1107. Decided March 23, 1970

Appeal dismissed and certiorari denied.

Burton Marks, appellant, *pro se.*

Roger Arnebergh 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.

FRIEDMAN *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 1137. Decided March 23, 1970

24 N. Y. 2d 528, 249 N. E. 2d 369, appeal dismissed.

Marx Leva, Alexander B. Hawes, and *Richard E. Nolan* for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jeremiah Jochnowitz,* Assistant Attorney General, for appellee.

PER CURIAM.

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

OHLSON ET AL. *v.* PHILLIPS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 1182. Decided March 23, 1970

304 F. Supp. 1152, affirmed.

William F. Reynard for appellants.

Duke W. Dunbar, Attorney General of Colorado, and *Michael T. Haley, John P. Holloway,* and *John E. Bush,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

GINGER *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL.

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

No. 1374, Misc. Decided March 23, 1970

Appeal dismissed and certiorari denied.

Aloysius J. Suchy for appellees Buback et al.

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.

NIEDER *v.* FULLERTON, TRUSTEE, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 1403, Misc. Decided March 23, 1970

Appeal dismissed and certiorari denied.

Alfred C. Clapp 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.

CAIN ET AL. *v.* KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 347. Decided March 23, 1970

437 S. W. 2d 769, reversed.

Edmund C. Grainger, Jr., and *James E. Thornberry* for appellants.

John B. Breckinridge, Attorney General of Kentucky, and *John B. Browning,* Assistant Attorney General, for appellee.

PER CURIAM.

The judgment is reversed. *Redrup* v. *New York,* 386 U. S. 767.

MR. CHIEF JUSTICE BURGER, dissenting.

In my view we should not inflexibly deny to each of the States the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken.

MR. JUSTICE HARLAN, dissenting.

If this case involved obscenity regulation by the Federal Government, I would unhesitatingly reverse the conviction, for the reasons stated in my separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496 (1957). Even in light of the much greater flexibility that I have always thought should be accorded to the States in this field, see, *e. g.,* my dissenting opinion in *Jacobellis* v. *Ohio,* 378 U. S. 184, 203 (1964), suppression of this

particular film presents a borderline question. However, laying aside my own personal estimate of the film, I cannot say that Kentucky has exceeded the constitutional speed limit in banning public showing of the film within its borders, and accordingly I vote to affirm the judgment below.

SANCHEZ *v.* UNITED STATES

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

No. 943, Misc. Decided March 23, 1970

412 F. 2d 1177; certiorari granted, judgment vacated and case remanded to the United States District Court for the Southern District of Florida with respect to Count 3 of the indictment; certiorari otherwise denied.

Alfred M. Carvajal for petitioner.

Solicitor General Griswold for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. Upon consideration of the suggestion of the Solicitor General and upon examination of the entire record, the petition for a writ of certiorari is granted insofar as it seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction on Count 3 of the indictment charging a violation of 26 U. S. C. § 4704. The judgment of the Court of Appeals with respect to Count 3 is vacated and the case is remanded to the United States District Court for the Southern District of Florida with directions to dismiss Count 3 of the indictment. The petition for a writ of certiorari is otherwise denied.

CAPITAL SOUTHWEST CORP. ET AL. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL.

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

No. 1130. Decided March 23, 1970

441 S. W. 2d 247, appeal dismissed.

J. Sam Winters, Henry D. Akin, Jr., and *William D. Powell* for appellants.

Crawford C. Martin, Attorney General of Texas, *pro se, Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, *John R. Grace* and *William Edward Allen,* Assistant Attorneys General, and *William B. Hilgers,* Special 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.

UNITED STATES *v.* KEY, TRUSTEE IN BANKRUPTCY

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

No. 402. Argued January 21, 1970—Decided March 30, 1970

The United States challenges as violative of § 3466 of the Revised Statutes a reorganization plan under Chapter X of the Bankruptcy Act under which claims of junior creditors were to be partially or fully paid before full payment was made of the Government's tax claims. Section 3466 provides that "[w]henever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied." The District Court approved the plan. The Court of Appeals affirmed on the ground that § 3466 was impliedly inapplicable by virtue of the statutory plan of Chapter X proceedings, § 199 of the Act providing that the United States shall have "payment" of its tax claims in such proceedings unless the Secretary of the Treasury accepts "a lesser amount," and §§ 216 and 221 establishing an equitable standard to govern the method of payment. *Held:* The United States is entitled to absolute priority of payment under § 3466 of the Revised Statutes over the other claimants in the reorganization here involved, there being no inconsistency between the terms of that section and the provisions of Chapter X. Pp. 324–333.

407 F. 2d 635, reversed and remanded.

Lawrence G. Wallace argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Walters, Peter L. Strauss,* and *Crombie J. D. Garrett.*

Sigmund J. Beck argued the cause for respondent. With him on the brief was *Edward B. Hopper II.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case the United States challenges the treatment given to its claim for unpaid taxes against an insolvent

corporation in reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. §§ 501–676. Under the reorganization plan approved by the District Court, the debtor, Hancock Trucking, Inc., will sell its chief asset, its Interstate Commerce Commission operating rights, to Hennis Freight Lines, Inc., for $935,000. The sale contract provides for a $300,000 down payment, with the balance to be paid in 78 monthly installments. Under the reorganization plan, the down payment will be used to satisfy certain wage and state and local tax claims in full, to satisfy 20% of the claims of the unsecured creditors, and to satisfy about 10% of the United States' tax claim of $375,386.55. The remainder of the United States' claim will be paid out of the monthly installments. The plan, an atypical one for a corporate reorganization, does not contemplate the continued existence of the debtor as a going concern, but amounts in substance to a liquidation.

The United States objects to that aspect of the plan that provides for partial or complete payment of the claims of unsecured creditors and state and local government units before full payment of the federal tax claims. This, the Government urges, violates the command of § 3466 of the Revised Statutes, 31 U. S. C. § 191, that "[w]henever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied." Respondent urges that § 3466 does not apply to Chapter X proceedings, but that the United States is entitled only to "payment" of its tax claim, as provided by § 199 of the Bankruptcy Act, 11 U. S. C. § 599.

The Court of Appeals accepted respondent's theory, and affirmed the order of the District Court approving the plan. 407 F. 2d 635 (C. A. 7th Cir. 1969). We granted certiorari, 396 U. S. 874 (1969), and we reverse.

Since the earliest days of the Republic, § 3466 and its predecessors have given the Government priority over all other claimants in collecting debts due it from insolvent debtors.[1] The present statute has existed almost unchanged since 1797,[2] and its historical roots reach back to the similar priority of the Crown in England, an aspect of the royal prerogative, founded upon a policy of protecting the public revenues.[3] The same policy underlies the federal statute, *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35 (1832), and it is established that the terms of § 3466 are to be liberally construed to achieve this broad purpose. *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134 (1838); *Bramwell* v. *United States Fidelity Co.,* 269 U. S. 483, 487 (1926).

Section 3466 applies literally to the situation here. The debtor is concededly insolvent, and it is established that a tax debt is a "debt due to the United States" within the meaning of the statute. *Price* v. *United States,* 269 U. S. 492, 499 (1926). No provision of Chapter X explicitly excepts corporate debtors in reorganization from the application of § 3466, and so the only remaining question is whether the legislative scheme established in Chapter X, either by logical inconsistency or other manifestation of congressional intent, implies such an exception.

In approaching a claim of an implied exception to § 3466, we start with the principle, noted above, that the statute must be given a liberal construction consonant with the public policy underlying it. Applying that principle to an earlier claim that a statutory scheme implicitly excluded § 3466, this Court held that "[o]nly

[1] See, *e. g.,* Act of July 31, 1789, § 21, 1 Stat. 42; Act of August 4, 1790, § 45, 1 Stat. 169.

[2] See Act of March 3, 1797, § 5, 1 Stat. 515, as amended by Act of March 2, 1799, § 65, 1 Stat. 676.

[3] See 33 Hen. 8, c. 39, § 74 (1541); 13 Eliz. 1, c. 4 (1570).

the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." *United States* v. *Emory,* 314 U. S. 423, 433 (1941).

Here the Court of Appeals discerned an intent not to apply § 3466 to Chapter X proceedings from § 199 of the Bankruptcy Act, which forbids the approval of any reorganization plan which does not provide for the "payment" of taxes or customs due to the United States, unless the Secretary of the Treasury accepts "a lesser amount." [4] The Court of Appeals further supported its inference of exclusionary intent from §§ 216 (7) and 221 of the Act, 11 U. S. C. §§ 616 (7) and 621. Section 216 (7) provides that where a class of creditors dissents from a reorganization plan, the District Court shall provide "adequate protection for the realization by them of the value of their claims against the property" in any of four ways, the last and most general of which is by "such method as will, under and consistent with

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[4] Section 199 provides:

"If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed." 11 U. S. C. § 599.

the circumstances of the particular case, equitably and fairly provide such protection." Section 221 merely sums up the applicable tests for a valid reorganization plan by providing that "[t]he judge shall confirm a plan if satisfied that" § 199 has been complied with and that "the plan is fair and equitable, and feasible."

The Court of Appeals reasoned from these provisions to the implied exclusion of the operation of § 3466 as follows:

> "Within Chapter X, §§ 199, 216 and 221 are inter-related statutes and part of a studied statutory plan. Section 199 outlines the nature of the government's tax claim 'priority,' and the two other sections establish an equitable standard to govern the method of payment. If, as the government would have us hold, § 3466 creates an absolute right to first payment in addition to full payment, there would be little need for §§ 199, 216 (7) and 221. These sections apply specifically to Chapter X proceedings and should control over the more general and conflicting direction of § 3466." 407 F. 2d, at 638.

In our view these provisions are not logically inconsistent with the terms of § 3466, nor would they be rendered redundant if the older statute applied, nor does their language or legislative history reveal a purpose incongruous with its application.

In the first place, § 216 (7) has nothing to do with the priorities of different classes of claimants under Chapter X. That section merely provides that where an affected class of creditors (and here the United States itself constitutes the whole of such a class) dissents from a plan, their claims are to be dealt with in one of the four ways specified, one of which is that those claims must be disposed of "equitably and fairly."

This Court has long held that these words, along with the words "fair and equitable" in § 221, in no way authorize a District Court to ignore or erode priorities otherwise granted by law, and it follows that this language cannot be taken to exclude by implication an explicit statutory priority, such as that granted the United States by § 3466. In short, the words "fair and equitable" in Chapter X are terms of art, and no plan can be "fair and equitable" which compromises the rights of senior creditors in order to protect junior creditors. *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, 115–116 (1939); *Consolidated Rock Co.* v. *Du Bois,* 312 U. S. 510, 527–529 (1941).

We turn then to the argument upon which respondent chiefly relies for his claim that § 3466 does not reach to Chapter X proceedings—the alleged inconsistency between application of the "first satisfied" requirement and the terms and purposes of § 199. As already noted, § 199 provides that the United States shall have "payment" of its tax claims in Chapter X proceedings unless the Secretary of the Treasury accepts "a lesser amount." Respondent argues and the Court of Appeals held that this establishes by negative implication that Congress did not mean the United States to be able to insist upon the more onerous remedy of payment first in time.[5]

[5] The Government argues in the alternative that even if § 3466 does not apply to claims against debtors in Chapter X, the plan here is defective even under the § 199 requirement of "payment" alone, since the deferment of payment of the Government's tax claim while the cash flow from the installment contract is used to satisfy the claims of lower ranking creditors means that the Government is receiving a "lesser amount," which § 199 in its terms contrasts with "payment," than what it would receive if it had first claim on all cash as it came in. The argument is premised on the fact that the Government cannot collect post-petition interest on its claim. *City of New York* v. *Saper,* 336 U. S. 328 (1949); *United States* v. *Edens,* 189 F. 2d 876 (C. A. 4th Cir. 1951), aff'd

As a matter of logic, we see no inconsistency between a requirement of payment and a requirement of first satisfaction. Congress surely could have provided that the United States receive payment out of a limited fund at the expense of other claimants, and quite consistently provided that when the wherewithal to make such payment became available in installments over time the United States should also have the right to claim the first of those installments and each succeeding one until its debt was satisfied.[6] Separate provisions to this effect in the same statute could certainly be read in harmony with each other, and there is no reason why § 3466 should not be read to supplement the requirement of payment contained in § 199 in the same fashion.

Nor is § 199 redundant if § 3466 applies in Chapter X proceedings on the ground that a requirement of first satisfaction necessarily implies a requirement of payment. Section 3466 applies only to insolvent debtors.[7]

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per curiam, 342 U. S. 912 (1952). Because of our determination that § 3466 applies here and requires payment first in time, we need not reach this contention.

[6] In the normal Chapter X reorganization no provision need be made for priority in time of different claims. Claimants receive debt or equity interests in a going concern in the usual situation, and the priority of one claimant over another means only that if there is insufficient going-concern value to satisfy both claims, the claimant with priority must receive value equivalent to his full claim if the other claimant is to receive anything. Here a second sense of priority is involved: when cash becomes available to pay off outstanding claims only over a period of time, the claimant with "priority" in this second sense receives his cash first in time; the nonpriority claimant may receive full payment, but receives it later. In its literal language—"first satisfied"—§ 3466 provides this kind of priority, and respondent has not argued that it should not be so construed if it applies here.

[7] It seems to have long been assumed that the term insolvent in § 3466 meant insolvent in the bankruptcy sense, and this Court clearly so held in *United States* v. *Oklahoma,* 261 U. S. 253, 260–261 (1923).

Yet Chapter X proceedings are not open merely to corporations that are insolvent, in that their liabilities exceed their assets, but also to those that are solvent in the bankruptcy or asset-liability sense and yet are unable to meet their obligations as they mature. Bankruptcy Act § 130 (1), 11 U. S. C. § 530 (1). Thus § 199 does not merely give the Government rights already granted by implication in § 3466, but extends the Government's priority, for tax claims at least, to solvent corporations in Chapter X reorganization.

Thus, on the face of the statute, no inconsistency arises from applying both § 3466 and § 199 to Chapter X proceedings, much less the "plain inconsistency" required if respondent is to prevail under the test of *United States* v. *Emory, supra.* That in itself strongly suggests that § 3466 should apply here, and our examination of the background and legislative history of § 199 and of Chapter X generally does not reveal a contrary intent on the part of Congress.

Before the reorganization legislation of the 1930's, the principal method of reorganizing corporations that were unable to meet their debts was the equity receivership. This judge-made device was designed to preserve the debtor business as a going concern by cancelling claims against it, in return for which cancellation the claimants received debt or equity interests in a new corporation, which then acquired the assets of the old corporation in a judicial sale. See T. Finletter, The Law of Bankruptcy Reorganization 1–17 (1939). By 1926, it was established that § 3466 applied to give the United States an absolute priority for payment of debts due it from insolvent corporations in equity receivership. *Price* v. *United States,* 269 U. S., at 502–503; and see Blair, The Priority of the United States in Equity Receiverships, 39 Harv. L. Rev. 1 (1925).

In 1933, Congress enacted § 77 of the Bankruptcy Act, 47 Stat. 1474, providing a statutory procedure for the

reorganization of railroads. Section 77, as well as later corporate reorganization statutes discussed below, was designed to follow the general format of the equity receivership. As one of the early commentators on the federal statutes has noted, "[t]he principles of the equity receivership underlie nearly every substantive provision of the [reorganization acts]." Finletter, *supra,* at 3. These statutes were not, of course, mere codifications of the law governing equity receiverships. They were designed in part to correct abuses and inefficiencies that had existed under the prior regime. *Duparquet Co.* v. *Evans,* 297 U. S. 216, 218–219 (1936). However, the problems of the equity receivership that led to the legislative intervention did not include the Government's priority under § 3466, a relatively uncontroversial aspect of the receivership procedure.

Nothing in § 77 casts any doubt on the continued priority of the United States under § 3466. Indeed the only provision in the new statute affecting the claims of the United States was § 77(e), which provided in pertinent part:

> "If the United States of America is directly a creditor or stockholder, the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the interests or claims of the United States." 47 Stat. 1478.

The purpose of this provision was to overcome the effect of two prior rulings of the Attorney General that the Secretary of the Treasury lacked authority to compromise claims of indebtedness owed to the Government by the railroads, 33 Op. Atty. Gen. 423 (1923), 34 Op. Atty. Gen. 108 (1924).[8]

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[8] See Senate Committee on the Judiciary, Criticisms and Suggestions Relating to H. R. 14359 and S. 5551, Amending the Bankruptcy Act 19–20, 72d Cong., 2d Sess. (Comm. Print. 1933).

In 1934, Congress enacted § 77B of the Bankruptcy Act, 48 Stat. 911, which provided a reorganization scheme for corporations generally, closely modeled on the railroad reorganization scheme of § 77; § 77B (e)(1) granted the Secretary of the Treasury power to compromise federal claims, in language almost identical with that of § 77 (e). 48 Stat. 918. There is no language in the statute, and nothing in its history, to suggest any intention to alter the established priority of the United States under § 3466.

In 1935, the Secretary of the Treasury called the attention of Congress to the fact that the courts were construing § 77B (e)(1) to include the United States among the general creditors in reorganization proceedings, so that plans disapproved by the Secretary for failure to satisfy a federal claim could nevertheless be confirmed if the necessary majority of general creditors approved. S. Rep. No. 953, 74th Cong., 1st Sess. (1935). The Secretary proposed an amendment, which, after some weakening in the House, see S. Rep. No. 1386, 74th Cong., 1st Sess. (1935), was adopted.[9] 49 Stat. 966

[9] The Secretary had proposed that he be given a veto over plans that failed to provide for "payment" of *any* federal claim. See S. Rep. No. 953, *supra*. The House imposed the "payment" requirement only upon tax and customs claims, possibly intending to leave the Government in the position of a general creditor with respect to other claims, see S. Rep. No. 1386, *supra*, and this was the form in which the amendment was adopted. Section 199 preserves this apparent distinction between tax and other claims, see text at n. 4, *supra*. However the courts, relying on the strong presumption against implied exceptions to § 3466, have not treated the Government as a general creditor in its nontax claims, but rather have held that it has priority under § 3466. *United States* v. *Anderson*, 334 F. 2d 111 (C. A. 5th Cir. 1964); *In re Cherry Valley Homes, Inc.*, 255 F. 2d 706 (C. A. 3d Cir. 1958); *Reconstruction Finance Corp.* v. *Flynn*, 175 F. 2d 761 (C. A. 2d Cir. 1949).

If, as appears from the present case, § 3466, if applicable, may, in some instances, give the Government greater protection than

(1935). In its relevant provisions, the amendment was identical with present § 199, and the 1938 revisions which culminated in the replacement of § 77B by present Chapter X did not affect it.

Thus § 199 is derived from an enactment designed to grant the Government the power to compromise its claims against debtors, and an amendment designed to ensure priority for federal claims over the claims of general creditors. Nothing in this background lends any support to respondent's claim that the draftsmen of Chapter X meant to provide an exception to the operation of § 3466 for reorganization proceedings under the new statute. Indeed the established practice of applying § 3466 to equity receiverships, the acknowledged predecessor of the Chapter X proceeding, combined with the failure to indicate in any way an intent to alter that practice in the new statutes, supports the conclusion that Congress affirmatively meant § 3466 to apply to statutory reorganization.[10]

As we noted at the outset, § 3466 must apply according to its terms except where expressly superseded, or where excluded by a later enactment "plainly inconsistent" with it. Here the statute literally applies, and no plain inconsistency with the scheme of Chapter X appears. The terms of § 3466 are clearly not satisfied by the reorganization plan here in question, which provides payment in part to general creditors and other nonpreferred claimants[11] before satisfaction of the federal tax

§ 199, it would be anomalous to deny that protection to Government tax claims while granting it to nontax claims, since Congress clearly intended that tax claims should have greater protection.

[10] The leading authorities agree that § 3466 applies to Chapter X proceedings. Finletter, *supra*, at 388–393; 6A Collier on Bankruptcy 269 n. 11 (14th ed. 1969).

[11] This case does not raise the question, never decided by this Court, whether § 3466 grants the Government priority over the prior specific liens of secured creditors. See *United States* v. *Gilbert Associates*, 345 U. S. 361, 365–366 (1953).

claim. Therefore the judgment upholding the plan must be reversed, and the case remanded to the Court of Appeals for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court. As it holds, the Chandler Act provides the standard for treatment of claims of the United States as "a secured or unsecured creditor" of the debtor. Those are the words of § 199, 52 Stat. 893, 11 U. S. C. § 599. Section 199 goes on to provide that "no plan which does not provide for the payment" of the claims of the United States for taxes or customs duties shall be "confirmed" by the judge, "except upon the acceptance of a lesser amount by the Secretary of the Treasury."

The question therefore is what kind of "payment," as used in § 199, the claim of the United States must receive in a Chapter X proceeding.

There is no doubt but that the claim of the United States has priority by reason of § 3466 of the Revised Statutes, 31 U. S. C. § 191.

Section 216 of the Chandler Act provides the standards for dealing with the priorities among creditors. Section 216 (7) says that where "any class of creditors" affected by the plan does not accept the plan, those claims can be dealt with in several ways, including a method which "equitably and fairly" protects them. And § 221 (2) of the Act provides that the judge shall confirm the plan if satisfied that it is "fair and equitable, and feasible."

The words "fair and equitable" are words of art; we have made unmistakably clear that compromising the rights of senior creditors to protect junior creditors is not "fair and equitable" treatment. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115–116; *Consolidated Rock*

Co. v. *Du Bois*, 312 U. S. 510, 527–529. We said in the *Du Bois* case:

> "[I]t is plain that while creditors may be given inferior grades of securities, their 'superior rights' must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating in the plan, if creditors are given only a face amount of inferior securities equal to the face amount of their claims. They must receive, in addition, compensation for the senior rights which they are to surrender. If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible." *Id.*, at 528–529.

The present plan is likewise infirm because it provides junior creditors with immediate, partial payment, while making the United States with a prior claim accept delayed and therefore discounted payment of its claim with all the attendant risks. If the United States is to forgo the right to be paid out of the first available funds, it must receive equivalent compensation in return. The Court of Appeals thought that it contradicted § 216 and § 221 to apply § 3466 to a Chapter X plan. Today we take the contrary view. Section 3466 is relevant in defining the priority; § 216 and § 221 are relevant in providing how that priority shall be honored.

CRAYCROFT *v.* FERRALL ET AL.

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

No. 718, Misc. Decided March 30, 1970

Certiorari granted; 408 F. 2d 587, vacated and remanded.

John Caughlan for petitioner.

Solicitor General Griswold for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted.

Upon consideration of the suggestion of the Solicitor General and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Ninth Circuit is vacated and the case is remanded to that court.

The Solicitor General concedes that the administrative remedies that the Court of Appeals held should first be exhausted by the petitioner, have either been exhausted or are nonexistent. The sole remaining question therefore seems to be whether petitioner's failure to seek relief in the Court of Military Appeals precludes consideration of petitioner's claims by the federal courts. While the Solicitor General concedes that resort to that judicial remedy does not preclude consideration of petitioner's claim by the federal courts, there is a conflict among the circuits. It is for consideration of that question, or alternatively the merits, that the case is remanded.

JOHNSTON ET AL. *v.* HAWAII

APPEAL FROM THE SUPREME COURT OF HAWAII

No. 1381, Misc. Decided March 30, 1970

51 Haw. 195, 456 P. 2d 805, appeal dismissed.

Norman Dorsen for appellants.

PER CURIAM.

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

Syllabus

ILLINOIS *v.* ALLEN

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

No. 606. Argued February 24, 1970—Decided March 31, 1970

Respondent, who was on trial for robbery, was removed from the courtroom for repeated disruptive behavior and the use of vile and abusive language directed at the trial judge, notwithstanding the judge's prior warning that removal would follow another outburst. Appointed counsel represented respondent during the period respondent was not allowed in the courtroom, principally the presentation of the State's case. Having given some assurances of good conduct, respondent was allowed to return to the courtroom while appointed counsel presented his defense. Respondent was convicted. Following the State Supreme Court's affirmance, respondent filed a petition for a writ of habeas corpus in federal court, contending that he had been deprived of his right under the Sixth and Fourteenth Amendments to confront the witnesses against him. The District Court declined to issue the writ. The Court of Appeals reversed, holding that a defendant's Sixth Amendment right to attend his own trial was so "absolute" that, regardless of how unruly his conduct, he could never be held to have lost that right so long as he insisted on it, as respondent had. *Held:*

1. A defendant can lose his right to be present at trial, if, following the judge's warning that he will be removed if his disruptive behavior continues, he nevertheless insists on conducting himself in such a disruptive manner that his trial cannot proceed if he remains in the courtroom. He can reclaim the right to be present as soon as he is willing to comport himself with decorum and respect. Pp. 342–343.

2. A trial judge confronted by a defendant's disruptive conduct can exercise discretion to meet the circumstances of the case; and though no single formula is best for all situations, there are at least three constitutionally permissible approaches for the court's handling of an obstreperous defendant: (1) bind and gag him as a last resort, thereby keeping him present; (2) cite him for criminal or civil contempt; or (3) remove him from the courtroom, while the trial continues, until he promises to conduct himself properly. Pp. 343–346.

3. On the facts of this case the trial judge did not abuse his discretion, respondent through his disruptive behavior having lost his right of confrontation under the Sixth and Fourteenth Amendments. Pp. 345–347.

413 F. 2d 232, reversed.

Joel M. Flaum, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *William J. Scott,* Attorney General, and *James R. Thompson, Morton E. Friedman,* and *Thomas J. Immel,* Assistant Attorneys General.

H. Reed Harris argued the cause and filed a brief for respondent.

Mr. Justice Black delivered the opinion of the Court.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. *Pointer* v. *Texas,* 380 U. S. 400 (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Lewis* v. *United States,* 146 U. S. 370 (1892). The question presented in this case is whether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial.

The issue arose in the following way. The respondent, Allen, was convicted by an Illinois jury of armed robbery and was sentenced to serve 10 to 30 years in the Illinois State Penitentiary. The evidence against him showed

that on August 12, 1956, he entered a tavern in Illinois and, after ordering a drink, took $200 from the bartender at gunpoint. The Supreme Court of Illinois affirmed his conviction, *People* v. *Allen*, 37 Ill. 2d 167, 226 N. E. 2d 1 (1967), and this Court denied certiorari. 389 U. S. 907 (1967). Later Allen filed a petition for a writ of habeas corpus in federal court alleging that he had been wrongfully deprived by the Illinois trial judge of his constitutional right to remain present throughout his trial. Finding no constitutional violation, the District Court declined to issue the writ. The Court of Appeals reversed, 413 F. 2d 232 (1969), Judge Hastings dissenting.

The facts surrounding Allen's expulsion from the courtroom are set out in the Court of Appeals' opinion sustaining Allen's contention:

> "After his indictment and during the pretrial stage, the petitioner [Allen] refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, 'I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] [to] sit in and protect the record for you, insofar as possible.'
>
> "The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed

counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, 'When I go out for lunchtime, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

"After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The [petitioner] protested this effort

> on the part of his attorney, saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." 413 F. 2d, at 233–234.

After this second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel.

The Court of Appeals went on to hold that the Supreme Court of Illinois was wrong in ruling that Allen had by his conduct relinquished his constitutional right to be present, declaring that:

> "No conditions may be imposed on the absolute right of a criminal defendant to be present at all stages of the proceeding. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver. Such conditions, if insisted upon, should and must be dealt with in a manner that does not compel the relinquishment of his right.
>
> "In light of the decision in Hopt v. Utah, 110 U. S. 574 . . . (1884) and Shields v. United States, 273

> U. S. 583 . . . (1927), as well as the constitutional mandate of the sixth amendment, we are of the view that the defendant should not have been excluded from the courtroom during his trial despite his disruptive and disrespectful conduct. The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged." 413 F. 2d, at 235.

The Court of Appeals felt that the defendant's Sixth Amendment right to be present at his own trial was so "absolute" that, no matter how unruly or disruptive the defendant's conduct might be, he could never be held to have lost that right so long as he continued to insist upon it, as Allen clearly did. Therefore the Court of Appeals concluded that a trial judge could never expel a defendant from his own trial and that the judge's ultimate remedy when faced with an obstreperous defendant like Allen who determines to make his trial impossible is to bind and gag him.[1] We cannot agree that the Sixth Amendment, the cases upon which the Court of Appeals relied, or any other cases of this Court so handicap a trial judge in conducting a criminal trial. The broad dicta in *Hopt* v. *Utah, supra,* and *Lewis* v. *United States,* 146 U. S. 370 (1892), that a trial can never continue in the defendant's absence have been expressly rejected. *Diaz* v. *United States,* 223 U. S. 442 (1912). We accept instead the statement of Mr. Justice Cardozo who, speaking for the Court in *Snyder* v. *Massachusetts,* 291 U. S. 97, 106 (1934), said: "No doubt the privilege [of personally confronting witnesses] may be lost by

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[1] In a footnote the Court of Appeals also referred to the trial judge's contempt power. This subject is discussed in Part II of this opinion. *Infra,* at 344–345.

consent or at times even by misconduct."[2] Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[3] Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstrep-

[2] Rule 43 of the Federal Rules of Criminal Procedure provides that "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

[3] See Murray, The Power to Expel a Criminal Defendant From His Own Trial: A Comparative View, 36 U. Colo. L. Rev. 171–175 (1964); Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Col. L. Rev. 18–31 (1916).

erous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

I

Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint. It is in part because of these inherent disadvantages and limitations in this method of dealing with disorderly defendants that we decline to hold with the Court of Appeals that a defendant cannot under any possible circumstances be deprived of his right to be present at trial. However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here.

II

In a footnote the Court of Appeals suggested the possible availability of contempt of court as a remedy to make Allen behave in his robbery trial, and it is true

that citing or threatening to cite a contumacious defendant for criminal contempt might in itself be sufficient to make a defendant stop interrupting a trial. If so, the problem would be solved easily, and the defendant could remain in the courtroom. Of course, if the defendant is determined to prevent *any* trial, then a court in attempting to try the defendant for contempt is still confronted with the identical dilemma that the Illinois court faced in this case. And criminal contempt has obvious limitations as a sanction when the defendant is charged with a crime so serious that a very severe sentence such as death or life imprisonment is likely to be imposed. In such a case the defendant might not be affected by a mere contempt sentence when he ultimately faces a far more serious sanction. Nevertheless, the contempt remedy should be borne in mind by a judge in the circumstances of this case.

Another aspect of the contempt remedy is the judge's power, when exercised consistently with state and federal law, to imprison an unruly defendant such as Allen for civil contempt and discontinue the trial until such time as the defendant promises to behave himself. This procedure is consistent with the defendant's right to be present at trial, and yet it avoids the serious shortcomings of the use of shackles and gags. It must be recognized, however, that a defendant might conceivably, as a matter of calculated strategy, elect to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time. A court must guard against allowing a defendant to profit from his own wrong in this way.

III

The trial court in this case decided under the circumstances to remove the defendant from the courtroom and to continue his trial in his absence until and

unless he promised to conduct himself in a manner befitting an American courtroom. As we said earlier, we find nothing unconstitutional about this procedure. Allen's behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint. Prior to his removal he was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, and, as Judge Hastings observed in his dissenting opinion, the record demonstrates that Allen would not have been at all dissuaded by the trial judge's use of his criminal contempt powers. Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner. Under these circumstances we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.

IV

It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what

the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. The record shows that the Illinois judge at all times conducted himself with that dignity, decorum, and patience that befit a judge. Even in holding that the trial judge had erred, the Court of Appeals praised his "commendable patience under severe provocation."

We do not hold that removing this defendant from his own trial was the only way the Illinois judge could have constitutionally solved the problem he had. We do hold, however, that there is nothing whatever in this record to show that the judge did not act completely within his discretion. Deplorable as it is to remove a man from his own trial, even for a short time, we hold that the judge did not commit legal error in doing what he did.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, concurring.

The safeguards that the Constitution accords to criminal defendants presuppose that government has a sovereign prerogative to put on trial those accused in good faith of violating valid laws. Constitutional power to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace. History has known the breakdown of lawful penal authority—the feud, the vendetta, and the terror of penalties meted out by mobs or roving bands of vigilantes. It has known, too, the perversion of that authority. In some societies the penal arm of the state has reached individual men through secret denunciation followed by summary punishment. In others the solemn power of condemnation has been confided to the caprice

of tyrants. Down the corridors of history have echoed the cries of innocent men convicted by other irrational or arbitrary procedures. These are some of the alternatives history offers to the procedure adopted by our Constitution. The right of a defendant to trial—to trial by jury—has long been cherished by our people as a vital restraint on the penal authority of government. And it has never been doubted that under our constitutional traditions trial in accordance with the Constitution is the proper mode by which government exercises that authority.

Lincoln said this Nation was "conceived in liberty and dedicated to the proposition that all men are created equal." The Founders' dream of a society where all men are free and equal has not been easy to realize. The degree of liberty and equality that exists today has been the product of unceasing struggle and sacrifice. Much remains to be done—so much that the very institutions of our society have come under challenge. Hence, today, as in Lincoln's time, a man may ask "whether [this] nation or any nation so conceived and so dedicated can long endure." It cannot endure if the Nation falls short on the guarantees of liberty, justice, and equality embodied in our founding documents. But it also cannot endure if we allow our precious heritage of ordered liberty to be ripped apart amid the sound and fury of our time. It cannot endure if in individual cases the claims of social peace and order on the one side and of personal liberty on the other cannot be mutually resolved in the forum designated by the Constitution. If that resolution cannot be reached by judicial trial in a court of law, it will be reached elsewhere and by other means, and there will be grave danger that liberty, equality, and the order essential to both will be lost.

The constitutional right of an accused to be present at his trial must be considered in this context. Thus

there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward. Over a half century ago this Court in *Diaz* v. *United States,* 223 U. S. 442, 457–458 (1912), approved what I believe is the governing principle. We there quoted from *Falk* v. *United States,* 15 App. D. C. 446 (1899), the case of an accused who appeared at his trial but fled the jurisdiction before it was completed. The court proceeded in his absence, and a verdict of guilty was returned. In affirming the conviction over the accused's objection that he could not be convicted in his absence, the Court of Appeals for the District of Columbia said:

> "It does not seem to us to be consonant with the dictates of common sense that an accused person . . . should be at liberty, whenever he pleased, . . . to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. . . . This would be a travesty of justice which could not be tolerated . . . . [W]e do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty.
>
> . . . . .
>
> "The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own

> safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."

To allow the disruptive activities of a defendant like respondent to prevent his trial is to allow him to profit from his own wrong. The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.

Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior. The record makes clear that respondent was so informed and warned in this case. Thus there can be no doubt that respondent, by persisting in his reprehensible conduct, surrendered his right to be present at the trial.

As the Court points out, several remedies are available to the judge faced with a defendant bent on disrupting his trial. He can have him bound, shackled, and gagged; he can hold him in civil or criminal contempt; he can exclude him from the trial and carry on in his absence. No doubt other methods can be devised. I join the Court's opinion and agree that the Constitution does not require or prohibit the adoption of any of these courses. The constitutional right to be present can be surrendered if it is abused for the purpose of frustrating the trial. Due process does not require the presence of the defendant if his presence means that there will be no orderly process at all. However, I also agree with the Court that these three methods are not equally acceptable. In particular, shackling and gagging a defendant is surely the least acceptable of them. It offends not only judicial dignity and decorum, but also that

respect for the individual which is the lifeblood of the law.

I would add only that when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances.

MR. JUSTICE DOUGLAS.

I agree with the Court that a criminal trial, in the constitutional sense, cannot take place where the courtroom is a bedlam and either the accused or the judge is hurling epithets at the other. A courtroom is a hallowed place where trials must proceed with dignity and not become occasions for entertainment by the participants, by extraneous persons, by modern mass media, or otherwise.

My difficulty is not with the basic hypothesis of this decision, but with the use of this case to establish the appropriate guidelines for judicial control.

This is a stale case, the trial having taken place nearly 13 years ago. That lapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction. But in this case it should be.

There is more than an intimation in the present record that the defendant was a mental case. The passage of time since 1957, the date of the trial, makes it, however, impossible to determine what the mental condition of the defendant was at that time. The fact that a defendant has been found to understand "the nature and object of the proceedings against him" and thus competent to stand trial [1] does not answer the difficult questions as to what a trial judge should do with an

[1] See n. 5, *infra*.

otherwise mentally ill defendant who creates a courtroom disturbance. What a judge should do with a defendant whose courtroom antics may not be volitional is a perplexing problem which we should not reach except on a clear record. This defendant had no lawyer and refused one, though the trial judge properly insisted that a member of the bar be present to represent him. He tried to be his own lawyer and what transpired was pathetic, as well as disgusting and disgraceful.

We should not reach the merits but should reverse the case for staleness of the record and affirm the denial of relief by the District Court. After all, behind the issuance of a writ of habeas corpus is the exercise of an informed discretion. The question, how to proceed in a criminal case against a defendant who is a mental case, should be resolved only on a full and adequate record.

Our real problems of this type lie not with this case but with other kinds of trials. *First* are the political trials. They frequently recur in our history [2] and insofar

[2] From *Spies* v. *People,* 122 Ill. 1, 12 N. E. 865, involving the Haymarket riot; *In re Debs,* 158 U. S. 564, involving the Pullman strike; *Mooney* v. *Holohan,* 294 U. S. 103, involving the copper strikes of 1917; *Commonwealth* v. *Sacco,* 255 Mass. 369, 151 N. E. 839, 259 Mass. 128, 156 N. E. 57, 261 Mass. 12, 158 N. E. 167, involving the Red scare of the 20's; to *Dennis* v. *United States,* 341 U. S. 494, involving an agreement to teach Marxism.

As to the Haymarket riot resulting in the *Spies* case, see 2 J. Commons and Associates, History of Labour in the United States 386 *et seq.* (1918); W. Swindler, Court and Constitution in the Twentieth Century, cc. 3 and 4 (1969).

As to the Pullman strike and the *Debs* case, see L. Pfeffer, This Honorable Court 215–216 (1965); A. Lindsey, The Pullman Strike, cc. XII and XIII (1942); Commons, *supra,* at 502–508.

As to the *Mooney* case, see the January 18, 1922, issue of The New Republic; R. Frost, The Mooney Case (1968).

As to the *Sacco-Vanzetti* case see Fraenkel, The Sacco-Vanzetti Case; F. Frankfurter, The Case of Sacco and Vanzetti (1927).

As to the repression of teaching involved in the *Dennis* case, see O. Kirchheimer, Political Justice 132–158 (1961).

as they take place in federal courts we have broad supervisory powers over them. That is one setting where the question arises whether the accused has rights of confrontation that the law invades at its peril.

In Anglo-American law, great injustices have at times been done to unpopular minorities by judges, as well as by prosecutors. I refer to London in 1670 when William Penn, the gentle Quaker, was tried for causing a riot when all that he did was to preach a sermon on Grace Church Street, his church having been closed under the Conventicle Act:

> "*Penn.* I affirm I have broken no law, nor am I Guilty of the indictment that is laid to my charge; and to the end the bench, the jury, and myself, with these that hear us, may have a more direct understanding of this procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.
>
> "*Rec.* Upon the common-law.
>
> "*Penn.* Where is that common-law?
>
> "*Rec.* You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.
>
> "*Penn.* This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.
>
> "*Rec.* Sir, will you plead to your indictment?
>
> "*Penn.* Shall I plead to an Indictment that hath no foundation in law? If it contain that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of this indictment, and the guilt, or contrary of my fact?

"*Rec.* You are a saucy fellow, speak to the Indictment.

"*Penn.* I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned: you are many mouths and ears against me, and if I must not be allowed to make the best of my case, it is hard, I say again, unless you shew me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely arbitrary.

. . . . . .

"*Rec.* The question is, whether you are Guilty of this Indictment?

"*Penn.* The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.

"*Rec.* You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?

"*Penn.* Certainly, if the common law be so hard to be understood, it is far from being very common; but if the lord Coke in his Institutes be of any consideration, he tells us, That Common-Law is common right, and that Common Right is the Great Charter-Privileges . . . .

"*Rec.* Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.

"*Penn.* I have asked but one question, and you have not answered me; though the rights and privileges of every Englishman be concerned in it.

"*Rec.* If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.

"*Penn.* That is according as the answers are.

"*Rec.* Sir, we must not stand to hear you talk all night.

"*Penn.* I design no affront to the court, but to be heard in my just plea: and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.

"*Rec.* Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do any thing to night.

"*Mayor.* Take him away, take him away, turn him into the bale-dock." [3] The Trial of William Penn, 6 How. St. Tr. 951, 958–959.

The panel of judges who tried William Penn were sincere, law-and-order men of their day. Though Penn was acquitted by the jury, he was jailed by the court for his contemptuous conduct. Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?

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[3] At Old Bailey, where the William Penn trial was held the baledock (or baildock) was "a small room taken from one of the corners of the court, and left open at the top; in which, during the trials, are put some of the malefactors." Oxford Eng. Dict.

Problems of political indictments and of political judges raise profound questions going to the heart of the social compact. For that compact is two-sided: majorities undertake to press their grievances within limits of the Constitution and in accord with its procedures; minorities agree to abide by constitutional procedures in resisting those claims.

Does the answer to that problem involve defining the procedure for conducting political trials or does it involve the designing of constitutional methods for putting an end to them? This record is singularly inadequate to answer those questions. It will be time enough to resolve those weighty problems when a political trial reaches this Court for review.

Second are trials used by minorities to destroy the existing constitutional system and bring on repressive measures. Radicals on the left historically have used those tactics to incite the extreme right with the calculated design of fostering a regime of repression from which the radicals on the left hope to emerge as the ultimate victor.[4] The left in that role is the provocateur. The Constitution was not designed as an instrument for that form of rough-and-tumble contest. The social compact has room for tolerance, patience, and restraint, but not for sabotage and violence. Trials involving that spectacle strike at the very heart of constitutional government.

I would not try to provide in this case the guidelines for those two strikingly different types of cases. The case presented here is the classical criminal case without any political or subversive overtones. It involves a defendant who was a sick person and who may or may

[4] As respects the strategy of German Communists *vis-à-vis* the Nazis in the 1930's, see K. Heiden, Der Fuehrer 461, 462, 525, 551–552 (1944).

not have been insane in the classical sense [5] but who apparently had a diseased mind. And, as I have said, the record is so stale that it is now much too late to find out what the true facts really were.

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[5] In a 1956 pretrial sanity hearing, Allen was found to be incompetent to stand trial. Approximately a year later, however, on October 19, 1957, in a second competency hearing, he was declared sane and competent to stand trial.

Allen's sister and brother testified in Allen's behalf at the trial. They recited instances of Allen's unusual past behavior and stated that he was confined to a mental institution in 1953, although no reason for this latter confinement was given. A doctor called by the prosecution testified that he had examined Allen shortly after the commission of the crime which took place on August 12, 1956, and on other subsequent occasions, and that, in his opinion, Allen was sane at the time of each examination. This evidence was admitted on the question of Allen's sanity at the time of the offense. The jury found him sane at that time and the Illinois Supreme Court affirmed that finding. See *People* v. *Allen,* 37 Ill. 2d 167, 226 N. E. 2d 1.

At the time of Allen's trial in 1957, the tests in Illinois for the defendant's sanity at the time of the criminal act were the M'Naghten Rule supplemented by the so-called "irresistible impulse test." *People* v. *Carpenter,* 11 Ill. 2d 60, 142 N. E. 2d 11. The tests for determining a defendant's sanity at the time of trial were that "[h]e should be capable of understanding the nature and object of the proceedings against him, his own condition in reference to such proceedings, and have sufficient mind to conduct his defense in a rational and reasonable manner," and, further, that "he should be capable of co-operating with his counsel to the end that any available defenses may be interposed." *People* v. *Burson,* 11 Ill. 2d 360, 369, 143 N. E. 2d 239, 244–245.

IN RE WINSHIP

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 778. Argued January 20, 1970—Decided March 31, 1970

Relying on a preponderance of the evidence, the standard of proof required by § 744 (b) of the New York Family Court Act, a New York Family Court judge found that appellant, then a 12-year-old boy, had committed an act that "if done by an adult, would constitute the crime . . . of Larceny." The New York Court of Appeals affirmed, sustaining the constitutionality of § 744 (b). *Held:* Proof beyond a reasonable doubt, which is required by the Due Process Clause in criminal trials, is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult. Pp. 361–368.

24 N. Y. 2d 196, 247 N. E. 2d 253, reversed.

Rena K. Uviller argued the cause for appellant. With her on the briefs was *William E. Hellerstein.*

Stanley Buchsbaum argued the cause for the City of New York, appellee. With him on the brief was *J. Lee Rankin.*

Marie S. Klooz filed a brief for the Neighborhood Legal Services Program of Washington, D. C., et al. as *amici curiae* urging reversal.

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Marie L. Marcus,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Constitutional questions decided by this Court concerning the juvenile process have centered on the adjudicatory stage at "which a determination is made as to

whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." *In re Gault,* 387 U. S. 1, 13 (1967). *Gault* decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of " 'the essentials of due process and fair treatment.' " *Id.,* at 30. This case presents the single, narrow question whether proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.[1]

Section 712 of the New York Family Court Act defines a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." During a 1967 adjudicatory hearing, conducted pursuant to § 742 of the Act, a judge in New York Family Court

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[1] Thus, we do not see how it can be said in dissent that this opinion "rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitations." As in *Gault,* "we are not here concerned with . . . the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process." 387 U. S., at 13. In New York, the adjudicatory stage of a delinquency proceeding is clearly distinct from both the preliminary phase of the juvenile process and from its dispositional stage. See N. Y. Family Court Act §§ 731–749. Similarly, we intimate no view concerning the constitutionality of the New York procedures governing children "in need of supervision." See *id.,* at §§ 711–712, 742–745. Nor do we consider whether there are other "essentials of due process and fair treatment" required during the adjudicatory hearing of a delinquency proceeding. Finally, we have no occasion to consider appellant's argument that § 744 (b) is a violation of the Equal Protection Clause, as well as a denial of due process.

found that appellant, then a 12-year-old boy, had entered a locker and stolen $112 from a woman's pocketbook. The petition which charged appellant with delinquency alleged that his act, "if done by an adult, would constitute the crime or crimes of Larceny." The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected appellant's contention that such proof was required by the Fourteenth Amendment. The judge relied instead on § 744 (b) of the New York Family Court Act which provides that "[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence." [2] During a subsequent dispositional hearing, appellant was ordered placed in a training school for an initial period of 18 months, subject to annual extensions of his commitment until his 18th birthday—six years in appellant's case. The Appellate Division of the New York Supreme Court, First Judicial Department, affirmed without opinion, 30 App. Div. 2d 781, 291 N. Y. S. 2d 1005 (1968). The New York Court of Appeals then affirmed by a four-to-three vote, expressly sustaining the constitutionality of § 744 (b), 24 N. Y. 2d 196, 247 N. E. 2d 253 (1969).[3]

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[2] The ruling appears in the following portion of the hearing transcript:

Counsel: "Your Honor is making a finding by the preponderance of the evidence."

Court: "Well, it convinces me."

Counsel: "It's not beyond a reasonable doubt, Your Honor."

Court: "That is true . . . . Our statute says a preponderance and a preponderance it is."

[3] Accord, *e. g., In re Dennis M.*, 70 Cal. 2d 444, 450 P. 2d 296 (1969); *In re Ellis*, 253 A. 2d 789 (D. C. Ct. App. 1969); *State* v. *Arenas*, 253 Ore. 215, 453 P. 2d 915 (1969); *State* v. *Santana*, 444 S. W. 2d 614 (Texas 1969). Contra, *United States* v. *Costanzo*, 395 F. 2d 441 (C. A. 4th Cir. 1968); *In re Urbasek*, 38 Ill. 2d 535, 232 N. E. 2d 716 (1967); *Jones* v. *Commonwealth*,

We noted probable jurisdiction, 396 U. S. 885 (1969). We reverse.

I

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." C. McCormick, Evidence § 321, pp. 681–682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed. 1940). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the

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185 Va. 335, 38 S. E. 2d 444 (1946); N. D. Cent. Code § 27–20–29 (2) (Supp. 1969); Colo. Rev. Stat. Ann. § 22–3–6 (1) (1967); Md. Ann. Code, Art. 26, § 70–18 (a) (Supp. 1969); N. J. Ct. Rule 6:9 (1)(f) (1967); Wash. Sup. Ct., Juv. Ct. Rule § 4.4 (b) (1969); cf. *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969).

Legislative adoption of the reasonable-doubt standard has been urged by the National Conference of Commissioners on Uniform State Laws and by the Children's Bureau of the Department of Health, Education, and Welfare's Social and Rehabilitation Service. See Uniform Juvenile Court Act § 29 (b) (1968); Children's Bureau, Social and Rehabilitation Service, U. S. Department of Health, Education, and Welfare, Legislative Guide for Drafting Family and Juvenile Court Acts § 32 (c) (1969). Cf. the proposal of the National Council on Crime and Delinquency that a "clear and convincing" standard be adopted. Model Rules for Juvenile Courts, Rule 26, p. 57 (1969). See generally Cohen, The Standard of Proof in Juvenile Proceedings: *Gault* Beyond a Reasonable Doubt, 68 Mich. L. Rev. 567 (1970).

way in which law should be enforced and justice administered." *Duncan* v. *Louisiana,* 391 U. S. 145, 155 (1968).

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, for example, *Miles* v. *United States,* 103 U. S. 304, 312 (1881); *Davis* v. *United States,* 160 U. S. 469, 488 (1895); *Holt* v. *United States,* 218 U. S. 245, 253 (1910); *Wilson* v. *United States,* 232 U. S. 563, 569–570 (1914); *Brinegar* v. *United States,* 338 U. S. 160, 174 (1949); *Leland* v. *Oregon,* 343 U. S. 790, 795 (1952); *Holland* v. *United States,* 348 U. S. 121, 138 (1954); *Speiser* v. *Randall,* 357 U. S. 513, 525–526 (1958). Cf. *Coffin* v. *United States,* 156 U. S. 432 (1895). Mr. Justice Frankfurter stated that "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland* v. *Oregon, supra,* at 802–803 (dissenting opinion). In a similar vein, the Court said in *Brinegar* v. *United States, supra,* at 174, that "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Davis* v. *United States, supra,* at 488, stated that the requirement is implicit in "constitutions . . . [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty." In *Davis* a murder conviction was

reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: "On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. . . . No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Id.*, at 484, 493.

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States, supra,* at 453. As the dissenters in the New York Court of Appeals observed, and we agree, "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 24 N. Y. 2d, at 205, 247 N. E. 2d, at 259.

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society

that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser* v. *Randall, supra,* at 525–526: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

II

We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. We do not find convincing the contrary arguments of the New York Court of Appeals. *Gault* rendered untenable much of the reasoning relied upon by that court to sustain the constitutionality of § 744 (b). The Court of Appeals indicated that a delinquency adjudication "is not a 'conviction' (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confidentiality is thrown around all the proceedings (§§ 783–784)." 24 N. Y. 2d, at 200, 247 N. E. 2d, at 255–256. The court said further: "The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision [challenged by appellant] . . . ." 24 N. Y. 2d, at 203, 247 N. E. 2d, at 257. In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the " 'civil' label-of-convenience which has been attached to juvenile proceedings." 387 U. S., at 50. But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U. S., at 50–51. The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed "not to punish, but to save the child." 24 N. Y. 2d, at 197, 247 N. E. 2d, at 254. Again, however, *Gault* expressly rejected this justification. 387 U. S., at 27. We made clear in that decision that civil labels and good

intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.*, at 36.

Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process.[4] Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the pro-

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[4] Appellee, New York City, apparently concedes as much in its Brief, page 8, where it states:

"A determination that the New York law unconstitutionally denies due process because it does not provide for use of the reasonable doubt standard probably would not have a serious impact if all that resulted would be a change in the quantum of proof."

And Dorsen & Rezneck, *supra*, at 27, have observed:

"[T]he reasonable doubt test is superior to all others in protecting against an unjust adjudication of guilt, and that is as much a concern of the juvenile court as of the criminal court. It is difficult to see how the distinctive objectives of the juvenile court give rise to a legitimate institutional interest in finding a juvenile to have committed a violation of the criminal law on less evidence than if he were an adult."

cedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing.

The Court of Appeals observed that "a child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court." 24 N. Y. 2d, at 199, 247 N. E. 2d, at 255. It is true, of course, that the juvenile may be engaging in a general course of conduct inimical to his welfare that calls for judicial intervention. But that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law [5] and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.

We conclude, as we concluded regarding the essential due process safeguards applied in *Gault,* that the observance of the standard of proof beyond a reasonable doubt "will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Gault, supra,* at 21.

Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a "tenuous difference" between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge's action evidences the accuracy of the observation of commentators that "the preponderance test is susceptible to the misinter-

[5] The more comprehensive and effective the procedures used to prevent public disclosure of the finding, the less the danger of stigma. As we indicated in *Gault,* however, often the "claim of secrecy . . . is more rhetoric than reality." 387 U. S., at 24.

pretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." Dorsen & Rezneck, *supra,* at 26–27.[6]

III

In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, "that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt." 24 N. Y. 2d, at 207, 247 N. E. 2d, at 260.

Reversed.

MR. JUSTICE HARLAN, concurring.

No one, I daresay, would contend that state juvenile court trials are subject to *no* federal constitutional limitations. Differences have existed, however, among the members of this Court as to *what* constitutional protections do apply. See *In re Gault,* 387 U. S. 1 (1967).

[6] Compare this Court's rejection of the preponderance standard in deportation proceedings, where we ruled that the Government must support its allegations with "clear, unequivocal, and convincing evidence." *Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276, 285 (1966). Although we ruled in *Woodby* that deportation is not tantamount to a criminal conviction, we found that since it could lead to "drastic deprivations," it is impermissible for a person to be "banished from this country upon no higher degree of proof than applies in a negligence case." *Ibid.*

The present case draws in question the validity of a New York statute that permits a determination of juvenile delinquency, founded on a charge of criminal conduct, to be made on a standard of proof that is less rigorous than that which would obtain had the accused been tried for the same conduct in an ordinary criminal case. While I am in full agreement that this statutory provision offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment, I am constrained to add something to what my Brother BRENNAN has written for the Court, lest the true nature of the constitutional problem presented become obscured or the impact on state juvenile court systems of what the Court holds today be exaggerated.

I

Professor Wigmore, in discussing the various attempts by courts to define how convinced one must be to be convinced beyond a reasonable doubt, wryly observed: "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly . . . a sound method of self-analysis for one's belief," 9 J. Wigmore, Evidence 325 (3d ed. 1940).[1]

Notwithstanding Professor Wigmore's skepticism, we have before us a case where the choice of the standard of proof has made a difference: the juvenile court judge below forthrightly acknowledged that he believed by a preponderance of the evidence, but was not convinced beyond a reasonable doubt, that appellant stole $112 from the complainant's pocketbook. Moreover, even though the labels used for alternative standards of proof are

[1] See also Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L. J. 527, 551–552 (1968).

vague and not a very sure guide to decisionmaking, the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.[2]

To explain why I think this so, I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction

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[2] For an interesting analysis of standards of proof see Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065, 1071–1077 (1968).

of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly,[3] it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party

[3] The preponderance test has been criticized, justifiably in my view, when it is read as asking the trier of fact to weigh in some objective sense the quantity of evidence submitted by each side rather than asking him to decide what he believes most probably happened. See J. Maguire, Evidence, Common Sense and Common Law 180 (1947).

who has the burden to persuade the [judge] of the fact's existence." [4]

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As MR. JUSTICE BRENNAN wrote for the Court in *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958):

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."

In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness,[5] requires a more stringent standard for criminal trials than for ordinary civil litigation.

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[4] F. James, Civil Procedure 250–251 (1965); see E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 84–85 (1956).

[5] In dissent my Brother BLACK again argues that, apart from the specific prohibitions of the first eight amendments, any procedure spelled out by a legislature—no matter how unfair—passes constitutional muster under the Due Process Clause. He bottoms his conclusion on history that he claims demonstrates (1) that due process means "law of the land"; (2) that any legislative enactment, *ipso facto*, is part of the law of the land; and (3) that the Fourteenth

II

When one assesses the consequences of an erroneous factual determination in a juvenile delinquency proceeding in which a youth is accused of a crime, I think it must be concluded that, while the consequences are

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Amendment incorporates the prohibitions of the Bill of Rights and applies them to the States. I cannot refrain from expressing my continued bafflement at my Brother BLACK's insistence that due process, whether under the Fourteenth Amendment or the Fifth Amendment, does not embody a concept of fundamental fairness as part of our scheme of constitutionally ordered liberty. His thesis flies in the face of a course of judicial history reflected in an unbroken line of opinions that have interpreted due process to impose restraints on the procedures government may adopt in its dealing with its citizens, see, *e. g.*, the cases cited in my dissenting opinions in *Poe* v. *Ullman,* 367 U. S. 497, 522, 539–545 (1961); *Duncan* v. *Louisiana,* 391 U. S. 145, 171 (1968); as well as the uncontroverted scholarly research (notwithstanding H. Flack, The Adoption of the Fourteenth Amendment (1908)), respecting the intendment of the Due Process Clause of the Fourteenth Amendment, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). Indeed, with all respect, the very case cited in Brother BLACK's dissent as establishing that "due process of law" means "law of the land" rejected the argument that any statute, by the mere process of enactment, met the requirements of the Due Process Clause. In *Murray's Lessee* v. *Hoboken Land & Improv. Co.,* 18 How. 272 (1856), an issue was whether a "distress warrant" issued by the Solicitor of the Treasury under an Act of Congress to collect money due for taxes offended the Due Process Clause. Justice Curtis wrote: "That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. *It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.*" *Id.*, at 276. (Emphasis supplied.)

not identical to those in a criminal case, the differences will not support a distinction in the standard of proof. First, and of paramount importance, a factual error here, as in a criminal case, exposes the accused to a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends. And, second, a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime.[6] Although there are no doubt costs to society (and possibly even to the youth himself) in letting a guilty youth go free, I think here, as in a criminal case, it is far worse to declare an innocent youth a delinquent. I therefore agree that a juvenile court judge should be no less convinced of the factual conclusion that the accused committed the criminal act with which he is charged than would be required in a criminal trial.

III

I wish to emphasize, as I did in my separate opinion in *Gault*, 387 U. S. 1, 65, that there is no automatic con-

[6] The New York statute was amended to distinguish between a "juvenile delinquent," *i. e.*, a youth "who does any act which, if done by an adult, would constitute a crime," N. Y. Family Court Act § 712 (1963), and a "[p]erson in need of supervision" [PINS] who is a person "who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." The PINS category was established in order to avoid the stigma of finding someone to be a "juvenile delinquent" unless he committed a criminal act. The Legislative Committee report stated: " 'Juvenile delinquent' is now a term of disapproval. The judges of the Children's Court and the Domestic Relations Court of course are aware of this and also aware that government officials and private employers often learn of an adjudication of delinquency." N. Y. Jt. Legislative Committee on Court Reorganization, The Family Court Act, pt. 2, p. 7 (1962). Moreover, the powers of the police and courts differ in these two categories of cases. See *id.*, at 7–9. Thus, in a PINS type case, the consequences of an erroneous factual determination are by no means identical to those involved here.

gruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases.[7] It is of great importance, in my view, that procedural strictures not be constitutionally imposed that jeopardize "the essential elements of the State's purpose" in creating juvenile courts, *id.*, at 72. In this regard, I think it worth emphasizing that the requirement of proof beyond a reasonable doubt that a juvenile committed a criminal act before he is found to be a delinquent does not (1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a "criminal" because he has been found to be a delinquent, or (3) burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time consuming, or rigid. Today's decision simply requires a juvenile court judge to be more confident in his belief that the youth did the act with which he has been charged.

With these observations, I join the Court's opinion, subject only to the constitutional reservations expressed in my opinion in *Gault*.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE STEWART joins, dissenting.

The Court's opinion today rests entirely on the assumption that all juvenile proceedings are "criminal prosecutions," hence subject to constitutional limitations. This derives from earlier holdings, which, like today's

[7] In *Gault*, for example, I agreed with the majority that due process required (1) adequate notice of the "nature and terms" of the proceedings; (2) notice of the right to retain counsel, and an obligation on the State to provide counsel for indigents "in cases in which the child may be confined"; and (3) a written record "adequate to permit effective review." 387 U. S., at 72. Unlike the majority, however, I thought it unnecessary at the time of *Gault* to impose the additional requirements of the privilege against self-incrimination, confrontation, and cross-examination.

holding, were steps eroding the differences between juvenile courts and traditional criminal courts. The original concept of the juvenile court system was to provide a benevolent and less formal means than criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders. Since I see no constitutional requirement of due process sufficient to overcome the legislative judgment of the States in this area, I dissent from further strait-jacketing of an already overly restricted system. What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.

Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate juvenile court staffs and facilities; we "burn down the stable to get rid of the mice." The lack of support and the distressing growth of juvenile crime have combined to make for a literal breakdown in many if not most juvenile courts. Constitutional problems were not seen while those courts functioned in an atmosphere where juvenile judges were not crushed with an avalanche of cases.

My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile-court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.

MR. JUSTICE BLACK, dissenting.

The majority states that "many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Ante,* at 362. I have joined in some of those opinions, as well as the dissenting opinion of Mr. Justice Frankfurter in *Leland* v. *Oregon,* 343 U. S. 790, 802 (1952). The Court has never clearly held, however, that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution. The Bill of Rights, which in my view is made fully applicable to the States by the Fourteenth Amendment, see *Adamson* v. *California,* 332 U. S. 46, 71–75 (1947) (dissenting opinion), does by express language provide for, among other things, a right to counsel in criminal trials, a right to indictment, and the right of a defendant to be informed of the nature of the charges against him.[1] And in two places the Constitution provides for trial by jury,[2] but nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt. The Constitution thus goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders. I realize that it is far easier to substitute individual judges' ideas of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right. That this old "shock-the-conscience" test is what the Court is relying on, rather than the words of the Constitution,

[1] Amdts. V, VI, U. S. Constitution.

[2] Art. III, § 2, cl. 3; Amdt. VI, U. S. Constitution.

is clearly enough revealed by the reference of the majority to "fair treatment" and to the statement by the dissenting judges in the New York Court of Appeals that failure to require proof beyond a reasonable doubt amounts to a "lack of fundamental fairness." *Ante,* at 359, 363. As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.

I

Our Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law."[3] The four words—due process of law—have been the center of substantial legal debate over the years. See *Chambers* v. *Florida,* 309 U. S. 227, 235–236, and n. 8 (1940). Some might think that the words themselves are vague. But any possible ambiguity disappears when the phrase is viewed in the light of history and the accepted meaning of those words prior to and at the time our Constitution was written.

"Due process of law" was originally used as a shorthand expression for governmental proceedings according to the "law of the land" as it existed at the time of those proceedings. Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing. The Magna Carta provided that:

> "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise

[3] The Fifth Amendment applies this limitation to the Federal Government and the Fourteenth Amendment imposes the same restriction on the States.

> destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." [4]

Later English statutes reinforced and confirmed these basic freedoms. In 1350 a statute declared that "it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land . . . ." [5] Four years later another statute provided "[t]hat no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law." [6] And in 1363 it was provided "that no man be taken or imprisoned, nor put out of his freehold, without process of law." [7]

Drawing on these and other sources, Lord Coke, in 1642, concluded that "due process of law" was synonymous with the phrase "by law of the land." [8] One of the earliest cases in this Court to involve the interpretation of the Due Process Clause of the Fifth Amendment declared that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta.*" *Murray's Lessee* v. *Hoboken Land & Improv. Co.*, 18 How. 272, 276 (1856).

While it is thus unmistakably clear that "due process of law" means according to "the law of the land," this Court has not consistently defined what "the law of the

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[4] 9 Hen. 3, c. 29 (1225). A similar provision appeared in c. 39 of the original issue signed by King John in 1215.

[5] 25 Edw. 3, Stat. 5, c. IV.

[6] 28 Edw. 3, c. III.

[7] 37 Edw. 3, c. XVIII.

[8] Coke's Institutes, Second Part, 50 (1st ed. 1642).

land" means and in my view members of this Court frequently continue to misconceive the correct interpretation of that phrase. In *Murray's Lessee, supra,* Mr. Justice Curtis, speaking for the Court, stated:

> "The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Id.,* at 276–277.[9]

Later in *Twining* v. *New Jersey,* 211 U. S. 78 (1908), Mr. Justice Moody, again speaking for the Court, reaffirmed that "due process of law" meant "by law of the

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[9] Cf. *United States* v. *Hudson,* 7 Cranch 32 (1812), in which the Court held that there was no jurisdiction in federal courts to try criminal charges based on the common law and that all federal crimes must be based on a statute of Congress.

land," but he went on to modify Mr. Justice Curtis' definition of the phrase. He stated:

> "First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . .
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> "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. . . .
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> "Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." *Id.*, at 100–101.[10]

In those words is found the kernel of the "natural law due process" notion by which this Court frees itself from the limits of a written Constitution and sets itself loose to declare any law unconstitutional that "shocks its conscience," deprives a person of "fundamental fairness," or violates the principles "implicit in the concept of

[10] Cf. the views of Mr. Justice Iredell in *Calder* v. *Bull,* 3 Dall. 386, 398 (1798).

ordered liberty." See *Rochin* v. *California,* 342 U. S. 165, 172 (1952); *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937). While this approach has been frequently used in deciding so-called "procedural" questions, it has evolved into a device as easily invoked to declare invalid "substantive" laws that sufficiently shock the consciences of at least five members of this Court. See, *e. g., Lochner* v. *New York,* 198 U. S. 45 (1905); *Coppage* v. *Kansas,* 236 U. S. 1 (1915); *Burns Baking Co.* v. *Bryan,* 264 U. S. 504 (1924); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). I have set forth at length in prior opinions my own views that this concept is completely at odds with the basic principle that our Government is one of limited powers and that such an arrogation of unlimited authority by the judiciary cannot be supported by the language or the history of any provision of the Constitution. See, *e. g., Adamson* v. *California,* 332 U. S. 46, 68 (1947) (dissenting opinion); *Griswold* v. *Connecticut, supra,* at 507 (1965) (dissenting opinion).

In my view both Mr. Justice Curtis and Mr. Justice Moody gave "due process of law" an unjustifiably broad interpretation. For me the only correct meaning of that phrase is that our Government must proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions as interpreted by court decisions. The Due Process Clause, in both the Fifth and Fourteenth Amendments, in and of itself does not add to those provisions, but in effect states that our governments are governments of law and constitutionally bound to act only according to law.[11] To some that view may seem a degrading and niggardly view of what is undoubtedly a fundamental part of our basic freedoms.

[11] It is not the Due Process Clause of the Fourteenth Amendment, standing alone, that requires my conclusion that that Amendment was intended to apply fully the protection of the Bill of Rights to actions by the States. That conclusion follows from the language

But that criticism fails to note the historical importance of our Constitution and the virtual revolution in the history of the government of nations that was achieved by forming a government that from the beginning had its limits of power set forth in one written document that

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of the entire first section of the Fourteenth Amendment, as illuminated by the legislative history surrounding its adoption. See *Adamson* v. *California, supra,* at 71–75, 92–123.

MR. JUSTICE HARLAN continues to insist that uncontroverted scholarly research shows that the Fourteenth Amendment did *not* incorporate the Bill of Rights as limitations on the States. See *Poe* v. *Ullman,* 367 U. S. 497, 540 (1961) (dissenting opinion); *Griswold* v. *Connecticut, supra,* at 500 (concurring in judgment); *ante,* at 372–373, n. 5. I cannot understand that conclusion. Mr. Fairman, in the article repeatedly cited by MR. JUSTICE HARLAN, surveys the legislative history and concludes that it is his opinion that the amendment did not incorporate the Bill of Rights. Mr. Flack, in at least an equally "scholarly" writing, surveys substantially the same documents relied upon by Mr. Fairman and concludes that a prime objective of Congress in proposing the adoption of the Fourteenth Amendment was "[t]o make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States." Compare H. Flack, The Adoption of the Fourteenth Amendment 94 (1908), with Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). It is, of course, significant that since the adoption of the Fourteenth Amendment this Court has held almost all the provisions of the Bill of Rights applicable to the States: the First Amendment, *e. g., Gitlow* v. *New York,* 268 U. S. 652 (1925), *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); the Fourth Amendment, *Mapp* v. *Ohio,* 367 U. S. 643 (1961); the Fifth Amendment, *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226 (1897), *Malloy* v. *Hogan,* 378 U. S. 1 (1964), *Benton* v. *Maryland,* 395 U. S. 784 (1969); the Sixth Amendment, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), *Pointer* v. *Texas,* 380 U. S. 400 (1965), *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967), *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); and the Eighth Amendment, *Robinson* v. *California,* 370 U. S. 660 (1962). To me this history indicates that in the end Mr. Flack's thesis has fared much better than Mr. Fairman's "uncontroverted" scholarship.

also made it abundantly clear that all governmental actions affecting life, liberty, and property were to be according to law.

For years our ancestors had struggled in an attempt to bring England under one written constitution, consolidating in one place all the threads of the fundamental law of that nation. They almost succeeded in that attempt,[12] but it was not until after the American Revolution that men were able to achieve that long-sought goal. But the struggle had not been simply to put all the constitutional law in one document, it was also to make certain that men would be governed by *law,* not the arbitrary fiat of the man or men in power. Our ancestors' ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase "due process of law." The many decisions of this Court that have found in that phrase a blanket authority to govern the country according to the views of at least five members of this institution have ignored the essential meaning of the very words they invoke. When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the "law of the land" and instead becomes one governed ultimately by the "law of the judges."

It can be, and has been, argued that when this Court strikes down a legislative act because it offends the idea of "fundamental fairness," it furthers the basic thrust of our Bill of Rights by protecting individual freedom.

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[12] See J. Frank, The Levellers (1955).

But that argument ignores the effect of such decisions on perhaps the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society. Our Federal Government was set up as one of limited powers, but it was also given broad power to do all that was "necessary and proper" to carry out its basic purpose of governing the Nation, so long as those powers were not exercised contrary to the limitations set forth in the Constitution. And the States, to the extent they are not restrained by the provisions in that document, were to be left free to govern themselves in accordance with their own views of fairness and decency. Any legislature presumably passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. The people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people, in my opinion, should never be denied by this Court except when the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution.

II

I admit a strong, persuasive argument can be made for a standard of proof beyond a reasonable doubt in criminal cases—and the majority has made that argument well—but it is not for me as a judge to say for that reason that Congress or the States are without constitutional power to establish another standard that the Constitution does not otherwise forbid. It is quite true that proof beyond a reasonable doubt has long been required in federal criminal trials. It is also true that

this requirement is almost universally found in the governing laws of the States. And as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard. See *Turner* v. *United States,* 396 U. S. 398, 430 (1970) (BLACK, J., dissenting). But when, as here, a State through its duly constituted legislative branch decides to apply a different standard, then that standard, unless it is otherwise unconstitutional, must be applied to insure that persons are treated according to the "law of the land." The State of New York has made such a decision, and in my view nothing in the Due Process Clause invalidates it.

WALLER *v.* FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

No. 24. Argued November 13, 1969—
Decided April 6, 1970

Petitioner was convicted by the St. Petersburg municipal court of violating two ordinances, destruction of city property and disorderly breach of the peace, and sentenced to 180 days in jail. Thereafter, an information, concededly based on the same acts that led to the previous convictions, was filed by the State of Florida charging petitioner with grand larceny. The State Supreme Court denied a writ of prohibition to prevent the second trial on petitioner's claim of double jeopardy. Petitioner was tried and convicted of grand larceny. The District Court of Appeal, holding that there would be no bar to the prosecution in the state court "even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court," affirmed the grand larceny conviction. *Held:* The State of Florida and its municipalities are not separate sovereign entities each entitled to impose punishment for the same alleged crime, as the judicial power of the municipal courts and the state courts of general jurisdiction springs from the same organic law, and the District Court of Appeal erred in holding that a second trial in a state court for the identical offense for which a person was tried in a municipal court did not constitute double jeopardy. Pp. 390–395.

213 So. 2d 623, vacated and remanded.

Leslie Harold Levinson argued the cause for petitioner. With him on the brief were *Melvin L. Wulf* and *Gardner W. Beckett, Jr.*

George R. Georgieff, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Earl Faircloth,* Attorney General, and *William D. Roth,* Special Assistant Attorney General.

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

We granted the writ in this case to review a narrow question which can best be treated on the basis of the facts as stated by the District Court of Appeal of Florida, Second District, and the holding of that court. Petitioner was one of a number of persons who removed a canvas mural which was affixed to a wall inside the City Hall of St. Petersburg, Florida. After the mural was removed, the petitioner and others carried it through the streets of St. Petersburg until they were confronted by police officers. After a scuffle, the officers recovered the mural, but in a damaged condition.

The petitioner was charged by the City of St. Petersburg with the violation of two ordinances: first, destruction of city property; and second, disorderly breach of the peace. He was found guilty in the municipal court on both counts, and a sentence of 180 days in the county jail was imposed.

Thereafter an information was filed against the petitioner by the State of Florida charging him with grand larceny. It is conceded that this information was based on the same acts of the petitioner as were involved in the violation of the two city ordinances.

Before his trial in the Circuit Court on the felony charge, petitioner moved in the Supreme Court of Florida for a writ of prohibition to prevent the second trial, asserting the claim of double jeopardy as a bar. Relief was denied without opinion. *Waller* v. *Circuit Court for the Sixth Judicial Circuit in and for Pinellas County,* 201 So. 2d 554 (1967). Thereafter petitioner was tried in the Circuit Court of Florida by a jury and was found guilty of the felony of grand larceny. After verdict in the state court, he was sentenced to six months to five years less 170 days of the 180-day sentence pre-

viously imposed by the municipal court of St. Petersburg, Florida.

On appeal, the District Court of Appeal of Florida considered and rejected petitioner's claim that he had twice been put in jeopardy because prior to his conviction of grand larceny, he had been convicted by the municipal court of an included offense of the crime of grand larceny. *Waller* v. *State,* 213 So. 2d 623 (1968). The opinion of the District Court of Appeal first explicitly acknowledged that the charge on which the state court action rested "was based on the same acts of the appellant as were involved in the violation of the two city ordinances." Then, in rejecting Waller's claim of double jeopardy, the court said:

> "Assuming but not holding that the violations of the municipal ordinances were included offenses of the crime of grand larceny, the appellant nevertheless has not twice been put in jeopardy, because *even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.* This has been the law of this state since 1894, as is established in the case of Theisen v. McDavid, 34 Fla. 440, 16 So. 321 . . . . The Florida Supreme Court has followed the Theisen case, supra, throughout the years and as recently as July 17, 1968, in Hilliard v. City of Gainesville, Fla., 213 So. 2d 689, reaffirmed the Theisen case and stated as follows:
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> " 'This double jeopardy argument has long been settled contrary to the claims of the petitioner. We see no reason to recede from our established precedent on the subject. Long ago it was decided that an act committed within municipal limits may be punished by city ordinance even though the same

act is also proscribed as a crime by a state statute. An offender may be tried for the municipal offense in the city court and for the crime in the proper state court. Conviction or acquittal in either does not bar prosecution in the other.'" (Emphasis added.)

A petition for a writ of certiorari to the Supreme Court of Florida was denied, *Waller* v. *State,* 221 So. 2d 749 (1968). It is reasonable to assume that the Florida trial court and the District Court of Appeal considered themselves bound by the doctrine of *Theisen* v. *McDavid,* 34 Fla. 440, 16 So. 321, which at that time was being reasserted in *Hilliard* v. *City of Gainesville,* 213 So. 2d 689, and had been reaffirmed by the Florida Supreme Court's denial of a writ of prohibition sought by Waller on the claim of double jeopardy.

We act on the statement of the District Court of Appeal that the second trial on the felony charge by information "was based on the same acts of the appellant as were involved in the violation of the two city ordinances" and on the assumption that the ordinance violations were included offenses of the felony charge.[1] Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one State to place petitioner on trial for the same alleged crime.

In *Benton* v. *Maryland,* 395 U. S. 784 (1969), this Court declared the double jeopardy provisions of the Fifth Amendment applicable to the States, overruling *Palko* v. *Connecticut,* 302 U. S. 319 (1937). Here, as

[1] We accept the assumption of the District Court of Appeal although the record is not adequate to verify its accuracy. For example, no part of the record of the municipal court conviction has been incorporated into the record in the present case.

in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), *Benton* should be applied to test petitioner's conviction, although we need not and do not decide whether each of the several aspects of the constitutional guarantee against double jeopardy requires such application in similar procedural circumstances.[2]

Florida does not stand alone in treating municipalities and the State as separate sovereign entities, each capable of imposing punishment for the same alleged crime.[3]

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[2] *Benton* v. *Maryland*, 395 U. S. 784 (1969), controls any case which arises in its ambit. See *Ashe* v. *Swenson*, *post*, p. 436 n. 1. Nonetheless, when this Court granted certiorari in *Price* v. *Georgia*, No. 269, 1969 Term, it requested that counsel "brief and argue [the] question of retroactivity of *Benton* v. *Maryland*, [395 U. S. 784], and whether that decision is applicable to this case." 395 U. S. 975 (1969). By our decisions in the instant case and in *Ashe* v. *Swenson*, *supra*, we do not resolve, with respect to the circumstances presented in *Price* v. *Georgia*, *supra*, either of the two questions posed by the Court in that case.

[3] Decisions of the States that currently appear to treat municipalities and the State as separate sovereigns for double jeopardy purposes are as follows:

Pike v. *City of Birmingham*, 36 Ala. App. 53, 53 So. 2d 394, cert. denied, 255 Ala. 664, 53 So. 2d 396 (1951). See also Ala. Code, Tit. 37, § 594 (1958). *United States* v. *Farwell*, 11 Alaska 507, 76 F. Supp. 35 (D. C. Alaska 1948); *McInerney* v. *City of Denver*, 17 Colo. 302, 29 P. 516 (1892); *State* v. *Musser*, 67 Idaho 214, 176 P. 2d 199 (1946); *People* v. *Behymer*, 48 Ill. App. 2d 218, 198 N. E. 2d 729 (1964); *State* v. *Garcia*, 198 Iowa 744, 200 N. W. 201 (1924); *Earwood* v. *State*, 198 Kan. 659, 426 P. 2d 151 (1967); *State* v. *Clifford*, 45 La. Ann. 980, 13 So. 281 (1893). See also La. Crim. Pro. Code Ann., Art. 597 (1967); *State* v. *End*, 232 Minn. 266, 45 N. W. 2d 378 (1950); *May* v. *Town of Carthage*, 191 Miss. 97, 2 So. 2d 801 (1941); *State* v. *Garner*, 360 Mo. 50, 226 S. W. 2d 604 (1950); *State* v. *Amick*, 173 Neb. 770, 114 N. W. 2d 893 (1962); *Ex parte Sloan*, 47 Nev. 109, 217 P. 233 (1923); *State* v. *Simpson*, 78 N. D. 360, 49 N. W. 2d 777 (1951); *Koch* v. *State*, 53 Ohio St. 433, 41 N. E. 689 (1895); *McCann* v. *State*, 82 Okla. Cr. 374, 170 P. 2d 562 (1946); *Miller* v. *Hansen*, 126 Ore. 297, 269 P. 864 (1928); *Webster* v. *Knewel*, 47 S. D. 142, 196

Here, respondent State of Florida seeks to justify this separate sovereignty theory by asserting that the relationship between a municipality and the State is analogous to the relationship between a State and the Federal Government. Florida's chief reliance is placed upon this Court's holdings in *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), and *Abbate* v. *United States,* 359 U. S. 187 (1959), which permitted successive prosecutions by the Federal and State Governments as separate sovereigns. Any such reading of *Abbate* is foreclosed. In another context, but relevant here, this Court noted—

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds* v. *Sims,* 377 U. S. 533, 575 (1964).

Florida has recognized this unity in its Constitution. Article VIII, § 2, of the Florida Constitution (1968 revision) contains a grant of power to the Florida Legislature respecting municipalities: [4]

> "(a) *Establishment.* Municipalities may be established or abolished and their charters amended pursuant to general or special law. . . .

N. W. 549 (1924); *State* v. *Tucker,* 137 Wash. 162, 242 P. 363, 246 P. 758 (1926); *City of Milwaukee* v. *Johnson,* 192 Wis. 585, 213 N. W. 335 (1927); *State* v. *Jackson,* 75 Wyo. 13, 291 P. 2d 798 (1955). Gross, Successive Prosecutions by City and State—The Question of Double Jeopardy, 43 Ore. L. Rev. 281 (1964), contains a discussion of the origins and development of this "dual sovereignty" doctrine. See also Note, 1968 Duke L. J. 362.

[4] At the time of petitioner's trial, before the 1968 revision of the Florida Constitution, Art. VIII, § 8, of the Florida Constitution (1885) gave power to the State Legislature:

"to establish, and to abolish, municipalities[,] to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

> "(b) *Powers.* Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services . . . ."

Moreover, Art. V, § 1, of the Florida Constitution (1885), which does not appear to have been changed in the 1968 Constitutional revision, declares:

> "[T]he judicial power of the *State of Florida* is vested in a supreme court . . . and such other courts, *including municipal courts* . . . as the legislature may from time to time ordain and establish." (Emphasis added.)

These provisions of the Florida Constitution demonstrate that the judicial power to try petitioner on the first charges in municipal court springs from the same organic law that created the state court of general jurisdiction in which petitioner was tried and convicted for a felony. Accordingly, the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton* v. *United States,* 206 U. S. 333 (1907), where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign.[5] In *Grafton* a soldier in the United States Army had been acquitted by a general court-martial convened in the Philippine Islands of the alleged crime of feloniously killing two men. Subsequently, a criminal information in the name of the United States was filed in a Philippine court while those islands were a federal terri-

[5] See also *Puerto Rico* v. *Shell Co. (P. R.), Ltd.,* 302 U. S. 253 (1937), where the Court in dicta approved of *Grafton.*

tory, charging the soldier with the same offense committed in violation of local law. When Philippine courts upheld a conviction against a double jeopardy challenge, this Court reversed, resting upon the single-sovereign rationale and distinguishing cases like *Fox* v. *Ohio,* 5 How. 410 (1847), which sanctioned successive prosecutions by State and Federal Governments for the same acts:

> "An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a State can be punished only by its authority and in its tribunals. The same act . . . may constitute two offenses, one against the United States and the other against a State. But these things cannot be predicated of the relations between the United States and the Philippines. The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States." 206 U. S., at 354–355.

Thus *Grafton,* not *Fox* v. *Ohio, supra,* or its progeny, *Bartkus* v. *Illinois, supra,* or *Abbate* v. *United States, supra,* controls, and we hold that on the basis of the facts upon which the Florida District Court of Appeal relied

petitioner could not lawfully be tried both by the municipal government and by the State of Florida. In this context a "dual sovereignty" theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

We decide only [6] that the Florida courts were in error to the extent of holding that—

> "even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court."

The second trial of petitioner which resulted in a judgment of conviction in the state court for a felony having no valid basis, that judgment is vacated and the cause remanded to the District Court of Appeal of Florida, Second District, for further proceedings in accord with this opinion. In these circumstances we do not reach other contentions raised by petitioner.

It is so ordered.

MR. JUSTICE BLACK joins the opinion of the Court, but nonetheless adheres to the views expressed in his dissenting opinions in *Bartkus* v. *Illinois,* 359 U. S. 121, 150 (1959), and *Abbate* v. *United States,* 359 U. S. 187, 201 (1959).

MR. JUSTICE BRENNAN, concurring.

I join the holding of the Court that, because the municipal and state courts of a State are part of one

[6] If petitioner has committed offenses not embraced within the charges against him in the municipal court he may, or may not, be subject to further prosecution depending on statutes of limitation and other restrictions not covered by the double jeopardy restraints of the Constitutions of Florida and of the United States.

sovereign judicial system, successive prosecutions in the municipal and state courts are not prosecutions by separate sovereign entities. Moreover, for the reasons stated in my concurring opinion in *Ashe* v. *Swenson, post,* p. 448, I believe that, unless this case fell within one of the exceptions to the "same transaction" rule, see, *id.,* at 453 n. 7, 455 n. 11, the Double Jeopardy Clause barred a second trial since all the charges grew out of the same criminal episode.*

*I adhere to the Court's holding in *Ashe* v. *Swenson, post,* at 437 n. 1, that our decision in *Benton* v. *Maryland,* 395 U. S. 784 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is "fully 'retroactive.'" See also *North Carolina* v. *Pearce,* 395 U. S. 711 (1969).

Syllabus

ROSADO ET AL. *v.* WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL.

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

No. 540. Argued November 19, 1969—Decided April 6, 1970

The Social Security Amendments of 1967 added § 402 (a) (23), which reads: "[The States shall] provide that by July 1, 1969, the amounts used by the State to determine needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." In 1969 New York, by § 131–a of its Social Services Law, altered its standard-of-need computation under the federally supported Aid to Families With Dependent Children (AFDC) program, and adopted a system fixing maximum allowances per family based on the number of persons in the family and the age of the oldest child, and eliminated a "special grants" program. The state statute resulted in decreased benefits to many New York City recipients. This controversy involving the compatibility of the two statutes arose out of a pendent claim included in petitioners' complaint bringing a class action challenging § 131–a as violative of the Equal Protection Clause by virtue of its provision for lesser payments to AFDC recipients in Nassau County than those allowed for New York City residents. A three-judge court was convened, but before a decision was rendered § 131–a was amended to permit Nassau County grants equal to those in New York City. The three-judge court concluded that the equal protection issue was "no longer justiciable," dissolved itself, and remanded the matter to the single District Judge. The District Judge issued an injunction prohibiting the reduction or discontinuance of "regular and recurring grants and special grants" payable under the predecessor welfare law. The Court of Appeals reversed, holding that the three-judge court had properly dissolved itself but that the District Judge should not have ruled on the merits of petitioners' statutory claim. *Held:*

1. The District Judge had jurisdiction to decide this federal statutory challenge to the New York welfare law. Pp. 402–407.

(a) Jurisdiction over the primary claim at all stages of the litigation is not a prerequisite to resolution of the pendent

claim, and the mootness of the equal protection claim does not eliminate the jurisdiction of the District Judge over the pendent statutory claim. Pp. 402–405.

(b) The District Judge properly did not decline jurisdiction to allow the Department of Health, Education, and Welfare (HEW) to resolve the controversy, as neither the "exhaustion of administrative remedies" nor the "primary jurisdiction" doctrine is applicable here. Petitioners do not seek review of an administrative ruling nor could they have obtained such a ruling since HEW does not permit welfare recipients to trigger or participate in its review of state welfare programs. Pp. 405–407.

2. New York's program is incompatible with § 402 (a)(23) and petitioners are entitled to an injunction by the District Court against payment of federal monies according to the State's new schedules, should New York not develop a conforming plan within a reasonable time. Pp. 407–420.

(a) Congress in § 402 (a)(23) required the States to face up to the magnitude of the public assistance requirement, prodded them more equitably to apportion their payments, and spoke in favor of increases in AFDC payments. Pp. 412–414.

(b) The evidence supports the District Judge's finding that New York has, in effect, impermissibly lowered its standard of need by deleting items that were previously included. Pp. 415–417.

(c) While § 402 (a)(23) does not prevent New York from pursuing a goal of administrative efficiency, it does foreclose the State from achieving this purpose by reducing significantly the content of its standard of need. Pp. 417–419.

(d) Section 402 (a)(23) invalidates any state program that decreases the content of the standard of need, unless the State can demonstrate that the items formerly included (here the system of special grants, not the system of maximum grants based upon average age of the oldest child) no longer constituted part of the reality of existence for the majority of welfare recipients. Pp. 419–420.

3. Congress has not foreclosed judicial review to welfare recipients who are most directly affected by the administration of the program and it is the duty of the federal courts to resolve disputes as to whether federal funds allocated to the States for welfare programs are properly expended. Pp. 420–423.

414 F. 2d 170, reversed and remanded.

Lee A. Albert argued the cause for petitioners. With him on the brief were *Carl Rachlin* and *Martin Garbus.*

Philip Weinberg argued the cause for respondents. With him on the brief were *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler,* Assistant Attorney General.

Briefs of *amici curiae* urging reversal were filed by *Alan H. Levine, Melvin L. Wulf, Eleanor Holmes Norton,* and *Martin M. Berger* for the New York Civil Liberties Union et al.; by *Karl D. Zukerman, Dorothy Coyle,* and *Mildred Shanley* for the Catholic Charities of the Archdiocese of New York et al.; and by *Floyd Sarisohn* for People for Adequate Welfare.

Briefs of *amici curiae* were filed by *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Peter L. Strauss* for the United States, and by *Theodore L. Sendak,* Attorney General, and *Robert A. Zaban,* Deputy Attorney General, for the State of Indiana.

Mr. Justice Harlan delivered the opinion of the Court.

The present controversy, which involves the compatibility of the New York Social Services Law (c. 184, L. 1969) with § 402 (a)(23) of the Social Security Act of 1935, as amended, 81 Stat. 898, 42 U. S. C. § 602 (a)(23) (1964 ed., Supp. IV), arises out of a pendent claim originally included in petitioners' complaint bringing a class action challenging § 131–a of the same New York statute as violative of equal protection by virtue of its provision for lesser payments to Aid to Families With Dependent Children recipients in Nassau County than those allowed for New York City residents. Pursuant to the recommendation of Judge Weinstein, a

three-judge court was convened on April 24, 1969, and a hearing was held. 304 F. Supp. 1350.

Before a decision was rendered New York State amended § 131–a to permit the State Commissioner of Social Services to make, in his discretion, grants to recipients in Nassau County equal to those provided for New York City residents. The three-judge panel in a memorandum opinion of May 12, 1969, concluded that the equal protection issue was "no longer justiciable" and that "[t]he constitutional attack on the provision [§ 131–a] as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication . . . until there [had] been opportunity for action by state officials . . . ."[1] That court further held that since there existed "no reason for continuing the three-judge court," the "matter" should be "remanded to the single judge to whom the complaint was originally presented for such further proceedings as are appropriate." 304 F. Supp. 1354, 1356. On the same day as the three-judge court dissolved itself, Judge Weinstein issued a preliminary injunction prohibiting respondents from reducing or discontinuing payments of "regular recurring grants and special grants," payable under the predecessor welfare law, 304 F. Supp. 1356, and the State's elimination of which from the computation of welfare benefits is the subject matter of the controversy now before this Court.

An interlocutory appeal was taken to the Court of Appeals and the case was granted a calendar preference. After hearing oral argument the Court of Appeals, on June 11, entered an order staying the preliminary in-

[1] A separate action was subsequently brought again challenging the disparity in payments between New York and Nassau County welfare recipients. See *Rothstein* v. *Wyman,* 303 F. Supp. 339 (D. C. S. D. N. Y. 1969), prob. juris. noted, *post,* p. 903.

junction pending its disposition of the appeal and later converted its stay into an order staying the permanent injunction subsequently issued by the District Court when it granted summary judgment on June 18, 1969, 304 F. Supp. 1356, 1381. On July 16, 1969, the Court of Appeals panel announced its judgment of reversal, accompanied by three opinions. 414 F. 2d 170. Chief Judge Lumbard and Judge Hays agreed that the three-judge panel had properly dissolved itself and were of the view, for somewhat different reasons, that Judge Weinstein should not have ruled on the merits of petitioners' statutory claim; they also expressed their opinion that the single-judge District Court (hereinafter District Court) erred on the merits. Judge Feinberg disagreed on all scores, expressing the view that the District Court properly reached and correctly decided the merits of the statutory claim.

Petitioners' application to the author of this opinion, as Circuit Justice, for a stay and an accelerated review was referred by him to the entire Court, and on October 13, 1969, certiorari was granted. 396 U. S. 815. The request for a stay was denied but the case was set down for early argument.

We now reverse. For essentially those reasons stated in the opinion of the District Court and Circuit Judge Feinberg's dissent, we think the District Court correctly exercised its discretion by proceeding to the merits. We are also unable to accept the conclusion reached by a majority of the Court of Appeals that § 402 (a)(23) does not affect States like New York that place no limitation on the level of payments of welfare benefits as determined by their standard of need. For reasons set forth in Part II, we conclude that the present New York program does not fulfill the requirements of § 402 (a)(23) of the federal statute.

I

A

We consider the threshold question of whether subject matter jurisdiction was vested in the District Court to decide this federal statutory challenge to the New York Social Services Law.

That the three-judge court itself not only had jurisdiction but would have been obliged to adjudicate this statutory claim in preference to deciding the original constitutional claim in this case follows from *King* v. *Smith,* 392 U. S. 309 (1968), where, on an appeal from a three-judge court, we decided the statutory question in order to avoid a constitutional ruling. 392 U. S., at 312 n. 3. In the case before us the constitutional claim was declared moot prior to decision by the three-judge court and the question arises whether that circumstance removed not only the *obligation* but destroyed the *power* of a federal court to adjudicate the pendent claim.[2] We think not. Jurisdiction over federal claims, constitutional or otherwise, is vested, exclusively or concurrently, in the federal district courts. Such courts usually sit as single-judge tribunals. While Congress has determined that certain classes of cases shall be heard in the first instance by a district court composed of three judges, that does not mean that the court *qua* court loses all

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[2] Judge Hays expressed the view:

"Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge court the statutory claim was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power." 414 F. 2d, at 175.

jurisdiction over the complaint that is initially lodged with it. To the contrary, once petitioners filed their complaint alleging the unconstitutionality of § 131–a, the District Court sitting as a one-man tribunal, was properly seised of jurisdiction over the case under §§ 1343 (3) and (4) of Title 28 and could dispose of even the constitutional question either by dismissing the complaint for want of a substantial federal question, *Ex parte Poresky,* 290 U. S. 30 (1933),[3] or by granting requested injunctive relief if "prior decisions [made] frivolous any claim that [the] state statute on its face [was] not unconstitutional." *Bailey* v. *Patterson,* 369 U. S. 31, 33 (1962). Even had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court. See *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965).

On remand the District Court correctly considered mootness a factor affecting its discretion, not its power, and balanced the policy considerations that have spawned the doctrine of pendency and the countervailing policy of federalism: the extent of the investment of judicial energy and the character of the claim. Not only had there been hearings and argument prior to dismissal of

[3] Even if *Poresky* is read simply as a restatement of the truism that a court always has jurisdiction to determine its own jurisdiction, in view of the now settled rule that the insubstantiality of a federal question is the occasion for a jurisdictional dismissal as opposed to a dismissal on the merits for failure to state a claim upon which relief can be granted, it still lends support to the proposition that jurisdiction is vested at the outset in the *district court* and not the three-judge panel.

the constitutional claim, but the statutory question is so essentially one "of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." [4] *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 727 (1966).

Respondents analogize dismissal for mootness to dismissal for want of a substantial claim and rely on language in *United Mine Workers* v. *Gibbs,* to the effect that a federal court should not pass on a state claim when the federal claim falters at the threshold and is "dismissed before trial." [5] 383 U. S., at 726. The argument would appear to be that once a federal court loses power over the jurisdiction-conferring claim, it may not consider a pendent claim. They contend that mootness, like insubstantiality, is a threshold jurisdictional defect.

Whether or not the view that an insubstantial federal question does not confer jurisdiction—a maxim more ancient than analytically sound—should now be held to mean that a district court should be considered without *discretion,* as opposed to *power,* to hear a pendent claim, we think the respondents' analogy fails. Unlike insubstantiality, which is apparent at the outset, mootness, frequently a matter beyond the control of the parties, may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court.

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[4] We intimate no view as to whether the situation might have been different had the constitutional claim become moot before the District Court had invested substantial time in its resolution.

[5] See *United Mine Workers* v. *Gibbs,* 383 U. S., at 725, where the Court said:

"[I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."

We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.[6] The Court has shunned this view. See *Moore* v. *New York Cotton Exch.*, 270 U. S. 593 (1926); *Hurn* v. *Oursler*, 289 U. S. 238 (1933) (dictum).[7]

B

A further reason given to support the contention that the District Court should have declined to exercise jurisdiction is that the Department of Health, Education, and Welfare was the appropriate forum, at least in the first instance, for resolution on the merits of the questions before us, and that at the time this action came to Court HEW was "engaged in a study of the relationship between Section 602 (a)(23) and Section

[6] A persuasive analogy is to be found in the well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of $10,000. See *Smith* v. *Sperling*, 354 U. S. 91, 93 n. 1 (1957); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289–290 (1938); *Smithers* v. *Smith*, 204 U. S. 632 (1907); see generally C. Wright, Federal Courts § 33, pp. 93–94 (1963).

[7] Since we conclude that the District Court properly exercised its pendent jurisdiction, we have no occasion to consider whether, as urged by petitioners, this statutory claim satisfies the $10,000 amount-in-controversy requirement of the general federal jurisdiction provision, 28 U. S. C. § 1331, or whether it could be maintained under 28 U. S. C. § 1343 (3), which contains no amount-in-controversy limitation, as an action "[t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens . . . ." See *King* v. *Smith*, 392 U. S., at 312 n. 3; see generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

131–a." 414 F. 2d, at 176 (opinion of Judge Hays).[8] Petitioners answer, we think correctly, that neither the principle of "exhaustion of administrative remedies" nor the doctrine of "primary jurisdiction" has any application to the situation before us. Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs. Cf. *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967); K. Davis, Administrative Law § 19.01 (1965); L. Jaffe, Judicial Control of Administrative Action 425 (1965).

That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever

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[8] In order to evaluate this argument, it is necessary to understand the mechanism by which HEW reviews state plans under the AFDC program. States desiring to obtain federal funds available for AFDC programs are required to submit a plan to the Secretary of HEW for his approval. 42 U. S. C. § 601 (1964 ed., Supp. IV). Once initially approved, federal funds are provided to the State until a change in its plan is formally disapproved. 42 U. S. C. § 604 (a) (1964 ed., Supp. IV). The Secretary must afford the State notice of an alleged noncompliance with federal requirements and an opportunity for a hearing. *Ibid.* If, after notice and hearing, the Secretary finds that the State does not comply with the federal requirements, he is directed to make a total or partial cutoff of federal funds to the State. *Ibid.* 42 U. S. C. § 1316 (1964 ed., Supp. IV) describes the administrative procedures that the Secretary must afford a State before cutting off funds, and also provides for review in the courts of appeals of the Secretary's action at the behest of the State. Whether HEW could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims.

possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is real doubt as to how the Department's standards apply to the particular state regulation or program.[9]

The District Court, in this instance, made considerable effort to learn the views of HEW. The possibility of HEW's participation, either as a party or an *amicus,* was explored in the District Court and the Department at that stage determined to remain aloof. We cannot in these circumstances fault the District Court for proceeding to try the case.

II

We turn to the merits which may be broadly characterized as involving the interpretation of § 402 (a)(23) of the Social Security Amendments of 1967 and its application to certain changes inaugurated by New York in its method of computing welfare benefits that have resulted in reduced payments to these petitioners and, on a broader scale, decreased by some $40 million the State's public assistance undertaking.

A

We begin with a brief review of the general structure of the Federal Aid to Families With Dependent Children (AFDC) program, one of the four "categorical assistance"

[9] As we observed in *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.,* 360 U. S. 411, 420 (1959), that an issue is "one appropriate ultimately for judicial rather than administrative resolution . . . does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant . . . facts which the administrative agency charged with regulation of the transaction . . . is peculiarly well equipped to marshal and initially to evaluate." See also *Far East Conference* v. *United States,* 342 U. S. 570, 574–575 (1952).

programs established by the Social Security Act of 1935.[10]

The general topography of the AFDC program was mapped in part by this Court in *King* v. *Smith,* 392 U. S. 309 (1968); and several lower court opinions, in addition to the opinion below, have surveyed the pertinent statutory and regulatory provisions.[11] While participating States must comply with the terms of the federal legislation, see *King* v. *Smith, supra,* the program is basically voluntary and States have traditionally been at liberty to pay as little or as much as they choose, and there are, in fact, striking differences in the degree of aid provided among the States.

There are two basic factors that enter into the determination of what AFDC benefits will be paid. First, it is necessary to establish a "standard of need," a yardstick for measuring who is eligible for public assistance. Second, it must be decided how much assistance will be given, that is, what "level of benefits" will be paid. On both scores Congress has always left to the States a great deal of discretion. *King* v. *Smith,* 392 U. S., at 318. Thus, some States include in their "standard of need" items that others do not take into account. Diversity also exists with respect to the level of benefits in fact paid.[12] Some States impose so-called dollar maximums

[10] The four categorical assistance programs are the Old Age Assistance (OAA), 42 U. S. C. § 301 *et seq.;* Aid to Families With Dependent Children (AFDC), 42 U. S. C. § 601 *et seq.;* Aid to the Blind (AB), 42 U. S. C. § 1201 *et seq.;* Aid For the Permanently and Totally Disabled (APTD), 42 U. S. C. § 1351 *et seq.*

[11] See *Lampton* v. *Bonin,* 299 F. Supp. 336, 304 F. Supp. 1384 (D. C. E. D. La. 1969); *Jefferson* v. *Hackney,* 304 F. Supp. 1332 (D. C. N. D. Tex. 1969); *Williams* v. *Dandridge,* 297 F. Supp. 450 (1968 and 1969), prob. juris. noted, 396 U. S. 811 (1969), decided this date, *post,* p. 471.

[12] According to information supplied by HEW in 1967, reported in the Explanation of Provisions of H. R. 5710, p. 36, $3,100 annually for a family of four marked the "poverty"

on the amount of public assistance payable to any one individual or family. Such maximums establish the upper limit irrespective of how far short the limitation may fall of the theoretical standard of need. Other States curtail the payments of benefits by a system of "ratable reductions" whereby all recipients will receive a fixed percentage of the standard of need.[13] It is, of course, possible to pay 100% of need as defined. New York, in fact, purports to do so.

B

In 1967 the Administration introduced omnibus legislation to amend the social security laws. The relevant AFDC proposals provided for more adequate assistance to welfare recipients and set up several programs for education and training accompanied by child care provisions designed to permit AFDC parents to take advantage of the training programs. In the former respect the AFDC proposals paralleled other provisions that put forward amendments to adjust benefits to recipients of other

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level. According to the report, "Although a few States define need at or above the poverty level, no State pays as much as that amount." It further appears that at that time 33 States provided less than their avowed standard of need which frequently fell short of the poverty mark. While New York purports to have paid its full standard, it would thus appear not to have paid enough to take a family out of poverty. See Hearings before the House Committee on Ways and Means on H. R. 5710, 90th Cong., 1st Sess., pt. 1, p. 118 (1967).

[13] A maximum may either be fixed in relation to the number of persons on welfare, *e. g.*, X dollars per child, no matter what age, or in terms of a family, X dollars per family unit, irrespective of the number of persons in the unit. This latter procedure has been challenged on equal protection grounds, see *Williams* v. *Dandridge, supra.* A "ratable reduction" represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is some income that is first deducted, the ratable reduction is applied to the amount by which the individual or family income falls short of need.

categorical aid to reflect the rise in the cost of living.[14] Thus, in its embryo stage the amendment to § 402 was § 202 (b) of the Administration bill, H. R. 5710, 90th Cong., 1st Sess. (1967), which would have added to § 402 (a) of the Social Security Act the following clause:

> "(14) provide (A), effective July 1, 1969, for meeting (in conjunction with other income that is not disregarded . . . under the plan and other resources) *all the need,* as determined in accordance with standards applicable under the plan for determining need, of individuals eligible to receive aid to families with dependent children (and such standards shall *be no lower than the standards for determining need in effect* on January 1, 1967), and (B), effective July 1, 1968, for an annual review of such standards and (to the extent prescribed by the Secretary) for up-dating such standards to take into account changes in living costs." (Emphasis added.)

Section 202 (b), however, was stillborn and no such provision was contained in the ultimate bill reported out by the House Ways and Means Committee. See H. R. 12080, 90th Cong., 1st Sess.

The Administration's renewed efforts, on behalf of a mandatory increase in benefit payments under the categorical assistance programs,[15] met with only limited suc-

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[14] See §§ 202 (a), (c), (d), and (e).

[15] Secretary Gardner testified:

"The House bill does nothing to improve the level of State public assistance payments. As things stand today, the States are required to set assistance standards for needy persons in order to determine eligibility—but they need not make their assistance payments on the basis of these standards. The result is that welfare payments are much too low in a good many States. That is a widely accepted fact among all who are concerned with these programs; indeed it

cess, resulting in § 213 (a) of the Senate version, which provided for a mandatory $7.50 per month increase in the standards and benefits for the adult categories, and § 213 (b) which is, in substance, the present § 402 (a)(23). The Committee's comment on § 213 (b), to the effect that States would be required "to price their standards . . . to reflect changes in living costs," tracks the statutory language.[16]

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is probably the most widely agreed-upon fact among welfare experts today.

"We strongly urge you to adopt the administration's proposal requiring States to meet need in full as they determine it in their own State assistance standards, and to update these standards periodically to keep pace with changes in the cost of living." Hearings before the Senate Committee on Finance on H. R. 12080, 90th Cong., 1st Sess., pt. 1, p. 216 (1967). See also testimony of Undersecretary Cohen. *Id.*, at 255–259.

[16] The comment to § 213 in the Senate Report reads:

"Social security benefits have been increased 15 percent across the board by the committee with a minimum of $70, for an average increase of 20 percent. However, there is no similar across-the-board increase in the amount of benefits payable to aged welfare recipients. . . . In view of this situation and the need to recognize that the increase in the cost of living since the last change made in the Federal matching formula in 1965 also is detrimental to the well-being of these recipients, the committee is recommending a further change in the law. It is proposed that the law be amended to provide that recipients of old-age assistance, aid to the blind, and aid to the permanently and totally disabled shall receive an average increase in assistance plus social security or assistance alone (for the recipients who do not receive social security benefits) of $7.50 a month. . . .

. . . . . .

"To accomplish these changes, the States would have to adjust their standards and any maximums imposed on payments by July 1, 1968, so as to produce an average increase of $7.50 from assistance alone or assistance and social security benefits (or other income). Any State which wishes to do so can claim credit for any increase

The Conference Committee eliminated the Senate provision in § 213 which would have required an annual adjustment for cost of living, and § 402 (a)(23) was enacted. It now provides:

> "[The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

C

The background of § 402 (a)(23) reveals little except that we have before us a child born of the silent union of legislative compromise. Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding. Our chief resources in this undertaking are the words of the statute and those commonsense assumptions that must be made in determining direction without a compass.

Reverting to the language of § 402 (a)(23) we find two separate mandates: first, the States must re-evaluate the component factors that compose their need equation; and, second, any "maximums" must be adjusted.

We think two broad purposes may be ascribed to § 402 (a)(23): First, to require States to face up realistically to

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it may have made since December 31, 1966. Thus, no State needs to make an increase to the extent that it has recently done so.

"States would be required to price their standards used for determining the amount of assistance under the AFDC program by July 1, 1969 and to reprice them at least annually thereafter, adjusting the standards and any maximums imposed on payments to reflect changes in living costs." S. Rep. No. 744, 90th Cong., 1st Sess., 169–170 (1967); see also *id.*, at 293.

the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis. Consistent with this interpretation of § 402 (a)(23), a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the *actual* standard of need.

The congressional purpose we discern does not render § 402 (a)(23) a meaningless exercise in "bookkeeping." Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions. In § 402 (a)(23) Congress has spoken in favor of increases in AFDC payments. While Congress rejected the mandatory adjustment provision in the administration bill, it embodied in legislation the cost-of-living exercise which has both practical and political consequences.

It has the effect of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard of need as computed in light of economic realities and to place them among those eligible for the care and training provisions. Secondly, while it leaves the States free to effect downward adjustments in the level of benefits paid, it accomplishes within that framework the goal, however modest, of forcing a State to accept the political consequence of such a cutback and bringing to light the true extent to which actual assistance falls short of the minimum acceptable. Lastly, by imposing on those States that desire to maintain "maximums" the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat "maximum" system,

thereby encouraging those States desirous of containing their welfare budget to shift to a percentage system that will more equitably apportion those funds in fact allocated for welfare and also more accurately reflect the real measure of public assistance being given.

While we do not agree with the broad interpretation given § 402 (a) (23) by the District Court,[17] we cannot accept the conclusion reached by the two-judge majority in the Court of Appeals—that § 402 (a) (23) does not affect New York.[18] It follows from what we fathom to

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[17] The District Court, while disclaiming any construction of § 402 (a) (23) that would preclude converting to a flat-grant system by averaging, concluded: "[S]ection 402 (a) (23) precludes a state from making changes resulting in either reduced standards of need or *levels* of *payments*." 304 F. Supp., at 1377. (Emphasis added.) An extensive alteration in the basic underlying structure of an established program is not to be inferred from ambiguous language that is not clarified by legislative history. Such legislative history as there is suggests the opposite. The Senate's failure to adopt the Administration's proposals and its failure to provide for AFDC recipients an increase like that provided for the adult program, notwithstanding a proposed amendment to that effect by Senator McGovern, gives rise to an inference, not negatived by the noncommittal and unilluminating comments of the committee, see n. 16, *supra*, that Congress had no such purpose. These considerations, we think, foreclose the broad construction adopted by the District Court.

[18] While it might be technically said that there was no majority holding on the merits in the Court of Appeals, this overlooks Judge Hays' preface to his discussion of the merits: "Although we are persuaded that the district judge had no power to adjudicate this action, we turn to a brief discussion of the merits, since our decision does not rest solely on jurisdictional grounds." 414 F. 2d, at 178. Chief Judge Lumbard disavowed reaching the merits but expressly disagreed with Judge Feinberg. 414 F. 2d, at 181. In these circumstances, it would be hypertechnical to conclude that the merits had not been faced and decided below so as to make a remand desirable prior to review and decision by this Court. Cf. *Barlow* v. *Collins*, *ante*, p. 159.

be the congressional purpose that a State may not redefine its standard of need in such a way that it skirts the requirement of re-evaluating its existing standard. This would render the cost-of-living reappraisal a futile, hollow, and, indeed, a deceptive gesture, and would avoid the consequences of increasing the numbers of those eligible and facing up to the failure to allocate sufficient funds to provide for them.

These conclusions, if not compelled by the words of the statute or manifested by legislative history, represent the natural blend of the basic axiom—that courts should construe all legislative enactments to give them some meaning—with the compromise origins of § 402 (a) (23), set forth above. This background, we think, precludes the more adventuresome reading that petitioners and the District Court would give the statute. See n. 17, *supra.* This reading is also buttressed by the fact that this construction has been placed on the statute by the Department of Health, Education, and Welfare.[19] While, in view of Congress' failure to track the Administration proposals and its substitution without comment of the present compromise section, HEW's construction commands less than the usual deference that may be accorded an administrative interpretation based on its expertise, it is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers. Cf. *Zuber* v. *Allen,* 396 U. S. 168, 192 (1969); *Udall* v. *Tallman,* 380 U. S. 1 (1965).

D

While the application of the statute to the New York program is by no means simple, we think the evidence adduced supports the ultimate finding of the District

[19] The regulations and explanations are set forth in the Government's Amicus Memorandum.

Court, unquestioned by the Court of Appeals, that New York has, in effect, impermissibly lowered its standard of need by eliminating items that were included prior to the enactment of § 402 (a)(23).

Prior to March 31, 1969, New York computed its standard of need on an individualized basis. Schedules existed showing the cost of particular items of recurring need, for example, food and clothing required by children at given ages. Payments of "recurring" grants were made to families based on the number of children per household and the age of the oldest child. Additional payments, designated as "special needs grants," were also made. Under an experiment in New York City instituted August 27, 1968, many allowances for special needs were eliminated and a flat grant of $100 per person was substituted.

Chapter 184 of the Session Laws, the present § 131–a, radically altered the New York approach. In lieu of individualized grants for "recurring" needs to be supplemented by special grants or the flat $100 grant, New York adopted a system fixing maximum allowances per family based on the number of individuals per household. The maximum dollar amounts were established by ascertaining "[t]he mean age of the oldest child in each size family." See Memorandum of Law in Support of Defendants' Motion for Summary Judgment 9–10. While these family maximums are exclusive of rent and fuel costs, the District Court found that "[s]pecial grants were seemingly not included in these computations. No attempt was made to average them out across the state and then to add that figure to that of the basic recurring grant." 304 F. Supp., at 1368.

The impact of the new system has been to reduce substantially benefits paid to families of these petitioners and of those similarly situated, and to decrease benefits to New York City recipients by almost $40,000,000. 304

F. Supp., at 1369–1370. The effect of the new program on upstate cases is less severe, with gains to some families apparently cancelling out losses to others, but the net effect is a drastic reduction in overall payments since New York City recipients compose approximately 72% of the State's welfare clientele. 304 F. Supp., at 1369.

E

Notwithstanding this $40,000,000 decrease in welfare payments after adjustment for increases in the cost of living, the State argues that the present § 131–a represents neither an attempt to circumvent federal requirements nor a reduction in the content of its former standard. The conversion to a flat grant maximum system is justified as an advance in administrative efficiency.[20]

While § 402 (a)(23) does not prevent the States from pursuing what is beyond dispute the laudable goal of administrative efficiency,[21] we think Congress has foreclosed them from achieving this purpose at the expense of significantly reducing the content of their standard of need. The findings and conclusions of the District

[20] New York points to the preamble to § 131–a which sets forth as its purpose the streamlining of administration of the welfare grant system and relies on that part of the HEW program that invites the States to adopt administrative programs that curtail unnecessarily burdensome calculations and paperwork.

[21] HEW's position, set forth in the Government's Amicus Memorandum 12, seems to be that under its regulations, a "reduction of content" does not necessarily result from "reductions in the recognition of special needs." The Department has, however, recognized both administratively and in the Government's Memorandum that certain "special" needs should properly be regarded as part of the basic standard. Thus, while the memorandum suggests that payments for special diets or special attendants are extraordinary and not susceptible of averaging, it leaves open the question whether New York's special grants have not been for recurring items which are basic.

Court, undisturbed by the Court of Appeals and supported by the record, clearly demonstrate that a significant reduction has here occurred. It is conceded by respondents that the present program does not include allowances for the items formerly covered by the so-called "special" grants.

We have no occasion to decide on the record before us whether we agree with that part of HEW's interpretation of § 402 (a)(23) that might approve elimination of grants for particular needs, without some averaging or other provision therefor such as direct payments to the provider of services. It suffices in this case that particular items, such as laundry and telephones, had formerly been deemed essential by New York, and were considered regular recurring expenses to a significant number of New York City welfare residents. We need look no farther than the state social service department's own regulations and the action taken by the state administrators in providing the $25 per quarter cyclical grant to city residents in the 1968 pilot project.

Thus, the state social service department's own regulations provided:

> "An individual or family shall be deemed 'in need' when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted *special needs* required by the case circumstances and included in the *standards of assistance.*" 18 NYCRR § 353.1 (c).[22] (Emphasis added.)

This persuasive, if not conclusive, evidence of what constituted the standard of need is further supported by

[22] See also former 18 NYCRR § 351.2, Aspects of Eligibility. "Social investigation shall cover the following aspects of initial and continuing eligibility. (b) *Need.* Consideration shall be given to individual and family requirements for the items of basic maintenance and for items of *special need*. . . ." (Second emphasis added.)

testimony of the administrators of New York's welfare program to the effect that these grants covered costs for essentials of life for numerous welfare residents in New York City.

F

We reach our conclusions without relying on the finding made by the court below that in § 131–a New York was *attempting* to constrict its welfare payments. Speculation as to legislative and executive motive is to be shunned. Section 402 (a)(23) invalidates any state program that substantially alters the content of the standard of need in such a way that it is less than it was prior to the enactment of § 402 (a)(23), unless a State can demonstrate that the items formerly included no longer constituted part of the reality of existence for the majority of welfare recipients. We do not, of course, hold that New York may not, consistently with the federal statutes, consolidate items on the basis of statistical averages. Obviously such averaging may affect some families adversely and benefit others. Moreover, it is conceivable that the net payout, assuming no change in the level of benefits, may be somewhat less under a streamlined program. Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with § 402 (a)(23) redefine its method for determining need. A State may, moreover, as we have noted, accommodate any increases in its standard by reason of "cost-of-living" factors to its budget by reducing its level of benefits. What is at the heart of this dispute is the elimination of special grants in the New York program, not the system of maximum grants based on average age. Lest there be uncertainty we also reiterate that New York is

not foreclosed from accounting for basic and recurring items of need formerly subsumed in the special grant category by an averaging system like that adopted in the 1968 New York City experiment with cyclical grants.

III

New York is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution. It follows, however, from our conclusion that New York's program is incompatible with § 402 (a)(23), that petitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time.

We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967); *Association of Data Processing Service Organizations* v. *Camp, ante,* p. 150; *Barlow* v. *Collins, ante,* p. 159. We adhere to *King* v. *Smith,* 392 U. S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief and held Alabama's "substitute father" regulation to be inconsistent with the federal statute. While *King* did not advert specifically to the remedial problem, the unarticulated premise was that the State had alternative choices of

assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements.

The prayer in the District Court in *Smith* v. *King,* as in the case before us, was for declaratory and injunctive relief against the enforcement of the invalid provision. 277 F. Supp. 31 (D. C. M. D. Ala. 1967). We see no justification in principle for drawing a distinction between invalidating a single nonconforming provision or an entire program. In both circumstances federal funds are being allocated and paid in a manner contrary to that intended by Congress. In *King* the withholding of benefits based on the invalid state regulation resulted in overpayments to some recipients, assuming a constant state welfare budget, and a corresponding misallocation of matching federal resources. In the case before us, noncompliance with § 402 (a)(23) may result in limiting the welfare rolls unduly and thus channeling the matching federal grants in a way not intended by Congress. We may also assume that Congress would not countenance the circumnavigation of the political consequences of § 402 (a)(23), see Part II C, *supra,* by permitting States to use federal funds while obscuring the actual extent to which their programs fall short of the ideal.

Unlike *King* v. *Smith,* however, any incremental cost to the State, assuming a desire to comply with § 402 (a)(23), is massive; nor is there a discrete and severable provision whose enforcement can be prohibited. Accordingly, we remand the case to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of § 402 (a)(23) if the State wishes to do so. The District Court shall retain jurisdiction to review, taking into account the views of HEW should it care to offer its recommenda-

tions, any revised program adopted by the State, or, should New York choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies pursuant to the present statute.

In conclusion, we add simply this. While we view with concern the escalating involvement of federal courts in this highly complicated area of welfare benefits,[23] one that should be formally placed under the supervision of HEW, at least in the first instance, we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to

[23] The judiciary is being called upon with increasing frequency to review not only the viability of state welfare procedures, *e. g., Goldberg* v. *Kelly, ante,* p. 254, and *Wheeler* v. *Montgomery, ante,* p. 280; *Wyman* v. *James,* 303 F. Supp. 935 (D. C. S. D. N. Y. 1969), prob. juris. noted, *post,* p. 904 (inspections of the house), but also the substance and structure of state programs and the validity of innumerable individual provisions. See, *e. g., Shapiro* v. *Thompson,* 394 U. S. 618 (1969) (residence requirements); *King* v. *Smith, supra* (substitute father); *Solman* v. *Shapiro,* 300 F. Supp. 409, aff'd, 396 U. S. 5 (1969); *Lewis* v. *Stark,* 312 F. Supp. 197 (D. C. N. D. Cal. 1968), prob. juris. noted, 396 U. S. 900 (1969) ("man-in-the-house rule"). At least two other actions have been instituted to review various aspects of state programs in light of the statutory provisions involved in this case. See *Lampton* v. *Bonin,* 299 F. Supp. 336, 304 F. Supp. 1384 (D. C. E. D. La. 1969); *Jefferson* v. *Hackney,* 304 F. Supp. 1332 (D. C. N. D. Tex. 1969); cf. *Rothstein* v. *Wyman,* 303 F. Supp. 339 (D. C. S. D. N. Y. 1969); *Dandridge* v. *Williams,* decided today, *post,* p. 471.

the States are being expended in consonance with the conditions that Congress has attached to their use. As Mr. Justice Cardozo stated, speaking for the Court in *Helvering* v. *Davis,* 301 U. S. 619, 645 (1937): "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." Cf. *Lassen* v. *Arizona ex rel. Arizona Highway Dept.,* 385 U. S. 458 (1967).

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 DOUGLAS, concurring.

While I join this opinion of the Court, I add a few words.

I

Our leading case on pendent jurisdiction is *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 721–729. In line with *Gibbs,* the courts below distinguished between the power to exercise pendent jurisdiction and the discretionary use of that power. *Gibbs* abandoned the "single cause of action" test which had been the controlling standard under *Hurn* v. *Oursler,* 289 U. S. 238, and instead held that pendent jurisdiction exists when "[t]he state and federal claims . . . derive from a common nucleus of operative fact" and "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." 383 U. S., at 725.

The claims presented in this case attacked the New York statute on two grounds. The constitutional ground attacked the differential in the level of welfare payments between New York City and Nassau County.

The statutory claim attacked the State's reduction in the overall level of payments, on the ground that it violated § 402 (a)(23) of the Social Security Act, as amended, 81 Stat. 898, 42 U. S. C. § 602 (a)(23) (1964 ed., Supp. IV), which requires States to make cost-of-living adjustments in the amounts used to determine need. No argument is made by any of the parties in this case that the *three-judge* court did not have pendent jurisdiction over the statutory claim. The sole basis for respondents' contention that pendent jurisdiction is not present in this case flows from the action of the three-judge court in remanding the case to the single district judge "for such further proceedings as are appropriate."

Yet if the three-judge court had pendent jurisdiction over the statutory claim, it had the power to decide that claim despite the dismissal of the constitutional claim. This Court held in *United States* v. *Georgia Pub. Serv. Comm'n,* 371 U. S. 285, 287–288: "Once [a three-judge court is] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." See also *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73, 80–81. There is no rule, however, holding that a three-judge court is *required* to decide all the claims presented in a suit properly before it, although the practice of a three-judge court remanding a case to the initial district judge for further proceedings seems to have been little used. See *Landry* v. *Daley,* 288 F. Supp. 194.

What united Judges Hays and Lumbard was the view that, as a matter of discretion, the District Court should have refused to exercise its pendent jurisdiction. The factors outlined in *Gibbs* to guide the discretionary exercise of pendent jurisdiction are those of "judicial economy, convenience and fairness to litigants." 383 U. S., at 726.

The main distinction between this case and *Gibbs* is that the pendent claim here was one of federal rather than state law. And it is clear from the opinion in *Gibbs* that the factor of federal-state comity is highly relevant in deciding whether or not the exercise of pendent jurisdiction is proper. Thus the Court stated: "There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." *Id.*, at 727. Since the claim involved here is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances should be required to prevent the exercise.

Moreover, incident to the issuance of a temporary restraining order, prior to the impaneling of the three-judge court, District Judge Weinstein had received and considered substantial testimony, affidavits, and briefs, so that he required no further hearings or testimony prior to issuing his preliminary injunction opinion three days after the case was remanded to him. In light of this fact, considerations of economy, convenience, and fairness all point to the exercise of pendent jurisdiction. See *Moore* v. *New York Cotton Exch.*, 270 U. S. 593, 608–610.

II

The fact that the Department of Health, Education, and Welfare is studying the relationship between the contested provision of the New York statute and the relevant section of the Social Security Act is irrelevant to the judicial problem. Once a State's AFDC plan is initially approved by the Secretary of HEW, federal funds are provided the State until the Secretary finds, after notice and opportunity for hearing to the State, that changes in the plan or the administration of the plan are

in conflict with the federal requirements. Social Security Act § 404 (a), 49 Stat. 628, as amended, 81 Stat. 918, 42 U. S. C. § 604 (a) (1964 ed., Supp. IV).

The statutory provisions for review by HEW of state AFDC plans [1] do not permit private individuals, namely, present or potential welfare recipients, to initiate or participate in these compliance hearings. Thus, there is no sense in which these individuals can be held to have failed to exhaust their administrative remedies by the fact that there has been no HEW determination on the compliance of a state statute with the federal requirements. In the present case, that problem was discussed in terms of the District Court's discretion to refuse to exercise pendent jurisdiction. The argument for such a refusal has little to commend it. HEW has been extremely reluctant to apply the drastic sanction of cutting off federal funds to States that are not complying with federal law. Instead, HEW usually settles its differences with the offending States through informal negotiations. See Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84, 91–92 (1967).[2]

Whether HEW could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims. Their refusal to act merely forces plaintiffs into the state courts which certainly are no more competent to decide the federal question than are the federal courts. The terms of the New York statute are clear, and there is no way in which a state court could interpret the challenged law in a way that would avoid the statutory claim pressed here.

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[1] The procedure by which HEW reviews state plans is set out in the opinion of the Court, *ante*, at 406 n. 8.

[2] See Appendix to this concurrence.

State participation in federal welfare programs is not required. States may choose not to apply for federal assistance or may join in some, but not all, of the various programs, of which AFDC is only one. That a State may choose to refuse to comply with the federal requirements at the cost of losing federal funds is, of course, a risk that any welfare plaintiff takes. Such a risk was involved in *King* v. *Smith,* 392 U. S. 309, which attacked Alabama's "substitute father" regulation as inconsistent with the Social Security Act. As long as a State is receiving federal funds, however, it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds; and individuals who are adversely affected by the failure of the State to comply with the federal requirements in distributing those federal funds are entitled to a judicial determination of such a claim. *King* v. *Smith, supra.* The duty of a State, which receives this federal bounty to comply with the conditions imposed by Congress was adverted to by Mr. Justice Cardozo who wrote for the Court in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 597–598, sustaining the constitutionality of the Social Security Act:

> "Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received."

As he also said, speaking for the Court in *Helvering* v. *Davis,* 301 U. S. 619, 645, a companion case to *Steward Machine Co.:*

> "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."

Where the suit involves an alleged conflict between the state regulation and the federal law, neither the United States nor HEW is a necessary party to such an action. The wrong alleged is the State's failure to comply with federal requirements in its use of federal funds, not HEW's failure to withhold funds from the State.

Whether HEW should withhold federal funds is entrusted to it, at least as a preliminary matter, by § 404 (a) of the Social Security Act.[3] Whether the courts have any role to perform beyond ruling on an alleged conflict between the state regulation and the federal law is a question we need not reach.

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[3] Section 404 (a) of the Act provides: "In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

"(1) that the plan has been so changed as to impose any residence requirement prohibited by section 602 (b) of this title, or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

"(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 602 (a) of this title to be included in the plan;

"[T]he Secretary shall notify such State agency that further payments will not be made to the State (or in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure)." 42 U. S. C. § 604 (a) (1964 ed., Supp. IV).

APPENDIX TO OPINION OF DOUGLAS, J., CONCURRING

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20201

December 29, 1969

Mr. George R. Houston
Associate Librarian
The Supreme Court of the United States
1st Street & East Capitol, N. W.
Washington, D. C. 20543

Dear Mr. Houston:

This relates to your conversation with me on December 29 concerning statements made in the last paragraph and footnote 55 on page 91 of volume 67, Columbia Law Review, January 1967, that this Department had not responded to a complaint and petition for hearing filed by Georgia and Arkansas claimants.

The author of the Law Review article is correct. There was, in fact, no response to the request for a conformity hearing. Had we replied to the letter, however, we would have stated, as we usually do in such cases, that conformity hearings are held only on the initiative of this Department when a determination has been made that the deficiencies in a state program are such that the state, under its applicable laws, cannot, or the responsible official, will not, voluntarily bring the state into compliance.

Letters such as the one you refer to may, however, trigger action by this Department when the contents

bring to light conformity matters of which the Department has not been made aware . . . as a result of its own audits.

To date this Department has initiated conformity hearings in connection with the state plans of Nevada and Connecticut. In view of the fact that the imposition of sanctions against states which are found to be out of conformity are mandatory, we exert every effort at our command to bring a state into conformity without the necessity of a formal hearing.

If you have any further questions, please let us know.

Very truly yours,

Robert C. Mardian,

General Counsel.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

Petitioners are New York welfare recipients who contend that recently enacted New York welfare legislation which reduces the welfare benefits to which they are entitled under the Aid to Families With Dependent Children (AFDC) program is inconsistent with the federal AFDC requirements found in § 402 (a)(23) of the Social Security Act, 42 U. S. C. § 602 (a)(23) (1964 ed., Supp. IV). The New York statute that petitioners are challenging, § 131–a of the New York Social Services Law, was enacted on March 31, 1969. Little more than a week later on April 9, petitioners filed their complaint challenging this statute. The Court today holds that "the District Court correctly exercised its discretion by proceeding to the merits" of petitioners' claim that the federal and state statutes are inconsistent. *Ante,* at 401. The Court reaches this conclusion despite the fact that the determination whether a State is following the federal AFDC requirements is clearly vested in the first

instance not in the federal courts but in the Department of Health, Education, and Welfare (HEW); despite the fact that at the very moment the District Court was deciding the merits of petitioners' claim HEW was performing its statutory duty of reviewing the New York legislation to determine if it was at odds with § 402 (a)(23); and despite the fact that if HEW had been given enough time to make a decision with regard to the New York legislation, its decision might have obviated the need for this and perhaps many other lawsuits. I regret that I cannot join an opinion which fails to give due consideration to the unmistakable intent of the Social Security Act to give HEW primary jurisdiction over these highly technical and difficult welfare questions, which affirms what is to me a clear abuse of discretion by the District Court, and which plunges this Court and other federal courts into an ever-increasing and unnecessary involvement in the administration of the Nation's categorical assistance programs administered by the States.[1]

Under the AFDC program, 42 U. S. C. §§ 601–610 (1964 ed. and Supp. IV), the Federal Government provides funds to a State on the condition that the State's plan for supplementing and distributing those funds to needy individuals satisfies the various federal requirements set out in the Social Security Act. By statute, the Secretary of HEW is charged with the duty of reviewing state plans to determine if they comply with the now considerable list of federal requirements, 42 U. S. C. § 602 (1964 ed. and Supp. IV), and his approval of such a plan, and only his approval, qualifies the state program for federal financial assistance. 42 U. S. C. § 601 (1964 ed., Supp. IV). So that HEW may determine whether

[1] This precise issue was not so clearly and sharply presented in *King* v. *Smith,* 392 U. S. 309 (1968), which I joined. See *id.,* at 317 n. 11, 326 n. 23.

the state plan continues at all times to meet the federal requirements, each State is required by regulation to submit all relevant changes, such as new state statutes, regulations, and court decisions, to HEW for its review. 45 CFR § 201.3. If, after affording the State reasonable notice and an opportunity for a hearing, HEW determines that the state plan does not conform to the federal requirements, the federal agency then has a legal obligation to terminate federal aid to which the State would otherwise be entitled. 42 U. S. C. §§ 604, 1316 (1964 ed., Supp. IV); 45 CFR § 201.5. Waiver by the Secretary of any of the federal requirements is permitted only where the Secretary and state welfare officials have together undertaken a "demonstration" or experimental welfare project. 42 U. S. C. § 1315 (1964 ed., Supp. IV). The administrative procedures that the Secretary must afford a State before denying or curtailing the use of federal funds are elaborated in 42 U. S. C. § 1316 (1964 ed., Supp. IV), and this section also provides that a State can obtain judicial review in a United States court of appeals of an adverse administrative determination.

This unified, coherent scheme for reviewing state welfare rules and practices was established by Congress to ensure that the federal purpose behind AFDC is fully carried out. The statutory provisions evidence a clear intent on the part of Congress to vest in HEW the primary responsibility for interpreting the federal Act and enforcing its requirements against the States. Although the agency's sanction, the power to terminate federal assistance, might seem at first glance to be a harsh and inflexible remedy, Congress wisely saw that in the vast majority of cases a credible threat of termination will be more than sufficient to bring about compliance. These procedures, if followed as Congress intended, would render unnecessary countless lawsuits by welfare recipients. In the case before the Court today it is

undisputed that HEW had by the time of the proceedings in the District Court commenced its own administrative proceedings to determine whether § 131–a conforms to the Social Security Act's provisions. The agency had requested the New York welfare officials to provide detailed information regarding the statute and was preparing to make its statutorily required decision on the conformity or nonconformity of § 131–a. It was at this point, when HEW was in the midst of performing its statutory obligation, that the District Court assumed jurisdiction over petitioners' claim and decided the very state-federal issue then pending before HEW. Both Judge Hays and Judge Lumbard of the Court of Appeals were of the opinion that the District Court abused its discretion in finding that it had jurisdiction over this statutory claim, and both judges relied in part on the pendency of the identical question before the federal agency. 414 F. 2d 170, 176, 181 (1969). Chief Judge Lumbard's reasoning is instructive:

> "[H]ere, as Judge Hays points out, the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of which this claim turns—the practical effect of § 131–a and the proper construction of § 602 (a)(23) of the Social Security Act—both are exceedingly complex. The briefs and arguments of the parties, and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW, with its expertise in the operation of the AFDC program and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not § 131–a is in compliance with § 602 (a)(23). This is HEW's responsibility under the Social Security Act, see 42 U. S. C. A. § 1316 (Supp. 1969). I believe that

> the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by plaintiffs, for the Department already had initiated review proceedings concerning § 131–a." 414 F. 2d, at 181.

I agree with the Court of Appeals that the District Court abused its discretion in taking jurisdiction over this case, but I would go further than holding that the District Court's action was a mere abuse of discretion. Ensuring that the federal courts have the benefit of HEW's expertise in the welfare area is an important but by no means the only consideration supporting the limitation of judicial intervention at this stage. Congress has given to HEW the grave responsibility of guaranteeing that in each case where federal AFDC funds are used, federal policies are followed, and it has established procedures through which HEW can enforce the federal interests against the States. I think these congressionally mandated compliance procedures should be the exclusive ones until they have run their course. The explicitness with which Congress set out the HEW compliance procedures without referring to other remedies suggests that such was the congressional intent. But more fundamentally, I think it will be impossible for HEW to fulfill its function under the Social Security Act if its proceedings can be disrupted and its authority undercut by courts which rush to make precisely the same determination that the agency is directed by the Act to make. And in instances when HEW is confronted with a particularly sensitive question, the agency might be delighted to be able to pass on to the courts its statutory responsibility to decide the question. In the long run, then, judicial pre-emption of the agency's rightful responsibility can only lead to the collapse of the enforcement scheme envisioned by Congress, and I fear that this case and others have carried such a

process well along its way. Finally, there is the very important consideration of judicial economy and the prevention of premature and unnecessary lawsuits, particularly at this time when the courts are overrun with litigants on every subject. If courts are permitted to consider the identical questions pending before HEW for its determination, inevitably they will hand down a large number of decisions that could have been mooted if only they had postponed deciding the issues until the administrative proceedings were completed. For all these reasons I would go one step further than the Court of Appeals majority and hold that all judicial examinations of alleged conflicts between state and federal AFDC programs prior to a final HEW decision approving or disapproving the state plan are fundamentally inconsistent with the enforcement scheme created by Congress and hence such suits should be completely precluded. This preclusion of judicial action does not, of course, necessarily mean that the individual welfare recipient has no legal remedies. The precise questions of when and under what circumstances individual welfare recipients can properly seek federal judicial review are not before the Court, however, and I express no views about those issues.[2]

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[2] The issues are canvassed in Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

ASHE *v.* SWENSON, WARDEN

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

No. 57. Argued November 13, 1969—Decided April 6, 1970

Three or four men robbed six poker players. Petitioner was separately charged with having robbed one of the players, Knight, who along with three others testified for the prosecution that each had been robbed. The State's evidence that petitioner had been one of the robbers was weak. The defense offered no testimony. The trial judge instructed the jury that if it found that petitioner participated in the robbery, the theft of any money from Knight would sustain a conviction and that if petitioner was one of the robbers he was guilty even though he had not personally robbed Knight. The jury found petitioner "not guilty due to insufficient evidence." Thereafter petitioner, following denial of his motion for dismissal based on the previous acquittal, was tried for having robbed another poker player, Roberts, and was convicted. Following affirmance by the Missouri Supreme Court and unsuccessful collateral attack in the state courts, petitioner brought this habeas corpus action in the District Court, claiming that the second prosecution had violated the Double Jeopardy Clause of the Fifth Amendment. The District Court denied the writ, relying on *Hoag* v. *New Jersey,* 356 U. S. 464, which on virtually identical facts held that there was no violation of due process. The Court of Appeals affirmed. Thereafter this Court in *Benton* v. *Maryland,* 395 U. S. 784, held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment, a decision which had fully "retroactive" effect, *North Carolina* v. *Pearce,* 395 U. S. 711. *Held:*

1. The Fifth Amendment guarantee against double jeopardy, applicable here through the Fourteenth Amendment by virtue of *Benton* v. *Maryland, supra,* embodies collateral estoppel as a constitutional requirement. Pp. 437–444.

2. Since on the record in this case the jury in the first trial had determined by its verdict that petitioner was not one of the robbers, the State under the doctrine of collateral estoppel was constitutionally foreclosed from relitigating that issue in another trial. Pp. 445–447.

399 F. 2d 40, reversed and remanded.

Clark M. Clifford, by appointment of the Court, 394 U. S. 941, argued the cause for petitioner. With him on the briefs were *James T. Stovall III* and *Robert G. Duncan.*

Gene E. Voigts, First Assistant Attorney General of Missouri, argued the cause for respondent. With him on the brief was *John C. Danforth,* Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Benton* v. *Maryland,* 395 U. S. 784, the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. The question in this case is whether the State of Missouri violated that guarantee when it prosecuted the petitioner a second time for armed robbery in the circumstances here presented.[1]

Sometime in the early hours of the morning of January 10, 1960, six men were engaged in a poker game in the basement of the home of John Gladson at Lee's Summit, Missouri. Suddenly three or four masked men, armed with a shotgun and pistols, broke into the basement and robbed each of the poker players of money and various articles of personal property. The robbers—and it has never been clear whether there were three or four of them—then fled in a car belonging to one of the victims of the robbery. Shortly thereafter the stolen car was discovered in a field, and later that morning three men were arrested by a state trooper while they were walking on a highway not far from where the abandoned car had been found. The petitioner was arrested by another officer some distance away.

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[1] There can be no doubt of the "retroactivity" of the Court's decision in *Benton* v. *Maryland.* In *North Carolina* v. *Pearce,* 395 U. S. 711, decided the same day as *Benton,* the Court unanimously accorded fully "retroactive" effect to the *Benton* doctrine.

The four were subsequently charged with seven separate offenses—the armed robbery of each of the six poker players and the theft of the car. In May 1960 the petitioner went to trial on the charge of robbing Donald Knight, one of the participants in the poker game. At the trial the State called Knight and three of his fellow poker players as prosecution witnesses. Each of them described the circumstances of the holdup and itemized his own individual losses. The proof that an armed robbery had occurred and that personal property had been taken from Knight as well as from each of the others was unassailable. The testimony of the four victims in this regard was consistent both internally and with that of the others. But the State's evidence that the petitioner had been one of the robbers was weak. Two of the witnesses thought that there had been only three robbers altogether, and could not identify the petitioner as one of them. Another of the victims, who was the petitioner's uncle by marriage, said that at the "patrol station" he had positively identified each of the other three men accused of the holdup, but could say only that the petitioner's voice "sounded very much like" that of one of the robbers. The fourth participant in the poker game did identify the petitioner, but only by his "size and height, and his actions."

The cross-examination of these witnesses was brief, and it was aimed primarily at exposing the weakness of their identification testimony. Defense counsel made no attempt to question their testimony regarding the holdup itself or their claims as to their losses. Knight testified without contradiction that the robbers had stolen from him his watch, $250 in cash, and about $500 in checks. His billfold, which had been found by the police in the possession of one of the three other men accused of the robbery, was admitted in evidence. The defense offered no testimony and waived final argument.

The trial judge instructed the jury that if it found that the petitioner was one of the participants in the armed robbery, the theft of "any money" from Knight would sustain a conviction.[2] He also instructed the jury that if the petitioner was one of the robbers, he was guilty under the law even if he had not personally robbed Knight.[3] The jury—though not instructed to elaborate upon its verdict—found the petitioner "not guilty due to insufficient evidence."

Six weeks later the petitioner was brought to trial again, this time for the robbery of another participant in the poker game, a man named Roberts. The petitioner filed a motion to dismiss, based on his previous acquittal. The motion was overruled, and the second trial began. The witnesses were for the most part the

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[2] "The Court instructs the jury that if you believe and find from the evidence in this case, beyond a reasonable doubt, that at the County of Jackson and State of Missouri, on the 10th day of January, 1960, the defendant herein, BOB FRED ASHE, alias BOBBY FRED ASHE, either alone or knowingly acting in concert with others, did then and there with force and arms in and upon one Don Knight, unlawfully and feloniously make an assault and took and carried away any money from his person or in his presence and against his will, by force and violence to his person, or by putting him in fear of some immediate injury to his person, with felonious intent to convert the same to his own use, without any honest claim to said money on the part of the defendant and with intent to permanently deprive the said Don Knight of his ownership and without the consent of the said Don Knight, if such be your finding, then you will find the defendant guilty of Robbery, First Degree, and so find in your verdict."

[3] "The Court instructs the jury that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting.

"The Court instructs the jury that when two or more persons knowingly act together in the commission of an unlawful act or purpose, then whatever either does in furtherance of such unlawful act or purpose is in law the act and deed of each of such persons."

same, though this time their testimony was substantially stronger on the issue of the petitioner's identity. For example, two witnesses who at the first trial had been wholly unable to identify the petitioner as one of the robbers, now testified that his features, size, and mannerisms matched those of one of their assailants. Another witness who before had identified the petitioner only by his size and actions now also remembered him by the unusual sound of his voice. The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative. The case went to the jury on instructions virtually identical to those given at the first trial. This time the jury found the petitioner guilty, and he was sentenced to a 35-year term in the state penitentiary.

The Supreme Court of Missouri affirmed the conviction, holding that the "plea of former jeopardy must be denied." *State* v. *Ashe,* 350 S. W. 2d 768, 771. A collateral attack upon the conviction in the state courts five years later was also unsuccessful. *State* v. *Ashe,* 403 S. W. 2d 589. The petitioner then brought the present habeas corpus proceeding in the United States District Court for the Western District of Missouri, claiming that the second prosecution had violated his right not to be twice put in jeopardy. Considering itself bound by this court's decision in *Hoag* v. *New Jersey,* 356 U. S. 464, the District Court denied the writ, although apparently finding merit in the petitioner's claim.[4] The Court

[4] "However persuasive the dissenting opinions in the *Hoag* case may be, it is the duty of this Court to follow the law as stated by the Supreme Court of the United States until it expresses a contrary view. Certainly the factual circumstances of this case provide an excellent opportunity for reexamination of the questions presented. An examination of the transcript of both trials shows that in both the single issue in real contest, as distinguished from the issues that may be said to have been in technical dispute, was the question

of Appeals for the Eighth Circuit affirmed, also upon the authority of *Hoag* v. *New Jersey, supra.*[5] We granted certiorari to consider the important constitutional question this case presents. 393 U. S. 1115.

As the District Court and the Court of Appeals correctly noted, the operative facts here are virtually identical to those of *Hoag* v. *New Jersey, supra.* In that case the defendant was tried for the armed robbery of three men who, along with others, had been held up in a tavern. The proof of the robbery was clear, but the evidence identifying the defendant as one of the robbers was weak, and the defendant interposed an alibi defense. The jury brought in a verdict of not guilty. The defendant was then brought to trial again, on an indictment charging the robbery of a fourth victim of the tavern holdup. This time the jury found him guilty. After appeals in the state courts proved unsuccessful, Hoag brought his case here.

Viewing the question presented solely in terms of Fourteenth Amendment due process—whether the course that New Jersey had pursued had "led to fundamental unfairness," 356 U. S., at 467—this Court declined to reverse the judgment of conviction, because "in the circumstances shown by this record, we cannot say that

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of whether petitioner was or was not present at the time the money was taken from the poker table and the other property taken from persons of the respective poker players." *Ashe* v. *Swenson,* 289 F. Supp. 871, 873.

[5] "It usually is difficult for a lower federal court to forecast with assurance a Supreme Court decision as to the continuing validity of a holding of a decade ago by a Court then divided as closely as possible. This is particularly so when the decision is in the rapidly developing and sensitive area of the criminal law and the Fourteenth Amendment Bill of Rights relationship. We feel, however, that our task is not to forecast but to follow those dictates, despite their closeness of decision, which at this moment in time are on the books and for us to read. . . ." *Ashe* v. *Swenson,* 399 F. 2d 40, 46.

petitioner's later prosecution and conviction violated due process." [6] 356 U. S., at 466. The Court found it unnecessary to decide whether "collateral estoppel"—the principle that bars relitigation between the same parties of issues actually determined at a previous trial—is a due process requirement in a state criminal trial, since it accepted New Jersey's determination that the petitioner's previous acquittal did not in any event give rise to such an estoppel. 356 U. S., at 471. And in the view the Court took of the issues presented, it did not, of course, even approach consideration of whether collateral estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy.

The doctrine of *Benton* v. *Maryland,* 395 U. S. 784, puts the issues in the present case in a perspective quite different from that in which the issues were perceived in *Hoag* v. *New Jersey, supra.* The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad

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[6] The particular "circumstance" most relied upon by the Court was "the unexpected failure of four of the State's witnesses at the earlier trial to identify petitioner, after two of these witnesses had previously identified him in the course of the police investigation. Indeed, after the second of the two witnesses failed to identify petitioner, the State pleaded surprise and attempted to impeach his testimony. We cannot say that, after such an unexpected turn of events, the State's decision to try petitioner for the Yager robbery was so arbitrary or lacking in justification that it amounted to a denial of those concepts constituting 'the very essence of a scheme of ordered justice, which is due process.'" 356 U. S., at 469–470.

In the case now before us, by contrast, there is no claim of any "unexpected turn of events" at the first trial, unless the jury verdict of acquittal be so characterized.

bounds of "fundamental fairness," but a matter of constitutional fact we must decide through an examination of the entire record. Cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285; *Niemotko* v. *Maryland,* 340 U. S. 268, 271; *Watts* v. *Indiana,* 338 U. S. 49, 51; *Chambers* v. *Florida,* 309 U. S. 227, 229; *Norris* v. *Alabama,* 294 U. S. 587, 590.

"Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States* v. *Oppenheimer,* 242 U. S. 85. As Mr. Justice Holmes put the matter in that case, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U. S., at 87.[7] As a rule of federal law, therefore, "[i]t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain." *United States* v. *Kramer,* 289 F. 2d 909, 913.

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[7] See also *Coffey* v. *United States,* 116 U. S. 436, 442–443; *Frank* v. *Mangum,* 237 U. S. 309, 333–334; *Sealfon* v. *United States,* 332 U. S. 575; *United States* v. *De Angelo,* 138 F. 2d 466; *United States* v *Curzio,* 170 F. 2d 354; *Yawn* v. *United States,* 244 F. 2d 235; *United States* v. *Cowart,* 118 F. Supp. 903.

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." [8] The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States,* 332 U. S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.[9]

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[8] Mayers & Yarbrough, *Bis Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38–39. See *Yawn* v. *United States, supra; United States* v. *De Angelo, supra.*

[9] "If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction." Mayers & Yarbrough, *supra,* at 38. See generally Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317. See also Comment, Twice in Jeopardy, 75 Yale L. J. 262; Hunvald, Criminal Law in Missouri, 25 Mo. L. Rev. 369, 369–375; Comment, Double Jeopardy and Collateral Estoppel in Crimes Arising From the Same Transaction, 24 Mo. L. Rev. 513; McLaren, The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, 10 Wash. L. Rev. 198.

Straightforward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.

The ultimate question to be determined, then, in the light of *Benton* v. *Maryland, supra,* is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is.[10] For whatever else that

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[10] It is true, as this Court said in *Hoag* v. *New Jersey, supra,* that we have never squarely held collateral estoppel to be a constitutional requirement. Until perhaps a century ago, few situations arose calling for its application. For at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. See Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L. J. 339, 342. In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. See Note, Double Jeopardy and the Multiple-Count Indictment, 57 Yale L. J. 132, 133. As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced. Comment, Twice in Jeopardy, 75 Yale L. J. 262, 279–280; Note, Double Jeopardy and the Concept of Identity of Offenses, 7 Brooklyn L. Rev. 79, 82. The federal courts soon recognized the need to prevent such abuses through the doctrine of collateral

constitutional guarantee may embrace, *North Carolina* v. *Pearce,* 395 U. S. 711, 717, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. *Green* v. *United States,* 355 U. S. 184, 190.

The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.

After the first jury had acquitted the petitioner of robbing Knight, Missouri could certainly not have brought him to trial again upon that charge. Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers.

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estoppel, and it became a safeguard firmly embedded in federal law. See n. 7, *supra.* Whether its basis was a constitutional one was a question of no more than academic concern until this Court's decision in *Benton* v. *Maryland, supra.*

In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

The judgment is reversed, and the case is remanded to the Court of Appeals for the Eighth Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring.

I join in the opinion of the Court although I must reject any implication in that opinion that the so-called due process test of "fundamental fairness" might have been appropriate as a constitutional standard at some point in the past or might have a continuing relevancy today in some areas of constitutional law. In my view it is a wholly fallacious idea that a judge's sense of what is fundamentally "fair" or "unfair" should ever serve as a substitute for the explicit, written provisions of our Bill of Rights. One of these provisions is the Fifth Amendment's prohibition against putting a man twice in jeopardy. On several occasions I have stated my view that the Double Jeopardy Clause bars a State or the Federal Government or the two together from subjecting a defendant to the hazards of trial and possible conviction more than once for the same alleged offense. *Bartkus* v. *Illinois,* 359 U. S. 121, 150 (1959) (dissenting opinion); *Abbate* v. *United States,* 359 U. S. 187, 201 (1959) (dissenting opinion); *Ciucci* v. *Illinois,* 356 U. S.

571, 575 (1958) (dissenting statement); *Green* v. *United States,* 355 U. S. 184 (1957). The opinion of the Court in the case today amply demonstrates that the doctrine of collateral estoppel is a basic and essential part of the Constitution's prohibition against double jeopardy. Accordingly, for the reasons stated in the Court's opinion I fully agree that petitioner's conviction must be reversed.

MR. JUSTICE HARLAN, concurring.

If I were to judge this case under the traditional standards of Fourteenth Amendment due process, I would adhere to the decision in *Hoag* v. *New Jersey,* 356 U. S. 464 (1958), believing that regardless of the reach of the federal rule of collateral estoppel, it would have been open to a state court to treat the issue differently. However, having acceded in *North Carolina* v. *Pearce,* 395 U. S. 711, 744 (1969), to the decision in *Benton* v. *Maryland,* 395 U. S. 784 (1969), which, over my dissent, held that the Fourteenth Amendment imposes on the States the standards of the Double Jeopardy Clause of the Fifth Amendment, I am satisfied that on this present record Ashe's acquittal in the first trial brought double jeopardy standards into play. Hence, I join the Court's opinion. In doing so I wish to make explicit my understanding that the Court's opinion in no way intimates that the Double Jeopardy Clause embraces to any degree the "same transaction" concept reflected in the concurring opinion of my Brother BRENNAN.

MR. JUSTICE BRENNAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring.

I agree that the Double Jeopardy Clause incorporates collateral estoppel as a constitutional requirement and therefore join the Court's opinion. However, even if

the rule of collateral estoppel had been inapplicable to the facts of this case, it is my view that the Double Jeopardy Clause nevertheless bars the prosecution of petitioner a second time for armed robbery. The two prosecutions, the first for the robbery of Knight and the second for the robbery of Roberts, grew out of one criminal episode, and therefore I think it clear on the facts of this case that the Double Jeopardy Clause prohibited Missouri from prosecuting petitioner for each robbery at a different trial. *Abbate* v. *United States,* 359 U. S. 187, 196–201 (1959) (separate opinion).

My conclusion is not precluded by the Court's decision in *Hoag* v. *New Jersey,* 356 U. S. 464 (1958), although the basic fact situation there was identical to that in this case. Three armed men entered a tavern and robbed five customers. Hoag was tried and acquitted under indictments for robbing three of the customers. He was then brought to trial under a fourth indictment, the same as the first three in all respects except that it named a fourth customer as the victim. This time Hoag was convicted. The New Jersey courts, in rejecting Hoag's double-jeopardy claim, construed the applicable New Jersey statute as making each of the four robberies, although taking place on the same occasion, a separate offense. This construction was consistent with the state courts' view that a claim of double jeopardy cannot be upheld unless the same evidence necessary to sustain a second indictment would have been sufficient to secure a conviction on the first. The issues differed only in the identifications of the victims and the property taken from each; otherwise the State's evidence covered the same ground at both trials. This Court stated that it was unable to hold that the Due Process

Clause of the Fourteenth Amendment "always prevents a State from allowing different offenses arising out of the same act or transaction to be prosecuted separately, as New Jersey has done. For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice." 356 U. S., at 468. But in the present case Missouri did not have "the widest latitude" because *Benton* v. *Maryland,* 395 U. S. 784 (1969), decided after *Hoag,* held that the Fifth Amendment guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" is enforceable against the States, and *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), accorded fully retroactive effect to that holding. This means, under our decisions, that federal standards as to what constitutes the "same offence" apply alike to federal and state proceedings; it would be incongruous to have different standards determine the validity of a claim of double jeopardy depending on whether the claim was asserted in a state or federal court. Cf. *Malloy* v. *Hogan,* 378 U. S. 1, 11 (1964).

The Double Jeopardy Clause is a guarantee "that the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States,* 355 U. S. 184, 187 (1957). This guarantee is expressed as a prohibition against multiple prosecutions for the "same offence." Although the phrase "same offence" appeared in most of the early common-law articulations of the double-jeop-

ardy principle,[1] questions of its precise meaning rarely arose prior to the 18th century, and by the time the Bill of Rights was adopted it had not been authoritatively defined.[2]

When the common law did finally attempt a definition, in *The King* v. *Vandercomb,* 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Crown 1796), it adopted the "same evidence" test, which provided little protection from multiple prosecution:

> "[U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."

The "same evidence" test of "same offence" was soon followed by a majority of American jurisdictions, but its deficiencies are obvious. It does not enforce but virtually annuls the constitutional guarantee. For example, where a single criminal episode involves several victims, under the "same evidence" test a separate prosecution may be brought as to each. *E. g., State* v. *Hoag,* 21 N. J. 496, 122 A. 2d 628 (1956), aff'd, 356 U. S. 464 (1958). The "same evidence" test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. *E. g., Johnson* v. *Commonwealth,* 201 Ky. 314, 256 S. W. 388 (1923) (each of 75 poker hands a separate "offense"). Even a single criminal act may lead to multiple prosecutions if it is viewed from the perspectives of different statutes. *E. g.,*

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[1] See, *e. g., Vaux's Case,* 4 Co. Rep. 44 a, 45 a, 76 Eng. Rep. 992, 993 (K. B. 1591); 2 M. Hale, Pleas of the Crown **240–255 ("same felony"); 2 W. Hawkins, Pleas of the Crown 515 (8th ed. 1824); 4 W. Blackstone, Commentaries *335.

[2] See generally J. Sigler, Double Jeopardy 1–37 (1969).

State v. *Elder*, 65 Ind. 282 (1879). Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution,[3] the potentialities for abuse inherent in the "same evidence" test are simply intolerable.[4]

The "same evidence" test is not constitutionally required. It was first expounded *after* the adoption of the Fifth Amendment, and, as shown in *Abbate* v. *United States*, *supra*, at 197–198 and n. 2, has never been squarely held by this Court to be the required construc-

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[3] See Baker, The Prosecutor—Initiation of Prosecution, 23 J. Crim. L. & C. 770 (1933); Baker & De Long, The Prosecuting Attorney—Powers and Duties in Criminal Prosecution, 24 J. Crim. L. & C. 1025 (1934); Kaplan, The Prosecutorial Discretion—A Comment, 60 Nw. U. L. Rev. 174 (1965); Note, Prosecutor's Discretion, 103 U. Pa. L. Rev. 1057 (1955); Note, Discretion Exercised by Montana County Attorneys in Criminal Prosecutions, 28 Mont. L. Rev. 41 (1966); Note, Prosecutorial Discretion in the Initiation of Criminal Complaints, 42 So. Cal. L. Rev. 519 (1969).

[4] Several subsidiary rules have been developed in attempts to eliminate anomalies resulting from the "same evidence" test. Thus, where one offense is included in another, prosecution for one bars reprosecution for the other even though the evidence necessary to prove the two offenses is different. Similarly, doctrines of *res judicata* and collateral estoppel have provided some, though not very much, relief from the extreme permissiveness of the test. See generally Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L. J. 513 (1949). Numerous practical exceptions to the test are discussed in Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805 (1937). So many exceptions to the "same evidence" rule have been found necessary that it is hardly a rule at all; yet the numerous exceptions have not succeeded in wholly preventing prosecutorial abuse.

tion of the constitutional phrase "same offence" in a case involving multiple trials; indeed, in that context it has been rejected. See *In re Nielsen,* 131 U. S. 176 (1889), discussed in *Abbate* v. *United States, supra,* at 201. The "same evidence" test may once have been defensible at English common law, which, for reasons peculiar to English criminal procedure, severely restricted the power of prosecutors to combine several charges in a single trial.[5] In vivid contrast, American criminal procedure generally allows a prosecutor freedom, subject to judicial control, to prosecute a person at one trial for all the crimes arising out of a single criminal transaction.[6]

In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances,[7] to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence,

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[5] As Mr. Justice Frankfurter has said, "Since the prohibition in the Constitution against double jeopardy is derived from history, its significance and scope must be determined, 'not simply by taking the words and a dictionary, but by considering [its] . . . origin and the line of [its] . . . growth.'" *Green* v. *United States, supra,* at 199 (dissenting opinion). The relation between the history of English criminal procedure and the history of the common law of double jeopardy is comprehensively examined in M. Friedland, Double Jeopardy (1969). See in particular pp. 161–194.

[6] See, *e. g.,* Fed. Rules Crim. Proc. 8, 13, 14; Ill. Rev. Stat., c. 38, § 3–3 (1967); Ann., 59 A. L. R. 2d 841 (1958).

[7] For example, where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to the "same transaction" rule should be made to permit a separate prosecution. See, *e. g., Diaz* v. *United States,* 223 U. S. 442, 448–449 (1912). Cf. ALI, Model Penal Code, Proposed Official Draft §§ 1.07 (2), 1.09 (1)(b) (1962); *Connelly* v. *D. P. P.,* [1964] A. C. 1254, 1360. Another exception would be necessary if no single court had jurisdiction of all the alleged crimes. An additional exception is discussed in n. 11, *infra.*

episode, or transaction. This "same transaction" test of "same offence" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.[8] Modern rules of criminal and civil procedure reflect this recognition. See *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 724–726 (1966). Although in 1935 the American Law Institute adopted the "same evidence" test, it has since replaced it with the "same transaction" test.[9] England, too, has abandoned its surviving rules against joinder of charges and has adopted the "same transaction" test.[10] The Federal

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[8] Admittedly, the phrase "same transaction" is not self-defining. Guidance for its application can be obtained from cases interpreting the phrase as it is used in the Federal Rules of Criminal Procedure. See in particular cases under Rule 8 (a). Although analogies to the use of the phrase in civil litigation are not perfect since policy considerations differ, some further guidance for its application in the present context can be obtained from the course of its application in civil litigation, where the courts have not encountered great difficulty in reaching sound results in particular cases. See 3 J. Moore, Federal Practice ¶13.13 (1968); 1A W. Barron & A. Holtzoff, Federal Practice and Procedure § 394 (Wright ed. 1960). Additional guidance may be found in cases developing the standard of "common nucleus of operative fact," *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966), for purposes of pendent jurisdiction. See generally Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 660–662 (1968).

[9] Compare ALI, Administration of the Criminal Law, Official Draft: Double Jeopardy § 5 (1935) with ALI, Model Penal Code, Proposed Official Draft §§ 1.07 (2), 1.09 (1)(b) (1962). See also Ill. Rev. Stat., c. 38, §§ 3–3, 3–4 (b)(1) (1967).

[10] See *Connelly* v. *D. P. P.*, [1964] A. C. 1254.

Rules of Criminal Procedure liberally encourage the joining of parties and charges in a single trial. Rule 8 (a) provides for joinder of charges that are similar in character, or arise from the same transaction or from connected transactions or form part of a common scheme or plan. Rule 8 (b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information.[11] These rules represent considered modern thought concerning the proper structuring of criminal litigation.

The same thought is reflected in the Federal Rules of Civil Procedure. A pervasive purpose of those Rules is to require or encourage the consolidation of related claims in a single lawsuit. Rule 13 makes compulsory (upon pain of a bar) all counterclaims arising out of the same transaction or occurrence from which the plaintiff's claim arose. Rule 14 extends this compulsion to third-party defendants. Rule 18 permits very broad joinder of claims, counterclaims, cross-claims, and third-party claims. Rules 19, 20, and 24 provide for joinder of parties and intervention by parties having claims

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[11] Rule 14 provides for separate trials under court order where joinder would be prejudicial to either the prosecution or the defense. Cf. Fed. Rule Civ. Proc. 42. Even where separate trials are permitted to avoid prejudicial joinder, the "same transaction" rule can serve a useful purpose since the defendant is at least informed at one time of all the charges on which he will actually be tried, and can prepare his defense accordingly. Moreover, the decision on whether charges are to be tried jointly or separately will rest with the judge rather than the prosecutor. And separate trials may not be ordered, of course, where the proofs will be repetitious, or the multiplicity of trials vexatious, or where the multiplicity will enable the prosecution to use the experience of the first trial to strengthen its case in a subsequent trial.

related to the subject matter of the action. Rule 23 permits the consolidation of separate claims in a class action; see particularly Rule 23 (b)(3).

In addition, principles of *res judicata* and collateral estoppel caution the civil plaintiff against splitting his case. The doctrine of pendent jurisdiction has furthered single trials of related cases. See *United Mine Workers* v. *Gibbs, supra.* Moreover, we have recognized the jurisdiction of three-judge courts to hear statutory claims pendent to the constitutional claim that required their convening. See, *e. g., United States* v. *Georgia Pub. Serv. Comm'n,* 371 U. S. 285, 287–288 (1963); *King* v. *Smith,* 392 U. S. 309 (1968).

It is true that these developments have not been of a constitutional dimension, and that many of them are permissive and discretionary rather than mandatory. Flexibility in the rules governing the structure of civil litigation is appropriate in order to give the parties the opportunity to shape their own private lawsuits, provided that injustice, harassment, or an undue burden on the courts does not result. Some flexibility in the structuring of criminal litigation is also desirable and consistent with our traditions. But the Double Jeopardy Clause stands as a constitutional barrier against possible tyranny by the overzealous prosecutor. The considerations of justice, economy, and convenience that have propelled the movement for consolidation of civil cases apply with even greater force in the criminal context because of the constitutional principle that no man shall be vexed more than once by trial for the same offense.[12] Yet, if the Double Jeopardy Clause were in-

[12] Joinder of defendants, as distinguished from joinder of offenses, requires separate analysis. For example, joinder of defendants can lead to Sixth Amendment problems. See, *e. g., Bruton* v. *United States,* 391 U. S. 123 (1968).

terpreted by this Court to incorporate the "same evidence" test, criminal defendants would have less protection from multiple trials than civil defendants. This anomaly would be intolerable. It was condemned by a New Jersey court nearly a century and a half ago in words even more applicable today:

> "If in civil cases, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions. . . . [This] is a case where the state has thought proper to prosecute the offence in its mildest form, and it is better that the residue of the offence go unpunished, than by sustaining a second indictment to sanction a practice which might be rendered an instrument of oppression to the citizen." *State* v. *Cooper,* 13 N. J. L. 361, 375–376 (1833).

The present case highlights the hazards of abuse of the criminal process inherent in the "same evidence" test and demonstrates the necessity for the "same transaction" test. The robbery of the poker game involved six players—Gladson, Knight, Freeman, Goodwin, McClendon, and Roberts. The robbers also stole a car. Seven separate informations were filed against the petitioner, one covering each of the robbery victims, and the seventh covering the theft of the car. Petitioner's first trial was under the information charging the robbery of Knight. Since Missouri has offered no justification for not trying the other informations at that trial, it is reasonable to infer that the other informations were held in reserve to be tried if the State failed to obtain a conviction on the charge of robbing Knight. Indeed, the State virtually concedes as much since it argues that the "same evidence" test

is consistent with such an exercise of prosecutorial discretion.

Four of the robbery victims testified at the trial. Their testimony conflicted as to whether there were three or four robbers. Gladson testified that he saw four robbers, but could identify only one, a man named Brown. McClendon testified that he saw only three men at any one time during the course of the robbery, and he positively identified Brown, Larson, and Johnson; he also thought he heard petitioner's voice during the robbery, but said he was not sure. Knight thought only three men participated in the robbery, and he could not identify anyone. Roberts said he saw four different men and he identified them as Brown, Larson, Johnson, and petitioner. Under cross-examination, he conceded that he did not recognize petitioner's voice, and that he did not see his face or his hands. He maintained that he could identify him by his "size and height" even though all the robbers had worn outsized clothing, and even though he could not connect petitioner with the actions of any of the robbers. On this evidence the jury acquitted petitioner.

At the second trial, for the robbery of Roberts, McClendon was not called as a witness. Gladson, who previously had been able to identify only one man—Brown—now was able to identify three—Brown, Larson, and petitioner. On a number of details his memory was much more vivid than it had been at the first trial. Knight's testimony was substantially the same as at the first trial—he still was unable to identify any of the robbers. Roberts, who previously had identified petitioner only by his size and height, now identified him by his size, actions, voice, and a peculiar movement of his mouth. As might be expected, this far stronger

identification evidence brought a virtually inevitable conviction.

The prosecution plainly organized its case for the second trial to provide the links missing in the chain of identification evidence that was offered at the first trial. McClendon, who was an unhelpful witness at the first trial was not called at the second trial. The hesitant and uncertain evidence of Gladson and Roberts at the first trial became detailed, positive, and expansive at the second trial. One must experience a sense of uneasiness with any double-jeopardy standard that would allow the State this second chance to plug up the holes in its case. The constitutional protection against double jeopardy is empty of meaning if the State may make "repeated attempts" to touch up its case by forcing the accused to "run the gantlet" as many times as there are victims of a single episode.

Fortunately for petitioner, the conviction at the second trial can be reversed under the doctrine of collateral estoppel, since the jury at the first trial clearly resolved in his favor the only contested issue at that trial, which was the identification of him as one of the robbers. There is at least doubt whether collateral estoppel would have aided him had the jury been required to resolve additional contested issues on conflicting evidence.[13] But correction of the abuse of criminal process should not in any event be made to depend on the availability of collateral estoppel. Abuse of the criminal process is foremost among the feared evils that led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if "same

[13] And, of course, collateral estoppel would not prevent multiple prosecutions when the first trial ends in a verdict of guilty.

offence" is construed to embody the "same transaction" standard. Then both federal and state prosecutors will be prohibited from mounting successive prosecutions for offenses growing out of the same criminal episode, at least in the absence of a showing of unavoidable necessity for successive prosecutions in the particular case.[14]

MR. CHIEF JUSTICE BURGER, dissenting.

The Fifth Amendment to the Constitution of the United States provides in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." Nothing in the language or gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment that the Court today accords to the collateral-estoppel doctrine. Nothing in the purpose of the authors of the Constitution commands or even justifies what the Court decides today; this is truly a case of expanding a sound basic

[14] The question of separate trials for different crimes committed during a single criminal transaction is entirely distinct from and independent of the question of prosecutorial discretion to select the charges on which a defendant shall be prosecuted; and, as explained in my separate opinion in *Abbate, supra,* at 198–199, it is also distinct from and independent of the question of the imposition of separate punishments for different crimes committed during a single transaction. The Double Jeopardy Clause does not limit the power of Congress and the States to split a single transaction into separate crimes so as to give the prosecution a choice of charges. Cf. *Gore* v. *United States,* 357 U. S. 386, 395 (1958) (DOUGLAS, J., dissenting). Moreover, the clause does not, as a general matter, prohibit the imposition at one trial of cumulative penalties for different crimes committed during one transaction. See my separate opinion in *Abbate, supra.* Thus no crime need go unpunished. However, the clause does provide an outer limit on the power of federal and state courts to impose cumulative punishments for a single criminal transaction. See *Gore* v. *United States, supra,* at 397–398 (BRENNAN, J., dissenting).

principle beyond the bounds—or needs—of its rational and legitimate objectives to preclude harassment of an accused.

I

Certain facts are not in dispute. The home of John Gladson was the scene of "a friendly game of poker" in the early hours of the morning of January 10, 1960. Six men—Gladson, Knight, Freeman, Goodwin, McClendon, and Roberts—were playing cards in the basement. While the game was in progress, three men, armed with a sawed-off shotgun and pistols, broke into the house and forced their way into the basement. They ordered the players to remove their trousers and tied them up, except for Gladson who had a heart condition of which the robbers seemed to be aware. Substantial amounts of currency and checks were taken from the poker table and items of personal property were taken from the persons of the players. During the same period in which the men were being robbed in the basement, one man entered Mrs. Gladson's bedroom three floors above, ripped out the telephone there, tied her with the telephone cord, and removed the wedding ring from her finger. The robbers then fled in a car belonging to Roberts.

Four men—Ashe, Johnson, Larson, and Brown—were arrested later in the morning of the robbery. Each was subsequently charged in a separate information with the robbery of each of the six victims. Ashe, Johnson, and Larson were also charged with the theft of the car belonging to Roberts.

Ashe went to trial on May 2, 1960, on the charge of robbing Knight. No charge as to other victims was presented. Four of the six men—Knight, Gladson, McClendon, and Roberts—testified about the robbery and described their individual losses. Mrs. Gladson did not

testify because she was ill on the day of trial. As MR. JUSTICE BRENNAN has stated, the victims' testimony conflicted as to whether there were three or four robbers:

> "Gladson testified that he saw four robbers, but could identify only one, a man named Brown. McClendon testified that he saw only three men at any one time during the course of the robbery, and he positively identified Brown, Larson, and Johnson; he also thought he heard petitioner's voice during the robbery, but said he was not sure. Knight thought only three men participated in the robbery, and he could not identify anyone. Roberts said he saw four different men and he identified them as Brown, Larson, Johnson, and petitioner." *Ante,* at 458.

Ashe put in no evidence whatever, as was his right, and even waived closing arguments to the jury; nonetheless, the jury did not reach a verdict of guilty but returned a somewhat unorthodox verdict of "not guilty due to insufficient evidence."

Then, on June 20, 1960, Ashe was tried for the robbery of Roberts. Mrs. Gladson testified at this trial, relating that she was asleep in her bedroom when one of the robbers entered, awoke her, tied her up with a telephone cord, and took cash and her wedding ring. The robber stayed in her room for about 15 or 20 minutes, during which time she could hear scuffling and talking in the basement. She said that she was able to identify the robber by his voice, and that he was Johnson, not Ashe.

The Court's opinion omits some relevant facts. The other victims' testimony at the second trial corroborated that of Mrs. Gladson that four robbers were present during the time in which the robbery took place.

Gladson identified three robbers—Brown, Larson, and Ashe—as having been in the basement for the first minutes of the robbery; also he stated that one or more of the robbers had left the basement after 20 or 25 minutes. Roberts identified Brown, Larson, and Ashe as the men who formed the original group who entered the basement and testified that after the robbery, two of the three men, including Ashe, left the room. Two men returned in a short time with car keys, but Johnson had replaced Ashe as one of the two. There can be no doubt that the record shows four persons in the robbery band. The jury found Ashe guilty of robbing Roberts—the only charge before it.

Thereafter, as described in the opinion of the majority, Ashe's conviction was reviewed and upheld by the Supreme Court of Missouri, the United States District Court for the Western District of Missouri, and the Court of Appeals for the Eighth Circuit; in turn each rejected Ashe's double-jeopardy claim.

II

The concept of double jeopardy and our firm constitutional commitment is against repeated trials "for the *same offence.*" This Court, like most American jurisdictions, has expanded that part of the Constitution into a "same evidence" test.[1] For example, in *Blockburger* v. *United States,* 284 U. S. 299, 304 (1932), it was stated, so far as here relevant, that

> "the test to be applied to determine whether there are two offenses or only one, is whether each provision [*i. e.,* each charge] requires *proof of a fact which the other does not.*" (Emphasis added.)

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[1] The test was first enunciated in *The King* v. *Vandercomb,* 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Crown 1796).

Clearly and beyond dispute the charge against Ashe in the second trial required proof of a fact—robbery of Roberts—which the charge involving Knight did not. The Court, therefore, has had to reach out far beyond the accepted offense-defining rule to reach its decision in this case. What it has done is to superimpose on the same-evidence test a new and novel collateral-estoppel gloss.

The majority rests its holding in part on a series of cases beginning with *United States* v. *Oppenheimer*, 242 U. S. 85 (1916), which did not involve constitutional double jeopardy but applied collateral estoppel as developed in civil litigation to federal criminal prosecutions as a matter of this Court's supervisory power over the federal court system. The Court now finds the federal collateral estoppel rule to be an "ingredient" of the Fifth Amendment guarantee against double jeopardy and applies it to the States through the Fourteenth Amendment; this is an ingredient that eluded judges and justices for nearly two centuries.

The collateral-estoppel concept—originally a product only of civil litigation—is a strange mutant as it is transformed to control this criminal case. In civil cases the doctrine was justified as conserving judicial resources as well as those of the parties to the actions and additionally as providing the finality needed to plan for the future. It ordinarily applies to parties on each side of the litigation who have the same interest as or who are identical with the parties in the initial litigation. Here the complainant in the second trial is not the same as in the first even though the State is a party in both cases. Very properly, in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation. Also, courts that have applied the collateral-estoppel concept to criminal actions would

certainly not apply it to *both* parties, as is true in civil cases, *i. e.*, here, if Ashe had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial.[2]

Perhaps, then, it comes as no surprise to find that the only expressed rationale for the majority's decision is that Ashe has "run the gantlet" once before. This is not a doctrine of the law or legal reasoning but a colorful and graphic phrase, which, as used originally in an opinion of the Court written by MR. JUSTICE BLACK, was intended to mean something entirely different. The full phrase is "run the gantlet once *on that charge* . . ." (emphasis added); it is to be found in *Green* v. *United States*, 355 U. S. 184, 190 (1957), where no question of multiple crimes against multiple victims was involved. Green, having been found guilty of second-degree murder on a charge of first degree, secured a new trial. This Court held nothing more than that Green, once put in jeopardy—once having "run the gantlet . . . on *that charge*"—of first degree murder, could not be compelled to defend against that charge again on retrial.

Today's step in this area of constitutional law ought not be taken on no more basis than casual reliance on the "gantlet" phrase lifted out of the context in which it was originally used. This is decision by slogan.

Some commentators have concluded that the harassment inherent in standing trial a second time is a sufficient reason for use of collateral estoppel in criminal

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[2] If Knight and Roberts had been passengers in a car that collided with one driven by Ashe no one would seriously suggest that a jury verdict for Ashe in an action by Knight against Ashe would bar an action by Roberts against Ashe. To present this situation shows how far the Court here has distorted collateral estoppel beyond its traditional boundaries.

trials.[3] If the Court is today relying on a harassment concept to superimpose a new brand of collateral-estoppel gloss on the "same evidence" test, there is a short answer; this case does not remotely suggest harassment of an accused who robbed six victims and the harassment aspect does not rise to constitutional levels.[4]

Finally, the majority's opinion tells us

> "that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ante,* at 444.

With deference I am bound to pose the question: what is reasonable and rational about holding that an acquittal of Ashe for robbing Knight bars a trial for robbing Roberts? To borrow a phrase from the Court's opinion, what could conceivably be more "hypertechnical and archaic" and more like the stilted formalisms of 17th and 18th century common-law England, than to stretch jeopardy for robbing Knight into jeopardy for robbing Roberts?

After examining the facts of this case the Court concludes that the first jury must have concluded that Ashe was not one of the robbers—that he was not present at

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[3] See, *e. g.,* Mayers & Yarbrough, *Bis Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 29–41 (1960); Comment, 24 Mo. L. Rev. 513 (1959); cf. Note, 75 Yale L. J. 262, 283–292 (1965).

[4] The weight of the harassment factor does not warrant elevating collateral-estoppel principles in criminal trials to the level of an "ingredient" of the Fifth and Fourteenth Amendments. True harassment deserves serious consideration because of the strain of the new trial. But society has an urgent interest in protecting the public from criminal acts and we ought not endorse any concepts that put a premium on aggravated criminal conduct in multiple crimes committed at the same time.

the time.[5] Also, since the second jury necessarily reached its decision by finding he was present, the collateral-estoppel doctrine applies. But the majority's analysis of the facts completely disregards the confusion injected into the case by the robbery of Mrs. Gladson. To me, if we are to psychoanalyze the jury, the evidence adduced at the first trial could more reasonably be construed as indicating that Ashe had been at the Gladson home with the other three men but was not one of those involved in the basement robbery. Certainly, the evidence at the first trial was equivocal as to whether there were three or four robbers, whether the man who robbed Mrs. Gladson was one of the three who robbed the six male victims, and whether a man other than the three had robbed Mrs. Gladson. Then, since the jury could have thought that the "acting together" instruction given by the trial court in both trials[6] only applied to the actual taking from the six card players, and not to Mrs. Gladson, the jury could well have acquitted Ashe but yet believed that he was present in the Gladson home. On the other hand, the evidence adduced at the second trial resolved issues other than identity that may have troubled the first jury. If believed, that evidence indicated that a fourth robber, Johnson, not Ashe, was with Mrs. Gladson when Ashe, Larson, and Brown were robbing the male victims. Johnson did go to the basement where the male victims were located, but only after the other three had already taken the stolen items and when the robbers were preparing for their departure in a car to be stolen from Roberts.

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[5] Arguably if Ashe had made a defense solely by alibi, that he was in Vietnam at the time and offered evidence of Army records etc., one might reasonably say the jury decided what the Court today says it probably decided. On this record however, such an analysis is baseless.

[6] See *ante,* at 439 n. 3.

Accordingly, even the facts in this case, which the Court's opinion considers to "lead to but one conclusion," are susceptible of an interpretation that the first jury did not base its acquittal on the identity ground which the Court finds so compelling. The Court bases its holding on sheer "guesswork," [7] which should have no place particularly in our review of state convictions by way of habeas corpus. As Mr. Justice Holmes said in *Guy* v. *Donald*, 203 U. S. 399, 406 (1906):

> "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied. . . ."

III

The essence of MR. JUSTICE BRENNAN's concurrence is that this was all one transaction, one episode, or, if I may so characterize it, one frolic, and, hence, only one crime. His approach, like that taken by the Court, totally overlooks the significance of there being *six entirely separate charges of robbery* against six individuals.

This "single transaction" concept is not a novel notion; it has been urged in various courts including this Court.[8] One of the theses underlying the "single transaction" notion is that the criminal episode is "indivisible." The short answer to that is that to the victims, the criminal conduct is readily divisible and intensely personal; each offense is an offense against *a person*. For me it de-

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[7] For a criticism of the collateral-estoppel doctrine because of the "guesswork" necessary to apply it to general criminal verdicts, see Note, 75 Yale L. J. 262, 285 (1965).

[8] *Hoag* v. *New Jersey*, 356 U. S. 464, 473 (Warren, C. J., dissenting), 477 (DOUGLAS, J., dissenting) (1958).

means the dignity of the human personality and individuality to talk of "a single transaction" in the context of six separate assaults on six individuals.

No court that elevates the individual rights and human dignity of the accused to a high place—as we should—ought to be so casual as to treat the victims as a single homogenized lump of human clay. I would grant the dignity of individual status to the victims as much as to those accused, not more but surely no less.

If it be suggested that multiple crimes can be separately punished but must be collectively tried, one can point to the firm trend in the law to allow severance of defendants and offenses into separate trials so as to avoid possible prejudice of one criminal act or of the conduct of one defendant to "spill over" on another.

What the Court holds today must be related to its impact on crimes more serious than ordinary housebreaking, followed by physical assault on six men and robbery of all of them. To understand its full impact we must view the holding in the context of four men who break and enter, rob, and then kill six victims. The concurrence tells us that unless all the crimes are joined in one trial the alleged killers cannot be tried for more than one of the killings even if the evidence is that they personally killed two, three, or more of the victims. Or alter the crime to four men breaking into a college dormitory and assaulting six girls. What the Court is holding is, in effect, that the second and third and fourth criminal acts are "free," unless the accused is tried for the multiple crimes in a single trial—something defendants frantically use every legal device to avoid, and often succeed in avoiding. This is the reality of what the Court holds today; it does not make good sense and it cannot make good law.

I therefore join with the four courts that have found no double jeopardy in this case.

To borrow some wise words from MR. JUSTICE BLACK in his separate opinion in *Jackson* v. *Denno,* 378 U. S. 368, 401, 407–408 (1964), the conviction struck down in this case "is in full accord with all the guarantees of the Federal Constitution and . . . should not be held invalid by this Court because of a belief that the Court can improve on the Constitution."

Syllabus

DANDRIDGE, CHAIRMAN, MARYLAND BOARD OF PUBLIC WELFARE, ET AL. *v.* WILLIAMS ET AL.

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

No. 131. Argued December 9, 1969—Decided April 6, 1970

Appellees, large-family recipients of benefits under the Aid to Families With Dependent Children (AFDC) program, brought this suit to enjoin the application of Maryland's maximum grant regulation as contravening the Social Security Act of 1935 and the Equal Protection Clause of the Fourteenth Amendment. Under the program, which is jointly financed by the Federal and State Governments, a State computes the "standard of need" of eligible family units. Under the Maryland regulation, though most families are provided aid in accordance with the standard of need, a ceiling of about $250 per month is imposed on an AFDC grant regardless of the size of the family and its actual need. The District Court held the regulation "invalid on its face for overreaching" and thus violative of the Equal Protection Clause. *Held:*

1. The Maryland regulation is not prohibited by the Social Security Act. Pp. 476–483.

(a) A State has great latitude in dispensing its available funds, *King* v. *Smith*, 392 U. S. 309, 318–319, and given Maryland's finite resources available for public welfare demands, it is not prevented by the Act from sustaining as many families as it can and providing the largest families with somewhat less than their ascertained per capita standard of need. Pp. 478–480.

(b) The statutory standard in § 402 (a)(10) of the Act that aid "shall be furnished with reasonable promptness to all eligible individuals," is not violated by the regulation, which does not deprive children of the largest families of aid but reduces the family grant as a whole, and the Secretary of Health, Education, and Welfare has approved the Maryland scheme. Pp. 480–482.

(c) In its Social Security Amendments of 1967, Congress fully recognized that maximum grant regulations are permissible. Pp. 482–483.

2. The regulation does not violate the Equal Protection Clause. Pp. 483–487.

(a) The concept of overbreadth, though relevant where First Amendment considerations are involved, is not pertinent to state regulation in the social and economic field. Pp. 484–485.

(b) The regulation is rationally supportable and free from invidious discrimination since it furthers the State's legitimate interest in encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor. Pp. 486–487.

297 F. Supp. 450, reversed.

George W. Liebmann, Assistant Attorney General of Maryland, argued the cause for appellants. With him on the briefs were *Francis B. Burch,* Attorney General, *Robert F. Sweeney,* Deputy Attorney General, and *J. Michael McWilliams,* Assistant Attorney General.

Joseph A. Matera argued the cause and filed a brief for appellees.

Thomas C. Lynch, Attorney General, and *Elizabeth Palmer,* Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Thomas L. Fike* for the Legal Aid Society of Alameda County, and by *Carl Rachlin, Anthony B. Ching, Peter E. Sitkin,* and *Steven J. Antler* for the Center on Social Welfare Policy and Law et al.

Mr. Justice Stewart delivered the opinion of the Court.

This case involves the validity of a method used by Maryland, in the administration of an aspect of its public welfare program, to reconcile the demands of its needy citizens with the finite resources available to meet those demands. Like every other State in the Union, Maryland participates in the Federal Aid to Families

With Dependent Children (AFDC) program, 42 U. S. C. § 601 *et seq.* (1964 ed. and Supp. IV), which originated with the Social Security Act of 1935.[1] Under this jointly financed program, a State computes the so-called "standard of need" of each eligible family unit within its borders. See generally *Rosado* v. *Wyman, ante,* p. 397. Some States provide that every family shall receive grants sufficient to meet fully the determined standard of need. Other States provide that each family unit shall receive a percentage of the determined need. Still others provide grants to most families in full accord with the ascertained standard of need, but impose an upper limit on the total amount of money any one family unit may receive. Maryland, through administrative adoption of a "maximum grant regulation," has followed this last course. This suit was brought by several AFDC recipients to enjoin the application of the Maryland maximum grant regulation on the ground that it is in conflict with the Social Security Act of 1935 and with the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court convened pursuant to 28 U. S. C. § 2281, held that the Maryland regulation violates the Equal Protection Clause. 297 F. Supp. 450. This direct appeal followed, 28 U. S. C. § 1253, and we noted probable jurisdiction, 396 U. S. 811.

The operation of the Maryland welfare system is not complex. By statute[2] the State participates in the AFDC program. It computes the standard of need for each eligible family based on the number of children in the family and the circumstances under which the family lives. In general, the standard of need increases with each additional person in the household, but the incre-

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[1] 49 Stat. 620, as amended, 42 U. S. C. §§ 301–1394 (1964 ed. and Supp. IV).

[2] Maryland Ann. Code, Art. 88A, § 44A *et seq.* (1969 Repl. Vol.).

ments become proportionately smaller.[3] The regulation here in issue imposes upon the grant that any single family may receive an upper limit of $250 per month in certain counties and Baltimore City, and of $240 per month elsewhere in the State.[4] The appellees all

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[3] The schedule for determining subsistence needs is set forth in an Appendix to this opinion.

[4] The regulation now provides:

"B. *Amount*—The amount of the grant is the resulting amount of need when resources are deducted from requirements as set forth in this Rule, subject to a maximum on each grant from each category:

"1. $250—for local departments under any 'Plan A' of Shelter Schedule

"2. $240—for local departments under any 'Plan B' of Shelter Schedule

"*Except that:*

"a. If the requirements of a child over 18 are included to enable him to complete high school or training for employment (III–C–3), the grant may exceed the maximum by the amount of such child's needs.

"b. If the resource of support is paid as a refund (VI–B–6), the grant may exceed the maximum by an amount of such refund. This makes consistent the principle that the amount from public assistance funds does not exceed the maximum.

"c. The maximum may be exceeded by the amount of an emergency grant for items not included in a regular monthly grant. (VIII)

"d. The maximum may be exceeded up to the amount of a grant to a person in one of the nursing homes specified in Schedule D, Section a.

"3. A grant is subject to any limitation established because of insufficient funds."

Md. Manual of Dept. of Social Services, Rule 200, § X, B, p. 23, formerly Md. Manual of Dept. of Pub. Welfare, pt. II, Rule 200, § VII, 1, p. 20.

In addition, AFDC recipients in Maryland may be eligible for certain assistance in kind, including food stamps, public housing, and medical aid. See, *e. g.*, 42 U. S. C. § 1396 *et seq.* (1964 ed., Supp. IV); 7 U. S. C. §§ 1695–1697. The applicable provisions of state and federal law also permit recipients to keep part of their

have large families, so that their standards of need as computed by the State substantially exceed the maximum grants that they actually receive under the regulation. The appellees urged in the District Court that the maximum grant limitation operates to discriminate against them merely because of the size of their families, in violation of the Equal Protection Clause of the Fourteenth Amendment. They claimed further that the regulation is incompatible with the purpose of the Social Security Act of 1935, as well as in conflict with its explicit provisions.

In its original opinion the District Court held that the Maryland regulation does conflict with the federal statute, and also concluded that it violates the Fourteenth Amendment's equal protection guarantee. After reconsideration on motion, the court issued a new opinion resting its determination of the regulation's invalidity entirely on the constitutional ground.[5] Both the statutory and constitutional issues have been fully briefed and argued here, and the judgment of the District Court must, of course, be affirmed if the Maryland regulation is in conflict with either the federal statute or the Constitution.[6] We consider the statutory question first, be-

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earnings from outside jobs. 42 U. S. C. §§ 630–644 (1964 ed., Supp. IV); Md. Manual of Dept. of Social Services, Rule 200, § VI, B (8)(c)(2). Both federal and state law require that recipients seek work and take it if it is available. 42 U. S. C. § 602 (a)(19)(F) (1964 ed., Supp. IV); Md. Manual of Dept. of Social Services, Rule 200, § III (D)(1)(d).

[5] Both opinions appear at 297 F. Supp. 450.

[6] The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. Compare *Langnes* v. *Green*, 282 U. S. 531, 538, with *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567–568. As the Court said in *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435–436: "[I]t is likewise settled that the appellee may, without

cause if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (Brandeis, J., concurring); *Rosenberg* v. *Fleuti*, 374 U. S. 449.

I

The appellees contend that the maximum grant system is contrary to § 402 (a)(10) of the Social Security Act, as amended,[7] which requires that a state plan shall

> "provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

The argument is that the state regulation denies benefits to the younger children in a large family. Thus, the appellees say, the regulation is in patent violation of the Act, since those younger children are just as "dependent"

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taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed." When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court. See *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U. S. 464, 468; *United States* v. *Ballard*, 322 U. S. 78, 88. That is not the situation here, however. The issue having been fully argued both here and in the District Court, consideration of the statutory claim is appropriate. *Bondholders Committee* v. *Commissioner*, 315 U. S. 189, 192 n. 2; H. Hart & H. Wechsler, The Federal Courts and the Federal System 1394 (1953). See also *Jaffke* v. *Dunham*, 352 U. S. 280.

[7] 64 Stat. 550, as amended, 76 Stat. 185, 81 Stat. 881, 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. V).

as their older siblings under the definition of "dependent child" fixed by federal law.[8] See *King* v. *Smith,* 392 U. S. 309. Moreover, it is argued that the regulation, in limiting the amount of money any single household may receive, contravenes a basic purpose of the federal law by encouraging the parents of large families to "farm out" their children to relatives whose grants are not yet subject to the maximum limitation.

It cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families. Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. Cf. *King* v. *Smith, supra,* at 335 n. 4 (DOUGLAS, J., concurring). It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant

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[8] 42 U. S. C. § 606 (a) (1964 ed., Supp. IV) provides:

"The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."

The Act also covers children who have been placed in foster homes pursuant to judicial order or because they are state charges. 42 U. S. C. § 608 (1964 ed., Supp. IV).

that is affected. Whether this per capita diminution is compatible with the statute is the question here. For the reasons that follow, we have concluded that the Maryland regulation is permissible under the federal law.

In *King* v. *Smith, supra,* we stressed the States' "undisputed power," under these provisions of the Social Security Act, "to set the level of benefits and the standard of need." *Id.,* at 334. We described the AFDC enterprise as "a scheme of cooperative federalism," *id.,* at 316, and noted carefully that "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *Id.,* at 318–319.

Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program. The first section of the Act, 42 U. S. C. § 601 (1964 ed., Supp. IV), provides that the Act is

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, *as far as practicable under the conditions in such State,* to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." (Emphasis added.)

Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds.

The very title of the program, the repeated references to families added in 1962, Pub. L. 87–543, § 104 (a)(3), 76 Stat. 185, and the words of the preamble quoted above, show that Congress wished to help children through the family structure. The operation of the statute itself has this effect. From its inception the Act has defined "dependent child" in part by reference to the relatives with whom the child lives.[9] When a "dependent child" is living with relatives, then "aid" also includes payments and medical care to those relatives, including the spouse of the child's parent. 42 U. S. C. § 606 (b) (1964 ed., Supp. IV). Thus, as the District Court noted, the amount of aid "is . . . computed by treating the relative, parent or spouse of parent, as the case may be, of the 'dependent child' as a part of the family unit." 297 F. Supp., at 455. Congress has been so desirous of keeping dependent children within a family that in the Social Security Amendments of 1967 it provided that aid could go to children whose need arose merely from their parents' unemployment, under federally determined standards, although the parent was not incapacitated. 42 U. S. C. § 607 (1964 ed., Supp. IV).

The States must respond to this federal statutory concern for preserving children in a family environment. Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent

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[9] 42 U. S. C. § 606 (a) (1964 ed., Supp. IV), *supra*, n. 8, formerly § 406, 49 Stat. 629, as amended, § 321, 70 Stat. 850. See also S. Rep. No. 628, 74th Cong., 1st Sess., 16–17 (1935).

economies of scale—to accommodate their needs to diminished per capita payments. The strong policy of the statute in favor of preserving family units does not prevent a State from sustaining as many families as it can, and providing the largest families somewhat less than their ascertained per capita standard of need.[10] Nor does the maximum grant system necessitate the dissolution of family bonds. For even if a parent should be inclined to increase his per capita family income by sending a child away, the federal law requires that the child, to be eligible for AFDC payments, must live with one of several enumerated relatives.[11] The kinship tie may be attenuated but it cannot be destroyed.

The appellees rely most heavily upon the statutory requirement that aid "shall be furnished with reasonable promptness to all eligible individuals." 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV). But since the statute leaves the level of benefits within the judgment of the State, this language cannot mean that the "aid" furnished must equal the total of each individual's standard of need in every family group. Indeed the appellees do not deny that a scheme of proportional reductions for all families could be used that would result in no individual's receiving aid equal to his standard of need. As we have

[10] The Maryland Dept. of Social Services, Monthly Financial and Statistical Report, Table 7 (Nov. 1969), indicates that 32,504 families receive AFDC assistance. In the Maryland Dept. of Social Services, 1970 Fiscal Year Budget, the department estimated that 2,537 families would be affected by the removal of the maximum grant limitation. It thus appears that only one-thirteenth of the AFDC families in Maryland receive less than their determined need because of the operation of the maximum grant regulation. Of course, if the same funds were allocated subject to a percentage limitation, no AFDC family would receive funds sufficient to meet its determined need.

[11] 42 U. S. C. § 606 (a) (1964 ed., Supp. IV), n. 8, *supra.*

noted, the practical effect of the Maryland regulation is that all children, even in very large families, do receive some aid. We find nothing in 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV) that requires more than this.[12] So long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated.

This is the view that has been taken by the Secretary of Health, Education, and Welfare (HEW), who is charged with the administration of the Social Security Act and the approval of state welfare plans. The parties have stipulated that the Secretary has, on numerous occasions, approved the Maryland welfare scheme, including its provision of maximum payments to any one family, a provision that has been in force in various forms since 1947. Moreover, a majority of the States pay less than their determined standard of need, and 20 of these States impose maximums on family grants of the kind here in issue.[13] The Secretary has not disapproved any state plan because of its maximum grant

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[12] The State argues that in the total context of the federal statute, reference to "eligible individuals" means eligible applicants for AFDC grants, rather than all the family members whom the applicants may represent, and that the statutory provision was designed only to prevent the use of waiting lists. There is considerable support in the legislative history for this view. See H. R. Rep. No. 1300, 81st Cong., 1st Sess., 48, 148 (1949); 95 Cong. Rec. 13934 (1949) (remarks of Rep. Forand). And it is certainly true that the statute contemplates that actual payments will be made to responsible adults. See, *e. g.*, 42 U. S. C. § 605. For the reasons given above, however, we do not find it necessary to consider this argument.

[13] See HEW Report on Money Payments to Recipients of Special Types of Public Assistance, Oct. 1967, Table 4 (NCSS Report D–4). See also Hearings on H. R. 5710 before the House Committee on Ways and Means, 90th Cong., 1st Sess., pt. 1, p. 118 (1967).

provision. On the contrary, the Secretary has explicitly recognized state maximum grant systems.[14]

Finally, Congress itself has acknowledged a full awareness of state maximum grant limitations. In the Amendments of 1967 Congress added to § 402 (a) a subsection, 23:

> "[The State shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and *any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.*" 81 Stat. 898, 42 U. S. C. § 602 (a)(23) (1964 ed., Supp. IV). (Emphasis added.)

This specific congressional recognition of the state maximum grant provisions is not, of course, an approval of any specific maximum. The structure of specific maximums Congress left to the States, and the validity of any such structure must meet constitutional tests. However, the above amendment does make clear that Con-

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[14] HEW, State Maximums and Other Methods of Limiting Money Payments to Recipients of Special Types of Public Assistance, Oct. 1962, p. 3:

"When States are unable to meet need as determined under their standards they reduce payments on a percentage or flat reduction basis . . . . These types of limitations may be used in the absence of, or in conjunction with, legal or administrative maximums. A maximum limits the amount of assistance that may be paid to persons whose determined need exceeds that maximum, whereas percentage or flat reductions usually have the effect of lowering payments to most or all recipients to a level below that of determined need."

See also HEW Interim Policy Statement of May 31, 1968, 33 Fed. Reg. 10230 (1968); 45 CFR § 233.20 (a)(2)(ii), 34 Fed. Reg. 1394 (1969).

gress fully recognized that the Act permits maximum grant regulations.[15]

For all of these reasons, we conclude that the Maryland regulation is not prohibited by the Social Security Act.

II

Although a State may adopt a maximum grant system in allocating its funds available for AFDC payments without violating the Act, it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Maryland says that its maximum grant regulation is wholly free of any invidiously discriminatory purpose or effect, and that the regulation is rationally supportable on at least four entirely valid grounds. The regulation can be clearly justified, Maryland argues, in terms of legitimate state interests in encouraging gainful employment, in maintaining an equitable balance in economic status as between welfare families and those sup-

[15] The provisions of 42 U. S. C. § 1396b (f) (1964 ed., Supp. IV), also added by the Amendments of 1967, 81 Stat. 898, are consistent with this view. That section provides that no medical assistance shall be given to any family that has a certain level of income. The section, however, makes an exception, 42 U. S. C. § 1396b (f)(1)(B)(ii) (1964 ed., Supp. IV):

"If the Secretary finds that the operation of a uniform maximum limits payments to families of more than one size, he may adjust the amount otherwise determined under clause (i) to take account of families of different sizes."

These provisions have particular significance in light of the Administration's initial effort to secure a law forcing each State to pay its full standard of need. See *Rosado* v. *Wyman, supra.*

This recognition of the existence of state maximums is not new with the Amendments of 1967. In reporting on amendments to the Social Security Act in 1962, 76 Stat. 185, the Senate committee referred to "States in which there is a maximum limiting the amount of assistance an individual may receive." S. Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962).

ported by a wage-earner, in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families. The District Court, while apparently recognizing the validity of at least some of these state concerns, nonetheless held that the regulation "is invalid on its face for overreaching," 297 F. Supp., at 468—that it violates the Equal Protection Clause "[b]ecause it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply . . . ." 297 F. Supp., at 469.

If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of "overreaching" would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, *e. g.*, *Shelton* v. *Tucker,* 364 U. S. 479. But the concept of "overreaching" has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families.[16] For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488. That

[16] Cf. *Shapiro* v. *Thompson,* 394 U. S. 618, where, by contrast, the Court found state interference with the constitutionally protected freedom of interstate travel.

era long ago passed into history. *Ferguson* v. *Skrupa,* 372 U. S. 726.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago,* 228 U. S. 61, 69–70. "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, 426.

To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.[17] See *Snell* v. *Wyman,* 281 F. Supp. 853, aff'd, 393 U. S. 323. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. *Goesaert* v. *Cleary,* 335 U. S. 464; *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552. See also *Flemming* v. *Nestor,* 363 U. S. 603. And it is a

[17] It is important to note that there is no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect. Cf. *McLaughlin* v. *Florida,* 379 U. S. 184.

standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.[18]

Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally valid. We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner.[19]

It is true that in some AFDC families there may be no person who is employable.[20] It is also true that with respect to AFDC families whose determined standard of need is below the regulatory maximum, and who therefore receive grants equal to the determined standard, the employment incentive is absent. But the Equal Protection Clause does not require that a State must

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[18] See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1082–1087.

[19] The present federal minimum wage is $52–$64 per 40-hour week, 29 U. S. C. § 206 (1964 ed., Supp. IV). The Maryland minimum wage is $46–$52 per week, Md. Ann. Code, Art. 100, § 83 (Supp. 1969).

[20] It appears that no family members of any of the named plaintiffs in the present case are employable.

choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly, ante,* p. 254. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. *Steward Mach. Co.* v. *Davis,* 301 U. S. 548, 584–585; *Helvering* v. *Davis,* 301 U. S. 619, 644.

The judgment is reversed.

[For Appendix, see *post,* p. 488.]

APPENDIX TO OPINION OF THE COURT

The following was the schedule for determining subsistence needs, exclusive of rent, at the time this action was brought. Md. Manual of Dept. of Pub. Welfare, pt. II, Rule 200, Sched. A, p. 27:

STANDARD FOR DETERMINING COST OF SUBSISTENCE NEEDS

Number of persons in assistance unit (include unborn child as an additional person)	I	II	III	IV	V
	Monthly costs when				
	No heat or utilities included with shelter	Light and/or cooking fuel included with shelter	Heat with or without light included with shelter	Heat, cooking fuel and water heating included with shelter	Heat and all utilities included with shelter
1 person living:					
Alone	$51.00	$49.00	$43.00	$40.00	$38.00
With 1 person	42.00	41.00	38.00	36.00	35.00
With 2 persons	38.00	37.00	35.00	34.00	33.00
With 3 or more persons	36.00	35.00	34.00	33.00	32.00
2 persons living:					
Alone	84.00	82.00	76.00	72.00	70.00
With 1 other person	76.00	74.00	70.00	68.00	66.00
With 2 or more other persons	72.00	70.00	68.00	66.00	64.00
3 persons living:					
Alone	113.00	110.00	105.00	101.00	99.00
With 1 or more other persons	108.00	106.00	101.00	99.00	97.00
4 persons	143.00	140.00	135.00	131.00	128.00
5 persons	164.00	162.00	156.00	152.00	150.00
6 persons	184.00	181.00	176.00	172.00	169.00
7 persons	209.00	205.00	201.00	197.00	193.00
8 persons	235.00	231.00	227.00	222.00	219.00
9 persons	259.00	256.00	251.00	247.00	244.00
10 persons	284.00	281.00	276.00	271.00	268.00
Each additional person over 10 persons	24.50	24.50	24.50	24.50	24.50

Modification of standard for cost of eating in restaurant: Add $15 per individual.

Other schedules set the estimated cost of shelter in the various counties in Maryland. See *id.*, Sched. B—Plan A, p. 29; Sched. B—Plan B, p. 30. The present schedules, which are substantially the same, appear in the Md. Manual of Dept. of Social Services, Rule 200, pp. 33, 35.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, concurring.

Assuming, as the Court apparently does, that individual welfare recipients can bring an action against state welfare authorities challenging an aspect of the State's welfare plan as inconsistent with the provisions of the Social Security Act, 42 U. S. C. §§ 601–610 (1964 ed. and Supp. IV), even though the Secretary of Health, Education, and Welfare has determined as he has here that the federal and state provisions are consistent, cf. *Rosado* v. *Wyman, ante,* p. 430 (BLACK, J., dissenting), I join in the opinion of the Court in this case.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion, with one reservation which I deem called for by certain implications that might be drawn from the opinion.

As I stated in dissent in *Shapiro* v. *Thompson,* 394 U. S. 618, 658–663 (1969), I find no solid basis for the doctrine there expounded that certain statutory classifications will be held to deny equal protection unless justified by a "compelling" governmental interest, while others will pass muster if they meet traditional equal protection standards. See also my dissenting opinion in *Katzenbach* v. *Morgan,* 384 U. S. 641, 660–661 (1966). Except with respect to racial classifications, to which unique historical considerations apply, see *Shapiro,* at 659, I believe the constitutional provisions assuring equal protection of the laws impose a standard of rationality of classification, long applied in the decisions of this Court, that does not depend upon the nature of the classification or interest involved.

It is on this basis, and not because this case involves only interests in "the area of economics and social welfare," *ante,* at 485, that I join the Court's constitutional holding.

MR. JUSTICE DOUGLAS, dissenting.

Appellees, recipients of benefits under the Aid to Families With Dependent Children (AFDC) program, brought this suit under 42 U. S. C. § 1983 to have declared invalid and permanently enjoined the enforcement of the Maryland maximum grant regulation, which places a ceiling on the amount of benefits payable to a family under AFDC. They alleged that the regulation was inconsistent with the Social Security Act and that it denied equal protection of the laws in violation of the Fourteenth Amendment. I do not find it necessary to reach the constitutional argument in this case, for in my view the Maryland regulation is inconsistent with the terms and purposes of the Social Security Act.

The Maryland regulation under attack, Rule 200, § X, B, of the Maryland Department of Social Services, places an absolute limit of $250 per month on the amount of a grant under AFDC, regardless of the size of the family and its actual need.[1] The effect of this regulation is to deny benefits to additional children born into a family of six, thus making it impossible for families of seven persons or more to receive an amount commensurate with their actual need in accordance with standards formulated by the Maryland Department of Social Services, whereas families of six or less can receive the full amount of their need as so determined. Appellee Williams, according to the computed need for herself and her eight

[1] In certain counties the applicable maximum grant is $240 per month. All of the appellees in this case are residents of Baltimore City, where the $250-per-month maximum grant applies.

children, should receive $296.15 per month. Appellees Gary should receive $331.50 for themselves and their eight children. Instead, these appellees received the $250 maximum grant.

In *King* v. *Smith,* 392 U. S. 309, 318–319, this Court stated: "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." That dictum, made in the context of a case that dealt with Alabama's "substitute father" regulation, does little to clarify the limits of state authority. The holding in *King* was that the Alabama regulation, which denied AFDC benefits to the children of a mother who "cohabited" in or outside her home with an able-bodied man, was invalid because it defined "parent" in a manner inconsistent with § 406 (a) of the Social Security Act, 42 U. S. C. § 606 (a) (1964 ed., Supp. IV). The Court rejected the State's contention that its regulation was "a legitimate way of allocating its limited resources available for AFDC assistance." 392 U. S., at 318. Thus, whatever else may be said of the "latitude" extended to States in determining the benefits payable under AFDC, the holding in *King* makes clear that it does not include restrictions on the payment of benefits that are incompatible with the Social Security Act.

The methods by which a State can limit AFDC payments below the level of need are numerous. The method used in *King* was to deny totally benefits to a specifically defined class of otherwise eligible recipients. Another method, which was disapproved by Congress in § 402 (a)(10) of the Social Security Act, 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV), was to refuse to take additional applications pending a decrease in the number of recipients on the assistance rolls or an increase in available funds. The two methods most commonly em-

ployed by the States at present, however, are percentage reductions and grant maximums. See Department of Health, Education, and Welfare (HEW), State Maximums and Other Methods of Limiting Money Payments to Recipients of the Special Types of Public Assistance, Oct. 1968, Tables 2, 3 (NCSS Report D–3). Grant maximums, in which payments are made according to need but subject to a stated dollar maximum, are of two types: individual maximums and family maximums. Only the latter type is at issue in the present case. Percentage reductions involve payments of a fixed percentage of actual need as determined by the State's need standard.

The authority given the States to set the level of benefits payable under their AFDC plans stems from § 401 of the Social Security Act, 42 U. S. C. § 601 (1964 ed., Supp. IV), which states the purpose of the federal AFDC appropriations as "enabling each State to furnish financial assistance and rehabilitation and other services, *as far as practicable under the conditions in such State* . . . ." (Emphasis added.) It is significant in this respect that the Court in *King* referred only to a State's determination of the level of benefits *"by the amount of funds it devotes to the* [AFDC] *program."* 392 U. S., at 318–319 (emphasis added). The language of § 401 and the language of the Court in *King* both reflect a concern that the Federal Government not require a state legislature to appropriate more money for welfare purposes than it is willing and able to appropriate. The use of the matching formula in § 403 of the Act, 42 U. S. C. § 603 (1964 ed., Supp. IV), supports this deference to the fiscal decisions of state legislatures. The question of a State's authority to pay less than its standard of need, however, has never been expressly decided.

Assuming, *arguendo,* that a State need not appropriate sufficient funds to pay all eligible AFDC recipients the

full amount of their need, it does not follow that it can distribute such funds as it deems appropriate in a manner inconsistent with the Social Security Act. The question involved here is not one of ends; it is one of means. Thus the United States Government, in its Memorandum as Amicus Curiae in *Rosado* v. *Wyman,* decided this day, *ante,* p. 397, stated, at 6–7:

> "Maximums, whether so many dollars per individual or a total number of dollars per family, have an arbitrary aspect lacking from ratable reductions, since their application means that one family or individual will receive a smaller proportion of the amounts he is determined to need under the state's test than another family or individual. Where percentage reductions are used, the payment of every family is reduced proportionately . . . . [T]his aspect explains why Congress might wish to distinguish between maximums and ratable reductions as a means of reducing a state's financial obligation and, at least inferentially, to disfavor the former."

The District Court, in its initial ruling that the Maryland regulation was inconsistent with the Social Security Act, relied primarily on § 402 (a)(10) of the Act, which provides that "all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to [families with] dependent children shall be furnished with reasonable promptness *to all eligible individuals.*" 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV). (Emphasis added.) This provision was added by the Social Security Act Amendments of 1950, 64 Stat. 549. The House Committee on Ways and Means, where the provision originated, explained its purpose as follows:

> "Shortage of funds in aid to dependent children has sometimes, as in old-age assistance, resulted in

> a decision not to take more applications or to keep eligible families on waiting lists until enough recipients could be removed from the assistance rolls to make a place for them. . . . [T]his difference in treatment accorded to eligible people results in undue hardship on needy persons and is inappropriate in a program financed from Federal funds." H. R. Rep. No. 1300, 81st Cong., 1st Sess., 48 (1949).

In the court below, the appellants relied upon this legislative history to argue that the "eligible individuals" to whom aid must be furnished are the applicants for aid referred to in the beginning of the provision, and not the individual members of a family unit. I find nothing in the Act or in the legislative history of § 402 (a)(10) which supports that argument.

The purpose of the AFDC program, as stated in the Act, is to encourage "the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, *to needy dependent children and the parents or relatives with whom they are living* to help maintain and strengthen family life . . . ." Social Security Act § 401, 42 U. S. C. § 601 (1964 ed., Supp. IV) (emphasis added). The terms "dependent child" and "relative with whom any dependent child is living" are defined in § 406 of the Act, 42 U. S. C. § 606 (1964 ed., Supp. IV).

The aid provided through the AFDC program has always been intended for the individual dependent children, not for those who apply for the aid on their behalf. The Senate Committee on Finance, in its report on the Social Security Bill of 1935, stated this purpose in the following terms:

> "The heart of any program for social security must be the child. All parts of the Social Security

Act are in a very real sense measures for the security of children. . . .

"In addition, however, there is great need for special safeguards for many underprivileged children. Children are in many respects the worst victims of the depression. . . .

"Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family. These children will be benefited through the work relief program and still more through the revival of private industry. But there are large numbers of children in relief families which will not be benefited through work programs or the revival of industry.

"These are the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children. . . .

"With no income coming in, and with young children for whom provision must be made for a number of years, families without a father's support require public assistance, unless they have been left with adequate means or are aided by friends and relatives. . . . *Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions.* This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised." S. Rep. No. 628, 74th Cong., 1st Sess., 16–17 (1935) (emphasis added).

Prior to 1950, no specific provision was made for the need of the parent or other relative with whom the dependent child was living. Although this underscores

the fact that the payments were intended to benefit the children and not the applicants who received those payments, the exclusion from the federal scheme of provision for the need of the caring relative operated effectively to dilute the ability of the AFDC payments to meet the need of the child. To correct this latter deficiency, the 1950 Amendments allowed provision for the needs of this caring relative. The Report of the House Committee on Ways and Means stated:

> "Particularly in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing, and other essentials, amounts allotted to the children must be used in part for this purpose if no other provision is made to meet her needs. . . .
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> . . . . . .
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> "To correct the present anomalous situation wherein no provision is made for the adult relative and to enable States to make payments that are more nearly adequate, the bill would include the relative with whom the dependent child is living as a recipient for Federal matching purposes. . . ." H. R. Rep. No. 1300, 81st Cong., 1st Sess., 46 (1949).

This amendment emphasizes the congressional concern with fully meeting the needs of the dependent children in a given family; and it would seem to negative the necessity of those children sharing their individual allocations with other essential members of the family unit.

There is other evidence that Congress intended each eligible recipient to receive his fair share of benefits under the AFDC program. The Public Welfare Amendments of 1962 provided that a state AFDC plan must "provide for the development and application of a pro-

gram for [services to maintain and strengthen family life] *for each child* who receives aid to families with dependent children . . . ." 42 U. S. C. § 602 (a)(13). The Social Security Amendments of 1967, which extended this program of "family services" to relatives receiving AFDC payments and "essential persons" living in the same home as the child and relative, retained the emphasis on providing these services to *"each* appropriate individual." Social Security Act, §§ 402 (a)(14), (15), 42 U. S. C. §§ 602 (a)(14), (15) (1964 ed., Supp. IV). The Senate Finance Committee Report on the 1967 Amendments stated:

> "Under the Social Security Act Amendments of 1962, an amendment was added to title IV requiring the State welfare agency to make a program for each child, identifying the services needed, and then to provide the necessary services. This has proven a useful amendment, for it has required the States to give attention to the children and to provide services necessary to carry out the plans for the individual child. . . . [T]he committee believes that it is essential to broaden the requirement for the program of services for each child to include the entire family. The committee bill would require, therefore, that the States establish a social services program for each AFDC family. Thus there will be a broadened emphasis to include a recognition of the needs of all members of the family, including 'essential persons.'" S. Rep. No. 744, 90th Cong., 1st Sess., 155 (1967).

These "family services" provisions are helpful in interpreting the words "all eligible individuals" in § 402 (a)(10) of the Act for they reveal Congress' overriding concern with meeting the needs of each eligible recipient of aid under the AFDC program. The resources com-

manded to meet those needs, as well as the definition of those individuals eligible to receive this aid, have expanded over the years. At first, only financial assistance was available. Now "family services" programs have been added.[2] In each case, however, the concern has been with meeting the needs of each eligible recipient.

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[2] The benefits distributed under the AFDC program include "financial assistance and rehabilitation and other services." Social Security Act § 401. The term "aid to families with dependent children" is itself defined in § 406 (b) of the Act, as "money payments with respect to, or . . . medical care in behalf of or any type of remedial care recognized under State law" in behalf of dependent children, the relatives with whom they live, and other "essential persons" residing with the relative and child.

The services provided by the Act for AFDC recipients include "family services" and "child-welfare services." "Family services" are defined by § 406 (d) of the Act, as "services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence." "Child-welfare programs" are defined by § 425 of the Act, 42 U. S. C. § 625 (1964 ed., Supp. IV), as "public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children, (2) protecting and caring for homeless, dependent, or neglected children, (3) protecting and promoting the welfare of children of working mothers, and (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible or, where needed, the provision of adequate care of children away from their homes in foster family homes or day-care or other child-care facilities." In addition, § 402 (a)(15) of the Act requires the State AFDC plan to provide for the development of a program for each appropriate relative and dependent child receiving aid under the plan, and other "essential persons" living with a relative and child receiving such aid, "with the objective of—(i) assuring, to the maximum extent possible, that such relative, child, and individual will enter the labor force and accept employment so that they will become self-sufficient, and (ii) preventing or reducing the

A further indication that the phrase "all eligible individuals" as used in § 402 (a)(10) refers to the individual beneficiaries of aid, and not those who apply for and receive the payments, lies in the provisions of the Act that concern the computation of federal payments to the States. Social Security Act § 403. These payments are presently computed in relation to the State's contribution to individual recipients, with federal payment of five-sixths of the first $18 a month per recipient of state expenditure, and further payment up to a maximum of $32 a month per recipient. There is no limitation on federal payments based on family size in the present provisions, nor has there ever been such a limitation in previous versions of the Act.

Section 403 (d)(1) of the Act imposes a limitation on federal payments to States as respects children whose eligibility is based upon the absence from the home of a parent. Under this section, the number of AFDC children under the age of 18 for whom federal sharing is available cannot exceed the ratio of AFDC children eligible because of an "absent parent" to the total child

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incidence of births out of wedlock and otherwise strengthening family life . . . ."

Section 432 of the Act, 42 U. S. C. § 632 (1964 ed., Supp. IV), provides for the establishment of work-incentive programs for AFDC recipients which include the placement of recipients over the age of 16 in employment, "institutional and work experience training for those individuals for whom such training is likely to lead to regular employment," and "special work projects for individuals for whom a job in the regular economy cannot be found." See also Social Security Act § 402 (a)(19).

The State must also provide foster care in accordance with § 408 of the Act. See Social Security Act § 402 (a)(20). And whenever the State feels that AFDC payments may not be used in the best interests of the child, it may provide for counseling or guidance with respect to the use of such payments and the management of other funds. Social Security Act § 405, 42 U. S. C. § 605.

population of a State as of January 1, 1968. Appellants have argued that this limitation somehow indicates congressional approval of the maximum grant concept. The District Court below properly rejected that contention. The Report of the House Committee on Ways and Means indicates that the purpose of the limitation is to keep federal financial participation "within reasonable bounds" and to "give the States an incentive to make effective use of the constructive programs which the bill would establish." H. R. Rep. No. 544, 90th Cong., 1st Sess., 110. Keeping federal participation "within reasonable bounds" was tied to the fact that the "absent parent" category of AFDC recipients was the one that was growing most rapidly. *Ibid.* This provision, however, relates only to federal contributions to a State's AFDC program, and does not authorize the State's termination of aid to any of the children who would otherwise be eligible for aid because of an absent parent. Representative Mills explained the purpose of this limitation to the House in the following terms:

> "Finally, Mr. Chairman, the bill would add a provision to present law which would limit Federal financing for the largest AFDC category—where the parent is absent from the home—to the proportion of each State's total child population that is now receiving AFDC in this category. This provision, we believe, would give the States an additional incentive to make effective use of the constructive programs which the bill would establish. Moreover, this limitation on Federal matching will not prevent any deserving family from receiving aid payments. The States would not be free to keep any family off the rolls to keep within this limitation because there is a requirement in the law that requires equal

> treatment of recipients and uniform administration of a program within a State. . . ." 113 Cong. Rec. 23055.

In sum, the provisions of the Act that compute the amount of federal contribution to state AFDC programs are related to state payments to individual recipients and have consistently excluded any limitation based upon family size. The limitation contained in § 403 (d)(1) of the Act affects only the amount of federal matching funds in one category of aid, and in no way indicates congressional approval of maximum grants.

The purpose of the AFDC provisions of the Social Security Act is not only to provide for the needs of dependent children but also "to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). Also see Social Security Act § 401. As the District Court noted, however, "the maximum grant regulation provides a powerful economic incentive to break up large families by placing 'dependent children' in excess of those whose subsistence needs, when added to the subsistence needs of other members of the family, exceed the maximum grant, in the homes of persons included in the class of eligible relatives." 297 F. Supp., at 456. By this device, payments for the "excess" children can be obtained.

> "If Mrs. Williams were to place two of her children of twelve years or over with relatives, each child so placed would be eligible for assistance in the amount of $79.00 per month, and she and her six remaining children would still be eligible to receive the maximum grant of $250.00. If Mr. and

> Mrs. Gary were to place two of their children between the ages of six and twelve with relatives, each child so placed would be eligible for assistance in the amount of $65.00 per month, and they and their six remaining children would still be eligible to receive the maximum grant of $250.00." *Id.*, at 453–454.

The District Court correctly states that this incentive to break up family units created by the maximum grant regulation is in conflict with a fundamental purpose of the Act.

The history of the Social Security Act thus indicates that Congress intended the financial benefits, as well as the other benefits, of the AFDC program to reach each individual recipient eligible under the federal criteria. It was to this purpose that Congress had reference when it commanded in § 402 (a)(10) of the Act that aid to families with dependent children shall be furnished to "all eligible individuals."

The Court attempts to avoid the effect of this command by stating that "it is the *family* grant that is affected." *Ante,* at 477–478. The implication is that, regardless of how the AFDC payments are computed or to whom they apply, the payments will be used by the parents for the benefit of all the members of the family unit. This is no doubt true. But the fact that parents may take portions of the payments intended for certain children to give to other children who are not given payments under the State's AFDC plan, does not alter the fact that aid is not being given *by the State* to the latter children. And it is payments by the State, not by the parents, to which the command of § 402 (a)(10) is directed. The Court's argument would equate family

grant maximums with percentage reductions, but the two are, in fact, quite distinct devices for limiting welfare payments. If Congress wished to design a scheme under which each family received equal payments, irrespective of the size of the family, I see nothing that would prevent it from doing so. But that is not the scheme of Congress under the present Act.

Against the legislative history and the command of § 402 (a)(10), the appellants cite three provisions of the Social Security Act as recognizing the validity of state maximum grant regulations.

The first of these provisions is § 402 (a)(23) of the Act, 42 U. S. C. § 602 (a)(23) (1964 ed., Supp. IV), which provides:

> "[A State plan for aid and services to needy families with children must] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

This section had its genesis in an Administration proposal to require States to pay fully the amounts required by their standard of need, and also to make cost-of-living adjustments to that standard of need by July 1, 1968, and annually thereafter. Hearings on H. R. 5710 before the House Committee on Ways and Means, 90th Cong., 1st Sess., pt. 1, p. 59 (1967); House Committee on Ways and Means, Section-by-Section Analysis and Explanation of Provisions of H. R. 5710, 90th Cong., 1st Sess., 36 (Comm. Print) (1967). The bill that emerged from the House as H. R. 12080, however, did not include any provision relating to an increase in benefit levels or

adjustments to standards of need. See Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., pt. 1, pp. 109–144 (1967). A provision requiring a cost-of-living adjustment in the standard of need by July 1, 1969, and annually thereafter was added to the House bill by the Senate Finance Committee, and this provision also required that "any maximums . . . on the amount of aid" be proportionately adjusted. S. Rep. No. 744, 90th Cong., 1st Sess., 293 (1967). An amendment of the bill was proposed in the Senate that would have required a positive increase in AFDC payments, but that amendment was rejected. 113 Cong. Rec. 33560. The Senate-House Conference Committee adopted the Senate AFDC cost-of-living provision, omitting only the requirement for annual updating of need standards after July 1, 1969. H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 63 (1967).

Nowhere in any of the hearings, committee reports, or floor debates, is there shown a congressional intent to validate state maximum grant regulations by the provisions of § 402 (a)(23). Rather, the legislative history shows that Congress was exclusively concerned with increasing the income of AFDC recipients. If Congress had not required cost-of-living adjustments in state-imposed grant maximums, the States could easily nullify the effect of the cost-of-living adjustments for many AFDC families by retaining the grant ceilings in force before the adjustment was made. Congress was, to be sure, acknowledging the existence of maximum grant regulations. But every congressional reference to an existing practice does not automatically imply approval of that practice. The task of statutory construction requires more. It requires courts to look to the context of that reference, and to the history of relevant legislation. In the present context, the reference to maximum

grants was necessary to preserve the integrity of the cost-of-living adjustment required by the bill. No further significance can legitimately be read into that reference.

Appellants also rely on § 108 (a) of Pub. L. 87–543, 76 Stat. 189, a provision of the Public Welfare Amendments of 1962 that amended § 406 of the Act. This amendment, which has since been superseded, authorized "protective payments" to an individual other than the relative with whom the dependent child is living. The problem which this amendment was designed to cure was that some payees were unable to manage their funds so that the dependent children received the full benefit of the AFDC payments. Hearings on H. R. 10606 before the Senate Committee on Finance, 87th Cong., 2d Sess., 137 (1962). The House bill required "a meeting of all need as determined by the State" as a condition to including "protective payments" within the definition of "aid to families with dependent children." The Senate Finance Committee changed that requirement, however, by an amendment which authorized federal funding of "protective payments" if the state-determined need of individuals with respect to whom such payments were made was fully met by their assistance payment and other income or resources. The Senate Committee explained this provision as follows:

> "The effect of this provision is to make it possible for protective payments to be made in behalf of certain ADC recipients in States in which there is a maximum limiting the amount of assistance an individual may receive. These are the cases in which the statutory maximum does not prevent need from being met in full according to the State's standards." S. Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962).

This reference to a state-imposed maximum can hardly be interpreted as a congressional approval of a family maximum grant. If anything, it implicitly disapproves the concept by withholding federal payments with respect to individuals receiving "protective payments" when a maximum grant operates to prevent these individuals from receiving the full amount of their state-determined need.

The final statutory provision relied upon by appellants is § 220 (a) of Pub. L. 90–248, 81 Stat. 898, which added to the Medical Assistance Title of the Act a new § 1903 (f), 42 U. S. C. § 1396b (f) (1964 ed., Supp. IV). This section limits federal financial participation in medical assistance benefits to those whose incomes do not exceed 133⅓% of the highest amount of AFDC assistance paid to a family of the same size without any income or resources. This section, however, also provides: "If the Secretary [of HEW] finds that the operation of a uniform maximum limits payments to families of more than one size, he may adjust the amount otherwise determined . . . to take account of families of different sizes." The purpose of this provision was to allow qualification as medically indigent of those individuals who would have qualified but for the operation of an AFDC grant maximum, and thus prevent the extension of the operation of grant maximums into the Medical Assistance Title. Congressional rejection of grant maximums in the Medical Assistance Title does not infer their approval in the context of the AFDC provisions. Quite the contrary would seem to be the case.

In all of the legislative provisions relied upon by the appellants, the congressional reference to maximum grants has been made in the context of attempting to alleviate the harsh results of their application, not in a context of approving and supporting their operation. The three statutory references cited by appellants and

discussed above are clearly inadequate to overcome the long history of concern manifested in the AFDC provisions of the Social Security Act for meeting the needs of each eligible recipient, and the command of § 402 (a) (10) of the Act to that effect.

Appellants tender one further argument as to the compliance of the Maryland maximum grant regulation with the Social Security Act. That argument is that the Department of Health, Education, and Welfare has not disapproved of any of the Maryland plans that have included maximum grant provisions, and that this lack of disapproval by HEW is a binding administrative determination as to the conformity of the regulation with the Social Security Act. That argument was thoroughly explored by the District Court below in its supplemental opinion. The District Court accepted the claim that HEW considers the Maryland maximum grant regulation not to be violative of the Act, but held:

> "In view of the fact, however, that there is no indication from administrative decision, promulgated regulation, or departmental statement that the question of the conformity of maximum grants to the Act has been given considered treatment, we believe that the various actions and inactions on the part of HEW are not entitled to substantial, much less to decisive, weight in our consideration of the instant case." 297 F. Supp., at 460.

HEW seldom has formally challenged the compliance of a state welfare plan with the terms of the Social Security Act. See Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84, 91 (1967). The mere absence of such a formal challenge, whatever may be said for its constituting an affirmative determination of the compliance of a state plan with the Social Security Act, is not such a determination as is entitled to

decisive weight in the judicial determination of this question.

On the basis of the inconsistency of the Maryland maximum grant regulation with the Social Security Act, I would affirm the judgment below.

MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN joins, dissenting.

For the reasons stated by MR. JUSTICE DOUGLAS, to which I add some comments of my own, I believe that the Court has erroneously concluded that Maryland's maximum grant regulation is consistent with the federal statute. In my view, that regulation is fundamentally in conflict with the basic structure and purposes of the Social Security Act.

More important in the long run than this misreading of a federal statute, however, is the Court's emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration. The Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects. This is so even though the classification's underinclusiveness or overinclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State, and even though the relationship between the classification and the state interests which it purports to serve is so tenuous that it could not seriously be maintained that the classification tends to accomplish the ascribed goals.

The Court recognizes, as it must, that this case involves "the most basic economic needs of impoverished human beings," and that there is therefore a "dramatically real factual difference" between the instant case and those decisions upon which the Court relies. The acknowledgment that these dramatic differences exist is

a candid recognition that the Court's decision today is wholly without precedent. I cannot subscribe to the Court's sweeping refusal to accord the Equal Protection Clause any role in this entire area of the law, and I therefore dissent from both parts of the Court's decision.

I

At the outset, it should be emphasized exactly what is involved in determining whether this maximum grant regulation is consistent with and valid under the federal law. In administering its AFDC program, Maryland has established its own standards of need, and they are not under challenge in this litigation. Indeed, the District Court specifically refused to require additional appropriations on the part of the State or to permit appellees to recover a monetary judgment against the State. At the same time, however, there is no contention, nor could there be any, that the maximum grant regulation is in any manner related to calculation of need.[1] Rather, it arbitrarily cuts across state-defined standards of need to deny any additional assistance with respect to the fifth or any succeeding child in a family.[2] In short, the regulation represents no less than the refusal of the State to give any aid whatsoever for the support of certain dependent children who meet the standards of need that the State itself has established.

[1] The Court is thus wrong in speaking of "the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments." Those economies have already been taken into account once in calculating the standard of need. Indeed, it borders on the ludicrous to suggest that a large family is more capable of living on perhaps 50% of its standard of need than a small family is on 95%.

[2] Because of minor variations in the calculation of the subsistence needs of particular families, and because the maximum grant varies between $240 and $250 per month, depending upon the county in which a particular family resides, the cutoff point between families that receive the full subsistence allowance and those that do not

Since its inception in the Social Security Act of 1935, the focus of the federal AFDC program has been to provide benefits for the support of dependent children of needy families with a view toward maintaining and strengthening family life within the family unit. As succinctly stated by the Senate Committee on Finance, "[t]he objective of the aid to dependent children program is to provide cash assistance for needy children *in their own homes.*" [3] In meeting these objectives, moreover, Congress has provided the outlines that the AFDC plan is to follow if a State should choose to participate in the federal program. The maximum grant regulation, however, does not fall within these outlines or accord with the purposes of the Act. And the Court by approving it allows for a complete departure from the congressional intent.

The phrase "aid to families with dependent children," from which the AFDC program derives its name, appears in § 402 (a)(10) of the Act, 42 U. S. C. § 602 (a)(10) (1964 ed., Supp. IV), and is defined in 42 U. S. C. § 606 (b) (1964 ed., Supp. IV) as, *inter alia,* "money payments *with respect to* . . . dependent children." (Emphasis added.) Moreover, the term "dependent child" is also extensively defined in the Act. See 42 U. S. C. § 606 (a) (1964 ed., Supp. IV). Nowhere in the Act is there any sanction or authority for the State to alter those definitions—that is, to select arbitrarily from among the

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is not precisely families of more than six members. In practice, it appears that the subsistence needs of a family of six members are fully met. The needs of the seventh member (*i. e.,* the fifth or sixth child, depending upon whether one or both parents are within the assistance unit), as defined by the State are met, if at all, only to a very small extent. In the usual situation, no payments whatever would be made with respect to any additional eligible dependent children.

[3] S. Rep. No. 165, 87th Cong., 1st Sess., 6 (1961). (Emphasis added.)

class of needy dependent children those whom it will aid. Yet the clear effect of the maximum grant regulation is to do just that, for the regulation creates in effect a class of otherwise eligible dependent children with respect to whom no assistance is granted.

It was to disapprove just such an arbitrary device to limit AFDC payments that Congress amended § 402 (a)(10) in 1950 to provide that aid "shall be furnished with reasonable promptness *to all eligible individuals.*" (Emphasis added.) Surely, as my Brother DOUGLAS demonstrates, this statutory language means at least that the State must take into account the needs of, and provide aid with respect to, *all* needy dependent children. Indeed, that was our assessment of the congressional design embodied in the AFDC program in *King* v. *Smith,* 392 U. S. 309, 329–330, 333 (1968).

The opinion of the Court attempts to avoid this reading of the statutory mandate by the conclusion that parents will see that all the children in a large family share in whatever resources are available so that all children "do receive some aid." And "[s]o long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." The Court also views sympathetically the State's contention that the "all eligible individuals" clause was designed solely to prevent discrimination against new applicants for AFDC benefits. I am unpersuaded, however, by the view that Congress simultaneously prohibited discrimination against one class of dependent children—those in families not presently receiving benefits—and at the same time sanctioned discrimination against another class—those children in large families. Furthermore, the Court's interpretation would permit a State to impose a drastically reduced maximum grant limitation—or, indeed, a uniform payment of, say, $25 per family per month—as long as all families were subject to the rule.

Thus, merely by purporting to compute standards of need and granting some benefits to all eligible families, the State would comply with the federal law—in spite of the fact that the needs of no or very few dependent children would thereby be taken into account in the actual assistance granted. I cannot agree that Congress intended that a State should be entitled to participate in the federally funded AFDC program under such circumstances.

Moreover, the practical consequences of the maximum grant regulation in question here confirm my view that it is invalid. Under the complicated formula for determining the extent of federal support for the AFDC program in the various States, the federal subsidy is based upon "the total number of recipients of aid to families with dependent children." 42 U. S. C. § 603 (a) (1964 ed., Supp. IV). "Recipients" is defined in the same provision to include both dependent children and the eligible relative or relatives with whom they live. There is, however, no limitation upon the number of recipients per family unit for whom the federal subsidy is paid to the States. Thus, when a maximum family grant regulation is in effect, the State continues to receive a federal subsidy for each and every dependent child even though the State passes *none* of this subsidy on to the large families for the use of the additional dependent children.

Specifically, in Maryland, the record in this case indicates that the State spends an average of almost $40 per recipient per month. Under the federal matching formula, federal funds provide $22 of the first $32 per recipient, with anything above $32 being supplied by the State.[4] However, the Federal Government provides a

[4] More technically, the Federal Government supplies five-sixths of the overall amount spent per recipient up to $18, plus one-half of the amount from $18 to $32, to a total of $22. See 42 U. S. C. § 603 (1964 ed., Supp. IV).

maximum of $22 for every dependent child, although none of that amount is received by the needy family in the case of the fifth or sixth and succeeding children. The effect is to shift a greater proportion of the support of large families from the State to the Federal Government as the family size increases. Indeed, if the size of the family should exceed 11, the State would succeed in transferring the entire support burden for the family to the Federal Government, and even make a "profit" in the sense that it would receive more from the Federal Government with respect to the family than the $250 maximum that is actually paid to that family. It is impossible to conclude that Congress intended so incongruous a result. On the contrary, when Congress undertook to subsidize payments on behalf of *each recipient*—including each dependent child—it seems clear that Congress intended each needy dependent child to receive the use and benefit of at least the incremental amount of the federal subsidy paid on his account.

A second effect of the maximum family grant regulation further demonstrates its inconsistency with the federal program. As administered in Maryland, the regulation serves to provide a strong economic incentive to the disintegration of large families. This is so because a family subject to the maximum regulation can, merely by placing the ineligible children in the homes of other relatives, receive additional monthly payments for the support of these additional dependent children.[5] When families are receiving support that is concededly far below their bare minimum subsistence needs, the economic incentive that the maximum grant regulation provides to divide up large families can hardly be viewed as speculative or negligible. The opinion of this Court

[5] For example, in the case of the appellee Mrs. Williams, if she were to place two of her children over 12 years of age with relatives, payments of $79 per month would be paid with respect to each

does not even dispute this effect.[6] The Court answers by saying that the family relationship "may be attenuated but it cannot be destroyed." Yet it was just this kind of attenuation that, as the legislative history conclusively demonstrates,[7] Congress was concerned with eliminating in establishing the AFDC program. The Court's rationale takes a long step backwards toward the time when persons were dependent upon the charity of their relatives—the very situation meant to be remedied by AFDC.

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child. Thus, a total of $408 per month, or $158 above the maximum, would be available for the support of Mrs. Williams and her eight children. Similarly, if appellees Mr. and Mrs. Gary were to place with relatives two of their children who are between the ages of 6 and 12 years, each child would be eligible to receive $65. Hence Mr. and Mrs. Gary and their eight children would receive support in the amount of $380 per month, or some $130 above the family maximum.

[6] The State has contended that the economic incentive to the disintegration of large families that the maximum grant regulation provides is merely speculative. However, serious doubt is cast upon this view by the stipulation of facts entered in the District Court which states in part that, despite the strong desire to keep their families together, appellees in this case were having great difficulty in doing so because of the limitations on their grants.

[7] In S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935), the original goals of the AFDC program are stated as follows: "With no income coming in, and with young children for whom provision must be made for a number of years, families without a father's support require public assistance, unless they have been left with adequate means or are aided by friends and relatives. . . . Through cash grants *adjusted to the needs of the family* it is possible to keep the young children *with their mother in their own home*, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised." (Emphasis added.) See also H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935).

These goals remain the same today. See 42 U. S. C. § 601 (1964 ed., Supp. IV). See generally Note, Welfare's "Condition X," 76 Yale L. J. 1222, 1232–1233 (1967).

Despite its denial of the principle that payments should be made with regard to all eligible individuals and its conflict with the basic purposes of the Act, the Maryland regulation is nevertheless found by the Court to be consistent with the federal law because the existence of such regulations has been recognized by Congress. To bolster this view, the Court argues that the same conclusion has been reached by the department charged with administering the Act. On neither score is the Court convincing.

With regard to the position of the Secretary of HEW, about all that can be said with confidence is that we do not know his views on the validity of family maximum regulations within the federal structure.[8] The reason is simple—he has not been asked. Thus, contrary to our admonition given today to the district courts in considering cases in this area, that whenever possible they "should obtain the views of HEW in those cases where it has not set forth its views," *Rosado* v. *Wyman, ante,* at 407, the Government was not invited to file a brief in this case. Perhaps the reason is that this Court is fully versed in the complexities of the Federal AFDC program. I am dubious, however, when

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[8] In various briefs submitted both to this Court and to other courts in analogous litigation, the Secretary of HEW and the Solicitor General have taken the occasion to label family maximum grant regulations as "arbitrary," oppressive of large families, as resulting in "patently different treatment of individuals," and having received, at least inferentially, the disfavor of Congress. See, *e. g.,* Memorandum for the United States as Amicus Curiae, *Rosado* v. *Wyman, ante,* p. 397; Brief of Robert H. Finch, Secretary of Health, Education, and Welfare as Amicus Curiae, *Lampton* v. *Bonin,* 299 F. Supp. 336, 304 F. Supp. 1384 (D. C. E. D. La. 1969); Brief of Robert H. Finch, *Jefferson* v. *Hackney,* 304 F. Supp. 1332 (D. C. N. D. Tex. 1969). Hence the views of HEW on the precise issue presented in the instant case are, at the very best, ambiguous and quite possibly the opposite of what the Court ascribes to it.

the Court explicitly relies on the failure of the Secretary to disapprove the Maryland welfare scheme. For if anything at all is completely clear in this area of the law it is that the failure of HEW to cut off funds from a state program has no meaning at all. See *Rosado* v. *Wyman, supra,* at 426 (DOUGLAS, J., concurring).

Finally, the Court tells us that Congress has said that the Act permits maximum grant regulations. If it had, this part of the case would be obvious; but, of course, it has not. There is no indication Congress has focused on the family maximum as opposed to individual or other maximums or combinations of such limiting devices.[9] And, to the extent that it could be said to have done so, as my Brother DOUGLAS fully demonstrates, it was in the context of disapproving all maximums and ameliorating the harshness of their effects. See also *Rosado* v. *Wyman, supra,* at 413–414. These slender threads of legislative comment simply cannot be woven into a conclusion of legislative sanction. Cf. *Shapiro* v. *Thompson,* 394 U. S. 618, 638–640 (1969). Further-

[9] The maximum may be expressed in terms of a flat dollar amount, as a percentage of the individual's budgetary deficit (*i. e.,* the difference between need and other income), or in both ways. A system of individual maximums may, or may not, be combined with a family maximum, or, alternatively, a family maximum may be imposed in the absence of individual maximums. See generally HEW, State Maximums and Other Methods of Limiting Money Payments to Recipients of the Special Types of Public Assistance, Oct. 1968 (NCSS Report D–3); Sparer, Social Welfare Law Testing, 12 Prac. Law. (No. 4) 13, 21 (1966). In addition, there are differing methods by which family maximums may be related to other resources available to the family. Some States, including Maryland, subtract available resources from the state-calculated need; in other jurisdictions, available resources are subtracted from the family maximum. See, *e. g., Dews* v. *Henry,* 297 F. Supp. 587 (D. C. Ariz. 1969), involving litigation with respect to the Arizona family maximum.

more, it is fundamental that in construing legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." *Richards* v. *United States,* 369 U. S. 1, 11 (1962). We concluded in *King* v. *Smith, supra,* after an extensive review of the AFDC program, that Congress "intended to provide programs for the economic security and protection of *all* children" and did not intend "arbitrarily to leave one class of destitute children entirely without meaningful protection." 392 U. S., at 330. (Emphasis in original.) That reasoning is likewise applicable to the instant case, in which the maximum grant regulation excludes consideration of the needs of a certain class of dependent children in large families. It is apparent, therefore, that Maryland's maximum grant regulation is not consistent with the Social Security Act, and hence appellees were entitled to the injunction they obtained against its operation.

II

Having decided that the injunction issued by the District Court was proper as a matter of statutory construction, I would affirm on that ground alone. However, the majority has of necessity passed on the constitutional issues. I believe that in overruling the decision of this and every other district court that has passed on the validity of the maximum grant device,[10] the Court both

[10] The lower courts have been unanimous in the view that maximum grant regulations such as Maryland's are invalid. See *Dews* v. *Henry, supra; Westberry* v. *Fisher,* 297 F. Supp. 1109 (D. C. Me. 1969); *Lindsey* v. *Smith,* 303 F. Supp. 1203 (D. C. W. D. Wash. 1969); *Kaiser* v. *Montgomery,* — F. Supp. — (D. C. N. D. Cal. 1969). See also *Collins* v. *State Board of Social Welfare,* 248 Iowa 369, 81 N. W. 2d 4 (1957) (family maximum invalid under equal protection clause of state constitution); *Metcalf* v. *Swank,* 293 F. Supp. 268 (D. C. N. D. Ill. 1968) (dictum).

reaches the wrong result and lays down an insupportable test for determining whether a State has denied its citizens the equal protection of the laws.

The Maryland AFDC program in its basic structure operates uniformly with regard to all needy children by taking into account the basic subsistence needs of all eligible individuals in the formulation of the standards of need for families of various sizes. However, superimposed upon this uniform system is the maximum grant regulation, the operative effect of which is to create two classes of needy children and two classes of eligible families: those small families and their members who receive payments to cover their subsistence needs and those large families who do not.[11]

This classification process effected by the maximum grant regulation produces a basic denial of equal treatment. Persons who are concededly similarly situated (dependent children and their families), are not afforded equal, or even approximately equal, treatment under the maximum grant regulation. Subsistence benefits are paid with respect to some needy dependent children; nothing is paid with respect to others. Some needy families receive full subsistence assistance as calculated by the State; the assistance paid to other families is grossly below their similarly calculated needs.

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[11] In theory, no payments are made with respect to needy dependent children in excess of four or five as the case may be. In practice, of course, the excess children share in the benefits that are paid with respect to the other members of the family. The result is that support for the entire family is reduced below minimum subsistence levels. However, for purposes of equal protection analysis, it makes no difference whether the class against which the maximum grant regulation discriminates is defined as eligible dependent children in excess of the fourth or fifth, or, alternatively, as individuals in large families generally, that is, those with more than six members.

Yet, as a general principle, individuals should not be afforded different treatment by the State unless there is a relevant distinction between them, and "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud,* 354 U. S. 457, 465 (1957). See *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U. S. 150, 155 (1897). Consequently, the State may not, in the provision of important services or the distribution of governmental payments, supply benefits to some individuals while denying them to others who are similarly situated. See, *e. g., Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964).

In the instant case, the only distinction between those children with respect to whom assistance is granted and those children who are denied such assistance is the size of the family into which the child permits himself to be born. The class of individuals with respect to whom payments are actually made (the first four or five eligible dependent children in a family), is grossly underinclusive in terms of the class that the AFDC program was designed to assist, namely, *all* needy dependent children. Such underinclusiveness manifests "a prima facie violation of the equal protection requirement of reasonable classification," [12] compelling the State to come forward with a persuasive justification for the classification.

The Court never undertakes to inquire for such a justification; rather it avoids the task by focusing upon the abstract dichotomy between two different approaches to equal protection problems that have been utilized by this Court.

Under the so-called "traditional test," a classification is said to be permissible under the Equal Protection Clause unless it is "without any reasonable basis."

[12] Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 348 (1949).

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).[13] On the other hand, if the classification affects a "fundamental right," then the state interest in perpetuating the classification must be "compelling" in order to be sustained. See, *e. g.*, *Shapiro* v. *Thompson*, *supra*; *Harper* v. *Board of Elections*, 383 U. S. 663 (1966); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964).

This case simply defies easy characterization in terms of one or the other of these "tests." The cases relied on by the Court, in which a "mere rationality" test was actually used, *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), are most accurately described as involving the application of equal protection reasoning to the regulation of business interests. The extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls. This case, involving the literally vital interests of a powerless minority—poor families without breadwinners—is far removed from the area of business regulation, as the Court concedes. Why then is the standard used in those cases imposed here? We are told no more than that this case falls in "the area of economics and social welfare," with the implication that from there the answer is obvious.

In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise.[14] Rather, con-

[13] See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1076–1087 (1969).

[14] See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). Appellees do argue that their "fundamental rights" are infringed

centration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification. As we said only recently, "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." *Kramer* v. *Union School District,* 395 U. S. 621, 626 (1969), quoting *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968).[15]

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by the maximum grant regulation. They cite, for example, *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), for the proposition that the "right of procreation" is fundamental. This statement is no doubt accurate as far as it goes, but the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner.*

At the same time the Court's insistence that equal protection analysis turns on the basis of a closed category of "fundamental rights" involves a curious value judgment. It is certainly difficult to believe that a person whose very survival is at stake would be comforted by the knowledge that his "fundamental" rights are preserved intact.

On the issue of whether there is a "right" to welfare assistance, see generally Graham, Public Assistance: The Right To Receive; the Obligation To Repay, 43 N. Y. U. L. Rev. 451 (1968); Harvith, Federal Equal Protection and Welfare Assistance, 31 Albany L. Rev. 210 (1967); Note, Welfare Due Process: The Maximum Grant Limitation on the Right To Survive, 3 Ga. L. Rev. 459 (1969). See also Universal Declaration of Human Rights, Art. 25.

[15] This is essentially what this Court has done in applying equal protection concepts in numerous cases, though the various aspects of the approach appear with a greater or lesser degree of clarity in particular cases. See, *e. g., McLaughlin* v. *Florida, supra; Rinaldi* v. *Yeager,* 384 U. S. 305 (1966); *Carrington* v. *Rash,* 380 U. S. 89

It is the individual interests here at stake that, as the Court concedes, most clearly distinguish this case from the "business regulation" equal protection cases. AFDC support to needy dependent children provides the stuff that sustains those children's lives: food, clothing, shelter.[16] And this Court has already recognized several times that when a benefit, even a "gratuitous" benefit, is necessary to sustain life, stricter constitutional standards, both procedural[17] and substantive,[18] are applied to the deprivation of that benefit.

(1965); *Douglas* v. *California,* 372 U. S. 353 (1963); *Skinner* v. *Oklahoma, supra.*

For an application of this approach to several welfare questions, see Comment, Equal Protection as a Measure of Competing Interests in Welfare Litigation, 21 Me. L. Rev. 175 (1969).

[16] See also *Rothstein* v. *Wyman,* 303 F. Supp. 339, 346–347 (D. C. S. D. N. Y. 1969); Harvith, *supra,* n. 14, 31 Albany L. Rev., at 222–226.

[17] See *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 340–342 (1969) (relying on devastating impact of wage garnishment to require prior hearing as a matter of due process); *Goldberg* v. *Kelly, ante,* at 264: "Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits."

[18] Compare *Shapiro* v. *Thompson, supra,* at 627, striking down one-year residency requirement for welfare eligibility as violation of equal protection, and noting that the benefits in question are "the very means to subsist—food, shelter, and other necessities of life," with *Kirk* v. *Board of Regents,* 273 Cal. App. 2d 430, 439–440, 78 Cal. Rptr. 260, 266–267 (1969), appeal dismissed, 396 U. S. 554 (1970), upholding one-year residency requirement for tuition-free graduate education at state university, and distinguishing *Shapiro* on the ground that it "involved the immediate and pressing need for

Nor is the distinction upon which the deprivation is here based—the distinction between large and small families—one that readily commends itself as a basis for determining which children are to have support approximating subsistence and which are not. Indeed, governmental discrimination between children on the basis of a factor over which they have no control—the number of their brothers and sisters—bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the Equal Protection Clause in *Levy* v. *Louisiana,* 391 U. S. 68 (1968).

The asserted state interests in the maintenance of the maximum grant regulation, on the other hand, are hardly clear. In the early stages of this litigation, the State attempted to rationalize the maximum grant regulation on the theory that it was merely a device to conserve state funds, in the language of the motion to dismiss, "a legitimate way of allocating the State's limited resources available for AFDC assistance." Indeed, the initial opinion of the District Court concluded that the sole reason for the regulation, as revealed by the record, was "to fit the total needs of the State's dependent children, as measured by the State's standards of their subsistence requirements, into an inadequate State appropriation." 297 F. Supp., at 458. The District Court quite properly rejected this asserted justification, for

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preservation of life and health of persons unable to live without public assistance, and their dependent children."

These cases and those cited in n. 17, *supra,* suggest that whether or not there is a constitutional "right" to subsistence (as to which see n. 14, *supra*), deprivations of benefits necessary for subsistence will receive closer constitutional scrutiny, under both the Due Process and Equal Protection Clauses, than will deprivations of less essential forms of governmental entitlements.

"[t]he saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson, supra,* at 633. See *Goldberg* v. *Kelly, ante,* at 266.

In post-trial proceedings in the District Court, and in briefs to this court, the State apparently abandoned reliance on the fiscal justification. In its place, there have now appeared several different rationales for the maximum grant regulation, prominent among them being those relied upon by the majority—the notions that imposition of the maximum serves as an incentive to welfare recipients to find and maintain employment and provides a semblance of equality with persons earning a minimum wage.

With regard to the latter, Maryland has urged that the maximum grant regulation serves to maintain a rough equality between wage earning families and AFDC families, thereby increasing the political support for—or perhaps reducing the opposition to—the AFDC program. It is questionable whether the Court really relies on this ground, especially when in many States the prescribed family maximum bears no such relation to the minimum wage.[19] But the Court does not indicate that a different result might obtain in other cases. Indeed, whether elimination of the maximum would produce welfare incomes out of line with other incomes in Maryland is itself open to question on this record.[20]

[19] See HEW Report on Money Payments to Recipients of Special Types of Public Assistance, Oct. 1967, Table 4 (NCSS Report D–4).

[20] The State of Maryland has long spoken with at least two voices on the issue of the maximum grant regulation. The Department of Public Welfare has taken the position, over a number of years, that the regulation should be abolished and has made several proposals to that effect. In so doing, the Department has taken the position that its proposals would not set welfare benefits out of line with household incomes throughout the State. See, *e. g.,* Minutes of State Board of Public Welfare Meeting, September 26, 1958, App. 130–132.

It is true that government in the United States, unlike certain other countries, has not chosen to make public aid available to assist families generally in raising their children. Rather, in this case Maryland, with the encouragement and assistance of the Federal Government, has elected to provide assistance at a subsistence level for those in particular need—the aged, the blind, the infirm, and the unemployed and unemployable, and their children. The only question presented here is whether, having once undertaken such a program, the State may arbitrarily select from among the concededly eligible those to whom it will provide benefits. And it is too late to argue that political expediency will sustain discrimination not otherwise supportable. Cf. *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

Vital to the employment-incentive basis found by the Court to sustain the regulation is, of course, the supposition that an appreciable number of AFDC recipients are in fact employable. For it is perfectly obvious that limitations upon assistance cannot reasonably operate as a work incentive with regard to those who cannot work or who cannot be expected to work. In this connection, Maryland candidly notes that "only a very small percentage of the total universe of welfare recipients are employable." The State, however, urges us to ignore the "total universe" and to concentrate attention instead upon the heads of AFDC families. Yet the very purpose of the AFDC program since its inception has been to provide assistance for dependent *children.* The State's position is thus that the State may deprive certain needy children of assistance to which they would otherwise be entitled in order to provide an arguable work incentive for their parents. But the State may not wield its economic whip in this fashion when the effect is to cause a deprivation to needy dependent children in order to correct an arguable fault of their parents.

Cf. *Levy* v. *Louisiana, supra; King* v. *Smith, supra,* at 334–336 (DOUGLAS, J., concurring); *Doe* v. *Shapiro,* 302 F. Supp. 761 (D. C. Conn. 1969), appeal dismissed, 396 U. S. 488 (1970).

Even if the invitation of the State to focus upon the heads of AFDC families is accepted, the minimum rationality of the maximum grant regulation is hard to discern. The District Court found that of Maryland's more than 32,000 AFDC families, only about 116 could be classified as having employable members, and, of these, the number to which the maximum grant regulation was applicable is not disclosed by the record. The State objects that this figure includes only families in which the father is unemployed and fails to take account of families in which an employable mother is the head of the household. At the same time, however, the State itself has recognized that the vast proportion of these mothers are in fact unemployable because they are mentally or physically incapacitated, because they have no marketable skills, or, most prominently, because the best interests of the children dictate that the mother remain in the home.[21] Thus, it is clear, although the record does not disclose precise figures, that the total number of "employable" mothers is but a fraction of the total number of AFDC mothers. Furthermore, the record is silent as to what proportion of large families subject to the maximum have "employable" mothers. Indeed, one

[21] Indeed, Rule 200, § IX A (2)(b)(5) of the Manual of the Md. Dept. of Social Services prohibits the referral for employment of AFDC mothers who are needed in the home. And the unsuitability of many AFDC mothers has been well chronicled in Md. Dept. of Social Services, Profile of Caseloads, Research Report No. 5, p. 6 (1969). See also Carter, The Employment Potential of AFDC Mothers, 6 Welfare in Review, No. 4, pp. 1, 4 (1968).

must assume that the presence of the mother in the home can be less easily dispensed with in the case of large families, particularly where small children are involved and alternative provisions for their care are accordingly more difficult to arrange. In short, not only has the State failed to establish that there is a substantial or even a significant proportion of AFDC heads of households as to whom the maximum grant regulation arguably serves as a viable and logical work incentive, but it is also indisputable that the regulation at best is drastically *overinclusive* since it applies with equal vigor to a very substantial number of persons who like appellees are completely disabled from working.

Finally, it should be noted that, to the extent there is a legitimate state interest in encouraging heads of AFDC households to find employment, application of the maximum grant regulation is also grossly *underinclusive* because it singles out and affects only large families. No reason is suggested why this particular group should be carved out for the purpose of having unusually harsh "work incentives" imposed upon them. Not only has the State selected for special treatment a small group from among similarly situated families, but it has done so on a basis—family size—that bears no relation to the evil that the State claims the regulation was designed to correct. There is simply no indication whatever that heads of large families, as opposed to heads of small families, are particularly prone to refuse to seek or to maintain employment.

The State has presented other arguments to support the regulation. However, they are not dealt with specifically by the Court, and the reason is not difficult to discern. The Court has picked the strongest available; the others suffer from similar and greater

defects.[22] Moreover, it is relevant to note that both Congress and the State have adopted other measures that deal specifically with exactly those interests the State contends are advanced by the maximum grant regulation. Thus, for example, employable AFDC recipients are required to seek employment through the congressionally established Work Incentive Program which provides an elaborate system of counseling, training, and incentive payments for heads of AFDC families. See generally 42 U. S. C. §§ 630–644 (1964 ed., Supp. IV).[23] The existence of these alternatives does not, of course, conclusively establish the invalidity of the maximum grant regulation. It is certainly relevant, however, in appraising the overall interest of the State in the maintenance of the regulation.

In the final analysis, Maryland has set up an AFDC program structured to calculate and pay the minimum standard of need to dependent children. Having set up that program, however, the State denies some of those

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[22] Thus, the State cannot single out a minuscule proportion of the total number of families in the State as in need of birth control incentives. Not only is the classification effected by the regulation totally underinclusive if this is its rationale, but it also arbitrarily punishes children for factors beyond their control, and overinclusively applies to families like appellees' that were already large before it became necessary to seek assistance. For similar reasons, the argument that the regulation serves as a disincentive to desertion does not stand scrutiny.

[23] Likewise, the State, with the encouragement of Congress, see 42 U. S. C. §§ 602 (a) (21), 610 (1964 ed., Supp. IV), has developed extensive statutory provisions to deal specifically with the problem of parental desertion. See generally Md. Ann. Code, Art. 27, §§ 88–96 (1967 Repl. Vol.). And Congress has mandated, with respect to family planning, that the States provide services to AFDC recipients with the objective of "preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life." 42 U. S. C. § 602 (a) (15) (1964 ed., Supp. IV).

needy children the minimum subsistence standard of living, and it does so on the wholly arbitrary basis that they happen to be members of large families. One need not speculate too far on the actual reason for the regulation, for in the early stages of this litigation the State virtually conceded that it set out to limit the total cost of the program along the path of least resistance. Now, however, we are told that other rationales can be manufactured to support the regulation and to sustain it against a fundamental constitutional challenge.

However, these asserted state interests, which are not insignificant in themselves, are advanced either not at all or by complete accident by the maximum grant regulation. Clearly they could be served by measures far less destructive of the individual interests at stake. Moreover, the device assertedly chosen to further them is at one and the same time both grossly underinclusive—because it does not apply at all to a much larger class in an equal position—and grossly overinclusive—because it applies so strongly against a substantial class as to which it can rationally serve no end. Were this a case of pure business regulation, these defects would place it beyond what has heretofore seemed a borderline case, see, *e. g., Railway Express Agency* v. *New York,* 336 U. S. 106 (1949), and I do not believe that the regulation can be sustained even under the Court's "reasonableness" test.

In any event, it cannot suffice merely to invoke the spectre of the past and to recite from *Lindsley* v. *Natural Carbonic Gas Co.* and *Williamson* v. *Lee Optical Co.* to decide the case. Appellees are not a gas company or an optical dispenser; they are needy dependent children and families who are discriminated against by the State. The basis of that discrimination—the classification of individuals into large and small families—is too

arbitrary and too unconnected to the asserted rationale, the impact on those discriminated against—the denial of even a subsistence existence—too great, and the supposed interests served too contrived and attenuated to meet the requirements of the Constitution. In my view Maryland's maximum grant regulation is invalid under the Equal Protection Clause of the Fourteenth Amendment.

I would affirm the judgment of the District Court.

O'HAIR ET AL. *v.* PAINE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 1190. Decided April 6, 1970

Appeal dismissed.

James H. Anderson, Jr., for appellants Society of Separationists, Inc., et al.

Solicitor General Griswold for appellees.

PER CURIAM.

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

AMERICAN FARM LINES *v.* BLACK BALL FREIGHT SERVICE ET AL.

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

No. 369. Argued February 25, 1970—Decided April 20, 1970*

Appellant American Farm Lines (AFL) filed an application for temporary operating authority under § 210a of the Interstate Commerce Act, which allows the Interstate Commerce Commission (ICC) to grant such authority without hearings for "service for which there is an immediate and urgent need" and where there is "no carrier service capable of meeting such need." ICC rules require that the application be supported by shippers' statements containing 11 items of information, including "(8) Whether efforts have been made to obtain the services from existing . . . carriers, and the dates and results of such efforts," and "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal." AFL's application, which was accompanied by a statement from the Department of Defense (DOD), was approved by the ICC. Protesting carriers sought review in the Federal District Court, where a single judge temporarily restrained the operation of the ICC's order. The ICC, not barred by the stay order from doing so, then granted petitions for reconsideration and reopened the proceeding to receive a further supporting statement from DOD. Based upon this statement the ICC issued a new order granting AFL's application, and a single District Judge restrained the operation of this new order. Thereafter a three-judge court conducted a full hearing on the merits and set aside both ICC orders, on the grounds that the agency failed to require strict compliance with its own rules and that the pendency of the review proceedings deprived the ICC of jurisdiction to reopen the administrative record. *Held:*

1. These ICC rules are mere aids to the exercise of the agency's independent discretion and the District Court exacted a standard of compliance with these procedural rules that was wholly unnec-

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* Together with No. 382, *Interstate Commerce Commission* v. *Black Ball Freight Service et al.*, on appeal from the same court.

essary to provide an adequate record to review the ICC's decision. Pp. 537–539.

2. The ICC's statutory jurisdiction to pass on petitions for rehearing may be exercised to add to its findings or to buttress them as it seems desirable, absent any interference with or injunction from the District Court. Here the ICC honored the District Court's stay order and reopened the record merely to remedy a deficiency before any judicial review of the merits had begun and acted in full harmony with that court's jurisdiction. Pp. 539–542.

298 F. Supp. 1006, reversed.

Joseph A. Califano, Jr., argued the cause for appellant in No. 369. With him on the briefs were *John D. Hawke, Jr.,* and *William L. Peterson, Jr. Arthur J. Cerra* argued the cause for appellant in No. 382. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Springer, John H. D. Wigger,* and *Robert W. Ginnane.*

William H. Dempsey, Jr., argued the cause for appellees in both cases and filed a brief for appellees Consolidated Freightways Corp. et al. In both cases *Ed White* filed a brief for railroad appellees; *William B. Adams, Peter T. Beardsley,* and *Nelson J. Cooney* filed a brief for certain motor carrier appellees, and *James W. Wrape* and *Robert E. Joyner* filed a brief for Dealers Transit, Inc., et al.

Mr. Justice Douglas delivered the opinion of the Court.

The Interstate Commerce Commission has statutory power to grant motor carriers temporary operating authority "without hearings or other proceedings" when the authority relates to a "service for which there is an immediate and urgent need" and where there is "no

carrier service capable of meeting such need." [1] Interstate Commerce Act § 210a, 52 Stat. 1238, as amended, 49 U. S. C. § 310a. The ICC processes applications for such authority under rules promulgated in 1965. 49 CFR pt. 1131.[2] Among other things, those rules require that an applicant accompany his application with supporting statements of shippers that contain information "designed to establish an immediate and urgent need for service which cannot be met by existing carriers." *Id.*, § 1131.2 (c). Each such supporting statement "must contain at least" 11 items of information [3] including the following:

> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

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[1] Section 210a(a) provides in part:

"To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. . . ."

[2] 49 CFR § 1131.4 (b)(2) defines the statutory term "immediate and urgent need" as follows:

"An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed."

[3] See 49 CFR § 1131.2 (c).

Appellant American Farm Lines (AFL) filed an application for temporary operating authority.[4] The application was accompanied by a supporting statement of the Department of Defense (DOD). The ICC Tem-

[4] AFL is a federation of agricultural marketing cooperatives created in 1964 to provide transportation for its members. By virtue of § 203 (b)(5) of the Interstate Commerce Act, 54 Stat. 921, as amended, 49 U. S. C. § 303 (b)(5), AFL may transport freight for its members without obtaining a certificate of convenience and necessity from the ICC. In 1965 § 203 (b)(5) was construed to exempt from the certification requirement any freight transportation by an agricultural cooperative for shippers other than its own members to the extent that such nonmember transportation is incidental and necessary to its principal transportation activities. See *Northwest Agricultural Cooperative Assn.* v. *ICC,* 350 F. 2d 252. The next year, AFL began transporting freight for DOD. In 1968–1969 AFL's ability to continue serving DOD was restricted by two events. First, certain competing carriers obtained injunctions prohibiting AFL from making two consecutive movements for DOD and from transporting freight for any nonmember except when going to pick up, or returning from delivery of, a member's freight. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* 415 F. 2d 747. Second, § 203 (b)(5) was amended to restrict the exemption for agricultural cooperatives to those whose transportation for nonmembers does not exceed 15% of their total annual interstate transportation, measured by tonnage. See 82 Stat. 448, 49 U. S. C. § 303 (b)(5) (1964 ed., Supp. IV). AFL had transported 74,155,685 pounds for DOD between December 1966 and June 1968, and, in an effort to continue providing this service, applied to the ICC in May 1968 for temporary operating authority. The authority sought was to transport general commodities, including Class A and B explosives moving on government bills of lading over irregular routes between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas on the one hand, and points in Washington, California, Nevada, Utah, and Arizona on the other.

AFL has applied to the ICC for a certificate of permanent authority. It was estimated at oral argument that final action on this application will not be taken by ICC before mid-1971. Meanwhile the ICC may extend the temporary authority. *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R. Co.,* 353 U. S. 436.

porary Authorities Board denied the application on the ground that the "applicant has not established that there exists an immediate and urgent need for any of the service proposed." Division I of the ICC (acting as an Appellate Division) reversed the Board and granted AFL temporary authority. Protesting carriers sought review of this action in the United States District Court for the Western District of Washington. A single judge of the District Court temporarily restrained the operation of the ICC order and the ICC thereupon ordered postponement of the operation of its grant. At that time numerous petitions for reconsideration were pending before the Commission and the stay order did not direct the Commission to stay its hand with respect to them. The record was indeed not filed with the court until much later. Meanwhile, the Commission granted the petitions and reopened the proceeding to receive a further supporting statement of DOD. This took the form of the verified statement of Vincent F. Caputo, DOD Director for Transportation and Warehousing Policy, which was submitted as a purported reply to the pending petitions for reconsideration. Based upon this statement, the ICC entered a new order granting the AFL application. A single judge of the District Court restrained the operation of the new order. Thereafter a three-judge District Court conducted a full hearing on the merits.[5] The ICC admitted at that stage that its first order "may not have been based upon evidence to support its conclusion," but argued that there was no infirmity in the new order. The three-judge court set aside both orders. 298 F. Supp. 1006. Both AFL and ICC appealed to this Court and we noted probable jurisdiction.[6] 396 U. S. 884.

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[5] The precise chronology of these events is shown in n. 9, *infra*.

[6] ICC is not appealing from the District Court's decision setting aside the first order.

I

The first alleged error in the case is the failure of the Interstate Commerce Commission to require strict compliance with its own rules. The rules in question, unlike some of our own, do not involve "jurisdictional" problems but only require certain information to be set forth in statements filed in support of applications of motor carriers for temporary operating authority.

The Caputo statement asserted that part of the tremendous volume of traffic that DOD moved in the territories involved had to be moved "in the most expeditious manner possible," and that, since air transport was prohibitively expensive "except in the most extreme emergencies," there was an "imperative" need for the most expeditious motor carrier service. The need for this expeditious transport did not rest merely on a desire to obtain the most efficient service, but in addition rested on the need to coordinate arrival times of shipments with factory production schedules and with shiploading or airlift times for overseas shipments. The particular inadequacies in existing service were pointed out, namely, the delays inherent in joint-line service, regular-route service, and the use of single drivers. The statement did not assert that *none* of the existing carriers provided sufficiently expeditious service to meet DOD needs; rather it claimed that the carriers providing satisfactory service in the territories in question were so few in number that the additional services of AFL were required to meet DOD's transportation needs.

Concededly, the Caputo statement did not give the dates of DOD's efforts to secure service from other existing carriers or a complete list of the names and addresses of the carriers who failed or refused to provide service, as required by the terms of subsections (8) and (9), 49 CFR § 1131.2 (c). Such a complete listing of this in-

formation, given the volume of traffic involved, would indeed have been a monumental undertaking.

The failure of the Caputo statement to provide these particular specifics did not prejudice the carriers in making precise and informed objections to AFL's application. The briefest perusal of the objecting carriers' replies, which cover some 156 pages in the printed record of these appeals, belies any such contention. Neither was the statement so devoid of information that it, along with the replies of the protesting carriers, could not support a finding that AFL's service was required to meet DOD's immediate and urgent transportation needs. In our view, the District Court exacted a standard of compliance with procedural rules that was wholly unnecessary to provide an adequate record to review the Commission's decision.

The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems. It is argued that the rules were adopted to confer important procedural benefits upon individuals; in opposition it is said the rules were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications for temporary authority.

We agree with the Commission that the rules were promulgated for the purpose of providing the "necessary information" for the Commission "to reach an informed and equitable decision" on temporary authority applications. ICC Policy Release of January 23, 1968. The Commission stated that requests for temporary authority would be turned down "if the applications do not *adequately* comply with [the] . . . rules." *Ibid.* (Emphasis added.) The rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion

as in *Vitarelli* v. *Seaton,* 359 U. S. 535; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi* v. *Shaughnessy,* 347 U. S. 260; *Yellin* v. *United States,* 374 U. S. 109. Thus there is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *NLRB* v. *Monsanto Chemical Co.,* 205 F. 2d 763, 764. And see *NLRB* v. *Grace Co.,* 184 F. 2d 126, 129; *Sun Oil Co.* v. *FPC,* 256 F. 2d 233; *McKenna* v. *Seaton,* 104 U. S. App. D. C. 50, 259 F. 2d 780.

We deal here with the grant of temporary authority similar to that granted in *Estes Express Lines* v. *United States,* 292 F. Supp. 842, aff'd, 394 U. S. 718. There the grant of temporary authority was upheld even though there may not have been literal compliance with subsections (8) and (9) of the Commission's rules. That result was in line with § 210a (a) of the Act which was designed to provide the Commission with a swift and procedurally simple ability to respond to urgent transportation needs. That functional approach is served by treating (8) and (9) not as inflexible procedural conditions but as tools to aid the Commission in exercising its discretion to meet "an immediate and urgent need" for services where the existing service is incapable of meeting that need. Unlike some rules, the present ones are mere aids to the exercise of the agency's independent discretion.

II

After the Commission issued its first order, petitions for reconsideration were filed and before they were passed

upon, some carriers filed suit and a single judge temporarily restrained operation of that first order. It was after that order issued and over a month before the case was argued to the three-judge court that the Commission granted the petitions for rehearing and reopened the record and received the Caputo verified statement.

The District Court held that the pendency of the review proceedings deprived the Commission of jurisdiction to reopen the administrative record.

Congress has provided as respects some regulatory systems that the agency may modify any finding up until the record is filed with a court. Such is the provision of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. § 160 (d) and § 160 (e), which provides that any subsequent changes in the record will be made only at the direction of the court. A similar provision is included in § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (c) and in § 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. § 21 (c). And a like provision is included in the review by the courts of appeals of orders of other designated federal agencies. 28 U. S. C. § 2347 (c) (1964 ed., Supp. IV). But there is no such requirement in the Interstate Commerce Act.[7] It indeed empowers the Commission "at any time to grant rehearings as to any decision, order, or requirement and to reverse, change, or modify the same." [8]

The power of the Commission to grant rehearings is not limited or qualified by the terms of 49 U. S. C.

[7] It was once proposed that the same requirement be written into the law respecting those orders of the Commission reviewed by the courts of appeal as distinguished from the three-judge district courts. See H. R. Rep. No. 1619, 80th Cong., 2d Sess., 4. But the ICC was deleted from the measure. *Id.*, at 1. And the Act as approved covered only other designated agencies. 28 U. S. C. § 2342 (1964 ed., Supp. IV).

[8] See *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478, 484.

§ 17 (6) or § 17 (7). Thus in § 17 (6) it is said, "Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear." And § 17 (7) provides that if after rehearing or reconsideration the original decision, order, or requirement appears "unjust or unwarranted," the Commission may "reverse, change, or modify" the same. These broad powers are plainly adequate to add to the findings or firm them up as the Commission deems desirable, absent any collision or interference with the District Court.

Unless Congress provides otherwise, "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied." *Outland* v. *CAB,* 109 U. S. App. D. C. 90, 93, 284 F. 2d 224, 227. In multi-party proceedings, such as the present one, some may seek judicial review and others may seek administrative reconsideration. "That both tribunals have jurisdiction does not mean, of course, that they will act at cross purposes." *Wrather-Alvarez Broadcasting, Inc.* v. *FCC,* 101 U. S. App. D. C. 324, 327, 248 F. 2d 646, 649. The concept "of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit" some statutory schemes, *ibid.*, but it does not fit this one.

This power of the Commission to reconsider a prior decision does not necessarily collide with the judicial power of review. For while the court properly could provide temporary relief against a Commission order, its issuance does not mean that the Commission loses all jurisdiction to complete the administrative process. It does mean that thereafter the Commission is "without power to act inconsistently with the court's jurisdiction." *Inland Steel Co.* v. *United States,* 306 U. S. 153, 160. When the Commission made the additional findings after its first order was stayed by the court, it did not act inconsistently with what the court had done. It did not interfere in the slightest with the court's protective

order. What the Commission did came before the court was ready to hear arguments on the merits and before the record was filed with it. Moreover, the Commission in light of the District Court's stay, by express terms, directed AFL not to perform operations under the first order and made the second order effective only on further order of the Commission.[9] Since by the Act the Commission never lost jurisdiction to pass on petitions for rehearing, and since the stay order did not forbid it from acting on those pending petitions, it was not necessary for the Commission to seek permission of the court to make those rulings.

The Commission reopened the record merely to remedy a deficiency in it before any judicial review of the merits had commenced and fully honored the stay order of the District Court. It therefore acted in full harmony with the court's jurisdiction.

Reversed.

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

I would affirm the judgment of the District Court on the ground that "[e]ven if ICC had jurisdiction to reopen the ICC proceeding and to consider the

[9] The District Court's stay was issued October 2, 1968. On October 9, the Commission stayed the effective date of its first order "until further order of the Commission." On November 5, 1968, the Commission reopened the proceeding before it and directed AFL, in light of the District Court's order, "not to perform" any operations under its first order "until further order of the Commission." On November 12, 1968, the Commission advised the District Court of its action. On December 20, 1968, the Commission entered its second order which authorized commencement of service by AFL only on further notice by the ICC. On December 31, 1968, a supplemental complaint was filed in the District Court challenging the Commission's second order. On January 6, 1969, a single judge of the District Court stayed that order. On March 26, 1969, the District Court entered its judgment now being reviewed.

Caputo verified statement, [the statement] would not meet the requirements of categories (8) and (9) of ICC Rule 49 C. F. R. 1131.2 (c)." 298 F. Supp. 1006, 1011.

Insofar as ICC regulations emphasize the requirement of information concerning the ability of existing carriers to provide the service sought by a shipper, they implement not only the statutory standard under Interstate Commerce Act § 210a, 49 U. S. C. § 310a, but also the fundamental scheme of our national transportation policy. Ever since the enactment in 1887 of the Interstate Commerce Act, 24 Stat. 379, national policy has reflected the congressional determination that the public interest is served by regulating competition among carriers. See, *e. g.*, Act of September 18, 1940, § 1, 54 Stat. 899, 49 U. S. C. preceding § 1. Regulation of entry into the motor transportation industry is one important feature of the pattern of regulation. *American Trucking Associations, Inc.* v. *United States,* 344 U. S. 298 (1953); *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R. Co.,* 353 U. S. 436, 440 (1957) (Burton, J., dissenting). The Motor Carrier Part of the Interstate Commerce Act was passed because "the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture" and "as a result . . . became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility." Therefore, "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition." *American Trucking Associations, Inc.* v. *United States, supra,* at 312–313. To ensure fair and effective regulation of entry, 49 U. S. C. §§ 305–309 require that entry ordinarily be authorized by the ICC only after full adversary proceedings.

Section 210a is a narrow exception to the basic procedural pattern of the Motor Carrier Part since it

permits the Commission to grant temporary operating authority after conducting only a minimal adversary proceeding;[1] under 49 CFR §§ 1131.2–1131.3 action is taken on the basis of the written application, supporting statements of shippers, and written responses and objections of protestants. But § 210a, like the statutory provision considered in *United States* v. *Drum*, 368 U. S. 370, 375 (1962), expressly "bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market." The section is explicit that the ICC may grant temporary operating authority only "to a point or points or within a territory *having no carrier service capable of meeting such need.*" (Emphasis supplied.)

This congressional concern to protect existing carriers was again forcefully expressed in the 1968 amendment to § 203 (b)(5) of the Act, 82 Stat. 448, 49 U. S. C. § 303 (b)(5) (1964 ed., Supp. IV), which curtails substantially the authority of agricultural cooperatives like AFL to haul nonmembers' freight.

The Senate Committee noted that the decision of the Court of Appeals for the Ninth Circuit in *Northwest Agricultural Cooperative Assn.* v. *ICC*, 350 F. 2d 252 (1965), "and the publicity attendant thereto has, as a practical matter, been construed by some cooperatives as an invitation to substantially expand their hauling of non-farm-related traffic for nonfarm members, and by certain groups and organizations as a device to institute unlawful transportation activities." S. Rep. No. 1152, 90th Cong., 2d Sess., 6. The report also states, at 2:

> "The relative decline of the Nation's common carrier system in recent years is a matter of serious

[1] In some "emergency" situations temporary authority may be granted without the notice to protestants otherwise required by ICC rules. See 49 CFR § 1131.2 (d). That provision is not at issue in this case.

> concern. Several traffic studies reveal that common carriers have lost considerable traffic which they formerly handled and, at the same time, have been unable to share proportionately in the additional traffic generated by the Nation's expanding economy.
>
> "This decline is essentially a result of the growth of unregulated private and exempt carriage. But it is also attributable in part to the growth of unauthorized and illegal carriage. Such illegal operators are inimical to the public interest, and if left unchecked, could ultimately undermine the common carrier system."

The ICC recognizes its duty to give effect to this congressional concern for existing carriers in the provision of Rule 1131.4 (b)(2) that "[a]n immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service." This key determination is made upon the basis of the information supplied in response to items (8) and (9) of 49 CFR § 1131.2 (c). Reasonable disclosure of whatever evidence there may be as to the inadequacy of existing service is thus of crucial importance. Disclosure makes it possible for protestants to frame specific objections addressed to concrete situations, and thereby comply with the provision of Rule 1131.3 (a)(2) that protests "must be specific as to the service which [the] protestant can and will offer . . . ." Disclosure also permits the ICC to come to an informed judgment that properly respects the congressional concern for existing carriers. It follows that details and not generalities are called for. There must be disclosure, by dates and results, of efforts made by the shipper to obtain the needed service from existing carriers, with names and specific reasons given for failure or refusal

to provide the service. In a case such as this, ICC action without such information flouts the congressional concern.

ICC Rules 1131.2 (c)(8) and (9) are not hypertechnical rules, or mere matters of housekeeping convenience. They go to the heart of the issue in a temporary authority proceeding. The significance of the rules does not depend on whether, in the Court's words, they "confer important procedural benefits upon individuals," but rather on the fact that they are designed to elicit information crucial to determining whether in light of congressional policies a particular factual situation warrants the grant of a temporary authority. Nor is the question in this case, as the Court assumes, whether the ICC erred in failing to require "strict" compliance with the rules. The District Court did not hold the Commission to a standard of strict compliance, and appellees have not argued that strict compliance is required. The issue is whether there was reasonable compliance with rules that the ICC purported to apply in this case.[2] The District Court found that the Caputo statement relied on by the ICC in issuing the new order "fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal." 298 F. Supp., at 1011. I

[2] The ICC makes no claim that it did not apply its regulations in this case; the insistence is that DOD's supporting statement satisfied the rules. There is, therefore, no occasion to consider the question mooted in the briefs whether, in light of the principle applied in *Service* v. *Dulles,* 354 U. S. 363 (1957), the ICC could depart from its own rules. See also *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959); *Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954); *Yellin* v. *United States,* 374 U. S. 109 (1963); *Bridges* v. *Wixon,* 326 U. S. 135, 153 (1945).

reach the same conclusion from my examination of the statement.

AFL argues that (8) and (9) require information, not action, and that therefore a response that no effort has been made to obtain the service from other carriers is compliance with both items. However, apart from the doubtful premise that in the circumstances of this case the statute would authorize a grant of temporary operating authority without proof of such effort, the argument is foreclosed by the ICC's express finding in its second order that DOD did in fact attempt to obtain the service elsewhere.[3] See *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168–169 (1962).

The ICC makes a different argument. It concedes that the DOD statement does not literally comply with (8) and (9) but argues that the content of the statement constitutes reasonable compliance. The ICC insists, therefore, that the protesting carriers were not prejudiced by the lack of specific information. Insofar as this argument rests on the extensive explanation in the DOD statement of the advantages of single-line service, ICC's own rule refutes it. 49 CFR § 1131.4 (b)(4) states:

> "Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate

[3] The ICC expressly found "[t]hat [DOD] has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs."

and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

Thus it was not enough for the statement to assert simply that DOD desires AFL's single-line service because DOD is interested in economy and efficiency; the requirement is that the statement spell out in detail just what DOD's needs are, why these needs cannot be met by existing carriers, and why the authority applied for will enable AFL to meet the needs. Consequently, in this case reasonable compliance with (8) and (9) means at least compliance sufficient to permit an informed application of the standard set forth in § 1131.4 (b)(4). In my view the DOD statement fails this test. It does not indicate specifically what needs are not being satisfied by the joint- or single-line services provided by existing certificated carriers, or how those needs were brought to the attention of the unsatisfactory carriers so as to discover whether they could improve their performance to meet DOD's needs.

The statement begins by noting that DOD ships a "tremendous volume" of freight between the nine-state area and the five-state area in question, and that "[a] part of this traffic requires that it be transported from origin to destination in the most expeditious manner possible." It adds that "[t]his defense need for speed has not been met in many, many instances by the current certified motor carriers due to a number of factors," among which are the facts that the "majority" of carriers offer only joint-line service, that "virtually all" carriers use regular routes which "often" are circuitous, and that "some" carriers use single drivers instead of two-man teams. The statement then gives three examples of inadequate service. The first two examples show that joint-line service is in these instances

slower than single-line service, but the single-line service cited is currently being provided by a certificated carrier. Thus these two examples do not show that any of DOD's needs are not currently being met. The third example states that in some instances, where single-line service is available over regular routes, service over irregular routes would be faster. But the statement does not identify these instances; it does not state whether DOD brought the inadequacies to the attention of any carrier; nor does it state that to DOD's knowledge there is no way the certificated carriers could speed up their service between the points in question so as to meet DOD's reasonable "immediate and urgent need." This entire segment of the Caputo statement fails substantially to carry out the purpose of Rules 1131.2 (c)(8) and (9) because it does not sufficiently identify what DOD regards as particular inadequacies in current service, so as to permit the protestants to make a focused response and the ICC to make a focused assessment of DOD's asserted needs.

The statement goes on to identify numerous points between which no known certificated carrier is authorized to provide single-line service. But for none of these specific routes does it explain why joint-line service is not or could not be made reasonably adequate for DOD's needs.

The statement next refers to particular situations calling for reliable delivery times, and examples of how present service is unreliable. Again, there is a fatal lack of specific information showing that present service is inadequate. The statement explains that it is often necessary to coordinate arrival of inbound shipments with production schedules at factories. As an example, it cites a situation in which only one of the currently certificated carriers has proven able to meet the delivery schedules, even though other car-

riers were made aware of the need for "timed" deliveries. The one satisfactory carrier cannot transport the entire load. However, the statement does not identify the carriers whose service has been unsatisfactory; it does not say what efforts were made to have them improve their service; and it does not say why they have not conformed to DOD requirements. The same is true of the example of present carriers' failure to make deliveries on time for transshipment outside the United States. It is also claimed that current carriers sometimes lack authority to formulate truckload shipments of diverse commodities, but no examples whatever are cited.

Finally, the statement gives five examples of outstanding service by AFL, and states that in each case DOD experience shows that joint-line carriers could not have met the Department's needs. Again, the unsatisfactory carriers are not identified; their reasons for not improving are not reported; and the "experience" on which DOD bases its assessment of them is not specified.

In sum, the DOD statement fails to supply that concrete evidence of the inability of particular existing carriers to provide the needed service that would enable protestants and ICC to make an informed assessment of AFL's application. Of course, DOD was not called upon to supply the specifics of innumerable instances of inadequate or unavailable service or of every effort to obtain improved service. However, the congressional concern expressed in the statutory limitation demanded that ICC be given at least enough specifics concerning inadequate or unavailable service and efforts to obtain better service so that protestants would have an opportunity for informed rebuttal and ICC the basis for an informed determination. It is of course irrelevant that DOD is the Nation's largest shipper and that its freight consists almost entirely of defense needs. ICC has held that "[w]here necessary facts are lacking" the Govern-

ment is in no better position than any other shipper. *Riss & Co., Inc., Extension—Explosives,* 64 M. C. C. 299, 328 (1955), *National Freight, Inc., Extension—Commodities in Bulk,* 84 M. C. C. 403, 407 (1961).

The Court purports to find in *Estes Express Lines* v. *United States,* 292 F. Supp. 842 (D. C. E. D. Va. 1968), aff'd *per curiam,* 394 U. S. 718 (1969), some support for its glossing over the inadequacies in the DOD statement. In that case an ICC grant of temporary authority was sustained without a showing that efforts had been made to establish whether any other carrier was able to meet the asserted need for the applicant's services. But the differences between that case and the present one are instructive. There the application was supported by statements of 11 separate shippers, each of whom reported that he had previously obtained the service from the applicant, and thus had never sought it elsewhere and, further, knew of no other carrier with the special characteristics of the applicant. The application covered a single route between the District of Columbia and Richmond, Virginia, and thus it could reasonably have been found that protestants were not prejudiced by any lack of information in the supporting statements. In striking contrast, the authority sought by AFL covers transportation between all points in a nine-state area and all points in a five-state area. In my view, where an applicant seeks temporary authority as broad as this, reasonable compliance with Rules 1131.2 (c)(8) and (9) requires more information than DOD provided. Accordingly, I would affirm.

LEWIS ET AL. *v.* MARTIN, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 829. Argued March 3–4, 1970—Decided April 20, 1970

Appellants, recipients of Aid to Families With Dependent Children (AFDC) assistance, brought this suit challenging the validity of a California law and regulations that conclusively presume that the income of a nonadoptive stepfather or a man assuming the role of a spouse (MARS) is available to the children in computing the AFDC assistance to which they are entitled. Appellants contend that the state provisions conflict with the Social Security Act and Department of Health, Education, and Welfare (HEW) regulations thereunder providing that income from a nonadoptive stepfather without legal obligation of support or a MARS may not be treated as available to the children absent proof of actual contributions. A three-judge District Court, holding the HEW regulations invalid, dismissed the complaint. *Held:*

1. AFDC aid can be granted under the Social Security Act only if "a parent" of the needy child is continually absent from the home, the term "parent" including only a person with a legal duty of support. *King* v. *Smith,* 392 U. S. 309, 313, 327. Pp. 557–558.

2. The HEW regulation validly implements the Act since HEW could reasonably conclude that only a person as near as a real or adoptive father would be has the consensual relation to the family that makes it reliably certain that his income is actually available for support of the children in the household. Pp. 558–560.

3. The State, which is foreclosed from arguing that the assumption-of-income provisions comport with the Act as applied to MARS, may seek to show on remand only that those provisions may be retained under the Act as applied to nonadoptive stepfathers if it can demonstrate that their legal obligation under state law is consistent with that under federal law. P. 560.

312 F. Supp. 197, reversed and remanded.

Anthony G. Amsterdam argued the cause for appellants. On the brief were *Rubin Tepper, Steven J. Antler,* and *Peter Sitkin.*

Jay S. Linderman, Deputy Attorney General of California, argued the cause for appellees. With him on the brief were *Thomas C. Lynch,* Attorney General, and *Elizabeth Palmer,* Deputy Attorney General.

Francis X. Beytagh, Jr., argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Lawrence G. Wallace,* and *Alan S. Rosenthal. Martin Garbus* and *Carl Rachlin* filed a brief for the Center on Social Welfare Policy & Law et al. as *amici curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellants are mothers and children who receive welfare assistance under California law.[1] At the time these actions were commenced, California law provided[2] that

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[1] Some of the appellants sue on behalf of themselves, their children, a man assuming the role of spouse (MARS), and all others similarly situated. There are also intervenors who represent two families, one with a stepfather and another with a MARS.

[2] Cal. Welf. & Inst'ns Code § 11351 (1966).

On September 3, 1969, the Governor of California signed into law a new § 11351.5 of the California Welfare and Institutions Code, which became effective November 10, 1969. It leaves unchanged § 11351 and implementing regulations insofar as they apply to a stepfather, but repeals the old § 11351 insofar as it applied to "an adult male person assuming the role of spouse." Under the new law, a MARS "shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement." The new law also provides that, under regulations to be promulgated by the State Welfare Department, the MARS and the mother will be required to present the Department with "all of the facts in connection with the sharing of expenses . . . ."

payments to a "needy child" who "lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her"—known in the vernacular as a MARS—shall be computed after consideration is given to the income of the stepfather or MARS.[3] The California law conclusively presumes that the needs of the children are reduced by the amount of income available from the man in the house whether or not it is in fact available or actually used to meet the needs of the dependent children.

Following our decision in *King* v. *Smith,* 392 U. S. 309, the Department of Health, Education, and Welfare (HEW) promulgated a regulation reaffirming its earlier rulings that the income of a man not ceremonially married to the mother of the dependent children may not be treated as available to the children unless there is proof that he has made actual contributions.[4] Even where the man is ceremonially married to the mother but is not the real or adoptive father, his income may not be treated as available to the children unless he is legally obligated to support the children by state law.[5]

These suits by appellants were brought in a three-judge District Court to have the California law and regulations declared invalid. That court dismissed the

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[3] The California regulations that governed a MARS at the time these suits were brought were Cal. State Dept. of Social Welfare, Public Social Services Manual §§ 42–535 (effective Nov. 1, 1967), 44–133.5 (effective July 1, 1967). As to a stepfather, the pertinent regulations were *id.* §§ 42–531 (effective Nov. 1, 1967), 44–113.242 (effective July 1, 1967).

For criminal sanctions against a natural father who fails to support his children see Cal. Penal Code § 270; Cal. Welf. & Inst'ns Code §§ 11476–11477 (1966).

[4] 45 CFR § 203.1.

[5] *Id.,* § 203.1 (a).

complaints, holding the HEW regulations were invalid. 312 F. Supp. 197. The cases are here on appeal and we noted probable jurisdiction. 396 U. S. 900.

The Social Security Act defines a dependent child as a "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" a specified relative. § 406 (a), 49 Stat. 629, 42 U. S. C. § 606 (a). This is the Aid to Families With Dependent Children (AFDC) program which we discussed in *King* v. *Smith.*

The federal statute provides that state agencies administering AFDC plans "shall, in determining need [of an eligible child], take into consideration any other income and resources [of the child] . . . as well as any expenses reasonably attributable to the earning of any such income." 42 U. S. C. § 602 (a)(7) (1964 ed., Supp. IV).

This directive was implemented by a regulation of HEW, effective July 1, 1967, which, as then worded, provided in part:

> "[O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment." [6]

We stated in *King* v. *Smith, supra,* at 319 n. 16, that those regulations "clearly comport with" the Act. And as we have noted, shortly after *King* v. *Smith,* HEW

[6] HEW Handbook of Public Assistance Administration, pt. IV, § 3131.7. In its present form the regulation provides:

"(ii) . . . in establishing financial eligibility and the amount of the assistance payment: . . . (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered." 45 CFR § 233.20 (a)(3)(ii), 34 Fed. Reg. 1395.

promulgated a new regulation [7] which provided in pertinent part:

> "(a) A State plan for aid and services to needy families with children . . . must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.
>
> "(b) The inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. . . . [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.*" (Emphasis added.)

In other words, the regulations explicitly negate the idea that in determining a child's needs, a stepfather (*i. e.*, a man married to a child's mother but who has not

[7] 45 CFR § 203.1.

adopted the child and is not legally obligated to support the child under state law) or a MARS may be presumed to be providing support.[8]

We said in *King* v. *Smith* that AFDC aid can be granted "only if 'a parent' of the needy child is continually absent from the home." 392 U. S., at 313. If the stepfather or MARS is a "parent" within the meaning of the federal Act, any federal matching assistance under the AFDC program for children living with a MARS or stepfather would not be available to appellants. The three-judge court said that "[t]he HEW regulation, by requiring proof of actual contributions from a MARS, reduces the expectation of Congress to a mere hope." 312 F. Supp., at 202. We disagree. We traversed the entire spectrum of that question in *King* v. *Smith,* and find it unnecessary to restate the legislative history of the relevant statutes. We concluded that Congress "intended the term 'parent' in § 406 (a) of the Act . . . to include only those persons with a legal duty of support." 392 U. S., at 327. And we went on to say:

> "It is clear, as we have noted, that Congress expected 'breadwinners' who secured employment

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[8] An exception is a person whose presence is deemed essential to the well-being of the recipient of assistance and who is included in the family budget unit for calculation of need. See 42 U. S. C. § 602 (a) (7) (1964 ed., Supp. IV) which provides:

"A State plan . . . must . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income . . . ."

The so-called AFDC "essential person" is also covered by regulation. See 45 CFR § 233.20 (a) (2) (vi), 34 Fed. Reg. 1394.

would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children. We think it beyond reason to believe that Congress would have considered that providing employment for the paramour of a deserted mother would benefit the mother's children whom he was not obligated to support.

"By a parity of reasoning, we think that Congress must have intended that the children in such a situation remain eligible for AFDC assistance notwithstanding their mother's impropriety." *Id.*, at 329.

That reasoning led us to invalidate Alabama's "substitute father" regulation.[9] Like reasoning leads us to hold, contrary to the three-judge District Court, that the HEW regulation is valid. We only add that HEW might reasonably conclude that only he who is as near as a real or adoptive father would be has that consensual relation to the family which makes it reliably certain that his income is actually available for support of the children in the household. HEW may, in other words, reasonably conclude that an obligation to support under

[9] "Under the Alabama regulation, an 'able-bodied man, married or single, is considered a substitute father of *all the children of the applicant* . . . mother' in three different situations: (1) if 'he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation'; or (2) if 'he visits [the home] frequently for the purpose of cohabiting with the child's natural or adoptive mother'; or (3) if 'he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere.' Whether the substitute father is actually the father of the children is irrelevant. It is also irrelevant whether he is legally obligated to support the children, and whether he does in fact contribute to their support. What is determinative is simply whether he 'cohabits' with the mother." 392 U. S., at 313–314.

state law must be of "general applicability" to make that obligation in reality a solid assumption on which estimates of funds actually available to children on a regular basis may be calculated.

Any lesser duty of support might merely be a device for lowering welfare benefits without guaranteeing that the child would regularly receive the income on which the reduction is based, that is to say, it would not approximate the obligation to support placed on and normally assumed by natural or adoptive parents. That reading of the Act and of *King* v. *Smith* certainly cannot be said to be impermissible.

Our decision in *King* v. *Smith* held only that a legal obligation to support was a necessary condition for qualification as a "parent"; it did not also suggest that it would always be a sufficient condition. We find nothing in this regulation to suggest inconsistency with the Act's basic purpose of providing aid to "needy" children, except where there is a "breadwinner" in the house who can be expected to provide such aid himself. HEW, the agency charged with administering the Act, has apparently concluded that as a matter of current, practical realities, the relationship of the MARS to the home is less stable than that of the stepfather who at least has the additional tie of the ceremonial marriage, and that the likelihood of the MARS' contributing his income to the children—even if legally obligated to do so—is sufficiently uncertain in the absence of the marriage tie, to prevent viewing him as a "breadwinner" unless the bread is actually set on the table. Nothing in this record shows that this administrative judgment does not correspond to the facts. We give HEW the deference due the agency charged with the administration of the Act, see, *e. g., Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U. S. 367, 381; *Zemel* v. *Rusk,* 381 U. S. 1, 11–12. In the absence of proof of actual con-

tribution, California may not consider the child's "resources" to include either the income of a nonadopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS—whatever the nature of his obligation to support.

California on remand is foreclosed from arguing that its assumption-of-income provisions are consistent with the Act as applied to MARS; the State is limited to demonstrating that those provisions may be retained under the Act as applied to nonadopting stepfathers by showing that the legal obligation placed on such stepparents is consistent with the obligation required by the federal regulation.

Whether in that posture of the case California's laws and regulations are inconsistent with the federal standard is a question that the District Court did not reach. The case is therefore reversed and remanded so that such an adjudication can be made.

It is so ordered.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

In my dissenting opinion in *Rosado* v. *Wyman, ante,* at 430–433, I pointed out that in many lawsuits brought against state welfare authorities by recipients of Aid to Families With Dependent Children (AFDC) the real controversy is not between the AFDC recipients and the State but between the Federal Government and the state government. This case presents precisely that situation. The Solicitor General has informed the Court that the Department of Health, Education, and Welfare (HEW)—the federal agency vested by statute with the duty of insuring that States which receive federal AFDC matching funds abide by the federal requirements—has determined that § 11351 of the California Welfare and Institutions Code is inconsistent

with federal AFDC regulations, 45 CFR § 203.1. This California statute provided when this suit was brought that the income of a stepfather or a man assuming the role of a spouse (MARS) to the mother of dependent, needy children shall be considered as available to the children in computing the AFDC assistance to which the children are entitled. The federal regulations, however, in general refuse to assume that the income of a stepfather or MARS is available to the children in the absence of proof of actual contributions. California admits that there is a conflict between these state and federal provisions but contends that the federal regulations are inconsistent with the requirements of the Social Security Act and that its statute is consistent with the Act. The controversy between these two governments is thus real and substantial. It was for exactly such situations that the Social Security Act provided a comprehensive remedial scheme for resolving disputes between federal and state governments. See 42 U. S. C. §§ 602, 604, 1316 (1964 ed. and Supp. IV). Under this scheme HEW has the power, subject to certain notice and hearing requirements, to terminate AFDC assistance to a State that refuses to conform to the federal policies. In this case, the termination of federal AFDC assistance to California or the credible threat to terminate that assistance in the near future would compel a resolution of the underlying issue in this lawsuit by forcing California (1) to amend its laws to conform to the existing federal regulations, (2) to challenge HEW's determination of nonconformity in the federal courts as provided in 42 U. S. C. § 1316 (1964 ed., Supp. IV), or (3) to withdraw from the federally assisted AFDC program. Generally, the Act provides procedures that allow the state and federal governments to resolve their difference either by agreement or by lawsuit. As I stated in my dissent in *Rosado* v. *Wyman, supra,* at 434–435,

if the congressional objective in establishing the Act's remedial procedures is to be realized it is imperative that the integrity of these procedures not be undermined by premature lawsuits brought by welfare recipients. I think these remedial provisions of the Social Security Act reflect an unmistakable intent to give HEW primary jurisdiction over technical and difficult welfare issues and that these procedures should be the exclusive ones until they have been exhausted. Accordingly, in my view it was error for the District Court to assume jurisdiction and decide this case. It is strange indeed to me that the Federal Government has never been made a party to this lawsuit although its interests are deeply involved.

I would add this note of caution, however. The Federal Government has no power under our Constitution to force or coerce a State into disobeying its own valid laws while those laws are still on the books. My concern in this regard arises from my belief that a State, absent some express constitutional prohibition, has power and authority to fix and determine the property relationships and support obligations among persons within its boundaries. I certainly hope that the opinion of the Court today will not be interpreted as compelling a State to violate its own valid laws in order to obtain money from the Federal Government.

When this action was brought challenging the California statute as inconsistent with the federal regulations, HEW was in the process of considering the effect of its new regulations on the California statute. It is now clear that HEW was preparing to rule that the California provision was inconsistent with the federal requirements. If this Court today would vacate the judgment of the District Court, that order would leave HEW free to proceed to settle its controversy with California as Congress has provided. For this reason, and

for those stated above, I would vacate the judgment of the District Court and order that the case be dismissed as prematurely brought.

MR. CHIEF JUSTICE BURGER, dissenting.

Unlike *Dandridge* v. *Williams, ante,* p. 471, the administrative procedures provided by statute have not been exhausted here. For this reason HEW's primary jurisdiction remains a bar to the jurisdiction of federal courts over suits brought by welfare recipients. See *Rosado* v. *Wyman, ante,* p. 430 (dissenting opinion of MR. JUSTICE BLACK). I therefore join the dissent filed by MR. JUSTICE BLACK.

BACHELLAR ET AL. *v.* MARYLAND

CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 729. Argued March 2, 1970—Decided April 20, 1970

Petitioners' convictions for violating Maryland's disorderly conduct statute stemming from a demonstration protesting the Vietnam conflict must be set aside, as the jury's general verdict, in light of the trial judge's instructions, could have rested on several grounds, including "the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area," and a conviction on that ground would violate the constitutional protection for the advocacy of unpopular ideas. *Stromberg* v. *California,* 283 U. S. 359. Pp. 565–571.

3 Md. App. 626, 240 A. 2d 623, reversed and remanded.

Anthony G. Amsterdam argued the cause for petitioners. With him on the brief was *Fred E. Weisgal.*

H. Edgar Lentz, Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Francis B. Burch,* Attorney General, and *Edward F. Borgerding,* Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in Baltimore City Criminal Court convicted petitioners of violating Md. Ann. Code, Art. 27, § 123 (1967 Repl. Vol.),[1] which prohibits "acting in a disorderly manner to the disturbance of the public peace, upon any public street . . . in any [Maryland] city . . . ."[2] The

[1] The trial in the Criminal Court was *de novo* upon appeal from a conviction in the Municipal Court of Baltimore. The Criminal Court judge sentenced each petitioner to 60 days in jail and a $50 fine.

[2] The statute was amended in 1968 but without change in the operative language involved in this case. See Md. Ann. Code, Art. 27, § 123 (c) (Supp. 1969).

prosecution arose out of a demonstration protesting the Vietnam war which was staged between 3 and shortly after 5 o'clock on the afternoon of March 28, 1966, in front of a United States Army recruiting station located on a downtown Baltimore street. The Maryland Court of Special Appeals rejected petitioners' contention that their conduct was constitutionally protected under the First and Fourteenth Amendments and affirmed their convictions. 3 Md. App. 626, 240 A. 2d 623 (1968). The Court of Appeals of Maryland denied certiorari in an unreported order. We granted certiorari, 396 U. S. 816 (1969). We reverse.

The trial judge instructed the jury that there were alternative grounds upon which petitioners might be found guilty of violating § 123. The judge charged, first, that a guilty verdict might be returned if the jury found that petitioners had engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." The judge also told the jury that "[a] refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." [3] So instructed, the jury re-

[3] Both elements of the instruction were based on the Maryland Court of Appeals' construction of § 123 in *Drews* v. *Maryland,* 224 Md. 186, 192, 167 A. 2d 341, 343–344 (1961), vacated and remanded on other grounds, 378 U. S. 547 (1964), reaffirmed on remand, 236 Md. 349, 204 A. 2d 64 (1964), appeal dismissed and cert. denied, 381 U. S. 421 (1965). The instruction was "that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct."

The trial judge refused to grant petitioners' request that the jury be charged to disregard any anger of onlookers that arose from their

turned a general verdict of guilty against each of the petitioners.

Since petitioners argue that their conduct was constitutionally protected, we have examined the record for ourselves. When "a claim of constitutionally protected right is involved, it 'remains our duty . . . to make an independent examination of the whole record.'" *Cox* v. *Louisiana* (*I*), 379 U. S. 536, 545 n. 8 (1965). We shall discuss first the factual situation that existed until shortly before 5 o'clock on the afternoon of the demonstration, since the pattern of events changed after that time. There is general agreement regarding the nature of the events during the initial period.

Baltimore law enforcement authorities had advance notice of the demonstration, and a dozen or more police officers and some United States marshals were on hand when approximately 15 protesters began peacefully to march in a circle on the sidewalk in front of the station. The marchers carried or wore signs bearing such legends as: "Peasant Emancipation, Not Escalation," "Make Love not War," "Stop in the Name of Love," and "Why are We in Viet Nam?" The number of protesters increased to between 30 and 40 before the demonstration ended. A crowd of onlookers gathered nearby and across the street. From time to time some of the petitioners and other marchers left the circle and distributed leaflets

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disagreement with petitioners' expressed views about Vietnam. For example, the judge refused to instruct the jury that "if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants. And if you have a reasonable doubt whether the anger of those other persons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of the defendants in sitting or staying on the street, you must acquit these defendants."

among and talked to persons in the crowd. The lieutenant in charge of the police detail testified that he "overheard" some of the marchers debate with members of the crowd about "the Viet Cong situation," and that a few in the crowd resented the protest; "[o]ne particular one objected very much to receiving the circular." However, the lieutenant did not think that the situation constituted a disturbance of the peace. He testified that "[a]s long as the peace was not disturbed I wasn't doing anything about it."

Clearly the wording of the placards was not within that small class of "fighting words" that, under *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574 (1942), are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace," nor is there any evidence that the demonstrators' remarks to the crowd constituted "fighting words." Any shock effect caused by the placards, remarks, and peaceful marching must be attributed to the content of the ideas being expressed, or to the onlookers' dislike of demonstrations as a means of expressing dissent. But "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," *Street* v. *New York,* 394 U. S. 576, 592 (1969); see also *Cox* v. *Louisiana (I), supra; Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), or simply because bystanders object to peaceful and orderly demonstrations. Plainly nothing that occurred during this period could constitutionally be the ground for conviction under § 123. Indeed, the State makes no claim that § 123 was violated then.

We turn now to the events that occurred shortly before and after 5 o'clock. The petitioners had left the marchers after half past 3 to enter the recruiting station. There they had attempted to persuade the sergeant in

charge to permit them to display their antiwar materials in the station or in its window fronting on the sidewalk. The sergeant had told them that Army regulations forbade him to grant such permission. The six thereupon staged a sit-in on chairs and a couch in the station.[4] A few minutes before 5 o'clock the sergeant asked them to leave, as he wanted to close the station for the day. When petitioners refused, the sergeant called on United States marshals who were present in the station to remove them. After deputizing several police officers to help, the marshals undertook to eject the petitioners.[5]

There is irreconcilable conflict in the evidence as to what next occurred. The prosecution's witnesses testified that the marshals and the police officers "escorted" the petitioners outside, and that the petitioners thereupon sat or lay down, "blocking free passage of the sidewalk." The police lieutenant in charge stated that he then took over and three times ordered the petitioners to get up and leave. He testified that when they remained sitting or lying down, he had each of them picked up bodily and removed to a patrol wagon. In sharp contrast, defense witnesses said that each petitioner was thrown bodily out the door of the station and landed on his back, that petitioners were not positioned so as to block the sidewalk completely, and that no police command was given to them to move away; on the contrary, that as some of them struggled to get to their feet, they were held down by the police officers until they were picked up and thrown into the patrol wagon. The evidence is clear, however, that while petitioners were on the sidewalk, they began to sing "We Shall

[4] Petitioners' conduct in the station is not at issue in this case, since the State did not prosecute them for their conduct in that place.

[5] The local police officers were deputized as marshals because their local police powers did not extend to the federally operated recruiting station.

Overcome" and that they were surrounded by other demonstrators carrying antiwar placards. Thus, petitioners remained obvious participants in the demonstration even after their expulsion from the recruiting station.[6] A crowd of 50–150 people, including the demonstrators, was in the area during this period.

The reaction of the onlookers to these events was substantially the same as that to the earlier events of the afternoon. The police lieutenant added only that two uniformed marines in the crowd appeared angry and that a few other bystanders "were debating back and forth about Bomb Hanoi and different things and I had to be out there to protect these people because they wouldn't leave." Earlier too, however, some of the crowd had taken exception to the petitioners' protest against the Vietnam war.

On this evidence, in light of the instructions given by the trial judge, the jury could have rested its verdict on any of a number of grounds. The jurors may have found that petitioners refused "to obey a policeman's command to move on when not to do so [might have endangered] the public peace." Or they may have relied on a finding that petitioners deliberately obstructed the sidewalk, thus offending, disturbing, and inciting the bystanders.[7] Or the jurors may have credited petitioners'

[6] The defense evidence indicated that petitioners were on the sidewalk after their removal from the recruiting station for only five minutes. A prosecution witness testified that they were there for 15 or 20 minutes.

[7] Maryland states in its brief, at 41–42, that "[o]bstructing the sidewalk had the legal effect under these circumstances of not only constituting a violation of . . . § 123 . . . but also of Article 27, § 121 of the Maryland Code, obstructing free passage." Had the State wished to ensure a jury finding on the obstruction question, it could have prosecuted petitioners under § 121, which specifically punishes "[a]ny person who shall wilfully obstruct or hinder the free passage of persons passing along or by any public street or highway . . . ."

testimony that they were thrown to the sidewalk by the police and held there, and yet still have found them guilty of violating § 123 because their anti-Vietnam protest amounted to "the doing or saying . . . of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." Thus, on this record, we find that petitioners may have been found guilty of violating § 123 simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions.

Stromberg v. *California,* 283 U. S. 359 (1931), is the controlling authority. There the jury returned a general verdict of guilty against an appellant charged under a California statute making it an offense publicly to display a red flag (a) "as a sign, symbol or emblem of opposition to organized government," (b) "as an invitation or stimulus to anarchistic action," or (c) "as an aid to propaganda that is and was of a seditious character." *Id.,* at 361. This Court held that clause (a) was unconstitutional as possibly punishing peaceful and orderly opposition to government by legal means and within constitutional limitations. The Court held that, even though the other two statutory grounds were severable and constitutional, the conviction had to be reversed, because the verdict "did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . [T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any

of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." 283 U. S., at 368. See also *Williams* v. *North Carolina,* 317 U. S. 287 (1942); *Terminiello* v. *Chicago, supra; Yates* v. *United States,* 354 U. S. 298 (1957); *Street* v. *New York, supra.*

On this record, if the jury believed the State's evidence, petitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. See, *e. g., Cox* v. *Louisiana* (*I*), *supra,* at 554–555; *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 90–91 (1965). It is impossible to say, however, that either of these grounds was the basis for the verdict. On the contrary, so far as we can tell, it is equally likely that the verdict resulted "merely because [petitioners' views about Vietnam were] themselves offensive to some of their hearers." *Street* v. *New York, supra,* at 592. Thus, since petitioners' convictions may have rested on an unconstitutional ground, they must be set aside.

The judgment of the Maryland Court of Special Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

WOODWARD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 412. Argued February 26, 1970—Decided April 20, 1970

Petitioner taxpayers, majority stockholders of an Iowa corporation, voted for perpetual extension of the corporate charter, and under Iowa law became obliged to purchase at its "real value" the stock of a minority shareholder who had voted against the extension. On the parties' failure to agree on the "real value" of the minority interest, petitioners brought an appraisal action in state court and thereafter bought the minority stock at a value fixed by the court. In their federal income tax returns petitioners claimed deductions as "ordinary . . . expenses paid . . . for the management, conservation, or maintenance of property held for the production of income" for attorneys', accountants', and appraisers' fees in connection with the appraisal litigation. The Commissioner of Internal Revenue disallowed the deductions "because the fees represent capital expenditures in connection with the acquisition of capital stock of a corporation," a determination sustained by the Tax Court and the Court of Appeals. Petitioners contend that current deductibility is justified on the ground that the "primary purpose" of the litigation was not for defense or perfection of title (a nondeductible capital expenditure) but to determine the stock's value. *Held:* The expenses incurred by petitioners must be treated as part of their cost in acquiring the stock rather than as ordinary expenses since the appraisal proceeding was merely the substitute provided by state law for the process of negotiation to fix the price at which the stock was to be purchased. The appropriate standard here is the origin of the claim litigated rather than the taxpayers' "primary purpose" in incurring the appraisal litigation expenses. Pp. 575–579.

410 F. 2d 313, affirmed.

Donald P. Cooney argued the cause for petitioners. On the brief was *Martin M. Cooney.*

Assistant Attorney General Walters argued the cause for respondent. With him on the brief were *Solicitor General Griswold, Matthew J. Zinn, Gilbert E. Andrews,* and *Stuart A. Smith.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case and *United States* v. *Hilton Hotels Corp., post,* p. 580, involve the tax treatment of expenses incurred in certain appraisal litigation.

Taxpayers owned or controlled a majority of the common stock of the Telegraph-Herald, an Iowa publishing corporation. The Telegraph-Herald was incorporated in 1901, and its charter was extended for 20-year periods in 1921 and 1941. On June 9, 1960, taxpayers voted their controlling share of the stock of the corporation in favor of a perpetual extension of the charter. A minority stockholder voted against the extension. Iowa law requires "those stockholders voting for such renewal . . . [to] purchase at its real value the stock voted against such renewal." Iowa Code § 491.25 (1966).

Taxpayers attempted to negotiate purchase of the dissenting stockholder's shares, but no agreement could be reached on the "real value" of those shares. Consequently, in 1962 taxpayers brought an action in state court to appraise the value of the minority stock interest. The trial court fixed a value, which was slightly reduced on appeal by the Iowa Supreme Court, *Woodward* v. *Quigley,* 257 Iowa 1077, 133 N. W. 2d 38, on rehearing, 257 Iowa 1104, 136 N. W. 2d 280 (1965). In July 1965, taxpayers purchased the minority stock interest at the price fixed by the court.

During 1963, taxpayers paid attorneys', accountants', and appraisers' fees of over $25,000, for services rendered

in connection with the appraisal litigation. On their 1963 federal income tax returns, taxpayers claimed deductions for these expenses, asserting that they were "ordinary and necessary expenses paid . . . for the management, conservation, or maintenance of property held for the production of income" deductible under § 212 of the Internal Revenue Code of 1954, 26 U. S. C. § 212. The Commissioner of Internal Revenue disallowed the deduction "because the fees represent capital expenditures incurred in connection with the acquisition of capital stock of a corporation." The Tax Court sustained the Commissioner's determination, with two dissenting opinions, 49 T. C. 377 (1968), and the Court of Appeals affirmed, 410 F. 2d 313 (C. A. 8th Cir. 1969). We granted certiorari, 396 U. S. 875 (1969), to resolve the conflict over the deductibility of the costs of appraisal proceedings between this decision and the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Hilton Hotels Corp., supra.*[1] We affirm.

Since the inception of the present federal income tax in 1913, capital expenditures have not been deductible.[2] See Internal Revenue Code of 1954, § 263. Such expenditures are added to the basis of the capital asset

[1] Other federal court decisions on the point are in conflict. Compare *Boulder Building Corp.* v. *United States,* 125 F. Supp. 512 (D. C. W. D. Okla. 1954) (holding appraisal proceeding costs capital expenditures), with *Smith Hotel Enterprises, Inc.* v. *Nelson,* 236 F. Supp. 303 (D. C. E. D. Wis. 1964) (holding such costs deductible as ordinary and necessary business expense). And see *Heller* v. *Commissioner,* 2 T. C. 371 (1943), aff'd, 147 F. 2d 376 (C. A. 9th Cir. 1945) (holding dissenting stockholder's appraisal costs deductible under predecessor to § 212).

See also *Naylor* v. *Commissioner,* 203 F. 2d 346 (C. A. 5th Cir. 1953), in which expenses of litigation to fix the purchase price of stock sold pursuant to an option to purchase it at its net asset value on a certain date were held deductible under the predecessor of § 212.

[2] See § II B of the Income Tax Act of 1913, 38 Stat. 167.

with respect to which they are incurred, and are taken into account for tax purposes either through depreciation or by reducing the capital gain (or increasing the loss) when the asset is sold. If an expense is capital, it cannot be deducted as "ordinary and necessary," either as a business expense under § 162 of the Code or as an expense of "management, conservation, or maintenance" under § 212.[3]

It has long been recognized, as a general matter, that costs incurred in the acquisition or disposition of a capital asset are to be treated as capital expenditures. The most familiar example of such treatment is the capitalization of brokerage fees for the sale or purchase of securities, as explicitly provided by a longstanding Treasury regulation, Treas. Reg. on Income Tax § 1.263 (a)–2 (e), and as approved by this Court in *Helvering* v. *Winmill,* 305 U. S. 79 (1938), and *Spreckels* v. *Commissioner,* 315 U. S. 626 (1942). The Court recognized that brokers' commissions are "part of the acquisition cost of the securities," *Helvering* v. *Winmill, supra,* at 84, and relied on the Treasury regulation, which had been approved by statutory re-enactment, to deny deductions for such commissions even to a taxpayer for whom they were a regular and recurring expense in his business of buying and selling securities.

The regulations do not specify other sorts of acquisition costs, but rather provide generally that "[t]he cost of acquisition . . . of . . . property having a useful life substantially beyond the taxable year" is a capital ex-

[3] The two sections are *in pari materia* with respect to the capital-ordinary distinction, differing only in that § 212 allows deductions for the ordinary and necessary expenses of nonbusiness profitmaking activities. See *United States* v. *Gilmore,* 372 U. S. 39, 44–45 (1963). *Heller* v. *Commissioner,* n. 1, *supra,* may have been based in part on the premise that the predecessor of § 212 permitted the deduction of some expenses that would have been capitalized if incurred in the conduct of a trade or business.

penditure. Treas. Reg. on Income Tax § 1.263 (a)–2 (a). Under this general provision, the courts have held that legal, brokerage, accounting, and similar costs incurred in the acquisition or disposition of such property are capital expenditures. See, *e. g., Spangler* v. *Commissioner,* 323 F. 2d 913, 921 (C. A. 9th Cir. 1963); *United States* v. *St. Joe Paper Co.,* 284 F. 2d 430, 432 (C. A. 5th Cir. 1960). See generally 4A J. Mertens, Law of Federal Income Taxation §§ 25.25, 25.26, 25.40, 25A.15 (1966 rev.). The law could hardly be otherwise, for such ancillary expenses incurred in acquiring or disposing of an asset are as much part of the cost of that asset as is the price paid for it.

More difficult questions arise with respect to another class of capital expenditures, those incurred in "defending or perfecting title to property." Treas. Reg. on Income Tax § 1.263 (a)–2 (c). In one sense, any lawsuit brought against a taxpayer may affect his title to property—money or other assets subject to lien.[4] The courts, not believing that Congress meant all litigation expenses to be capitalized, have created the rule that such expenses are capital in nature only where the taxpayer's "primary purpose" in incurring them is to defend or perfect title. See, *e. g., Rassenfoss* v. *Commissioner,* 158 F. 2d 764 (C. A. 7th Cir. 1946); *Industrial Aggregate Co.* v. *United States,* 284 F. 2d 639, 645 (C. A. 8th Cir. 1960). This test hardly draws a bright line, and has produced a melange of decisions, which, as the Tax Court has noted, "[i]t would be idle to suggest . . . can be reconciled." *Ruoff* v. *Commissioner,* 30 T. C. 204, 208 (1958).[5]

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[4] See *Hochschild* v. *Commissioner,* 161 F. 2d 817, 820 (C. A. 2d Cir. 1947) (Frank, J., dissenting).

[5] A large number of these decisions are collected in 4A Mertens, *supra,* §§ 25.24, 25A.16.

Taxpayers urge that this "primary purpose" test, developed in the context of cases involving the costs of defending property, should be applied to costs incurred in acquiring or disposing of property as well. And if it is so applied, they argue, the costs here in question were properly deducted, since the legal proceedings in which they were incurred did not directly involve the question of title to the minority stock, which all agreed was to pass to taxpayers, but rather was concerned solely with the value of that stock.[6]

We agree with the Tax Court and the Court of Appeals that the "primary purpose" test has no application here. That uncertain and difficult test may be the best that can be devised to determine the tax treatment of costs incurred in litigation that may affect a taxpayer's title to property more or less indirectly, and that thus calls for a judgment whether the taxpayer can fairly be said to be "defending or perfecting title." Such uncertainty is not called for in applying the regulation that makes the "cost of acquisition" of a capital asset a capital expense. In our view application of the latter regulation to litigation expenses involves the simpler inquiry whether the origin of the claim litigated is in the process of acquisition itself.

A test based upon the taxpayer's "purpose" in undertaking or defending a particular piece of litigation would encourage resort to formalisms and artificial distinctions. For instance, in this case there can be no doubt that

[6] Taxpayers argue at length that under Iowa law title to the stock passed before the appraisal proceeding. The Court of Appeals viewed Iowa law differently, and it seems to us that it was correct in so doing. See *United States* v. *Hilton Hotels Corp., post,* at 583–584, n. 2. But resolution of this question of state law makes no difference and is not necessary for decision of the case, since, as we hold in *Hilton Hotels,* the sequence in which title passes and price is determined is irrelevant for purposes of the tax question involved here.

legal, accounting, and appraisal costs incurred by taxpayers in *negotiating* a purchase of the minority stock would have been capital expenditures. See *Atzingen-Whitehouse Dairy Inc.* v. *Commissioner,* 36 T. C. 173 (1961). Under whatever test might be applied, such expenses would have clearly been "part of the acquisition cost" of the stock. *Helvering* v. *Winmill, supra.* Yet the appraisal proceeding was no more than the substitute that state law provided for the process of negotiation as a means of fixing the price at which the stock was to be purchased. Allowing deduction of expenses incurred in such a proceeding, merely on the ground that title was not directly put in question in the particular litigation, would be anomalous.

Further, a standard based on the origin of the claim litigated comports with this Court's recent ruling on the characterization of litigation expenses for tax purposes in *United States* v. *Gilmore,* 372 U. S. 39 (1963). This Court there held that the expense of defending a divorce suit was a nondeductible personal expense, even though the outcome of the divorce case would affect the taxpayer's property holdings, and might affect his business reputation. The Court rejected a test that looked to the consequences of the litigation, and did not even consider the taxpayer's motives or purposes in undertaking defense of the litigation, but rather examined the origin and character of the claim against the taxpayer, and found that the claim arose out of the personal relationship of marriage.

The standard here pronounced may, like any standard, present borderline cases, in which it is difficult to determine whether the origin of particular litigation lies in the process of acquisition.[7] This is not such a border-

[7] See, *e. g., Petschek* v. *United States,* 335 F. 2d 734 (C. A. 2d Cir. 1964), for a borderline case of whether legal expenses were incurred in the disposition of property.

line case. Here state law required taxpayers to "purchase" the stock owned by the dissenter. In the absence of agreement on the price at which the purchase was to be made, litigation was required to fix the price. Where property is acquired by purchase, nothing is more clearly part of the process of acquisition than the establishment of a purchase price.[8] Thus the expenses incurred in that litigation were properly treated as part of the cost of the stock that the taxpayers acquired.

Affirmed.

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[8] Taxpayers argue that "purchase" analysis cannot properly be applied to the appraisal situation, because the transaction is an involuntary one from their point of view—an argument relied upon by the District Court in the *Smith Hotel Enterprises* case, *supra*, n. 1. In the first place, the transaction is in a sense voluntary, since the majority holders know that under state law they will have to buy out any dissenters. More fundamentally, however, wherever a capital asset is transferred to a new owner in exchange for value either agreed upon or determined by law to be a fair *quid pro quo*, the payment itself is a capital expenditure, and there is no reason why the costs of determining the amount of that payment should be considered capital in the case of the negotiated price and yet considered deductible in the case of the price fixed by law. See *Isaac G. Johnson & Co.* v. *United States*, 149 F. 2d 851 (C. A. 2d Cir. 1945) (expenses of litigating amount of fair compensation in condemnation proceeding held capital expenditures).

UNITED STATES *v.* HILTON HOTELS CORP.

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

No. 528. Argued February 26, 1970—
Decided April 20, 1970

Respondent corporation (Hilton), which owned close to 90% of the stock of Waldorf, determined to merge the two companies. The merger was formally opposed by the holders of about 6% of Waldorf shares, title to whose stock under New York law thereupon passed to Waldorf, the dissenters becoming Waldorf's creditors for its fair value. On December 28, 1953, Hilton voted its Waldorf stock approving the merger, which was consummated in accordance with New York law on December 31. The dissenting Waldorf shareowners thereafter rejected a Hilton cash offer and began appraisal proceedings in the New York courts. Hilton retained a consultant to value the Waldorf stock as of the day before the Waldorf shareholders' merger vote, and also obtained legal and other services in connection with the appraisal litigation, which ultimately ended in a settlement. Hilton deducted the consulting and other professional fees on its income tax return as ordinary and necessary business expenses, which the Commissioner of Internal Revenue disallowed on the ground that the payments were capital expenditures. Hilton paid the tax and brought this refund suit in District Court, which held that the payments related to the appraisal proceeding were deductible. The Court of Appeals, applying the "primary purpose" test, affirmed, noting that the proceeding was not necessary to effect the merger but that its paramount purpose was to determine the fair value of the dissenting shareholders' share in Waldorf. *Held:*

1. Litigation costs arising out of the acquisition of a capital asset are capital expenses whether or not the taxpayer incurred them for the purpose of defending or perfecting title to property, *Woodward* v. *Commissioner, ante,* p. 572, and the functional nature of the appraisal remedy as a forced purchase of the dissenters' stock is the same, regardless of whether title passed before or after the price of their stock was determined. Pp. 583–584.

2. The debt that Hilton inherited from Waldorf of paying the dissenters for their shares retained its capital character through the merger, as did the expenditure for fixing the amount of that debt. Pp. 584–585.

410 F. 2d 194, reversed and remanded.

Assistant Attorney General Walters argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Matthew J. Zinn, Gilbert E. Andrews,* and *Stuart A. Smith.*

Milton A. Levenfeld argued the cause for respondent. With him on the brief were *Burton W. Kanter* and *Richard M. Kates.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This is the companion case to *Woodward* v. *Commissioner, ante,* p. 572, and presents a similar question involving the tax treatment of appraisal litigation expenses.

In 1953 taxpayer Hilton Hotels Corporation, which owned close to 90% of the common shares of the Hotel Waldorf-Astoria Corporation, determined to merge the two companies. Hilton retained a consulting firm to prepare a merger study to determine a fair rate of exchange between Hilton stock and Waldorf stock. After this study was completed, on November 12, 1953, Hilton and Waldorf entered into a merger agreement under which Hilton would be the surviving corporation, and 1.25 shares of Hilton stock would be offered for each outstanding Waldorf share not already held by Hilton. On December 28, Hilton voted its Waldorf stock to approve the merger by the requisite majority. Prior to the vote, the holders of about 6% of the Waldorf shares had filed with Waldorf their written objections

to the merger, and demanded payment for their stock, pursuant to § 91 of the New York Stock Corporation Law.

On December 31, 1953, Hilton filed the merger agreement and the certificate of consolidation with the Secretary of State of New York, thus consummating the merger under New York law. On January 7, 1954, Hilton made a cash offer to the dissenting Waldorf shareholders, which they rejected. The dissenters then began appraisal proceedings in the New York courts, pursuant to § 21 of the New York Stock Corporation Law.

Between January and May 1954, Hilton asked its consulting firm to value the Waldorf stock as of December 27, 1953, the day prior to the Waldorf shareholders' vote approving the merger. Hilton also obtained the services of lawyers, and other professional services, in connection with the appraisal litigation. The appraisal proceeding was finally terminated in June 1955, when the state court approved a settlement agreed to by the parties.

Hilton deducted the fees paid to the consulting firm, and the cost of legal and other professional services arising out of the appraisal proceeding, as ordinary and necessary business expenses under § 162 of the Internal Revenue Code of 1954, 26 U. S. C. § 162. The Commissioner of Internal Revenue disallowed the deduction on the ground that the payments were capital expenditures. Hilton paid the tax and sued for a refund in the District Court. In the course of that suit, Hilton conceded, and the court held, that the payments to the consulting firm for the pre-merger determination of fair value were a nondeductible capital outlay. But the District Court held that the fees and costs related to the post-merger appraisal proceeding itself were deductible. 285 F. Supp. 617 (D. C. N. D. Ill. 1968). The Court of Appeals

affirmed, 410 F. 2d 194 (C. A. 7th Cir.), and we granted certiorari, 396 U. S. 954 (1969). We reverse.

The Court of Appeals recognized that expenses of acquiring capital assets are capital expenditures for tax purposes. However, the court believed that the "primary purpose" test of *Rassenfoss* v. *Commissioner,* 158 F. 2d 764 (C. A. 7th Cir. 1946), should be applied to determine whether the appraisal proceeding was sufficiently related to the merger or the stock acquisition. Noting that "the proceeding was not necessary to the consummation of the merger nor did it function primarily to permit the acquisition of the objecting holders' shares," the court found that "the paramount purpose of the appraisal proceeding was to determine the fair value of the dissenting stockholders' shares in Waldorf." 410 F. 2d, at 197.

As we held in *Woodward, supra,* the expenses of litigation that arise out of the acquisition of a capital asset are capital expenses, quite apart from whether the taxpayer's purpose in incurring them is the defense or perfection of title to property. The chief distinction between this case and *Woodward* is that under New York law title to the dissenters' stock passed to Waldorf as soon as they formally registered their dissent, placing them in the relationship of creditors of the company for the fair value of the stock,[1] whereas under Iowa law passage of title was delayed until after the price was settled in the appraisal proceeding.[2]

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[1] Section 91, subd. 9, of the New York Stock Corporation Law provides that a corporate consolidation becomes effective upon the filing of the requisite certificate. Section 21, subd. 6, of the same law provides that as of the time of a merger vote, a dissenting shareholder loses all rights as such, except the right to receive payment for the value of his shares.

[2] Iowa Code § 491.25 (1966) provides that majority shareholders voting for renewal "shall have three years from the date such

This is a distinction without a difference. The functional nature of the appraisal remedy as a forced purchase of the dissenters' stock is the same, whether title passes before or after the price is determined. Determination and payment of a price is no less an element of an acquisition by purchase than is the passage of title to the property. In both *Woodward* and this case, the expenses were incurred in determining what that price should be, by litigation rather than by negotiation. The whole process of acquisition required both legal operations—fixing the price, and conveying title to the property—and we cannot see why the order in which those operations occurred under applicable state law should make any difference in the characterization of the expenses incurred for the particular federal tax purposes involved here.

Hilton also argues that the appraisal costs cannot be considered as its own capital expenditures, since Waldorf acquired the shares (on December 28) before the merger (on December 31). This argument would carry too far. It is true that title to the dissenters' stock passed to Waldorf before that corporation was merged into the surviving corporation, Hilton. But the stock was never paid for by Waldorf; rather Hilton assumed all of Waldorf's debts under the merger agreement, and finally paid for the stock after the appraisal proceeding was settled. If Waldorf's acquisition of the minority stock interest was not a capital transaction of Hilton's, then Hilton's payment for the stock itself, as well as the expenditures made in fixing that price, would lose its

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action for renewal was taken in which to purchase and pay for the stock voting against such renewal . . . ." There is no intimation in the statute itself, nor in Iowa cases construing it cited by petitioners in *Woodward, supra,* that dissenters lose any of their rights as shareholders, or that title passes to the majority shareholders, prior to the actual purchase of the dissenters' shares.

character as a capital expenditure of Hilton's. But Hilton concedes that the payment for the stock was a capital expenditure on its part. The debts that Hilton inherited from Waldorf retained their capital or ordinary character through the merger, and so did the expenditures for fixing the amount of those debts.

In short, the distinctions urged between this case and *Woodward* are not availing. The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with directions to dismiss the complaint.

It is so ordered.

STANDARD INDUSTRIES, INC. *v.* TIGRETT INDUSTRIES, INC., ET AL.

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

No. 445. Argued March 2, 1970—Decided April 20, 1970

411 F. 2d 1218, affirmed by an equally divided Court.

I. Walton Bader argued the cause for petitioner. With him on the briefs was *Maximilian Bader.*

Ralph W. Kalish argued the cause and filed a brief for respondents.

Lawrence G. Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Richard H. Stern.*

Sidney Neuman argued the cause for the American Patent Law Association as *amicus curiae.* On the brief were *Frank L. Neuhauser, John F. Witherspoon, Robert E. LeBlanc, William L. Mathis,* and *Henry Shur.*

PER CURIAM.

The judgments are affirmed by an equally divided Court.

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

In this case respondents sued petitioner for payments alleged to be due under a patent-licensing agreement. At trial and on appeal petitioner defended primarily on the ground that its product did not involve any use of the respondent's patent. Petitioner did not at any time attack the validity of the patent itself, and apparently conceded that controlling law prevented it from doing so. The District Court found that the product did utilize the patented invention and awarded damages. The Court

of Appeals for the Sixth Circuit affirmed in an opinion delivered May 27, 1969, 411 F. 2d 1218.

On June 16, 1969, this Court decided in *Lear, Inc.* v. *Adkins,* 395 U. S. 653, that a patent licensee could attack the validity of a patent. That case specifically overruled the patent-licensee estoppel doctrine applied in *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.,* 339 U. S. 827 (1950), a doctrine that was the controlling law at all times in the proceedings below. Petitioner now seeks to attack the validity of the patent, but respondents argue that since the issue was never raised below, it cannot now be litigated.

The failure to assert invalidity below cannot, in these circumstances, be deemed a waiver of that defense. The Court has recognized that to be effective a waiver must be "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), and we have frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law since the trial. This principle has most often been applied in proceedings relating to criminal prosecutions,[1] but it has also been invoked in purely civil cases.[2] The principle has not been limited to constitutional issues, and the Court has permitted consideration on appeal of statutory arguments not presented below.[3] In deciding whether such

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[1] See *White* v. *Maryland,* 373 U. S. 59 (1963); cf. *McConnell* v. *Rhay,* 393 U. S. 2 (1968); *Tehan* v. *Shott,* 382 U. S. 406 (1966); *Linkletter* v. *Walker,* 381 U. S. 618, 622–629 (1965); *Griffin* v. *California,* 380 U. S. 609 (1965).

[2] *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 142–145 (opinion of HARLAN, J.), 172 n. 1 (separate opinion of BRENNAN, J.) (1967); *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966); *Uebersee Finanz-Korp.* v. *McGrath,* 343 U. S. 205, 213 (1952); *Hormel* v. *Helvering,* 312 U. S. 552, 556–557 (1941).

[3] In *Hormel* v. *Helvering, supra,* the Court allowed the Commissioner of Internal Revenue to rely on § 22 (a) of the Revenue Act

new arguments can be considered, we have primarily considered three factors: first, whether there has been a material change in the law; second, whether assertion of the issue earlier would have been futile; and third, whether an important public interest is served by allowing consideration of the issue. It is clear to me that all these criteria are met in this case.

Undoubtedly our decision in *Lear* was a major change in the field of patent law. The Court implicitly recognized this fact by overruling the estoppel holding in *Automatic Radio*. It is also clear that the trial court was satisfied that applicable law precluded the assertion of invalidity by patent licensees [4] and thus earlier argument on the point would have been futile. Finally, and most importantly, an overriding public interest would be served by allowing petitioner to challenge the validity of this patent. Last Term we unanimously held that "the public's interest in the elimination of specious patents would be significantly prejudiced if the retroactive effect of [*Lear*] were limited in any way." *Lear, supra,* at 674 n. 19. I do not understand how today's decision can be reconciled with that statement. Although analytically this case may present a question of waiver and not retroactivity, the public interest that the Court felt required full retroactivity in *Lear* is an equally compelling reason for allowing petitioner's attack now in spite of the concessions below. I would vacate the judgments below and remand the case to the District Court for a determination of the validity of the patent in issue.

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of 1934 although his argument before the Board of Tax Appeals had rested solely on §§ 166 and 167. We did so because of the intervening decision in *Helvering* v. *Clifford,* 309 U. S. 331 (1940).

[4] App. 52a, 129a–3.

SNYDER *v.* WARE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 1225. Decided April 20, 1970

Affirmed.

J. Minos Simon for appellant.

PER CURIAM.

The judgment is affirmed.

JACKSON ET AL. *v.* DEPARTMENT OF PUBLIC WELFARE OF FLORIDA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 471, Misc. Decided April 20, 1970

Vacated and remanded.

Howard W. Dixon for appellants.

Earl Faircloth, Attorney General of Florida, *T. T. Turnbull* and *Michael Schwartz,* Assistant Attorneys General, and *S. Strome Maxwell* for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case is remanded to the District Court for reconsideration in light of *Goldberg* v. *Kelly, ante,* p. 254; Fed. Rule Civ. Proc. 23; and to determine whether the case is moot.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE STEWART dissent.

GIAGNOCAVO *v.* BUCKS COUNTY COMMISSIONERS

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 1239. Decided April 20, 1970

Appeal dismissed.

Peter A. Glascott 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 a substantial federal question.

SPARTAN'S INDUSTRIES, INC., ET AL. *v.* TEXAS

APPEAL FROM THE SUPREME COURT OF TEXAS

No. 1255. Decided April 20, 1970

447 S. W. 2d 407, appeal dismissed.

William H. Allen, William H. Bloch, George A. Kampmann, Oscar Spitz, Harold B. Berman, and *Jay S. Fichtner* for appellants.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Monroe Clayton,* 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.

SUNDACO, INC., ET AL. *v.* TEXAS ET AL.

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

No. 1271. Decided April 20, 1970

445 S. W. 2d 606, appeal dismissed.

William H. Allen, Harold B. Berman, and *Jay S. Fichtner* for appellants.

Crawford C. Martin, Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Monroe Clayton,* Assistant Attorneys General, for appellee the State of Texas.

PER CURIAM.

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

EUGENE SAND & GRAVEL, INC. *v.* LOWE ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON

No. 1335. Decided April 20, 1970

254 Ore. 518, 459 P. 2d 222, appeal dismissed.

John E. Jaqua for appellant.

PER CURIAM.

The appeal is dismissed, it appearing that the judgment below rests upon an adequate state ground.

GABLE, DBA BOOK SALES CO. *v.* JENKINS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1049. Decided April 20, 1970

Affirmed.

Wesley R. Asinof for appellant.

Henry L. Bowden for appellee.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

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

HACKNEY, COMMISSIONER OF PUBLIC WELFARE OF TEXAS, ET AL. *v.* MACHADO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 553. Decided April 20, 1970

299 F. Supp. 644, vacated and remanded.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Hawthorne Phillips,* Executive Assistant Attorney General, and *J. C. Davis* and *John H. Banks,* Assistant Attorneys General, for appellants.

C. Stanley Banks, Jr., for appellees.

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court for reconsideration in light of *Goldberg* v. *Kelly, ante,* p. 254.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE STEWART dissent.

UNITED STATES *v.* SIMON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

No. 742. Decided April 20, 1970

301 F. Supp. 859, vacated and remanded.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Mervyn Hamburg* for the United States.

Jack McManus for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for the Western District of Wisconsin with instructions to reinstate count 1 of the indictment, charging a violation of 26 U. S. C. § 4742 (a).

MONTGOMERY, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* KAISER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 828. Decided April 20, 1970

Vacated and remanded.

Thomas C. Lynch, Attorney General of California, and *Elizabeth Palmer,* Deputy Attorney General, for appellants.

Thomas L. Fike for appellees.

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for the Northern District of California for further consideration in light of *Dandridge* v. *Williams, ante,* p. 471.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that the judgment should be affirmed.

SANTANA *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

No. 1002. Decided April 20, 1970

Certiorari granted; 444 S. W. 2d 614, vacated and remanded.

H. Ernest Griffith for petitioner.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Monroe Clayton,* Assistant Attorneys General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Texas for further consideration in light of *In re Winship, ante,* p. 358.

THE CHIEF JUSTICE and MR. JUSTICE STEWART dissent for the reasons set forth in the dissenting opinion of THE CHIEF JUSTICE in *In re Winship, ante,* p. 375. MR. JUSTICE BLACK dissents for the reasons set forth in his dissenting opinion in *In re Winship, ante,* p. 377.

RICHARD S. *v.* CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 1478, Misc. Decided April 20, 1970

Vacated and remanded.

Jonathan A. Weiss for appellant.

J. Lee Rankin, Stanley Buchsbaum, and *Robert T. Hartmann* for appellee.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *In re Winship, ante,* p. 358.

THE CHIEF JUSTICE and MR. JUSTICE STEWART dissent for the reasons set forth in the dissenting opinion of THE CHIEF JUSTICE in *In re Winship, ante,* p. 375. MR. JUSTICE BLACK dissents for the reasons set forth in his dissenting opinion in *In re Winship, ante,* p. 377.

TOOAHNIPPAH (GOOMBI), ADMINISTRATRIX, ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 300. Argued January 14, 1970—Decided April 27, 1970

Testator, a Comanche Indian, left his estate consisting of interests in three Comanche allotments under the jurisdiction of the Department of the Interior's Bureau of Indian Affairs, to a niece and her children. Decedent was survived by a putative married daughter, with whom he had not been close. Pursuant to 25 U. S. C. § 373, which requires approval by the Secretary of the Interior of a will of an Indian devising allotments, a hearing was held before an Examiner of Inheritance. He found that the daughter was decedent's sole heir but concluded that the will should be approved as it was properly executed, statements of the draftsman and witnesses showed that testator possessed testamentary capacity, and failure to provide for the daughter was not unnatural since there had been no close relationship. The Regional Solicitor, acting for the Secretary, under a standard to "most nearly achieve just and equitable treatment of the beneficiaries [under the will] and the decedent's heirs-at-law," set aside the Examiner's action, and ordered distribution to the daughter. The beneficiaries brought suit in the District Court, contending that the Regional Solicitor's action exceeded his authority under § 373. That court held that the Administrative Procedure Act does not preclude judicial review and that the Regional Solicitor erred in viewing the Secretary's powers as authorizing disapproval of any will thought unwise or inequitable. The Court of Appeals reversed, holding the Secretary's action under § 373 unreviewable. *Held:*

1. The Secretary's disapproval is subject to judicial review, as there is no language in § 373 (enacted as § 2 of the Act of June 25, 1910) evincing an intention to make the Secretary's action unreviewable, and the finality language of § 1 of the 1910 Act cannot be carried over to the other sections of that Act. Pp. 605–607.

2. Whatever may be the scope of the Secretary's power under § 373, there is nothing in the statute, its history, or purpose that vests in a government official the power to revoke or rewrite a

will that reflects a rational testamentary scheme simply because of a subjective feeling that the disposition was not "just and equitable." On this record the disapproval was arbitrary and capricious. Pp. 607–610.

407 F. 2d 394, reversed and remanded.

Omer Luellen argued the cause and filed briefs for petitioners.

Richard B. Stone argued the cause for respondent Hickel, *pro hac vice.* With him on the brief were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Edmund B. Clark,* and *Robert S. Lynch. Houston Bus Hill* argued the cause and filed a brief for respondent Horse.

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

We granted the writ to review the action of the Court of Appeals holding that the decision of the Regional Solicitor, acting for the Secretary of the Interior, disapproving the will of a Comanche Indian constitutes final and unreviewable agency action. We conclude that such decision is subject to judicial review.[1]

George Chahsenah, a Comanche Indian, died on October 11, 1963, unmarried and without a surviving father, mother, brother, or sister. His estate consisted of interests in three Comanche allotments situated in Oklahoma under the jurisdiction of the Bureau of Indian Affairs, Department of the Interior.[2] Shortly after

[1] The Court of Appeals decision, which held that the United States District Court for the Western District of Oklahoma had erred in reviewing the Regional Solicitor's action, is reported as *High Horse* v. *Tate,* 407 F. 2d 394.

[2] The General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 331 *et seq.,* provides, *inter alia,* for the allotment to individual Indians of parcels of land. The title to these lands is held by the United States in

Chahsenah's death, the value of those interests was fixed at $34,867. On March 14, 1963, Chahsenah had made a will devising and bequeathing his estate to a niece, Viola Atewooftakewa Tate, and her three children, these devisees or their representatives being the petitioners herein. Chahsenah had resided with this niece a considerable portion of the later years of his life. His will made no mention of a surviving daughter, but stated that he was leaving nothing to his "heirs at law . . . for the reason that they have shown no interest in me."

The beneficiaries under the will sought to have it approved by the Secretary of the Interior, as required by 25 U. S. C. § 373.[3] A hearing was had before an Examiner of Inheritance, Office of the Solicitor, Department of the Interior. Dorita High Horse, claiming as sole surviving issue, and certain nieces and nephews of the testator contended that the will was not entitled to departmental approval, arguing that due to the effects

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trust for the allottee, or his heirs, during the trust period, or any extension thereof. Chahsenah had inherited the interests he held at his death.

[3] Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by Act of February 14, 1913, 37 Stat. 678, 25 U. S. C. § 373, provides in pertinent part:

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator . . . . *Provided also,* That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians."

of chronic alcoholism, cirrhosis of the liver, and diabetes, George Chahsenah was incompetent to make a will. Pursuant to the provisions of § 5 of the Act of February 28, 1891, 26 Stat. 795, 25 U. S. C. § 371, if Chahsenah had died intestate his putative daughter, Dorita High Horse, would have been an heir at law, whether or not her parents were married.

The Examiner found that the will of March 14, 1963, drawn on a form printed by the Department of the Interior for that purpose, was Chahsenah's last will and testament and that it had been prepared by an attorney employed by the Department of the Interior who advised the testator concerning the will. He also found that at the time the will was made the attorney and the witnesses executed an affidavit attesting that the will was properly made and executed, and that the decedent was of sound and disposing mind and memory and not acting under undue influence, fraud, duress, or coercion at the time of its execution. The Examiner found that Dorita High Horse was George Chahsenah's illegitimate daughter and his sole heir at law. He concluded, however, that the evidence presented by the contestants was not sufficient to outweigh the presumption of correctness attaching to a properly executed will, in addition to which were the unimpeached statements of the draftsman and witnesses that Chahsenah possessed testamentary capacity. The Examiner concluded that the testator's failure to provide for Dorita High Horse was not unnatural since there was no evidence of any close relationship between the two during any part of their lives. The will was approved and distribution in accordance with its provisions was ordered.

A petition for rehearing, contending that the evidence did not support the Examiner's conclusion regarding the decedent's competency, was denied. An appeal was taken to the Regional Solicitor, Department of the In-

terior, an officer having authority to make a final decision in the matter on behalf of the Secretary. He concluded that although the evidence supported the Examiner's finding that decedent's will met the technical requirements for a valid testamentary instrument, 25 U. S. C. § 373 vested in the Secretary broad authority to approve or disapprove the will. In exercising that discretion, the Regional Solicitor viewed his authority as requiring him to examine all the circumstances to determine whether "approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law." Under this standard he concluded that the decedent, an unemployed person addicted to alcohol[4] and living on the income he received from his inherited land allotments, had not fulfilled his obligations to his illegitimate daughter and had ceased cohabiting with her mother shortly before Dorita's birth, thus failing to provide her with a "normal home life during her childhood." The Regional Solicitor concluded that although the daughter was a married adult and could not legally claim support monies from her father or his estate, "it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare . . . ." Accordingly, he found that under the circumstances the Examiner's approval of the will was not a reasonable exercise of the discretionary responsibility vested in the Secretary. He thereupon set aside the Examiner's action, disapproved the will,[5] and ordered

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[4] Reference to Chahsenah's supposed alcohol addiction carries an intimation that the Regional Solicitor saw some want of testamentary capacity, a notion contrary to his approval of the Examiner's finding of testamentary capacity and absence of undue influence.

[5] The Regional Solicitor gratuitously volunteered that if any of the five previous wills made by the testator between 1956 and 1963 were presented he would disapprove them because they made no provision for Dorita High Horse. The record discloses no inquiry

the entire estate distributed by intestate succession to Dorita High Horse as sole heir at law.

The beneficiaries under the will brought an action against the Secretary of the Interior in the United States District Court for the Western District of Oklahoma contending that the action of the Regional Solicitor was arbitrary, capricious, and an abuse of discretion, and that it exceeded the authority conferred upon the Secretary by 25 U. S. C. § 373. The plaintiffs sought to have the District Court review the Regional Solicitor's action in accord with the standards of the Administrative Procedure Act, 5 U. S. C. §§ 701–706 (1964 ed., Supp. IV), arguing that the District Court had jurisdiction over the matter by virtue of either that Act [6] or 28 U. S. C. § 1361.[7] Dorita High Horse was allowed to intervene as a party defendant. Both the Secretary and Dorita High Horse moved for summary judgment, contending that the action of the Regional Solicitor was within the authority conferred upon the Secretary, and, as such, is made final and unreviewable by 25 U. S. C. § 373. They also contended that the Regional Solicitor's decision was in accordance with the evidence, was not arbitrary or capricious, and did not involve an abuse of discretion. Although the Secretary conceded that the

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by him into the circumstances of the execution of those wills, the testator's state of health at the time of their execution or his reasons for omitting provision for Dorita High Horse.

[6] The plaintiffs supporting the will appear to have relied upon 5 U. S. C. § 702 (1964 ed., Supp. IV), which provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[7] 28 U. S. C. § 1361 provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

District Court had jurisdiction to review the action of the Regional Solicitor, Dorita High Horse contended that neither the Administrative Procedure Act nor 28 U. S. C. § 1361 allowed judicial review.

The District Court held that while there was some question as to whether jurisdiction existed under the Administrative Procedure Act, 28 U. S. C. § 1361 did provide a basis for jurisdiction, "in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates." [8] 277 F. Supp. 464, 465 n. 1. The court then reasoned that, unlike § 1 of the Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 372,[9] § 2, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U. S. C. § 373, contains no language conferring unreviewable finality upon a decision of the Secretary approving or disapproving an Indian's will. The District Judge concluded that the Administrative Procedure Act, 5 U. S. C. § 701 (1964 ed., Supp. IV), does not preclude judicial review of the Regional Solicitor's action. On the merits he held that Congress had conferred upon adult Indians

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[8] We express no opinion as to the correctness of this determination. The complaint alleged that the amount in dispute was in excess of $10,000, exclusive of interest and costs, and that the dispute arose under the laws of the United States. Independently of the District Court's ruling, it had jurisdiction over the complaint under 28 U. S. C. § 1331. Cf. *Machinists* v. *Central Airlines,* 372 U. S. 682, 685 n. 2 (1963); *AFL* v. *Watson,* 327 U. S. 582, 589–591 (1946).

[9] That section provides in pertinent part:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, *and his decision thereon shall be final and conclusive.* . . ." (Emphasis added.)

the right to make a will, limited only by the requirement that it be approved by the Secretary.

The District Court held that the review powers of the Secretary are not so broad as to defeat a plainly expressed and rationally based distribution by one who possessed testamentary capacity. The court concluded that the Regional Solicitor incorrectly viewed the Secretary's powers as authorizing disapproval of any will thought unwise or inequitable, and stated: "Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms." 277 F. Supp., at 468. The case was remanded to the Secretary with directions to approve the will and distribute the estate in accordance with its provisions.

On appeal the Court of Appeals for the Tenth Circuit reversed the District Court, holding that the Secretary's action under 25 U. S. C. § 373 was unreviewable.[10]

Two basic questions are presented here: First, whether the Secretary's action is subject to judicial review; and second, if judicial review is available, whether on this record the Secretary's decision on the validity of the will was within the scope of authority vested in him under 25 U. S. C. § 373.

I

The Administrative Procedure Act contemplates judicial review of agency action "except to the extent that—(1) statutes preclude judicial review; or (2) agency ac-

[10] There is a conflict in the circuits on this point. Compare *Hayes* v. *Seaton,* 106 U. S. App. D. C. 126, 128, 270 F. 2d 319, 321 (1959); *Homovich* v. *Chapman,* 89 U. S. App. D. C. 150, 153, 191 F. 2d 761, 764 (1951), with *Heffelman* v. *Udall,* 378 F. 2d 109 (C. A. 10th Cir.), cert. denied, 389 U. S. 926 (1967); *Attocknie* v. *Udall,* 390 F. 2d 636 (C. A. 10th Cir.), cert. denied, 393 U. S. 833 (1968).

tion is committed to agency discretion by law. . . ." 5 U. S. C. § 701 (1964 ed., Supp. IV). Earlier in this Term in *City of Chicago* v. *United States*, 396 U. S. 162, 164 (1969), relying on *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), we noted that "we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." [11] Section 2 of the Act of 1910 contains no language displaying a congressional intention to make unreviewable the Secretary's approval or disapproval of an Indian's will.

The respondents argue that we should follow the course taken by the Court of Appeals, reading into § 2 the language of the first section of the 1910 Act, which declares that the Secretary's decisions ascertaining the legal heirs of deceased Indians are "final and conclusive." Cf. *First Moon* v. *White Tail*, 270 U. S. 243, 244 (1926). The respondents contend that §§ 1 and 2 of the 1910 Act must be read *in pari materia* because both deal with the Secretary's power over the devolution of lands held in trust by the United States and both vest in the Secretary broad managerial and supervisory power over allotted lands.

We find this unpersuasive. First, while § 1 of the 1910 Act applies only to Indians possessed of allotments, § 2, as amended in 1913, also applies to all Indians having individual Indian monies or other properties held in trust by the United States. Thus, the coverage of these sections is not identical. Second, the 1910 Act is composed of some 33 sections, virtually all of which deal with the Secretary's managerial and supervisory powers over

[11] See also *Association of Data Processing Service Organizations* v. *Camp*, *ante*, p. 150; *Barlow* v. *Collins*, *ante*, p. 159.

Indian lands. Many of these provisions vest in the Secretary discretionary authority. For example, § 3 of the Act permits transfers of beneficial ownership of allotments by providing that allottees can relinquish allotments to their unallotted children if the Secretary "in his discretion" approves. 25 U. S. C. § 408. Yet neither this section nor any of the others in the enactment contains language cloaking the Secretary's actions with immunity from judicial review. If the respondents' position were accepted and we implied the finality language of § 1 into § 2, it would be difficult to justify on a reading of the statute a later refusal to extend the "final and conclusive" clause to other sections, such as § 3. Congress quite plainly stated that the Secretary's action under § 1 was not to be subject to judicial scrutiny. Similar language in § 2 would have made clear that Congress desired to work a like result under that section. Cf. *City of Chicago* v. *United States, supra.*

II

The Regional Solicitor accepted the findings and conclusions of the Examiner of Inheritance that the testator had testamentary capacity when he executed the instrument, that he was not unduly influenced in its execution, and that it was executed in compliance with the prescribed formalities. This removes from the case before us all questions except the scope of the Secretary's power to grant or withhold approval of the instrument under 25 U. S. C. § 373.

The Regional Solicitor's view of the scope of the Secretary's power is reflected in his statement:

> "When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving

it to determine whether approval will most nearly achieve *just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law.*" App. 84–85. (Emphasis added.)

The basis of the Regional Solicitor's action emerges most clearly from his reliance on the legal relationship of the testator to his daughter and his failure to support her. From this he concluded that failure to provide for the daughter in the will did not meet the just and equitable "standard" that he considered the Secretary was authorized to apply in passing on an Indian will. The Regional Solicitor related the failure to support the daughter in her childhood to the absence of provision for her in the will and declared that the decedent "had an obligation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. *For this reason* it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare . . . ." (Emphasis added.) While thus stressing the natural ties with Dorita High Horse, the Regional Solicitor neither challenged nor gave weight to the predicate of the Examiner's determination which was that the decedent had a close and sustained familial relationship with his niece and had resided in her home, while, in contrast, he had virtually no contact with his natural daughter.

To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian testator. We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary

the same degree of authority to disapprove such a disposition.[12]

In reaching our conclusions it is not necessary to accept the contention of the petitioners that the Secretary's authority is narrowly limited to passing on the formal sufficiency of a document claimed to be a will. The power to make testamentary dispositions arises by statute; here we deal with a special kind of property right under allotments from the Government. The right is not absolute; the allottee is the beneficial owner while the Government is trustee. 25 U. S. C. § 348. The Indian's right to make *inter vivos* dispositions is limited and requires approval of the Secretary. The legislative history reflects the concern of the Government to protect Indians from improvident acts or exploitation by others, and comprehensive regulations govern the process of such *inter vivos* dispositions. No comparable regulations govern the right to make testamentary dispositions, and from this one might argue that the power of an Indian relating to testamentary disposition of allotted property is uninhibited. The legislative history on this score is perhaps no more or less reliable an indicator of what Congress intended than is usual when the scope of administrative discretion is in question.

Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U. S. C.

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[12] This is borne out by the Secretary's interpretation of § 373 in an arguably "improvident" testamentary disposition. As to a will naming a Caucasian as a beneficiary, a memorandum, dated May 10, 1941, from the Solicitor's Office to the Assistant Secretary of the Interior, stated, *inter alia*,

"Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. . . ."

§ 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not "just and equitable." The Regional Solicitor's action was based on nothing more that we can discern than his concept of equity and in our view this was not the kind or degree of discretion Congress vested in him. Cf. *Attocknie* v. *Udall,* 261 F. Supp. 876 (D. C. W. D. Okla. 1966), reversed on other grounds, 390 F. 2d 636 (C. A. 10th Cir.), cert. denied, 393 U. S. 833 (1968).

The Secretary's task is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines. It is not difficult to conceive of dispositions so lacking in rational basis that the Secretary's approval could reasonably be withheld under § 373 even though the same scheme of disposition by a non-Indian of unrestricted property might pass muster in a conventional probate proceeding; on this record, however, we see no basis for the decision of the Regional Solicitor and must hold it arbitrary and capricious. There being no suggestion that the record need or could be supplemented by added factual material, the case is remanded to the Court of Appeals with directions to reinstate the judgment of the District Court.

Reversed and remanded.

Mr. Justice Black, for the reasons set forth by the Court of Appeals in this case, 407 F. 2d 394, and in *Heffelman* v. *Udall,* 378 F. 2d 109 (C. A. 10th Cir. 1967), would affirm the judgments below.

MR. JUSTICE HARLAN, concurring.

The Court's opinion has two aspects: *First,* that the Secretary of the Interior's approval or disapproval of a will disposing of restricted Indian property is subject to judicial review in a federal court. *Second,* that the Secretary's action disapproving the decedent's will in the circumstances of this case was not a valid exercise of the authority vested in him by the first proviso of 25 U. S. C. § 373.[1] I join the Court's opinion in both respects; but I deem it appropriate to amplify the reasons given by the Court for its second conclusion.

From the facts stated in the Court's opinion, I think the issue presented by the merits of this case can fairly be characterized as follows: When there is no evidence of fraud, duress, or undue influence, when the decedent is of sound and disposing mind, when there is a rational basis for the decedent's disposition, and when the will meets all the technical requirements of the Secretary's regulations, does the proviso of 25 U. S. C. § 373 authorize the Secretary of the Interior or his delegate to withhold approval of an Indian will simply because he concludes, in the absence of any standards of general applicability, that the distribution pursuant to the will does not "most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law"?

As the Court's opinion suggests, the petitioners would have us decide this issue by holding that the Secretary can do no more under § 373 than see to it that the various technical requirements of a valid testamentary instrument have been met. Nothing in the language of the statute would prevent such a construction, and as a way of preventing any possibility of arbitrary bureaucratic action to be undertaken in the name of paternalism

[1] The text of 25 U. S. C. § 373 is quoted in relevant part in n. 3, *ante,* at 600, of the Court's opinion.

there is much to commend it. I think the petitioners' claim must be rejected, however, because both the statutory network relating to the restrictions on allotted lands (of which § 373 is only a part) and the legislative history of § 373 itself, suggest the Secretary's role was not to be that limited. Nevertheless, like the Court, I conclude that the Secretary is not empowered to disapprove a will simply on the basis of an *ad hoc* determination that it is unfair. In reaching this conclusion, although the Court's reasoning and my own are parallel in significant respects, I think it helpful for purposes of analysis to elaborate in somewhat greater detail than the Court finds necessary the background of the allotment system, the legislative history of § 373, and the administrative practice of the Department of the Interior in administering Indian wills.

Section 373 relates to the testamentary disposition of what is known as restricted Indian property. This property consists primarily of beneficial interests in land allotments held in trust by the Government for individual Indians. Under the allotment system established by the Dawes Act in 1887, 24 Stat. 388, an eligible Indian was given a property interest in a specific tract of land. Although the allottee was ordinarily given possessory rights to the land, his interest was not a fee simple. Instead, the land is held in trust by the United States for the benefit of the particular Indian, 25 U. S. C. § 348. See 25 U. S. C. §§ 331–358.

As long as the legal title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests.[2] In fact, 25 U. S. C. § 348 broadly

[2] At the end of the trust period—not yet expired because the initial 25-year period has been extended—the allottee was to receive a fee simple interest in the land. See 25 U. S. C. § 391. Before the termination of the trust period, the Secretary is now authorized, for a particular Indian, to remove the restrictions on alienation, see 25 U. S. C. § 372; 25 CFR § 121.49.

states that any "conveyance" of an allotment held in trust, or any "contract" affecting that land, "shall be absolutely null and void." Moreover, it is a crime for "any person to induce any Indian to execute any contract, deed, mortgage . . . purporting to convey any land . . . held by the United States in trust for such Indian," 25 U. S. C. § 202. Under an elaborate regulatory scheme, it is only by securing the prior approval of the Secretary of the Interior that someone like George Chahsenah, the decedent here, could sell, mortgage, or give away his restricted allotments.[3] These substantial restrictions on the free alienability of allotted lands suggest that, in making the Secretary's approval a condition for the validity of a will disposing of these lands, Congress did not mean to foreclose the possibility that the Secretary might do more than simply see that the will had the requisite number of witnesses, and that the testator had the capacity to make a will.

What little legislative history there is for § 373—and there is very little—also suggests that the Secretary was given broader powers than a state probate judge. Section 373 has its origins in a 1910 "omnibus" Indian bill, 36 Stat. 855–863. This bill was a potpourri of provisions, for the most part unrelated to the devolution of allotted lands. However, § 2 of the bill, 36 Stat. 856, gave to the Indian, for the first time, the power to dispose of his restricted allotments by will,[4] rather than

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[3] See 25 CFR §§ 121.9–121.20, 121.61, 121.18 (b), promulgated under the authority of 25 U. S. C. § 379. There are also restrictions on the allottee's ability to lease the land, see 25 U. S. C. §§ 393, 403, 415a; 25 CFR subchs. P and Q.

[4] Section 2, 36 Stat. 856, provided:

"That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed

simply having the allotments descend to his heirs by the operation of law.[5] The origins of § 2 are rather obscure, and only the House Committee Report on the omnibus bill even refers to § 2 and then only in descriptive terms.[6]

Even though the Committee Reports provide no indication of the Secretary's powers under the proviso of § 373, there was one exchange on the floor of the House in which Congressman Burke, the sponsor of the omnibus bill, does strongly suggest that he at least envisioned the role of the Secretary under § 373 to extend beyond simply seeing that the will met all the formal requirements of a valid testamentary instrument. This exchange between Congressman Burke and Congressman Cox of Indiana went as follows:

> "Mr. COX of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the

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by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided, further,* That sections one and two of this Act shall not apply to the State of Oklahoma." Section 2 was amended to its present form (25 U. S. C. § 373) by 37 Stat. 678 (1913).

[5] See 25 U. S. C. § 348.

[6] See H. R. Rep. No. 1135, 61st Cong., 2d Sess., 2 (April 26, 1910); S. Rep. No. 868, 61st Cong., 2d Sess. (June 17, 1910); H. R. Conf. Rep. No. 1727, 61st Cong., 2d Sess. (June 23, 1910).

The original bill, as introduced in the House by Congressman Burke and referred to the Indian Affairs Committee, contained no provision empowering Indians to make wills. See H. R. 12439, 61st Cong., 2d Sess. (introduced Dec. 6, 1909). The bill reported out of committee, H. R. 24992, had such a provision, however. The House Committee Report suggested that the changes and additions to H. R. 12439 found in H. R. 24992 were made in response to recommendations made by the Secretary of the Interior in a letter of April 13, 1910. See H. R. Rep. No. 1135, *supra,* at 1. However, examination of the letter referred to in the House Committee Report, together with the revisions suggested therein, reveals neither

proviso contained in section 2 [now 25 U. S. C. § 373] does not place the complete power of the will in the hands of the Commissioner of Indian Affairs?

"Mr. BURKE of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the department.

"Mr. COX of Indiana. Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?

"Mr. BURKE of South Dakota. I think so.

"Mr. COX of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.

"Mr. BURKE of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who

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a reference to nor an espousal of the idea that Indians be given testamentary capacity over restricted lands. See letter of April 13, 1910, from Secretary of the Interior Richard A. Ballinger to Hon. Charles H. Burke with new draft of H. R. 12439.

The bill (H. R. 24992) was passed by the House as reported out of the Committee. The Senate amended the bill, deleting § 2 along with most of the remainder of the original House version. See S. Rep. No. 868, *supra*. However, the Conference readopted for the most part all of the original House version, see H. R. Conf. Rep. No. 1727, *supra*, and § 2 was enacted into law in the identical form as originally passed by the House.

were living at the time allotments were made have allotments, but the other children have no land at all.

"Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O. K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

"Mr. COX of Indiana. I suppose the purpose of this proviso is an equitable purpose, reserving in the Department of the Interior the power to compel the Indian to make a proper will——

"Mr. BURKE of South Dakota. Not compel him at all.

"Mr. COX of Indiana. Or else revoke the will if he did not make a proper will.

"Mr. BURKE of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect." 45 Cong. Rec. 5812.

It is primarily on the basis of the colloquy on the floor that the United States argues that we should uphold the Secretary's action in this case. According to the Government, this exchange shows that the Secretary was empowered to take "equitable considerations" into account in approving or disapproving a will. However, to affirm the administrative action in this instance, it would be necessary to hold that an otherwise valid will reflecting a rational testamentary disposition of the decedent's property can be disapproved simply because a government official decides that had he been the testator he

would have written a different, and, to his way of thinking, a "fairer" will.

Without attempting to define with precision the outer limits of the Secretary's authority under the proviso of § 373, I think it clear that it cannot be construed this broadly. First, it must be remembered that the primary purpose of § 373 is to give to the testator, not to the Secretary, the power to dispose of restricted property by a will. In according to the Indian testamentary capacity over restricted property Congress could have only intended to give him the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession. Such is the essence of the power to make a will. The notion that the Secretary can disapprove a will on the basis of a subjective appraisal—governed by no standards of general applicability [7]—that the disposition is unfair to a person who would otherwise inherit as a legal heir simply cuts too deeply into the primary objective of the statutory grant.

This conclusion that there must be limits to the Secretary's power under the proviso of § 373 if the primary purpose of the statute is to be accomplished, finds explicit support in the Department of the Interior's own earlier construction of § 373. In response to a letter suggesting that the Secretary disapprove a will that both disinherited certain legal heirs and left part of the estate to a white person not related to the Indian decedent, the Office of the Solicitor stated in a written memorandum, after quoting the statute:

> "The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discre-

[7] See n. 10, *infra*.

> tion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other imposition, which is clearly not present." [8]

This statement reflects what appears to have been the consistent practice of the Secretary from 1910 up to the time of the administrative action taken in this case. For, apart from the case now before us, no other instance has been called to our attention in which an Indian's will was disapproved under circumstances requiring the broad discretionary authority claimed here.[9]

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[8] Memorandum dated May 10, 1941, from the Solicitor's Office to the Assistant Secretary of the Interior.

[9] At oral argument, the government attorney was asked whether there were any other instances where the Secretary had disapproved a will in circumstances such as those here. He replied, "No; I have only been able to find cases in which the wills have been approved, though it is clear that equitable considerations were taken into account." Transcript of Oral Argument 30. The opinion of the Regional Solicitor in the present case cites three unreported decisions to support his broad claim of the right to determine whether the "will most nearly achieve[s] just and equitable treatment." Although there is language in these opinions claiming for the Secretary "discretionary" authority to disapprove wills, all three involved wills that disinherited minor children for whom the decedent had an obligation of support at the time of his death. Moreover, in two of the three cases the disinherited child was born after the execution of the will, thus creating the possibility that the disinheritance was inadvertent. See Estate of Oliver Maynahonah, IA–T–1 (June 30, 1966); Estate of Kosope (Richard) Maynahonah, IA–141 (Oct. 28, 1954); Estate of Frank (Oren F.) Simpkins (will disapproved Dec. 1, 1943). In this case, on the other hand, the decedent's daughter was an adult, who was married, and who was completely estranged from her father both when his will was executed and at the time of his death. On the facts shown here

In summary, I think the statutory framework and legislative history of § 373 do indicate that the Secretary of the Interior is not foreclosed from going beyond the technical requirements in deciding whether to approve a will. A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertence—as might be the case if the testator married or became a parent after the will was executed—the Secretary might properly disapprove it. However, I do not think the Secretary can withhold approval simply because he concludes it was unfair of the testator to disinherit a legal heir in circumstances where as here there is a perfectly understandable and rational basis for the testator's decision.[10]

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there is no basis for concluding that the decedent's will reflects an uninformed or irrational disposition, or one that is contrary to public policy. Any notion that the Secretary has a regular policy of disapproving wills that disinherit illegitimate offspring is belied by *Attocknie* v. *Udall,* 261 F. Supp. 876 (D. C. W. D. Okla. 1966), where the Secretary approved a will that disinherited a son born out of wedlock.

[10] I do not mean to suggest that the Secretary might not promulgate a regulation that, like certain state statutes, provides that a testator cannot completely disinherit any of his offspring. A general standard like this would, of course, eliminate the dangers inherent in *ad hoc* determinations of whether the will is in some vague sense fair to an heir.

CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 41. Argued October 22–23, 1969—Reargued March 5, 1970—Decided April 27, 1970*

Under various treaties (including the Treaty of Dancing Rabbit Creek in 1830 between the United States and the Choctaws and the Treaty of New Echota in 1835 between the United States and the Cherokees) and patents issued thereunder, petitioner Indian Nations are *held*, contrary to the claims of the State of Oklahoma and other respondents, to have received title to the land underlying the navigable portion of the Arkansas River from its confluence with the Grand River in Oklahoma to the Oklahoma-Arkansas border. Pp. 628–636.

402 F. 2d 739, reversed and remanded.

Lon Kile argued the cause for petitioners in No. 41 on the original argument and on the reargument. With him on the briefs was *J. D. McLaughlin. Peyton Ford* argued the cause for petitioner in No. 59 on the original argument and on the reargument. With him on the briefs were *Michael S. Yaroschuk, Andrew C. Wilcoxen, Earl Boyd Pierce,* and *Paul M. Niebell.*

M. Darwin Kirk and *G. T. Blankenship,* Attorney General of Oklahoma, argued the cause for respondents in both cases on the reargument. *Mr. Kirk* argued the cause for respondents in both cases on the original argument. With them on the brief were *David O. Cordell, Riley B. Fell, Julien B. Fite, N. A. Gibson, S. M. Groom, Jr., Oscar L. Hasty, William P. McClure, Heartsill Ragon, Robert W. Richards, Varley H. Taylor, S. W. Wells,* and *Judson S. Woodruff.*

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*Together with No. 59, *Cherokee Nation or Tribe of Indians in Oklahoma* v. *Oklahoma et al.*, also on petition for writ of certiorari to the same court.

Louis F. Claiborne argued the cause for the United States as *amicus curiae* urging reversal in both cases on the original argument and on the reargument. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *Frank B. Friedman.*

Charles A. Hobbs filed a brief for Wilkinson, Cragun & Barker as *amicus curiae* urging reversal in both cases.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases involve a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil and gas and other mineral rights. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had been since 1835 the absolute fee owner of certain land below the mean high water level of the Arkansas River. Subsequently, petitioners Choctaw and Chickasaw Nations sought and were granted leave to intervene in the case in order to present their claims that part of the river bed belongs to them.

After pre-trial proceedings in the District Court, a judgment on the pleadings was entered against petitioners and in favor of the State. The District Court held that land grants made to petitioners by the United

States conveyed no rights to the bed of the navigable portion of the Arkansas River. The court thus held that title to the river bed remained in the United States until 1907, when it passed to the State upon Oklahoma's admission to the Union. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court. 402 F. 2d 739 (1968). We granted certiorari, 394 U. S. 972 (1969), to consider petitioners' claims that they received title to the land in question by treaties with the United States in 1830 and 1835.

I

At the outset, we note that these cases require us to pass upon the effect of treaties that were entered into nearly a century and a half ago. As background, it is necessary briefly to relate the circumstances by which petitioners received large grants of land by treaty from the United States.

The history behind these treaties goes back at least to the period immediately after the Revolutionary War and prior to the adoption of the Constitution—a time when petitioners and other Indian Nations occupied much of what are today the southern and southeastern parts of the United States. In 1785, in the Treaty of Hopewell, November 28, 1785, 7 Stat. 18, the United States entered into a treaty of peace and friendship with the Cherokee Indians which established the boundaries of the Cherokee Nation and in which the Indians acknowledged themselves to be under the protection of the United States. The next year, a similar treaty was concluded between the Choctaws and the United States. Treaty of Hopewell, January 3, 1786, 7 Stat. 21.

In following years, the United States entered into a number of additional treaties with both the Chero-

kees and Choctaws.[1] By means of these treaties, the United States purchased large areas of land from the Indians to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations. Although the Indians were not considered to own the fee title to the land on which they lived, they did have the right to the exclusive use and occupancy of the land—a right that could be ceded only to the United States.[2] Moreover, the Indians continued to live on the land not ceded under their own laws and way of life, and their rights to those lands were "solemnly" guaranteed by the United States. Treaty of Holston, July 2, 1791, 7 Stat. 39, 40; see Indian Intercourse Act of 1802, 2 Stat. 139.

Even while it was making this solemn guarantee, however, the United States adopted a policy aimed at completely extinguishing these Indian Nations' rights to their native lands. The United States had acquired a large western territory in 1803 by the Louisiana Purchase, and it was soon proposed that the Indians be relocated on new lands west of the Mississippi.[3] For a time, it seemed that the westward removal of the Indians might be readily accomplished. In the Treaty of July 8, 1817, 7 Stat. 156, the Cherokee Nation agreed to trade part of its lands in Georgia for a large amount

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[1] *E. g.*, Treaty of October 2, 1798, 7 Stat. 62; Treaty of December 17, 1801, 7 Stat. 66; Treaty of October 25, 1805, 7 Stat. 93.

[2] See *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823); *Fletcher* v. *Peck*, 6 Cranch 87, 142–143 (1810).

[3] See Act of March 26, 1804, § 15, 2 Stat. 289. In 1802, even before it had acquired new lands west of the Mississippi, "the United States agreed to extinguish Indian title within the limits of the States as soon as it could be done 'peaceable [sic] and on reasonable terms.'" U. S. Interior Dept., Federal Indian Law 180–181 (1958).

of land in the Arkansas Territory. See also Treaty of February 27, 1819, 7 Stat. 195. Thereafter, a number of the Cherokees left their eastern lands and traveled west. Three years later, in the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, the Choctaw Nation agreed to exchange approximately half of its remaining Mississippi lands for a large tract of land in the Arkansas Territory and an even larger one farther west.

Before the United States could relocate the Indians on these new lands, however, at least part of the land that had been set aside in the Arkansas Territory was already settled. It was apparent that the westward removal had not been aimed far enough west to escape the new nation's expansion. By the Treaty of January 20, 1825, 7 Stat. 234, the Choctaws were persuaded to cede back to the United States the eastern portion of the land given them in the Treaty of Doak's Stand. Similarly, the Cherokees who had voluntarily moved to Arkansas agreed to move again—farther west to a new tract of land, "*a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever." Treaty of May 6, 1828, 7 Stat. 311.

The prospect of the voluntary removal of the Indians to land west of the Mississippi soon disappeared. For the most part, the Choctaws and the Cherokees who had not already left their eastern lands refused to give up the land that had long been their home. The abortive attempt to set aside Arkansas Territory land for the Indians justifiably made many of them doubt that the United States would protect them in their new lands. But at the same time the Indians were deciding to remain, the new settlers' expansion and desire for their lands increased. In Georgia, the state legislature, tired of waiting for the United States to fulfill its

promise to extinguish Indian rights to Georgia lands,[4] asserted jurisdiction over the Cherokees and prepared to distribute the Cherokee lands. Mississippi soon followed suit, abolishing tribal government and extending its laws to Choctaw territory.

A clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other was inevitable. With the passage of the Indian Removal Act of 1830, 4 Stat. 411, it became apparent that policy, not obligation, would prevail. In spite of the promises to protect the Indians' land and sovereignty, it was clear that the United States was unable or unwilling to prevent the States and their citizens from violating Indian rights.

Thus faced with the prospect of losing both their lands and way of life, the Choctaws agreed in 1830 to leave Mississippi and to move to new lands west of the Arkansas Territory. As a guarantee that they would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it." In addition, the United States pledged itself to secure to the Choctaws the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333–334.

The Cherokees were at first determined to retain the Georgia lands on which they had by that time settled

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[4] See n. 3, *supra*.

down, establishing farms and towns.[5] However, after a time, they, too, were forced to leave. In the Treaty of New Echota, December 29, 1835, 7 Stat. 478, the Cherokees who had remained in the East agreed to leave their lands and to join the Cherokees who had already moved west of the Mississippi. Once again, the United States assured the Indians that they would not be forced to move from their new lands: a patent would issue to convey those lands in fee simple, and they would never be embraced within the boundaries of any State or Territory.

The United States thus succeeded in its efforts to remove the Indians from their eastern lands. In exchange, by the Treaty of Dancing Rabbit Creek with the Choctaws in 1830 and the Treaty of New Echota with the Cherokees in 1835, the United States granted a vast area of its western territory to the two Indian Nations. The land thus granted to the Choctaws encompassed what is today approximately the southern third of the State of Oklahoma; to the north, the Cherokees received title to a tract of land in the eastern part of the remainder of the State with a perpetual outlet to and other rights in land farther west.

Although by later treaties other Indian tribes were settled on parts of the land originally included in these grants, and the Chickasaw Nation was granted an undivided one-fourth interest in the remainder of the Choctaw land, see Treaty of January 17, 1837, 11 Stat. 573; Treaty of June 22, 1855, 11 Stat. 611, the fee

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[5] The efforts on behalf of the Cherokees remaining in Georgia included two cases that were brought to this court, *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831), and *Worcester* v. *Georgia,* 6 Pet. 515 (1832). For a recent account of these and other Cherokee efforts, see Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500 (1969). See generally Federal Indian Law, *supra,* n. 3, at 180–200.

simple title to a vast tract of land continued to be held by the petitioner Indian Nations for well over half a century.

Then, again due in large part to the pressure of settlers who were encroaching on Indian lands,[6] Congress acted to change the arrangement. By § 16 of the Act of March 3, 1893, 27 Stat. 645, a commission was created to negotiate with the Indian tribes that had been located in Oklahoma on the allotment of land to their individual members in preparation for the final dissolution of the tribes. Thereafter, the Indians—including the Choctaws, Chickasaws, and Cherokees—agreed to the allotment of their lands and the termination of tribal affairs. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716. Finally, Congress provided for the disposition of all petitioners' lands with the provision that any remaining tribal property "be held in trust by the United States for the use and benefit of the Indians." Act of April 26, 1906, § 27, 34 Stat. 148. The way was thus paved for Oklahoma's admission to the Union "on an equal footing with the original States," conditioned on its disclaimer of all right and title to lands "owned or held by any Indian, tribe, or nation." Act of June 16, 1906, §§ 3, 4, 34 Stat. 270, 271.

According to petitioners, they received title to the bed of the Arkansas River by treaty and patent from the United States. Because the land was not individually allotted or otherwise disposed of pursuant to the 1906 Act, title remained in petitioners or passed to the United States to be held in trust for them. The State, on the other hand, claims that petitioners never received title to the land. The courts below held in favor of the State, thus disposing of the case since it was undis-

[6] See *Marlin* v. *Lewallen*, 276 U. S. 58, 61 (1928); *Choate* v. *Trapp*, 224 U. S. 665, 667–668 (1912).

puted that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood. The sole question for review then is whether the treaty grants from the United States conveyed title to the bed of the Arkansas River to the Cherokee and Choctaw Nations.

II

We move then to the construction and effect of the treaties between petitioners and the United States. At the outset, the State argues that the bed of the Arkansas River was not included in the grants to petitioners even by the accepted standards of ordinary conveyancing since to a skilled draftsman "the land descriptions in the treaties, standing alone, actually exclude the river beds."

Part of the Arkansas River here in question is surrounded on both sides by land granted to the Cherokees, and with regard to it the argument is at the least strained. There is no explicit exclusion of the river bed in the 1835 Treaty of New Echota; in fact, there is no reference at all to the river from "a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas" to its junction with the Canadian. See 7 Stat. 480. As we read the Cherokee treaties and the patent issued thereunder by the President, the Cherokee Nation was granted one undivided tract of land described merely by exterior metes and bounds. That portion of the Arkansas River between its junctions with the Grand and Canadian Rivers lies completely within those metes and bounds, and all of the land inside those boundaries including the river bed seems clearly encompassed within the grant.

Below its confluence with the Canadian, the Arkansas River forms the boundary between the land granted to the Cherokees to the north and the Choctaws to the south, and the treaties do explicitly refer to this portion

of the river. In the Treaty of Doak's Stand in 1820, petitioner Choctaw Nation was granted all the land within the following boundaries:

> "*Beginning on the Arkansas River,* where the lower boundary line of the Cherokees strikes the same; thence *up the Arkansas to the Canadian Fork,* and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." 7 Stat. 211. (Emphasis added.)

Ten years later, this grant was superseded by the Treaty of Dancing Rabbit Creek, which "varied the description a little and provided for a special patent," *Fleming* v. *McCurtain,* 215 U. S. 56, 59 (1909):

> "*beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork;* if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning." 7 Stat. 333. (Emphasis added.)

And the patent issued to the Choctaw Nation in 1842 by President Tyler merely repeated the language of this latter treaty.

The Choctaw treaties preceded any grant to the Cherokee Nation; and, under them, petitioners Choctaw and Chickasaw Nations claim the entire bed of the Arkansas River between its confluence with the Canadian River and the Oklahoma-Arkansas border. The Cherokees, however, also have a claim to this part of the river, based on the language setting out the southern border of the

land granted them in the Treaty of New Echota: From a point on the Canadian River,

> "thence down the Canadian to the Arkansas; thence *down the Arkansas* to that point on the Arkansas where the eastern Choctaw boundary strikes said river . . . ." 7 Stat. 480. (Emphasis added.)

Moreover, they point to the patent issued them by President Van Buren in 1838, which described the southern boundary of their lands as follows:

> "down the Canadian river on its north bank to its junction with Arkansas river; thence *down the main channel of Arkansas river* to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river . . . ." (Emphasis added.)

According to the Cherokee Nation, the United States thereby conveyed to it the north half of the Arkansas River from its junction with the Canadian to the eastern Oklahoma border. Petitioners thus are in disagreement about the effect of the words in the treaties and patents with regard to this lower portion of the river.[7]

That disagreement, however, does nothing to make convincing even the State's argument that this part of the river bed was excluded from the grants as a matter of conveyancing law. About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. More important is the fact that these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction.

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[7] The courts below did not resolve the dispute between petitioners, and we likewise do not pass on that question.

Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, *e. g., Jones* v. *Meehan,* 175 U. S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws." 7 Stat. 336.

Applying these principles here, we conclude that the entire Arkansas River below its confluence with the Grand River was within the metes and bounds of the treaty grants to petitioners. The State argues that the treaty terms "up the Arkansas" and "down the Arkansas" should be read to mean "along the bank of the Arkansas River." However, the United States was competent to say the "north side" or "bank" of the Arkansas River when that was what it meant, as it had in the 1817 grant to the Cherokees in the Arkansas Territory. See 7 Stat. 158. Even more damaging to the State's argument is the contemporaneous interpretation of the treaty language by the President as reflected in the specific language of the Cherokee patent, "down the Canadian river on its north bank to its junction with Arkansas river; thence *down the main channel of Arkansas river.*" [8]

[8] This construction of the treaty term "down the Arkansas" indicates that at the minimum the boundary of the Choctaws was also the middle of the main channel. Congress was accustomed to using the terms "up" or "down" the river when designating a navigable river as the boundary between States, see, *e. g.,* Act of March 2, 1819, § 2, 3 Stat. 490 (Alabama); Act of February 20, 1811, § 1, 2 Stat. 641 (Louisiana); and, when it did so, the boundary was set as the middle of the main channel. See *Arkansas* v.

(Emphasis added.) According to the State, the italicized part of this description should be read to mean "down the north bank of the main branch of the Arkansas River." However, not only does this reading itself seem to include part of the river bed—that underlying the "secondary" branches—but it also conflicts with this Court's interpretation of the term in *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77 (1922).

The facts involved in *Brewer-Elliott* were essentially similar to those of the present cases. There the United States had established a reservation for the Osage Indians which was bounded on one side by "the main channel of the Arkansas river." 260 U. S., at 81. The United States brought suit to establish the Indians' right to the river bed and the oil reserves beneath it, and the State of Oklahoma intervened to claim that the river bed had passed to it at statehood. The case came

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Mississippi, 250 U. S. 39 (1919); *Iowa* v. *Illinois,* 147 U. S. 1 (1893).

Given this congressional usage, it seems natural for the President, on whose behalf the treaties had been negotiated, to have given the same interpretation to identical language in the analogous situation involving the boundary between petitioners Choctaw and Cherokee Nations, which had long been considered sovereign entities. In fact, this Court recognized the analogy in *Barney* v. *Keokuk,* 94 U. S. 324, 337 (1877), a case involving a grant bounded by the Mississippi River, when it quoted with apparent approval the following language from *Haight* v. *City of Keokuk,* 4 Iowa 199, 213 (1856): "The grant to the [Indians] was to them as persons, and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the *medium filum aquæ,* as it is now between Iowa and Illinois." The grants to petitioners were undoubtedly to them as "a political society," and any "well founded doubt" regarding the boundaries must, of course, be resolved in their favor.

here after the Court of Appeals had held that "whether the river was navigable or non-navigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages." *Id.,* at 80. This Court held that in the region in question the Arkansas River was nonnavigable and that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant *expressly carry the title to that line.*" *Id.,* at 87. (Emphasis added.) The question whether it would have been beyond the power of the United States to make the grant had the river been navigable was reserved for future decision.

In the present cases, there is no question that the Arkansas River is navigable below its junction with the Grand River.[9] However, we do not understand the State to argue the question reserved in *Brewer-Elliott.* Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See *Shively* v. *Bowlby,* 152 U. S. 1, 47–48 (1894). Rather, the question is whether the United States intended to convey title to the river bed to petitioners. See *Alaska Pacific Fisheries* v. *United States, supra,* at 87; *Moore* v. *United States,* 157 F. 2d 760, 763 (C. A. 9th Cir. 1946); cf. *Donnelly* v. *United States,* 228 U. S. 243, 259 (1913).

Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties

[9] The District Court took judicial notice of the navigability at all relevant times of those portions of the Arkansas River in question, and that issue is not in dispute here. In the *Brewer-Elliott* case, this Court affirmed the finding of the District Court that "the head of navigation is and was the mouth of the Grand River." 260 U. S., at 86.

and patents did not pause specifically to provide for the ownership of the river bed. According to the State—even if the river bed was within the bounds of the grants to petitioners—we need look no further because "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926). Even were we limited to the treaties and patents alone, the most specific language of those instruments is identical to that which we said "expressly" conveyed title to the river bed in *Brewer-Elliott.* However, nothing in the *Holt State Bank* case or in the policy underlying its rule of construction (see *Shively* v. *Bowlby, supra,* at 49–50) requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor. Indeed, the court in *Holt State Bank* itself examined the circumstances in detail and concluded "the reservation was not intended to effect such a disposal." 270 U. S., at 58. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor.

Together, petitioners were granted fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers. To the extent that the documents speak to the question, they are consistent with and tend to confirm this natural reading. Certainly there was no express exclusion of the bed of the Arkansas River by the United States as there was to other land within the grants.

As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See *Atlantic & Pacific R. Co.* v. *Mingus,* 165 U. S. 413, 435–436 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. *Pollard* v. *Hagan,* 3 How. 212, 229 (1845).

Finally, it must be remembered that the United States accompanied its grants to petitioners with the promise that "no part of the land granted to them shall ever be embraced in any Territory or State." In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.

We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma in the grants it made to peti-

tioners. The judgments of the Court of Appeals are therefore reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for more than 14,000,000 acres of land west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands here in question in fee simple.[1]

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States, however, made other reservations: (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of

[1] In addition to the millions of acres conveyed to the Cherokees in fee simple, which included the land surrounding the segment of the Arkansas River here in question, they were guaranteed lands to the west of that tract as "a perpetual outlet west" which provided for "free and unmolested use" of those lands.

those facilities. Since the United States made some reservations but made no reservations of the river bed, and if fair dealing is the standard, one would conclude, I think, that the river bed was the tail that went with the hide.

As respects the Choctaws, another section of the Arkansas River was the boundary between the Choctaw and the Cherokee grants. Whatever may be the rights between the Cherokees and the Choctaws, it seems clear to me that since one portion of the Arkansas was within the exterior boundaries of the Cherokee grant and another portion was within the exterior boundaries of the Choctaw grant, the river bed of each of those segments went to the respective grantees in fee simple.

Here an entire region was conveyed to these tribes as part of their resettlement,[2] with assurances of self-

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[2] The details of the removal of the Cherokees from their ancestral lands are related in *Western Cherokee Indians* v. *United States,* 27 Ct. Cl. 1, 20 *et seq.* While 6,000 had moved west to their new lands by 1838, 18,000 were still in their ancestral homes.

"The Eastern Cherokees were prisoners in Georgia, under the guard of 5,000 United States soldiers, who had hunted them down from their mountains and driven them out of their valleys and were now bringing them to the terms of an enforced emigration." *Id.,* at 20.

They were finally forcibly removed by the U. S. Army under General Scott:

"He moved quickly and successfully, and has thus recorded the most painful experience of his military life:

" 'Food in abundance had been provided at the depots, and wagons accompanied every detachment of troops. The Georgians distinguished themselves by their humanity and tenderness. Before the first night thousands—men, women, and children, sick and well—were brought in. Poor creatures. They had obstinately refused to prepare for the removal. Many arrived half starved, but refused the food that was pressed upon them. At length the children, with less pride, gave way, and next their parents. The Georgians were the waiters on the occasion, many of them with flowing tears. The

government [3] and with pledges that their new homelands would never be part of any State.[4] They were indeed constituted as the sovereign autonomy established in lieu of a prospective State.[5]

The title held by these tribes was not the usual aboriginal Indian title of use and occupancy but a fee simple, cf. *United States* v. *Creek Nation,* 295 U. S. 103, terminable if and when these Indian nations ceased to exist

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autobiographer has never witnessed a scene of deeper pathos.'" *Id.,* at 23.

For early incidents involving this Court in aspects of the removal problems see M. James, Andrew Jackson: Portrait of a President 280–281, 304–305 (1937); 1 C. Warren, Supreme Court in U. S. History, c. 19 (1937); *Worcester* v. *Georgia,* 6 Pet. 515.

[3] Our agents said the following to the Cherokee Council on July 31, 1837: "Here you are subjected to laws, in the making of which you have no voice; laws which are unsuited to your customs, and abhorrent to your ideas of liberty. There, Cherokees, you will make laws for yourselves, and establish such government as in your own estimation may be best suited to your condition. There, Cherokees, in your new country, you will be far beyond the limits or jurisdiction of any State or Territory. The country will be yours; yours exclusively. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man." S. Doc. No. 120, 25th Cong., 2d Sess., 988.

[4] The Treaty with the Cherokees of December 29, 1835, 7 Stat. 478, provided in Article 5 that no lands conveyed shall without the consent of the Cherokees ever "be included within the territorial limits or jurisdiction of any State or Territory." And see Article IV of the Treaty of Sept. 27, 1830, 7 Stat. 333.

[5] The Treaty with the Cherokees of May 6, 1828, 7 Stat. 311, spoke of the desire of the United States to provide the Cherokees "*a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State."

or abandoned the territory—conditions not yet occurring. The reliance by the Court of Appeals on *United States* v. *Holt State Bank,* 270 U. S. 49, was therefore misplaced as that case involved only the aboriginal Indian title of use and occupancy. *Id.,* at 58–59.

The United States, speaking through the Solicitor General, has filed a brief *amicus* taking that position in these cases and maintaining it vigorously on oral argument. It concedes, as it must in light of *Shively* v. *Bowlby,* 152 U. S. 1, 49–50, that while the United States holds a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future State, though as stated in *Holt State Bank* that purpose is "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U. S., at 55. Such exceptional circumstances are present here.

The treaties with the present Indians solemnly assured them that these new homelands would never be made part of a State or Territory. So it is reasonable to infer that the United States did not have a plan to hold this river bed in trust for a future State. As the United States says, we would have to indulge "a cynical fiction without any basis in fact" to attribute such a purpose to the parties. Sixty years later, however, Congress was intent in creating a State out of these lands.[6]

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[6] The story of the exploitation of Indians by state and local agencies has been recently summarized by William Brandon:

"Termination is truly a word of ill omen to tribal Indians. Its meaning in Indian affairs is the termination of 'Federal responsibility,' the responsibility of the Federal Government to act as trustee for Indian lands, rights, and resources; the responsibility to protect Indian groups in these rights and possessions—protect them particularly against states, counties, cities, or other local powers

Friction between the Indians and the whites who sought to settle on these lands mounted. As time passed the American attitude towards these treaties became as hostile as the opinion below. The Commissioner of Indian Affairs in his 1886 Report spoke of the exploitation of many Indians by a few Indians who had a monopoly of land and he attacked the treaties as such:

> "[I]t is perfectly plain to my mind that the treaties never contemplated the un-American and absurd

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that might divest them of their rights and possessions—and to provide certain services such as education and health.

"These responsibilities are based upon treaty promises or other equally legal commitments, in which the Federal Government pledged, in return for cessions of value, to render unto specific Indian groups specific rights and their protection, plus the provision of schools, hospitals, sawmills, teachers, doctors, tools and implements, roads, supplies when needed—all the services of the modern world, to be supplied and administered by the Federal Government rather than administered under state and local jurisdictions, because of well-founded apprehensions that state and local jurisdictions might not be trustworthy in carrying out such promises." Progressive, January 1970, p. 38.

E. Cahn, Our Brother's Keeper 21 (1969), states the same theme:

"The Indian knows that termination takes many forms. He can be flooded out of his reservation; he can be relocated; his reservation can be sold out from under him if he cannot meet taxes to which it is subject. His limited power to protect himself on the reservation from local prejudice and discrimination can be wiped away by the substitution of state laws for tribal law, and state jurisdiction for tribal jurisdiction. All of these, the Indian knows, are variants on one basic truth: the United States Government does not keep its promises. Sometimes it breaks them all at once, and sometimes slowly, one at a time. The result is the same—termination. When the Indian is asked to forsake his status under the Bureau in exchange for cash, for promises of technical aid, for public works improvements and industrial developments, he has learned to expect two things:

"*—That the promises will not be kept.*

"*—That even if they should be kept, they will prove inadequate to maintain the Indian at even his reservation level of deprivation.*"

> idea of a separate nationality in our midst, with power as they may choose to organize a government of their own, or not to organize any government nor allow one to be organized, for the one proposition contains the other. These Indians have no right to obstruct civilization and commerce and set up an exclusive claim to self-government, establishing a government within a government, and then expect and claim that the United States shall protect them from all harm, while insisting that it shall not be the ultimate judge as to what is best to be done for them in a political point of view. I repeat, to maintain any such view is to acknowledge a foreign sovereignty, with the right of eminent domain, upon American soil—a theory utterly repugnant to the spirit and genius of our laws, and wholly unwarranted by the Constitution of the United States." H. R. Exec. Doc. No. 1, pt. 5, 49th Cong., 2d Sess., 87.

But cf. the views of Robert L. Owen, U. S. Indian Agent, in H. R. Exec. Doc. No. 1, pt. 5, vol. 2, 50th Cong., 2d Sess., 134–135 (1888). And see A. Debo, The Rise and Fall of the Choctaw Republic 245 *et seq.* (1934).

A commission was created to negotiate an agreement with these tribes superseding the earlier treaties, all as related in *Choate* v. *Trapp,* 224 U. S. 665, 667–670. An agreement was in time reached whereby tribal lands were allotted to individual members of the tribe, with any remaining tribal land passing to the United States as trustees for the Indians. 34 Stat. 137. The bed of the Arkansas was not allotted. The next year—1907—Oklahoma was admitted to the Union on an equal footing with the original States. 34 Stat. 267. Certainly this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for

their members was no possible vehicle for transferring that title to Oklahoma.[7]

The Court properly makes these cases candidates for application of the classic rule that treaties or agreements with Indians are to be construed in their favor, not in favor of commercial interests that repeatedly in our history have sought to exploit them. The idea was perhaps best stated in *United States* v. *Winans,* 198 U. S. 371, 380–381:

> "[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances."

We should therefore resolve any doubts in these cases in favor of these Indians, mindful of what President Jackson said at a meeting with the Choctaws and Chickasaws:

> "Brothers, listen: the only plan by which this can be done, and tranquillity for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give

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[7] The Cherokee Nation claims to have negotiated some 13 sand and gravel leases for the bed of the Arkansas River between April 12, 1883, and May 27, 1893—prior to the admission of Oklahoma into the Union. The record does not disclose the date when the State of Oklahoma first assumed the role of lessor of the river bed, although several cases have involved such leases by the State. See, *e. g., Lynch* v. *Clements,* 263 P. 2d 153.

> it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.
>
> . . . . .
>
> "Peace invites you there; annoyance will be left behind; within your limits, no State or territorial authority will be permitted; intruders, traders, and above all, ardent spirits, so destructive to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission." S. Doc. No. 512, 23d Cong., 1st Sess., Vol. 2, 240–242.

Only the continuation of a regime of discrimination against these people,[8] which long plagued the relations between the races, can now deny them this just claim.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas. The Arkansas River is a navigable stream below, but not above, its junction with the Grand River. The contending parties are three Indian tribes on the one hand and the State of Oklahoma on the other. The Cherokees base their claim on a United States patent of 1838 and underlying treaties, the Choctaws and the

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[8] Sequoyah, the great Cherokee from Tennessee, whose home stood on the banks of the Little Tennessee River, was crippled for life on a hunting trip; and in his inactive life thereafter invented the Cherokee syllabary, inspired by the "talking leaves" or written and printed pages by which the whites communicated. His syllabary contains some 80 syllables in the Cherokee language. His memory is perpetuated in the name of the *genus* of California giant redwoods and his statue was placed in Statuary Hall of the National Capitol in 1917.

Chickasaws on an 1842 patent also issued in fulfillment of prior treaty commitments. The State claims under the settled doctrine that a newly admitted State takes title to the beds of all navigable rivers within its borders; the State denies that the prior patents conveyed the river bed. The patent to the Cherokees included property on both sides of the Arkansas River from its confluence with the Grand River downstream to its junction with the Canadian River. From the Canadian River to the Arkansas border, the Arkansas River was the boundary between Cherokee lands on the north side and the Choctaw lands on the south.

According to the Court, the Indians became the owners of all of the river bed from the Grand River to the Arkansas border: the river bed between the Grand River and the Canadian River is Cherokee property because the metes and bounds description of the grant crossed the river without purporting to exclude the river bed; the remaining portion of the river bed is said to be Indian property because by ordinary conveyancing standards the relevant patents and treaties reveal an intent by the United States to convey the river bed to the tribes. I differ with the Court as to both portions of the river bed.

I

As far as riparian rights are concerned—and for other purposes too—the policy and applicable laws of the United States have always distinguished between navigable and nonnavigable streams. Section 931 of Title 43 of the United States Code, Rev. Stat. § 2476, which dates from 1796, does so unmistakably:

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to

> different persons, the stream and the bed thereof shall become common to both."

The owners of land adjacent to a nonnavigable stream own the river bed, but the surveys of public lands stop with the banks of navigable streams; conveyances by the United States of land located on a navigable river carry no interest in the river bed under federal law. *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 288–289 (1869), made the difference very clear:

> "[T]he court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

Packer v. *Bird,* 137 U. S. 661, 672 (1891), is to like effect. *Shively* v. *Bowlby,* 152 U. S. 1, 49–50 (1894), re-emphasized that:

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some in-

> ternational duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The issue in *Shively* was whether the grantee of lands along a navigable river in Oregon Territory had an interest in the river bed by reason of his federal grant. It was held that he did not.

In 1845, *Pollard* v. *Hagan,* 3 How. 212, held that the United States had no power, except where state law permitted, to convey an interest in the bed of a navigable river after the State in which it was located had been admitted to the Union. The Court also implied that because the beds of navigable streams were held in trust for future States, the United States was without power to dispose of the beds prior to statehood. This implication was repudiated by statements in such later cases as *Goodtitle* v. *Kibbe,* 9 How. 471, 478 (1850), and *Shively* v. *Bowlby, supra,* at 47–48. In the words of the latter:

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with for-

> eign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 U. S., at 48.

Nevertheless, whether the United States had only a restricted power to convey interests in navigable river beds prior to statehood was deemed an open question in *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 85–86 (1922); decision on that question was reserved as was decision on the issue whether, if the power to convey was limited to certain purposes, provision of a home for an Indian tribe came within one of these permitted purposes. Three years later, *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926), again recognized that "the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency."

The ownership of lands under navigable waters was deemed an incident of sovereignty, *Martin* v. *Waddell,* 16 Pet. 367, 409–411 (1842), and whatever the power of the Federal Government to convey such lands lying in its unorganized territories, Congress never undertook to do so by general laws. *Shively* v. *Bowlby, supra,* at 48–50. Conveyance of a river bed would not be implied and would not be found unless the grant "in terms embraces the land under the waters of the stream," *Packer* v. *Bird, supra,* at 672; *Shively* v. *Bowlby, supra,* at 47–48. Such disposals by the United States "during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention

was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank, supra,* at 55.

II

Against this doctrinal background, for either the Cherokees, the Choctaws, or the Chickasaws to prevail, there must be found in their grant a "very plain" basis for concluding that the United States intended to convey an interest in the river bed. As I see it, neither the patents nor the treaties here involved satisfy that standard.

The patent to the Choctaws in 1842, which merely quotes from the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333, describes the northern boundary of the Choctaw grant as "[b]eginning near fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork . . . ." An earlier treaty, the 1820 Treaty of Doak's Stand, 7 Stat. 210, described the northern boundary of the Choctaw lands as going "up the Arkansas to the Canadian Fork . . . ." The quoted phrases of the patent (and the Treaty of Dancing Rabbit Creek) and of the Treaty of Doak's Stand are the sole bases for the Choctaw claim to the entire bed of the Arkansas River from the western boundary of Arkansas upstream to the junction with the Canadian River. The Cherokees claim that the conveyance gave the Choctaws only the southern half of the river bed; the State of Oklahoma claims that the northern boundary of the Choctaw lands went up the river on its south bank and hence gave the Choctaws none of the river bed since the river was navigable and there was no express conveyance of the river bed to the Choctaws.

As for the Cherokees, their southern boundary from the Canadian River to the Arkansas border is described in the 1838 patent as proceeding from the north bank of the

Canadian River at its junction with the Arkansas River, "thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas river . . . ." The patent was in execution of three prior treaties. The 1835 Treaty of New Echota, 7 Stat. 478, in describing the land to be conveyed, repeated the description of the Treaty of February 14, 1833, 7 Stat. 414, which was supplemental to the Treaty of May 6, 1828, 7 Stat. 311. The description in the Treaty of New Echota did not contain the "main channel" language later used in the patent; from the Canadian, the southern boundary ran "down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river . . . ." The Cherokees claim this language gives them the northern half of the river bed. The Choctaws and the State claim that the Cherokees have no interest in this part of the river bed.

Insofar as the river bed from the Canadian River to the Arkansas border is concerned, the terms of the patents and the treaties are obviously a far cry from what the cases require to evidence the intention of the United States to dispose of lands under a navigable river. But it is said that these cases are irrelevant where the grantee is an Indian tribe and that countervailing considerations require treaties with Indian tribes to be interpreted as the treaties would have been understood by the Indians. Reliance is also placed on the provision in the 1830 Choctaw treaty stating that "wherever well founded doubt shall arise," the treaty shall be construed in favor of the Choctaws. But I find it difficult to conclude from such murky language that the United States intended to reject its historic policy with respect to beds of navigable rivers in executing these treaties and patents. Nor is there any evidence whatsoever that the

Indians of that day would have considered the land under a navigable river to be of any utility to them or as being included in a grant of lands adjacent to the river. Indeed, the Treaty of Dancing Rabbit Creek expressly negatives any inference that the United States was sharing with the Choctaws any of its sovereignty over the navigable portion of the Arkansas River. It provided that "[n]avigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U. S."

The Cherokee patent recited that the treaty lands had been surveyed and the description in the patent was taken from the survey. Field notes of an 1831 survey of the eastern Cherokee boundary show unmistakably that the surveyor "fixed, the South East corner of the Cherokee lands" on the north bank of the Arkansas River and that from this point it was "64.50 Ch, to the South bank, where the northern extremity of the Eastern boundary of the Choctaw lands, strikes the Arkansas River."

The Choctaw grant had also been surveyed pursuant to treaties executed prior to the patent. The field notes of an official survey made in 1821 show that the northern point of the eastern boundary of Choctaw territory was on "the south bank of the Arkansas River . . . distance from the Cherokee corner on the north bank of the river, one mile and thirty chains, Arkansas River 630 yards wide," and that the surveyor on "October 4th started from a post on the south side of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas." A plat of another survey of Choctaw lands made in 1825 shows the northern terminus of the eastern Choctaw boundary as being on the south side of the river.

There is little, if anything, in these early surveys to support ownership of the river bed in the Indians. On

the contrary, the indications clearly are that downstream from the Canadian River the southern border of the Cherokees' land was on the north side of the Arkansas River and the northern boundary of the Choctaws' land was on the south side.

I find unimpressive the Court's reliance on *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* for the proposition that because the southern boundary of the Cherokee lands ran "down the main channel of Arkansas river" the northern half of the river bed belonged to the Indians. In *Brewer-Elliott* the Cherokees had ceded certain land to the United States and from that land the United States created a home for the Osage Indians, "[b]ounded . . . on the south and west by . . . the main channel of the Arkansas river . . . ." 17 Stat. 229. As stated by the Court of Appeals, the central issue was whether the Osage Indians owned "the bed of the Arkansas river north of the thread of the main channel thereof, which was the south boundary of the lands of the Osage Tribe of Indians." 270 F. 100, 101 (C. A. 8th Cir. 1920). The Court of Appeals ruled that the river at that point was not navigable and that "riparian grantees and owners under the acts of Congress and under the law applicable in 1838, 1872, and 1883 at the place where these leased premises lie became the owners of the beds of unnavigable streams to the respective threads thereof. Rev. Stat. § 2476 [43 U. S. C. § 931]; *Railroad Co.* v. *Schurmeier* [*sic*], 7 Wall. 272, 287 . . . ." 270 F., at 109. This Court affirmed, pointing out, as was obviously true, that the grant extended "as far as the main channel . . . ." 260 U. S., at 87. Nothing the Court said, however, is any basis for construing a grant to or as far as the main channel of a *navigable* river as an express grant of any lands under that channel.

Much is made of the declarations in the treaties with the Cherokee and Choctaw Nations that the Indian

lands would not be included within any State or Territory. It is argued that in view of these declarations the United States had no reason to reserve the river bed. But this is a narrow view of the historic policy of the United States. Navigable rivers in the public domain were a public resource and lands underlying them were not to be conveyed to private hands by the United States. Whether or not it was anticipated that the public domain would be included in a future State, congressional policy, declared early in our history, was that conveyances of public lands bordering on navigable rivers carried no title to the adjoining river bed.

I cannot, therefore, conclude that either the Cherokees or the Choctaws took any interest in the bed of the Arkansas River, at least from the junction of the Arkansas River and the Canadian River downstream to the Arkansas border.

III

The river bed above the Canadian River is said to be owned by the Cherokees because the tribe was granted lands on both sides of the river pursuant to a single metes and bounds description the calls of which crossed the river without excluding the river bed. It is quite true that if one plots out the conveyance described by the patent the Arkansas River is included within the perimeters of the granted property. But there is no express reference to the river bed, the river was a navigable stream, and the policy of the United States was not to convey lands underlying such waters. No such conveyance should be recognized unless the intention to make such a conveyance was unmistakably stated. No one suggests that the Cherokees were granted full sovereignty over the Arkansas River, that the United States had conveyed away its power to control navigation and commerce on the Arkansas, or that the public had lost

its right to travel the navigable portion of the Arkansas by virtue of the conveyance to the Cherokee Nation. There being no indications that the Indians thought one way or the other about the underwater lands or that they had any use for them in those days, the evidence is insufficient to prove an intent on the part of the Government to convey the river bed. Cf. *United States* v. *Holt State Bank, supra.*

Even if it were otherwise, however, the conveyance to the Cherokees was to the Cherokees as a Nation; it created no rights, legal or equitable, in individuals. Cf. *Fleming* v. *McCurtain,* 215 U. S. 56 (1909). If the river bed passed to the tribe, it was to be held by the Nation as property common to all. Moreover, the Cherokee patent expressly provided "that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same." The Choctaw patent and treaties contained a similar condition. Such provision limited the duration of title and qualified "the absoluteness of the earlier words, 'in fee simple.'" *Fleming* v. *McCurtain, supra,* at 61. The significance of the limitation is that pursuant to agreements reached with the Cherokee, Choctaw, and Chickasaw Nations, Congress early in this century provided for the allotment of tribal lands to individual members of the tribe, terminated the general powers of the tribal governments and continued tribal existence for limited purposes only under the supervision of the Interior Department. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716; Act of April 26, 1906, 34 Stat. 137. Tribal lands for the most part were conveyed to individual Indians or sold. Transfers of lands to individuals along the navigable portion of the Arkansas River neither expressly nor by implication carried with them the river bed. The former Indian territory is not now either occupied or owned solely by

Indians but is widely held by diverse peoples and interests in the State of Oklahoma. Should it now be held that the title to the river bed, severed from and no longer serving communal property, remains in the tribe, to be administered or sold by it for purely private purposes? I think not. For the purposes anticipated by the treaties and patents, the Cherokee, Choctaw, and Chickasaw Nations ceased to exist as general governmental entities in 1906. Oklahoma became a State in 1907 and took title to the river bed, which had meanwhile reverted to the United States if title to the river bed had ever been in the Indian Nations.

I would affirm the judgment of the Court of Appeals.

Syllabus

SEARS, ROEBUCK & CO. *v.* CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 476. Argued March 3, 1970—Decided April 27, 1970

The National Labor Relations Board (NLRB) Regional Director, after investigating petitioner's charge that respondent union was violating § 8 (b) (4) (B) of the National Labor Relations Act, issued an unfair labor practice complaint with the NLRB and petitioned the District Court for injunctive relief under § 10 (*l*) of the Act, which directs him to apply for such temporary relief "pending the final adjudication of the Board with respect to such matter." The Regional Director did not appeal the denial of an injunction but petitioner (which had not formally intervened at the District Court hearing) sought to do so. The Court of Appeals dismissed the appeal on the ground that only the Regional Director could appeal. The NLRB thereafter found that the union had violated § 8 (b) (4) (B) and ordered it to cease and desist from its unlawful conduct. *Held:* Since any injunctive relief to which petitioner might have been entitled under § 10 (*l*) terminated upon final action by the NLRB, albeit respondent union is seeking judicial review of the order, the question whether petitioner could appeal the denial of an injunction is moot.

410 F. 2d 1148, vacated and remanded.

Gerard C. Smetana argued the cause for petitioner. With him on the briefs was *Alan Raywid.*

David S. Barr argued the cause for respondent union. With him on the brief was *Philip Hornbein, Jr. Dominick L. Manoli* argued the cause for respondent the Regional Director of the National Labor Relations Board. With him on the brief were *Solicitor General Griswold, Joseph J. Connolly, Arnold Ordman,* and *Norton J. Come.*

Briefs of *amici curiae* urging reversal were filed by *Brice I. Bishop* and *Phil B. Hammond* for the American Retail Federation, and by *Jerry Kronenberg* and *Charles C. Kieffer* for the Terminal Freight Handling Co. et al.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

PER CURIAM.

The petitioner, Sears, Roebuck and Company (Sears), filed a charge with the NLRB Regional Director, alleging that the respondent union was engaged in unlawful secondary picketing of the petitioner's premises in violation of § 8 (b)(4)(B) of the National Labor Relations Act, as amended.[1] The Regional Director investigated the charge and, finding there was reasonable cause to believe it was true, issued an unfair labor practice complaint

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[1] Sec. 8 (b). "It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 . . . ." (61 Stat. 141, 73 Stat. 542, 29 U. S. C. § 158 (b).)

with the Board. He also petitioned a Federal District Court for injunctive relief pursuant to § 10 (*l*) of the Act, which directs him to apply for such temporary relief "pending the final adjudication of the Board with respect to such matter." [2]

Counsel for Sears appeared at the hearing before the District Court, but Sears did not seek to intervene formally. After hearing testimony the court declined to issue an injunction, believing that Sears was not likely to prevail before the Board on its unfair labor practice charge.[3] The Regional Director did not appeal the court's decision, but Sears sought to do so. 410 F. 2d 1148. The Court of Appeals dismissed Sears' appeal on the ground that under the Act only the Regional Director could appeal from the denial of a § 10 (*l*) injunction. Thereafter the Board issued its decision and order in the underlying unfair labor practice proceeding, finding that the respondent union had violated § 8 (b)(4)(B) of the Act, and ordering it to cease and desist from its unlawful conduct. 176 N. L. R. B. No. 120, 71 L. R. R. M. 1372 (1969).

Under these circumstances the question whether Sears could appeal the District Court's denial of an injunction has now become moot. For even if the Court of Appeals was wrong in dismissing Sears' appeal, any relief that that court might have given would now have terminated. " 'To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' " *Oil Workers Union* v. *Missouri,* 361 U. S. 363, 371, quoting from *Brownlow* v. *Schwartz,* 261 U. S. 216, 217–218. See also *Hall* v. *Beals,* 396 U. S. 45; *Brockington* v. *Rhodes,* 396 U. S. 41; *Golden* v. *Zwickler,* 394 U. S. 103.

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[2] 29 U. S. C. § 160 (*l*).

[3] The District Court decision is unreported.

Sears concedes that an injunction, had one issued, would terminate upon "final" Board resolution of the underlying unfair labor practice charge. But it argues that the Board's action cannot be considered final where, as here, one of the parties, in this case the respondent union, has sought review of the Board's order. In this situation, Sears maintains, the injunctive relief, if granted, would remain in effect until the Board's order with respect to the underlying unfair labor practice were either enforced or denied enforcement by the Court of Appeals. It is argued that because the Court of Appeals has not yet acted on the Board's order here, Sears may still be entitled to injunctive relief, and thus the question of whether it was entitled to appeal the denial of a § 10 (*l*) injunction remains a viable one.

But neither the language, the legislative history, nor the policies of the Act support this construction. For by its terms § 10 (*l*) merely authorizes the issuance of an injunction "pending the final adjudication *of the Board* with respect to [the] matter." (Emphasis added.) Once the Board has acted, it can itself seek injunctive relief from the Court of Appeals, pursuant to § 10 (e) of the Act, which empowers that court to grant "such temporary relief or restraining order as it deems just and proper." [4] See *McLeod* v. *Business Machine Mechanics Conference Board,* 300 F. 2d 237, 241. The legislative history makes clear that the purpose of enacting § 10 (*l*) in 1947 was simply to supplement the pre-existing § 10 (e) power of the Board by authorizing injunctive relief prior to Board action.[5] It was thus relief prior to Board

[4] 29 U. S. C. § 160 (e).

[5] "Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. . . .

"In subsections (j) and (l) . . . the Board is given additional authority to seek injunctive relief. . . . Thus the Board need not

action that Congress was concerned with providing when it enacted § 10 (*l*), and any injunction issued pursuant to that section terminates when the Board resolves the underlying dispute.

Where the Board ultimately finds no unfair labor practice, it would clearly be contrary to the policies of the Act to permit a district court injunction to remain in effect pending Court of Appeals review of the District Court's action. And where the Board does find an unfair labor practice, § 10 (e) provides an adequate remedy should its order be disobeyed. Yet on the petitioner's reading of the Act, the District Court injunction would remain in effect until Court of Appeals review, whatever the Board did. This is not what was intended by § 10 (*l*), and the courts that have confronted the issue have consistently so held. *Carpenters' District Council* v. *Boire,* 288 F. 2d 454, 455; *Monique, Inc.* v. *Boire,* 344 F. 2d 1017, 1018; *NLRB* v. *Nashville Bldg. Trades Council,* 383 F. 2d 562, 564. See also this Court's disposition in *Los Angeles Bldg. & Construction Trades Council* v. *LeBaron,* 342 U. S. 802. But see *Houston Insulation Contractors Assn.* v. *NLRB,* 339 F. 2d 868.

Because any injunctive relief to which Sears might have been entitled under § 10 (*l*) would now have terminated in any event, the question of whether Sears was entitled to challenge the denial of such relief has become moot.

Accordingly the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint as moot.

It is so ordered.

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wait, if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order." S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947).

HESTER *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 82. Argued November 18, 1969—Decided April 27, 1970

39 Ill. 2d 489, 237 N. E. 2d 466, certiorari dismissed.

Marshall Kaplan argued the cause for petitioner. With him on the brief was *Edward Kaplan.*

Joel M. Flaum, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, and *James R. Thompson, James B. Zagel, Thomas J. Immel,* and *Morton E. Friedman,* Assistant Attorneys General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL dissent.

FIRST NATIONAL BANK OF SANTA FE *v.* COMMISSIONER OF REVENUE OF NEW MEXICO

APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

No. 1171. Decided April 27, 1970

80 N. M. 699, 460 P. 2d 64, appeal dismissed.

S. Hazard Gillespie and *Porter R. Chandler* for appellant.

James A. Maloney, Attorney General of New Mexico, *Gary O'Dowd,* Deputy Attorney General, and *Justin Reid,* Assistant Attorney General, for appellee.

PER CURIAM.

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

GARDEN STATE TRANSIT CO., INC. *v.* UNITED STATES ET AL.

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

No. 1323. Decided April 27, 1970

Affirmed.

Herman B. J. Weckstein for appellant.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, Fritz R. Kahn, and *Raymond M. Zimmet* for the United States et al.

PER CURIAM.

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

UNITED STATES *v.* ROWELL

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

No. 863. Decided April 27, 1970

Certiorari granted; 415 F. 2d 300, vacated and remanded.

Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg, and *Mervyn Hamburg* for the United States.

PER CURIAM.

The motion of the respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted and the judgment of the United States Court of Appeals is vacated. The case is remanded to that court for further consideration in light of *Buie* v. *United States,* 396 U. S. 87.

LAMPTON ET AL. *v.* BONIN ET AL.

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

No. 1112, Misc. Decided April 27, 1970

299 F. Supp. 336, vacated and remanded.

Jeffrey B. Schwartz and *Richard S. Buckley* for appellants.

Jack P. F. Gremillion, Attorney General of Louisiana, and *William P. Schuler* and *Dorothy D. Wolbrette,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted and the judgment of the United States District Court is vacated. The case is remanded to that court for further consideration in light of *Rosado* v. *Wyman, ante,* p. 397.

THE CHIEF JUSTICE and MR. JUSTICE BLACK dissent for the reasons set forth in MR. JUSTICE BLACK's dissenting opinion in *Rosado* v. *Wyman, ante,* p. 430.

WALZ *v.* TAX COMMISSION OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 135. Argued November 19, 1969—Decided May 4, 1970

Appellant property owner unsuccessfully sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for properties used solely for religious worship, as authorized by the state constitution and the implementing statute providing for tax exemptions for property used exclusively for religious, educational, or charitable purposes. Appellant contended that the exemptions as applied to religious bodies violated provisions prohibiting establishment of religion under the First and Fourteenth Amendments. *Held:*

1. The First Amendment tolerates neither governmentally established religion nor governmental interference with religion. Pp. 667–672.

2. The legislative purpose of tax exemptions is not aimed at establishing, sponsoring, or supporting religion, and New York's legislation simply spares the exercise of religion from the burden of property taxation levied on private profit institutions. Pp. 672–674.

3. The tax exemption creates only a minimal and remote involvement between church and state, far less than taxation of churches would entail, and it restricts the fiscal relationship between them, thus tending to complement and reinforce the desired separation insulating each from the other. Pp. 674–676.

4. Freedom from taxation for two centuries has not led to an established church or religion and on the contrary has helped to guarantee the free exercise of all forms of religious belief. Pp. 676–680.

24 N. Y. 2d 30, 246 N. E. 2d 517, affirmed.

Edward J. Ennis argued the cause for appellant.

J. Lee Rankin argued the cause for appellee. With him on the brief were *Stanley Buchsbaum* and *Edith I. Spivack.*

Briefs of *amici curiae* urging reversal were filed by *Osmond K. Fraenkel, Marvin M. Karpatkin, Norman Dorsen, Mr. Ennis,* and *Melvin L. Wulf* for the American Civil Liberties Union, and by *Lola Boswell* for Madalyn Murray O'Hair and *James H. Anderson, Jr.,* for the Society of Separationists, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Julius Greenfield,* Assistant Attorney General, for the State of New York, joined by the Attorneys General for their respective States as follows: *MacDonald Gallion* of Alabama, *Gary K. Nelson* of Arizona, *Joe Purcell* of Arkansas, *Duke W. Dunbar* of Colorado, *Robert K. Killian* of Connecticut, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Bertram T. Kanbara* of Hawaii, *William J. Scott* of Illinois, *Theodore L. Sendak* of Indiana, *Richard C. Turner* of Iowa, *Kent Frizzell* of Kansas, *John B. Breckinridge* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *James S. Erwin* of Maine, *Francis B. Burch* of Maryland, *Frank J. Kelley* of Michigan, *A. F. Summer* of Mississippi, *John C. Danforth* of Missouri, *Robert L. Woodahl* of Montana, *Clarence A. H. Meyer* of Nebraska, *Arthur J. Sills* of New Jersey, *James A. Maloney* of New Mexico, *Robert B. Morgan* of North Carolina, *Helgi Johanneson* of North Dakota, *Paul W. Brown* of Ohio, *William C. Sennett* of Pennsylvania, *Herbert F. De Simone* of Rhode Island, *Gordon Mydland* of South Dakota, *George F. McCanless* of Tennessee, *Crawford C. Martin* of Texas, *James M. Jeffords* of Vermont, *Robert Y. Button* of Virginia, *Slade Gorton* of Washington, *Robert W. War-*

ren of Wisconsin, and *James E. Barrett* of Wyoming, and by *Santiago C. Soler-Favale,* Attorney General of Puerto Rico; by *Franklin C. Salisbury* for Protestants and Other Americans United for Separation of Church and State; by *Noel Thompson* for the Parish Hall School, Inc.; by *Charles H. Tuttle* and *Thomas A. Shaw, Jr.,* for the National Council of the Churches of Christ in the United States; by *Anthony L. Fletcher, Stephen B. Clarkson, John Miles Evans, George F. Mackey, William G. Rhines, William Sherman,* and *H. Richard Schumacher* for the Episcopal Diocese of New York et al.; by *William R. Consedine, George E. Reed, Alfred L. Scanlan, Arthur E. Sutherland,* and *Charles M. Whelan* for the United States Catholic Conference; by *Marvin Braiterman* for the Synagogue Council of America et al.; by *Nathan Lewin* and *Julius Berman* for the National Jewish Commission on Law and Public Affairs; by *Joseph B. Friedman* for the Baptist Joint Committee on Public Affairs; and by *Roy L. Cole* for the Baptist General Convention of Texas.

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

Appellant, owner of real estate in Richmond County, New York, sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious worship. The exemption from state taxes is authorized by Art. 16, § 1, of the New York Constitution, which provides in relevant part:

> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or

charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit." [1]

The essence of appellant's contention was that the New York City Tax Commission's grant of an exemption to church property indirectly requires the appellant to make a contribution to religious bodies and thereby violates provisions prohibiting establishment of religion under the First Amendment which under the Fourteenth Amendment is binding on the States.[2]

Appellee's motion for summary judgment was granted and the Appellate Division of the New York Supreme Court, and the New York Court of Appeals affirmed. We noted probable jurisdiction, 395 U. S. 957 (1969), and affirm.

I

Prior opinions of this Court have discussed the development and historical background of the First Amendment in detail. See *Everson* v. *Board of Education,* 330 U. S. 1 (1947); *Engel* v. *Vitale,* 370 U. S. 421 (1962). It would therefore serve no useful purpose to review in detail the background of the Establishment and Free

[1] Art. 16, § 1, of the New York State Constitution is implemented by § 420, subd. 1, of the New York Real Property Tax Law which states in pertinent part:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

[2] The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Exercise Clauses of the First Amendment or to restate what the Court's opinions have reflected over the years.

It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity. In England, and in some Colonies at the time of the separation in 1776, the Church of England was sponsored and supported by the Crown as a state, or established, church; in other countries "establishment" meant sponsorship by the sovereign of the Lutheran or Catholic Church. See *Engel* v. *Vitale,* 370 U. S., at 428 n. 10. See generally C. Antieau, A. Downey, & E. Roberts, Freedom from Federal Establishment (1964). The exclusivity of established churches in the 17th and 18th centuries, of course, was often carried to prohibition of other forms of worship. See *Everson* v. *Board of Education,* 330 U. S., at 9–11; L. Pfeffer, Church, State and Freedom 71 *et seq.* (1967).

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a

logical extreme, would tend to clash with the other. For example, in *Zorach* v. *Clauson,* 343 U. S. 306 (1952), MR. JUSTICE DOUGLAS, writing for the Court, noted:

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." *Id.,* at 312.
>
> "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Id.,* at 313.

MR. JUSTICE HARLAN expressed something of this in his dissent in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), saying that the constitutional neutrality imposed on us

> "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." *Id.,* at 422.

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses

has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

The hazards of placing too much weight on a few words or phrases of the Court is abundantly illustrated within the pages of the Court's opinion in *Everson*. MR. JUSTICE BLACK, writing for the Court's majority, said the First Amendment

> "means at least this: 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., at 15.

Yet he had no difficulty in holding that:

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. *It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets . . . .*" *Id.*, at 17. (Emphasis added.)

The Court did not regard such "aid" to schools teaching a particular religious faith as any more a violation of the Establishment Clause than providing "state-paid policemen, detailed to protect children . . . [at the schools] from the very real hazards of traffic . . . ." *Ibid.*

Mr. Justice Jackson, in perplexed dissent in *Everson,* noted that

> "the undertones of the opinion, advocating complete and uncompromising separation . . . seem utterly discordant with its conclusion . . . ." *Id.*, at 19.

Perhaps so. One can sympathize with Mr. Justice Jackson's logical analysis but agree with the Court's eminently sensible and realistic application of the language of the Establishment Clause. In *Everson* the Court declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history. Surely, bus transportation and police protection to pupils who receive religious instruction "aid" that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools. But if as in *Everson* buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses.

Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an "aid" to the sponsoring churches because it relieved those churches of an enormous aggregate cost

for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. *Board of Education* v. *Allen,* 392 U. S. 236 (1968). In so holding the Court was heeding both its own prior decisions and our religious tradition. MR. JUSTICE DOUGLAS, in *Zorach* v. *Clauson, supra,* after recalling that we "are a religious people whose institutions presuppose a Supreme Being," went on to say:

> "We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . *When the state encourages religious instruction . . . it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." 343 U. S., at 313–314. (Emphasis added.)

With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a "tight rope" and one we have successfully traversed.

II

The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It

has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption.

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. See *Sherbert* v. *Verner,* 374 U. S. 398, 423 (1963) (HARLAN, J., dissenting); *Braunfeld* v. *Brown,* 366 U. S. 599, 608 (1961). See generally Kauper, The Constitutionality of Tax Exemptions for Religious Activities in The Wall Between Church and State 95 (D. Oaks ed. 1963). We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing

them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; [3] each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context "a page of

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[3] The support of religion with direct allocation of public revenue was a common colonial practice. See C. Antieau, A. Downey, & E. Roberts, Freedom from Federal Establishment cc. 1 and 2 (1964). A general assessment proposed in the Virginia Legislature in 1784 prompted the writing of James Madison's Remonstrance. See opinion of Mr. Justice Douglas dissenting, *post,* at 704–706; 716–727. Governmental support of religion is common in many countries. See *e. g.,* R. Murray, A Brief History of the Church of Sweden 75 (1961); G. Codding, The Federal Government of Switzerland 53–54 (1961); M. Scehic, Zbirka Propisa o Doprinosima i Porezima Gradjana 357 (Yugoslavia) (1968).

history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits.

All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax.[4] Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exer-

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[4] Act of August 27, 1894, § 32, 28 Stat. 556. Following passage of the Sixteenth Amendment, federal income tax acts have consistently exempted corporations and associations, organized and operated exclusively for religious purposes along with eleemosynary groups, from payment of the tax. Act of Oct. 3, 1913, § IIG (a), 38 Stat. 172. See Int. Rev. Code of 1954, § 501 *et seq.*, 26 U. S. C. § 501 *et seq.*

cise generally so long as none was favored over others and none suffered interference.

It is significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies. In 1802 the 7th Congress enacted a taxing statute for the County of Alexandria, adopting the 1800 Virginia statutory pattern which provided tax exemptions for churches. 2 Stat. 194.[5] As early as 1813 the 12th Congress refunded import duties paid by religious societies on the importation of religious articles.[6] During this period the City Council of Washington, D. C., acting under congressional authority, Act of Incorporation, § 7, 2 Stat. 197 (May 3, 1802), enacted a series of real and personal property assessments that uniformly exempted church property.[7] In 1870 the Congress specifically exempted all churches in the District of Colum-

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[5] In 1798 Congress passed an Act to provide for the valuation of lands and dwelling houses. All existing state exemptions were expressly excluded from the aforesaid valuation and enumeration. Act of July 9, 1798, § 8, 1 Stat. 585. Subsequent levies of direct taxes expressly or impliedly incorporated existing state exemptions. Act of July 14, 1798, § 2, 1 Stat. 598 (express incorporation of state exemption). See Act of Aug. 2, 1813, § 4, 3 Stat. 71; Act of Jan. 9, 1815, § 5, 3 Stat. 166 (express incorporation of state exemptions).

[6] See 6 Stat. 116 (1813), relating to plates for printing Bibles. See also 6 Stat. 346 (1826) relating to church vestments, furniture, and paintings; 6 Stat. 162 (1816), Bible plates; 6 Stat. 600 (1834), and 6 Stat. 675 (1836), church bells.

[7] See, *e. g.*, Acts of the Corporation of the City of Washington, First Council, c. V, approved Oct. 6, 1802, p. 13; Acts of the Corporation of the City of Washington, Second Council, § 1, approved Sept. 12, 1803, p. 13; Acts of the Corporation of the City of Washington, Third Council, § 1, approved Sept. 5, 1804, p. 13. Succeeding Acts of the Corporation impliedly renewed the exemption in subsequent assessments. See, *e. g.*, Acts of the Corporation of the City of Washington, Thirteenth Council, c. 19, § 2, approved July 27, 1815, p. 24.

bia and appurtenant grounds and property "from any and all taxes or assessments, national, municipal, or county." Act of June 17, 1870, 16 Stat. 153.[8]

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated:

> "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church. If tax exemption can be seen as this first step toward "establishment" of religion, as Mr. Justice Douglas fears, the second step has been long in coming. Any move that realistically "establishes" a church or tends to do so can be dealt with "while this Court sits."

Mr. Justice Cardozo commented in The Nature of the Judicial Process 51 (1921) on the "tendency of a prin-

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[8] Subsequent Acts of Congress carried over the substance of the exemption. Act of July 12, 1876, § 8, 19 Stat. 85; Act of March 3, 1877, § 8, 19 Stat. 399; Act of August 15, 1916, 39 Stat. 514; D. C. Code Ann. § 47–801a (1967).

ciple to expand itself to the limit of its logic"; such expansion must always be contained by the historical frame of reference of the principle's purpose and there is no lack of vigilance on this score by those who fear religious entanglement in government.

The argument that making "fine distinctions" between what is and what is not absolute under the Constitution is to render us a government of men, not laws, gives too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution. We must frequently decide, for example, what are "reasonable" searches and seizures under the Fourth Amendment. Determining what acts of government tend to establish or interfere with religion falls well within what courts have long been called upon to do in sensitive areas.

It is interesting to note that while the precise question we now decide has not been directly before the Court previously, the broad question was discussed by the Court in relation to real estate taxes assessed nearly a century ago on land owned by and adjacent to a church in Washington, D. C.[9] At that time Congress granted real estate tax exemptions to buildings devoted to art, to institutions of public charity, libraries, cemeteries, and "church buildings, and grounds actually occupied by such buildings." In denying tax exemption as to land owned by but not used for the church, but rather to produce income, the Court concluded:

> "In the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or

[9] *Gibbons* v. *District of Columbia,* 116 U. S. 404 (1886). Cf. *Washington Ethical Society* v. *District of Columbia,* 101 U. S. App. D. C. 371, 249 F. 2d 127 (1957).

> may tax them at a lower rate than other property." *Gibbons* v. *District of Columbia,* 116 U. S. 404, 408 (1886).

It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment. As to the New York statute, we now confirm that view.

Affirmed.

MR. JUSTICE BRENNAN, concurring.

I concur for reasons expressed in my opinion in *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 230 (1963). I adhere to the view there stated that to give concrete meaning to the Establishment Clause,

> "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those

> dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Clause." *Id.*, at 294–295.

Thus, in my view, the history, purpose, and operation of real property tax exemptions for religious organizations must be examined to determine whether the Establishment Clause is breached by such exemptions. See *id.*, at 293.

I

The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. As Mr. Justice Holmes observed in an analogous context, in resolving such questions of interpretation "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349 (1921). The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.

The Establishment Clause, along with the other provisions of the Bill of Rights, was ratified by the States in 1791. Religious tax exemptions were not an issue in the petitions calling for the Bill of Rights, in the pertinent congressional debates, or in the debates preceding ratification by the States.[1] The absence of concern about the exemptions could not have resulted from failure to foresee the possibility of their existence, for they were widespread during colonial days.[2] Rather, it seems clear that the exemptions were not among the evils that the Framers and Ratifiers of the Establishment Clause sought to avoid. Significantly, within a decade after ratification, at least four States passed statutes exempting the property of religious organizations from taxation.[3]

Although the First Amendment may not have applied to the States during this period, practice in Virginia at the time is nonetheless instructive. The Commonwealth's efforts to separate church and state provided the direct antecedents of the First Amendment, see *McGowan* v. *Maryland,* 366 U. S. 420, 437–440 (1961); *Abington School Dist.* v. *Schempp, supra,* at 233–234

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[1] In fact, it does not appear that the exemptions were even discussed. See, *e. g.,* C. Antieau, P. Carroll, & T. Burke, Religion Under the State Constitutions 122 (1965): "As far as anyone has been able to discover, the topic was never mentioned in the debates which took place prior to the adoption of the First Amendment."

[2] See, *e. g.,* C. Antieau, A. Downey, & E. Roberts, Freedom from Federal Establishment 20–21, 73–74, 175 (1964); cf. 3 A. Stokes, Church and State in the United States 419 (1950).

[3] 2 Del. Laws of 1700–1797, p. 1247 (Act of Feb. 9, 1796); 2 Md. Laws (1785–1799, Kilty), c. 89 (Act of Jan. 20, 1798); N. Y. Laws of 1797–1800, c. 72, at 414 (Act of April 1, 1799); 2 Va. Statutes at Large of 1792–1806 (Shepherd) 200 (Act of Jan. 23, 1800). See also 16 Penn. Statutes at Large of 1682–1801, at 379 (Act of April 11, 1799). For practice in other States, see the accounts in Antieau, Carroll, & Burke, *supra,* n. 1, at 123–169; Antieau, Downey, & Roberts, *supra,* n. 2, at 73–74; C. Zollmann, American Civil Church Law 238–242 (1917).

(BRENNAN, J., concurring); *Everson* v. *Board of Education*, 330 U. S. 1, 33–38 (1947) (Rutledge, J., dissenting), and Virginia remained unusually sensitive to the proper relation between church and state during the years immediately following ratification of the Establishment Clause. Virginia's protracted movement to disestablish the Episcopal Church culminated in the passage on January 24, 1799, of "An ACT to repeal certain acts, and to declare the construction of the [Virginia] bill of rights and constitution, concerning religion." The 1799 Act stated that the Virginia Bill of Rights had "excepted from the powers given to the [civil] government, the power of reviving any species of ecclesiastical or church government . . . by referring the subject of religion to conscience" and that the repealed measures had "bestowed property upon [the Anglican] church," had "asserted a legislative right to establish any religious sect," and had "incorporated religious sects, all of which is inconsistent with the principles of the constitution, and of religious freedom, and manifestly tends to the re-establishment of a national church." 2 Va. Statutes at Large of 1792–1806 (Shepherd) 149. Yet just one year after the passage of this Act, Virginia re-enacted a measure exempting from taxation property belonging to "any . . . college, houses for divine worship, or seminary of learning." *Id.*, at 200. This exemption dated at least from 1777 and had been reaffirmed immediately before and after ratification of the First Amendment. See 9 Va. Statutes at Large (1775–1778, Hening), at 351; 13 Va. Statutes at Large (1789–1792, Hening), at 112, 241, 336–337. It may reasonably be inferred that the Virginians did not view the exemption for "houses of divine worship" as an establishment of religion.

Similarly, in 1784 the New York Legislature repealed colonial acts establishing the Episcopal Church in several counties of the State. See N. Y. Laws of 1777–1784,

c. 38, p. 661. Yet in 1799, the legislature provided that "no house or land belonging to . . . any church or place of public worship, . . . nor any college or incorporated academy, nor any school house, . . . alms house or property belonging to any incorporated library, shall be taxed by virtue of this act." N. Y. Laws of 1797–1800, c. 72, at 414. And early practice in the District of Columbia—governed from the outset by the First Amendment—mirrored that in the States. In 1802 the Corporation of the City of Washington, under authority delegated by Congress, exempted "houses for public worship" from real property taxes. Acts of the Corporation of the City of Washington, First Council, c. V, approved Oct. 6, 1802, p. 13. See also the congressional Acts cited in the Court's opinion, *ante,* at 677–678.

Thomas Jefferson was President when tax exemption was first given Washington churches, and James Madison sat in sessions of the Virginia General Assembly that voted exemptions for churches in that Commonwealth.[4] I have found no record of their personal views on the respective Acts.[5] The absence of such a record is itself

[4] See, *e. g.,* E. Swem & J. Williams, A Register of the General Assembly of Virginia, 1776–1918, p. 53 (1918); Journal of the House of Delegates of the Commonwealth of Virginia 94, 98 (1799–1800).

[5] In an essay written after he had left the presidency, Madison did argue against tax exemptions for churches, the incorporation of ecclesiastical bodies with the power of acquiring and holding property in perpetuity, the right of the Houses of Congress to choose chaplains who are paid out of public funds, the provision of chaplains in the Army and Navy, and presidential proclamations of days of thanksgiving or prayer—though he admitted proclaiming several such days at congressional request. See Fleet, Madison's "Detatched Memoranda," 3 Wm. & Mary Q. (3d ser.) 534, 555–562 (1946). These arguments were advanced long after the passage of the Virginia exemption discussed in the text, *supra,* and even longer after the adoption of the Establishment Clause. They represent at most an extreme view of church-state relations, which Madison himself

significant. It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion. And if they had not either approved the exemptions, or been mild in their opposition, it is probable that their views would be known to us today. Both Jefferson and Madison wrote prolifically about issues they felt important, and their opinions were well known to contemporary chroniclers. See, for example, the record preserved of Madison's battle in 1784–1785 against the proposal in the Virginia Assembly to levy a general tax to support "Teachers of the Christian Religion," in the dissenting opinion of MR. JUSTICE DOUGLAS, *post,* at 704–706, 719–727. Much the same can be said of the other Framers and Ratifiers of the Bill of Rights who remained active in public affairs during the late 18th and early 19th centuries. The adoption of the early exemptions without controversy, in other words, strongly suggests that they were not thought incompatible with constitutional prohibitions against involvements of church and state.

The exemptions have continued uninterrupted to the present day. They are in force in all 50 States. No judicial decision, state or federal, has ever held that they violate the Establishment Clause. In 1886, for example, this Court in *Gibbons* v. *District of Columbia,* 116 U. S. 404, rejected on statutory grounds a church's claim for the exemption of certain of its land under congressional statutes exempting Washington churches and appurtenant ground from real property taxes. But the Court

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may have reached only late in life. He certainly expressed no such understanding of Establishment during the debates on the First Amendment. See 1 Annals of Cong. 434, 730–731, 755 (1789). And even if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights.

gave not the slightest hint that it ruled against the church because, under the First Amendment, *any* exemption would have been unconstitutional. To the contrary, the Court's opinion implied that nothing in the Amendment precludes exemption of church property: "We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also to add to its beauty and attractiveness, may, if not used or intended to be used for any other purpose, be exempt from taxation under these statutes." *Id.*, at 407.[6]

Mr. Justice Holmes said that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922). For almost 200 years the view expressed in the actions of legislatures and courts has been that tax exemptions for churches do not threaten "those consequences which the Framers deeply feared" or "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." *Schempp, supra,* at 236 (BRENNAN, J., concurring). An examination both of the governmental purposes for granting the exemptions and of the type of

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[6] See also, *e. g., Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237 (1890), where the Court stated: "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions." Indeed, the Court seems always to have viewed attacks upon the constitutionality of the exemptions as wholly frivolous. See, *e. g., Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, 298 P. 2d 1, appeal dismissed *sub nom. Heisey* v. *County of Alameda,* 352 U. S. 921 (1956); *General Finance Corp.* v. *Archetto,* 93 R. I. 392, 176 A. 2d 73 (1961), appeal dismissed, 369 U. S. 423 (1962).

church-state relationship that has resulted from their existence makes clear that no "strong case" exists for holding unconstitutional this historic practice.[7]

II

Government has two basic secular purposes for granting real property tax exemptions to religious organizations.[8] First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community. See, for example, 1938 N. Y. Constitutional Convention, Report of the Committee on Taxation, Doc. No. 2, p. 2. Thus, New York exempts "[r]eal property owned by a corporation or association

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[7] Compare the very different situation regarding prayers in public schools. The practice was not widespread at the time of the adoption of the First Amendment. Legislative authorization for the prayers came much later and then only in a relatively small number of States. Moreover, courts began to question the constitutionality of the practice by the late 19th century. The prayers were found unconstitutional by courts in six States and by state attorneys general in several others. See 374 U. S., at 270, 274–275.

[8] The only governmental purposes germane to the present inquiry, of course, are those that now exist. As I said in *Schempp*, "In the *Sunday Law Cases*, we found in state laws compelling a uniform day of rest from worldly labor no violation of the Establishment Clause . . . . The basic ground of our decision was that, granted the Sunday Laws were first enacted for religious ends, they were continued in force for reasons wholly secular, namely, to provide a universal day of rest and ensure the health and tranquillity of the community. In other words, government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends." 374 U. S., at 263–264.

organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes . . . ." N. Y. Real Prop. Tax Law § 420, subd. 1 (Supp. 1969–1970).

Appellant seeks to avoid the force of this secular purpose of the exemptions by limiting his challenge to "exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes." Appellant assumes, apparently, that church-owned property is used for exclusively religious purposes if it does not house a hospital, orphanage, weekday school, or the like. Any assumption that a church building itself is used for exclusively religious activities, however, rests on a simplistic view of ordinary church operations. As the appellee's brief cogently observes, "the public welfare activities and the sectarian activities of religious institutions are . . . intertwined . . . . Often a particular church will use the same personnel, facilities and source of funds to carry out both its secular and religious activities." Thus, the same people who gather in church facilities for religious worship and study may return to these facilities to participate in Boy Scout activities, to promote antipoverty causes, to discuss public issues, or to listen to chamber music. Accordingly, the funds used to maintain the facilities as a place for religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole. Even during formal worship services, churches frequently collect the funds used to finance

their secular operations and make decisions regarding their nature.

Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society. See *Washington Ethical Society* v. *District of Columbia,* 101 U. S. App. D. C. 371, 373, 249 F. 2d 127, 129 (1957). To this end, New York extends its exemptions not only to religious and social service organizations but also to scientific, literary, bar, library, patriotic, and historical groups, and generally to institutions "organized exclusively for the moral or mental improvement of men and women." The very breadth of this scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference. The scheme is not designed to inject any religious activity into a nonreligious context, as was the case with school prayers. No particular activity of a religious organization—for example, the propagation of its beliefs—is specially promoted by the exemptions. They merely facilitate the existence of a broad range of private, nonprofit organizations, among them religious groups, by leaving each free to come into existence, then to flourish or wither, without being burdened by real property taxes.

III

Although governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in

extensive state involvement with religion. Accordingly, those who urge the exemptions' unconstitutionality argue that exemptions are the equivalent of governmental subsidy of churches. General subsidies of religious activities would, of course, constitute impermissible state involvement with religion.

Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance,[9] they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.[10] It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words,

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[9] In certain circumstances, of course, the economic value of a subsidy exceeds that of an exemption. If the only state assistance received by a religious organization is a real property tax exemption, the church must raise privately every cent that it spends. If, on the other hand, the only state aid to a church is a general subsidy, the church is relieved of the need to support itself to the extent that its subsidy payments from the State exceed its tax payments to the State. Thus, to take the extreme case, a lightly taxed religious organization that received a large, general subsidy could purchase property, construct buildings and maintain its program wholly at public expense. Such dependence on state support is impossible when the only aid provided is a real property tax exemption.

[10] A real property tax exemption cannot be viewed as the free provision by the State of certain basic services—fire, police, water, and the like. As the Court, *ante*, at 676, points out, "the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits." See generally Bittker, Churches, Taxes and the Constitution, 78 Yale L. J. 1285, 1304–1310 (1969).

"[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, 81 Harv. L. Rev. 513, 553 (1968). Thus, "the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1687 n. 16 (1969). Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.[11]

Even though exemptions produce only passive state involvement with religion, nonetheless some argue that their termination would be desirable as a means of reducing the level of church-state contact. But it cannot realistically be said that termination of religious tax exemptions would quantitatively lessen the extent of state involvement with religion. Appellee contends that "[a]s a practical matter, the public welfare activities and the sectarian activities of religious institutions are so intertwined that they cannot be separated for the purpose of determining eligibility for tax exemptions." If not impossible, the separation would certainly involve extensive state investigation into church operations and finances. Moreover, the termination of exemptions would give rise, as the Court says, to the necessity for "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Ante,*

[11] See also, *e. g.,* Bittker, *supra,* n. 10, at 1285–1304.

at 674. Taxation, further, would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them. And taxation would surely influence the allocation of church resources. By diverting funds otherwise available for religious or public service purposes to the support of the Government, taxation would necessarily affect the extent of church support for the enterprises that they now promote. In many instances, the public service activities would bear the brunt of the reallocation, as churches looked first to maintain their places and programs of worship. In short, the cessation of exemptions would have a significant impact on religious organizations. Whether Government grants or withholds the exemptions, it is going to be involved with religion.[12]

IV

Against the background of this survey of the history, purpose, and operation of religious tax exemptions, I must conclude that the exemptions do not "serve the essentially religious activities of religious institutions." Their principal effect is to carry out secular purposes—the encouragement of public service activities and of a pluralistic society. During their ordinary operations, most churches engage in activities of a secular nature

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[12] The state involvement with religion that would be occasioned by any cessation of exemptions might conflict with the demands of the Free Exercise Clause. Cf. *Presbyterian Church* v. *Mary Eliz. Blue Hull Church,* 393 U. S. 440 (1969); *Maryland & Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.,* 396 U. S. 367, 368–370 (1970) (BRENNAN, J., concurring). It is unnecessary to reach any questions of free exercise in the present case, however. And while I believe that "hostility, not neutrality, would characterize the refusal to provide [the exemptions] . . . , I do not say that government *must* provide [them], or that the courts should intercede if it fails to do so." 374 U. S., at 299.

that benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us.

Nor do I find that the exemptions "employ the organs of government for essentially religious purposes." To the extent that the exemptions further secular ends, they do not advance "essentially religious purposes." To the extent that purely religious activities are benefited by the exemptions, the benefit is passive. Government does not affirmatively foster these activities by exempting religious organizations from taxes, as it would were it to subsidize them. The exemption simply leaves untouched that which adherents of the organization bring into being and maintain.

Finally, I do not think that the exemptions "use essentially religious means to serve governmental ends, where secular means would suffice." The means churches use to carry on their public service activities are not "essentially religious" in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities. It is true that each church contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation. Viewed in this light, there is no nonreligious substitute for religion as an element in our societal mosaic, just as there is no nonliterary substitute for literary groups.

As I said in *Schempp*, the First Amendment does not invalidate "the propriety of certain tax . . . exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. . . . [R]eligious institutions simply share benefits which government makes generally available

to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God." 374 U. S., at 301.

Opinion of MR. JUSTICE HARLAN.

While I entirely subscribe to the result reached today and find myself in basic agreement with what THE CHIEF JUSTICE has written, I deem it appropriate, in view of the radiations of the issues involved, to state those considerations that are, for me, controlling in this case and lead me to conclude that New York's constitutional provision, as implemented by its real property law, does not offend the Establishment Clause. Preliminarily, I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.

I

Two requirements frequently articulated and applied in our cases for achieving this goal are "neutrality" and "voluntarism." *E. g.,* see *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 305 (1963) (concurring opinion of Mr. Justice Goldberg); *Engel* v. *Vitale,* 370 U. S. 421 (1962). These related and mutually reinforcing concepts are short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion. Mr. Justice Goldberg's concurring opinion in

Abington which I joined set forth these principles: "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." 374 U. S., at 305. The Court's holding in *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961), is to the same effect: the State cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." In the vast majority of cases the inquiry, albeit an elusive one, can end at this point. Neutrality and voluntarism stand as barriers against the most egregious and hence divisive kinds of state involvement in religious matters.

While these concepts are at the "core" of the Religion Clauses, they may not suffice by themselves to achieve in all cases the purposes of the First Amendment. As Professor Freund has only recently pointed out in Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion. Thus, as the opinion of THE CHIEF JUSTICE notes, religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation. See my concurring

opinion in *Board of Education* v. *Allen,* 392 U. S. 236, 249 (1968), and the concurring opinion of Mr. Justice Goldberg in *Abington School Dist.* v. *Schempp, supra,* at 307.

II

This legislation neither encourages nor discourages participation in religious life and thus satisfies the voluntarism requirement of the First Amendment. Unlike the instances of school prayers, *Abington School Dist.* v. *Schempp, supra,* and *Engel* v. *Vitale, supra,* or "released time" programs, *Zorach* v. *Clauson,* 343 U. S. 306 (1952), and *McCollum* v. *Board of Education,* 333 U. S. 203 (1948), the State is not "utilizing the prestige, power, and influence" of a public institution to bring religion into the lives of citizens. 374 U. S., at 307 (Goldberg, J., concurring).

The statute also satisfies the requirement of neutrality. Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.

The statute that implements New York's constitutional provision for tax exemptions to religious organizations has defined a class of nontaxable entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of "good works" by performing certain social services in the community that might otherwise have to be assumed by government. Included are such broad and divergent groups as historical and literary societies and more generally associations "for the moral or mental

improvement of men." The statute by its terms grants this exemption in furtherance of moral and intellectual diversity and would appear not to omit any organization that could be reasonably thought to contribute to that goal.

To the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions. I think, moreover, in the context of a statute so broad as the one before us, churches may properly receive an exemption even though they do not themselves sponsor the secular-type activities mentioned in the statute but exist merely for the convenience of their interested members. As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.[1]

[1] While I would suppose most churches devote part of their resources to secular community projects and conventional charitable activities, it is a question of fact, a fact that would only be relevant if we had before us a statute framed more narrowly to include only "charities" or a limited class of organizations, and churches. In such a case, depending on the administration of the exemption, it might be that the granting of an exemption to religion would turn out to be improper. This would depend, I believe, on what activities the church in fact sponsored. It would also depend, I think, on whether or to what extent the exemption were accorded to secular social organizations, conceived to benefit their own membership but also engaged in incidental general philanthropic or cultural undertakings. It might also depend on whether, if church-sponsored programs were not open to all without charge, the exemption were extended to private clubs and organizations promoting activities on

III

Whether the present exemption entails that degree of involvement with government that presents a threat of fragmentation along religious lines involves, for me, a more subtle question than deciding simply whether neutrality has been violated. Unlike the subsidy that my Brother DOUGLAS foresees as the next step down the road, tax exemptions to nonprofit organizations are an institution in themselves, so much so that they are, as THE CHIEF JUSTICE points out, expected and accepted as a matter of course. See Freund, Public Aid to Parochial Schools, *supra*. In the instant case noninvolvement is further assured by the neutrality and breadth of the exemption. In the context of an exemption so sweeping as the one before us here its administration need not entangle government in difficult classifications of what is or is not religious, for any organization—although not religious in a customary sense—would qualify under the pervasive rubric of a group dedicated to the moral and cultural improvement of men. Obviously the more discriminating and complicated the basis of classification for an exemption—even

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a contributory basis. These would all be questions of fact to be determined by the revenue authorities and the courts. While such determinations necessarily involve government in the religious institutions, they do not offend the First Amendment. That an evaluation of the scope of charitable activities in proportion to doctrinal pursuits may be difficult, does not render it undue interference with religion, cf. *Presbyterian Church* v. *Mary Eliz. Blue Hull Church*, 393 U. S. 440 (1969), for it does not entail judicial inquiry into dogma and belief. Indeed, such an inquiry may be inescapable in the context of a statute of less breadth than the one before us.

I would hold the present exemption neutral because New York has created a general class so broad that it would be difficult to conclude that religious organizations cannot properly be included in it.

a neutral one—the greater the potential for state involvement in evaluating the character of the organizations. Cf. *Presbyterian Church* v. *Mary Eliz. Blue Hull Church,* 393 U. S. 440 (1969).

I agree with my Brother DOUGLAS that exemptions do not differ from subsidies as an economic matter. Aside from the longstanding tradition behind exemptions there are other differences, however. Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case.

Whether direct aid or subsidies entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a later case upon a record that fully develops all the pertinent considerations [2] such as the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided. It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government. Cf., *e. g.,* my separate opinion in *Roth* v. *United States,* 354 U. S. 476, 496 (1957).

I recognize that for those who seek inflexible solutions this tripartite analysis provides little comfort. It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe

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[2] The dimension of the problem would also require consideration of what kind of pluralistic society is compatible with the political concepts and traditions embodied in our Constitution.

that a "slippery slope" is necessarily without a constitutional toehold. Like THE CHIEF JUSTICE I am of the view that it is the task of this tribunal to "draw distinctions, including fine ones, in the process of interpreting the Constitution." *Ante,* at 679. The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible. I think this one is, and on the foregoing premises join with the Court in upholding this New York statute.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner is the owner of real property in New York and is a Christian. But he is not a member of any of the religious organizations, "rejecting them as hostile." The New York statute exempts from taxation real property "owned by a corporation or association organized exclusively for . . . religious . . . purposes" and used "exclusively for carrying out" such purposes.[1] Yet nonbelievers who own realty are taxed at the usual rate. The question in the case therefore is whether believers—organized in church groups—can be made exempt from real estate taxes, merely because they are believers, while nonbelievers, whether organized or not, must pay the real estate taxes.

My Brother HARLAN says he "would suppose" that the tax exemption extends to "groups whose avowed tenets may be antitheological, atheistic, or agnostic." *Ante,* at 697. If it does, then the line between believers and nonbelievers has not been drawn. But, with all respect, there is not even a suggestion in the present record that the statute covers property used exclusively by organizations for "antitheological purposes," "atheistic purposes," or "agnostic purposes."

In *Torcaso* v. *Watkins,* 367 U. S. 488, we held that

[1] N. Y. Real Prop. Tax Law § 420, subd. 1 (Supp. 1969–1970).

a State could not bar an atheist from public office in light of the freedom of belief and religion guaranteed by the First and Fourteenth Amendments. Neither the State nor the Federal Government, we said, "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.*, at 495.

That principle should govern this case.

There is a line between what a State may do in encouraging "religious" activities, *Zorach* v. *Clauson,* 343 U. S. 306, and what a State may not do by using its resources to promote "religious" activities, *McCollum* v. *Board of Education,* 333 U. S. 203, or bestowing benefits because of them. Yet that line may not always be clear. Closing public schools on Sunday is in the former category; subsidizing churches, in my view, is in the latter. Indeed I would suppose that in common understanding one of the best ways to "establish" one or more religions is to subsidize them, which a tax exemption does. The State may not do that any more than it may prefer "those who believe in no religion over those who do believe." *Zorach* v. *Clauson, supra,* at 314.

In affirming this judgment the Court largely overlooks the revolution initiated by the adoption of the Fourteenth Amendment. That revolution involved the imposition of new and far-reaching constitutional restraints on the States. Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in state law.

The process of the "selective incorporation" of various provisions of the Bill of Rights into the Fourteenth Amendment, although often provoking lively disagree-

ment at large as well as among the members of this Court, has been a steady one. It started in 1897 with *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, in which the Court held that the Fourteenth Amendment precluded a State from taking private property for public use without payment of just compensation, as provided in the Fifth Amendment. The first direct holding as to the incorporation of the First Amendment into the Fourteenth occurred in 1931 in *Stromberg* v. *California,* 283 U. S. 359, a case involving the right of free speech, although that holding in *Stromberg* had been foreshadowed in 1925 by the Court's opinion in *Gitlow* v. *New York,* 268 U. S. 652. As regards the religious guarantees of the First Amendment, the Free Exercise Clause was expressly deemed incorporated into the Fourteenth Amendment in 1940 in *Cantwell* v. *Connecticut,* 310 U. S. 296, although that holding had been foreshadowed in 1923 and 1934 by the Court's dicta in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and *Hamilton* v. *Regents,* 293 U. S. 245, 262. The Establishment Clause was not incorporated in the Fourteenth Amendment until *Everson* v. *Board of Education,* 330 U. S. 1, was decided in 1947.

Those developments in the last 30 years have had unsettling effects. It was, for example, not until 1962 that state-sponsored, sectarian prayers were held to violate the Establishment Clause. *Engel* v. *Vitale,* 370 U. S. 421. That decision brought many protests, for the habit of putting one sect's prayer in public schools had long been practiced. Yet if the Catholics, controlling one school board, could put their prayer into one group of public schools, the Mormons, Baptists, Moslems, Presbyterians, and others could do the same, once they got control. And so the seeds of Establishment would grow and a secular institution would be used to serve a sectarian end.

Engel was as disruptive of traditional state practices as was *Stromberg.* Prior to *Stromberg,* a State could arrest an unpopular person who made a rousing speech on the charge of disorderly conduct. Since *Stromberg,* that has been unconstitutional. And so the revolution occasioned by the Fourteenth Amendment has progressed as Article after Article in the Bill of Rights has been incorporated in it and made applicable to the States.

Hence the question in the present case makes irrelevant the "two centuries of uninterrupted freedom from taxation," referred to by the Court. *Ante,* at 678. If history be our guide, then tax exemption of church property in this country is indeed highly suspect, as it arose in the early days when the church was an agency of the state. See W. Torpey, Judicial Doctrines of Religious Rights in America 171 (1948). The question here, though, concerns the meaning of the Establishment Clause and the Free Exercise Clause made applicable to the States for only a few decades at best.

With all due respect the governing principle is not controlled by *Everson* v. *Board of Education, supra. Everson* involved the use of public funds to bus children to parochial as well as to public schools. Parochial schools teach religion; yet they are also educational institutions offering courses competitive with public schools. They prepare students for the professions and for activities in all walks of life. Education in the secular sense was combined with religious indoctrination at the parochial schools involved in *Everson.* Even so, the *Everson* decision was five to four and, though one of the five, I have since had grave doubts about it, because I have become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause. See *Engel* v. *Vitale, supra,* at 443–444 (DOUGLAS, J., concurring).

This case, however, is quite different. Education is not involved. The financial support rendered here is to the church, the place of worship. A tax exemption is a subsidy. Is my Brother BRENNAN correct in saying that we would hold that state or federal grants to churches, say, to construct the edifice itself would be unconstitutional? What is the difference between that kind of subsidy and the present subsidy? [2]

The problem takes us back where Madison was in 1784 and 1785 when he battled the Assessment Bill [3] in Virginia. That bill levied a tax for the support of Christian churches, leaving to each taxpayer the choice as to "what society of Christians" he wanted the tax paid; and absent such designation, the tax was to go for education. Even so, Madison was unrelenting in his opposition. As stated by Mr. Justice Rutledge:

> "The modified Assessment Bill passed second reading in December, 1784, and was all but enacted.

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[2] In the oral argument in *McCollum* v. *Board of Education*, 333 U. S. 203, the following colloquy took place between MR. JUSTICE BLACK and counsel John L. Franklin:

"MR. JUSTICE BLACK. Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?

"MR. FRANKLIN. Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.

"MR. JUSTICE BLACK. How does it do it?

"MR. FRANKLIN. By tax exemptions specifically granted to religious organizations.

"MR. JUSTICE BLACK. Your position is that they could grant five million dollars a year to religion, if they wanted to, out of the taxpayer's money, so long as they treated all faiths the same?

"MR. FRANKLIN. Yes, Your Honor. That is our interpretation of the meaning of the first clause of the First Amendment." J. O'Neill, Religion and Education under the Constitution 225 (1949).

[3] See Appendix I to this dissent, *post*, p. 716.

> Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And before the Assembly reconvened in the fall he issued his historic Memorial and Remonstrance." *Everson* v. *Board of Education, supra,* at 37 (dissenting opinion).

The Remonstrance [4] stirred up such a storm of popular protest that the Assessment Bill was defeated.[5]

The Remonstrance covers some aspects of the present subsidy, including Madison's protest in paragraph 3 to a requirement that any person be compelled to contribute even "three pence" to support a church. All men, he maintained in paragraph 4, enter society "on equal conditions," including the right to free exercise of religion:

> "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions."

Madison's assault on the Assessment Bill was in fact an assault based on both the concepts of "free exercise" and "establishment" of religion later embodied in the First Amendment. Madison, whom we recently called "the leading architect of the religion clauses of the First Amendment," *Flast* v. *Cohen,* 392 U. S. 83, 103,

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[4] See Appendix II to this dissent, *post,* p. 719.

[5] See H. Eckenrode, Separation of Church and State in Virginia, c. V (1910).

was indeed their author and chief promoter.[6] As Mr. Justice Rutledge said:

> "All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing." *Everson* v. *Board of Education, supra,* at 39.

The Court seeks to avoid this historic argument as to the meaning of "establishment" and "free exercise" by relying on the long practice of the States in granting the subsidies challenged here.

Certainly government may not lay a tax on either worshiping or preaching. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, we ruled on a state license tax levied on religious colporteurs as a condition to pursuit of their activities. In holding the tax unconstitutional we said:

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44–45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of

[6] 1 Annals of Cong. 434, 729–731.

> the vital power of the press which has survived from the Reformation." *Id.*, at 112.

Churches, like newspapers also enjoying First Amendment rights, have no constitutional immunity from all taxes. As we said in *Murdock:*

> "We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." *Ibid.*

State aid to places of worship, whether in the form of direct grants or tax exemption, takes us back to the Assessment Bill and the Remonstrance. The church *qua* church would not be entitled to that support from believers and from nonbelievers alike. Yet the church *qua* nonprofit, charitable institution is one of many that receive a form of subsidy through tax exemption. To be sure, the New York statute [7] does not single out the church for grant or favor. It includes churches in a long list of nonprofit organizations: for the moral or mental improvement of men and women (§ 420); for charitable, hospital, or educational purposes (*ibid.*); for playgrounds (*ibid.*); for scientific or literary objects (*ibid.*); for bar associations, medical societies, or libraries (*ibid.*); for patriotic and historical purposes (*ibid.*); for cemeteries (*ibid.*); for the enforcement of laws relating to children or animals (*ibid.*); for opera

[7] N. 1, *supra.*

houses (§ 426); for fraternal organizations (§ 428); for academies of music (§ 434); for veterans' organizations (§ 452); for pharmaceutical societies (§ 472); and for dental societies (§ 474). While the beneficiaries cover a wide range, "atheistic," "agnostic," or "antitheological" groups do not seem to be included.

Churches perform some functions that a State would constitutionally be empowered to perform. I refer to nonsectarian social welfare operations such as the care of orphaned children and the destitute and people who are sick. A tax exemption to agencies performing those functions would therefore be as constitutionally proper as the grant of direct subsidies to them. Under the First Amendment a State may not, however, provide worship if private groups fail to do so. As Mr. Justice Jackson said:

> "[A State] may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. . . . That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today." *Everson* v. *Board of Education, supra,* at 26 (dissenting opinion).

That is a major difference between churches on the one hand and the rest of the nonprofit organizations on the other. Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within

the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them.

The Brookings Institution, writing in 1933, before the application of the Establishment Clause of the First Amendment to the States, said about tax exemptions of religious groups: [8]

> "Tax exemption, no matter what its form, is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body *would be equally willing to make* a direct appropriation from public funds equal to the amount of the exemption. This test would not be met except in the case where the exemption is granted to encourage certain activities of private interests, which, if not thus performed, would have to be assumed by the government at an expenditure at least as great as the value of the exemption." (Emphasis added.)

Since 1947, when the Establishment Clause was made applicable to the States, that report would have to state that the exemption would be justified only where "the legislative body *could make*" an appropriation for the cause.

On the record of this case, the church *qua* nonprofit, charitable organization is intertwined with the church *qua* church. A church may use the same facilities, resources, and personnel in carrying out both its secular and its sectarian activities. The two are unitary and on the present record have not been separated one from

[8] The Brookings Institution, Report on a Survey of Administration in Iowa: The Revenue System 33 (1933).

the other. The state has a public policy of encouraging private public welfare organizations, which it desires to encourage through tax exemption. Why may it not do so and include churches *qua* welfare organizations on a nondiscriminatory basis? That avoids, it is argued, a discrimination against churches and in a real sense maintains neutrality toward religion which the First Amendment was designed to foster. Welfare services, whether performed by churches or by nonreligious groups, may well serve the public welfare.

Whether a particular church seeking an exemption for its welfare work could constitutionally pass muster would depend on the special facts. The assumption is that the church is a purely private institution, promoting a sectarian cause. The creed, teaching, and beliefs of one may be undesirable or even repulsive to others. Its sectarian faith sets it apart from all others and makes it difficult to equate its constituency with the general public. The extent that its facilities are open to all may only indicate the nature of its proselytism. Yet though a church covers up its religious symbols in welfare work, its welfare activities may merely be a phase of sectarian activity. I have said enough to indicate the nature of this tax exemption problem.

Direct financial aid to churches or tax exemptions to the church *qua* church is not, in my view, even arguably permitted. Sectarian causes are certainly not antipublic and many would rate their own church or perhaps all churches as the highest form of welfare. The difficulty is that sectarian causes must remain in the private domain not subject to public control or subsidy. That seems to me to be the requirement of the Establishment Clause. As Edmond Cahn said:

> "In America, Madison submitted most astutely, the rights of conscience must be kept not only free but *equal* as well. And in view of the endless varia-

> tions—not only among the numerous sects, but also among the organized activities they pursued and the relative emotional values they attached to their activities—how could any species of government assistance be considered genuinely equal from sect to sect? If, for example, a state should attempt to subsidize all sectarian schools without discrimination, it would necessarily violate the principle of equality because certain sects felt impelled to conduct a large number of such schools, others few, others none.[9] How could the officers of government begin to measure the intangible factors that a true equality of treatment would involve, i. e., the relative intensity of religious attachment to parochial education that the respective groups required of their lay and clerical members? It would be presumptuous even to inquire. Thus, just as in matters of race our belated recognition of intangible factors has finally led us to the maxim 'separate therefore unequal,' so in matters of religion Madison's immediate recognition of intangible factors led us promptly to the maxim 'equal therefore separate.' Equality was out of the question without total separation." Confronting Injustice 186–187 (1967).

The exemptions provided here insofar as welfare projects are concerned may have the ring of neutrality. But subsidies either through direct grant or tax exemption for sectarian causes, whether carried on by church *qua* church or by church *qua* welfare agency, must be treated differently, lest we in time allow the church *qua* church to be on the public payroll, which, I fear, is imminent.

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[9] This inequality, some argue, is pronounced when it comes to aid to parochial schools now run mainly by the Catholic Church. See G. Cogdell, What Price Parochiaid? 68–70 (1970).

As stated by my Brother BRENNAN in *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 259 (concurring opinion), "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

Madison as President vetoed a bill incorporating the Protestant Episcopal Church in Alexandria, Virginia, as being a violation of the Establishment Clause. He said, *inter alia:* [10]

> "[T]he bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty."

He also vetoed a bill that reserved a parcel of federal land "for the use" of the Baptist Church, as violating the Establishment Clause.[11]

What Madison would have thought of the present state subsidy to churches—a tax exemption as distinguished from an outright grant—no one can say with certainty. The fact that Virginia early granted church tax exemptions cannot be credited to Madison. Certainly he seems to have been opposed. In his paper Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments he wrote: [12] "Strongly guarded as is the separation between Religion & Govt in the Constitution of the United

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[10] H. R. Misc. Doc. No. 210, pt. 1, 53d Cong., 2d Sess., 489–490.

[11] *Id.,* at 490.

[12] Fleet, Madison's "Detatched Memoranda," 3 Wm. & Mary Q. (3d ser.) 534, 551, 555 (1946).

States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history." And he referred, *inter alia,* to the "attempt in Kentucky for example, where it was proposed to exempt Houses of Worship from taxes." From these three statements, Madison, it seems, opposed all state subsidies to churches. Cf. D. Robertson, Should Churches Be Taxed? 60–61 (1968).

We should adhere to what we said in *Torcaso* v. *Watkins,* 367 U. S., at 495, that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements *which aid all religions as against nonbelievers,* and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (Emphasis added.)

Unless we adhere to that principle, we do not give full support either to the Free Exercise Clause or to the Establishment Clause.

If a church can be exempted from paying real estate taxes, why may not it be made exempt from paying special assessments? The benefits in the two cases differ only in degree; and the burden on nonbelievers is likewise no different in kind.[13]

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[13] See Zollmann, Tax Exemptions of American Church Property, 14 Mich. L. Rev. 646, 655–656 (1916).

The New York Supreme Court in *In re Mayor of New York,* 11 Johns. 77, 81, said:

"As the church property is not, nor is likely soon to be, either appropriated to renting or exposed to sale, but is devoted exclusively to religious purposes, the benefit resulting to it, by the improvement of *Nassau-street,* must be small in comparison with that of other property, and it, therefore, ought not to contribute in the like proportion. It may be considered, possibly, as benefited, by rendering the access to the churches more convenient, and the places more pleasant and salubrious, by the freer circulation of the air. This may have some influence on the pew rents, and the ground may become permanently more valuable. These, however, appear to be small and remote benefits to property so circumstanced; and to

The religiously used real estate of the churches today constitutes a vast domain. See M. Larson & C. Lowell, The Churches: Their Riches, Revenues, and Immunities (1969). Their assets total over $141 billion and their annual income at least $22 billion. *Id.*, at 232. And the extent to which they are feeding from the public trough in a variety of forms is alarming. *Id.*, c. 10.

We are advised that since 1968 at least five States have undertaken to give subsidies to parochial and other private schools [14]—Pennsylvania, Ohio, New York, Connecticut, and Rhode Island. And it is reported that under two federal Acts, the Elementary and Secondary Education Act of 1965, 79 Stat. 27, and the Higher Education Act of 1965, 79 Stat. 1219, *billions of dollars* have been granted to parochial and other private schools.

The federal grants to elementary and secondary schools under 79 Stat. 27 were made to the States which in turn made advances to elementary and secondary schools. Those figures are not available.

But the federal grants to private institutions of higher education are revealed in Department of Health, Education, and Welfare (HEW), Digest of Educational Statistics 16 (1969). These show in billions of dollars the following: [15]

1965–66	$1.4
1966–67	$1.6
1967–68	$1.7
1968–69	$1.9
1969–70	$2.1

charge the churches equally with adjoining private property is unreasonable and extravagant; and on this point the report ought to be sent back to the commissioners for revisal and correction."

[14] U. S. News & World Report, May 4, 1970, p. 34.

[15] These totals include all types of federal aid—physical plants, dormitory construction, laboratories, libraries, lunch programs, fellowships and scholarships, etc.

Of the total federal outlays for education only two-fifths are for

It is an old, old problem. Madison adverted to it: [16]

> "Are there not already examples in the U. S. of ecclesiastical wealth equally beyond its object and the foresight of those who laid the foundation of it? In the U. S. there is a double motive for fixing limits in this case, because wealth may increase not only from additional gifts, but from exorbitant advances in the value of the primitive one. In grants of vacant lands, and of lands in the vicinity of growing towns & Cities the increase of value is often such as if foreseen, would essentially controul the liberality confirming them. The people of the U. S. owe their Independence & their liberty, to the wisdom of descrying in the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let them exert the same wisdom, in watching agst every evil lurking under plausible disguises, and growing up from small beginnings." [17]

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programs administered by the Office of Education, other parts of the Department of HEW account for one-fifth. The rest of the outlays are distributed among 24 federal departments and agencies, of which the largest shares are accounted for by the Department of Defense, the Veterans Administration, the National Science Foundation, and the Office of Economic Opportunity. U. S. Bureau of the Budget, Special Analysis, Federal Education Program, 1971 Budget, Special Analysis I, pt. 2, p. 115 (Feb. 1970).

[16] Fleet, *supra*, n. 12, at 557–558.

[17] In 1875 President Grant in his State of the Union Message referred to the vast amounts of untaxed church property:

"In 1850, I believe, the church property of the United States which paid no tax, municipal or State, amounted to about $83,000,000. In 1860 the amount had doubled; in 1875 it is about $1,000,000,000. By 1900, without check, it is safe to say this property will reach a sum exceeding $3,000,000,000. So vast a sum, receiving all the protection and benefits of Government without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay the taxes. In a growing country, where real estate enhances so rapidly with time, as in the United States, there is scarcely a limit

If believers are entitled to public financial support, so are nonbelievers. A believer and nonbeliever under the present law are treated differently because of the articles of their faith. Believers are doubtless comforted that the cause of religion is being fostered by this legislation. Yet one of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects, but also between believers and nonbelievers. The present involvement of government in religion may seem *de minimis*. But it is, I fear, a long step down the Establishment path. Perhaps I have been misinformed. But as I have read the Constitution and its philosophy, I gathered that independence was the price of liberty.

I conclude that this tax exemption is unconstitutional.

APPENDIX I TO OPINION OF DOUGLAS, J., DISSENTING

Assessment Bill. The December 24, 1784, print reproduced in the Supplemental Appendix to the dissenting opinion of Rutledge, J., in *Everson* v. *Board of Education,* 330 U. S. 1, 72:

"A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION.

"Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society;

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to the wealth that may be acquired by corporations, religious or otherwise, if allowed to retain real estate without taxation. The contemplation of so vast a property as here alluded to, without taxation, may lead to sequestration, without constitutional authority and through blood.

"I would suggest the taxation of all property equally, whether church or corporation, exempting only the last resting place of the dead and possibly, with proper restrictions, church edifices." 9 Messages and Papers of the Presidents 4288–4289 (1897).

which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

"*Be it therefore enacted by the General Assembly,* That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

"*And be it enacted,* That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the day of in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff

be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

"*And be it further enacted,* That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

"*And be it enacted,* That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account cer-

tified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

"THIS Act shall commence, and be in force, from and after the day of in the year

"*A Copy from the Engrossed Bill.*

"JOHN BECKLEY, C. H. D."

APPENDIX II TO OPINION OF DOUGLAS, J., DISSENTING [18]

Memorial and Remonstrance Against Religious Assessments, as reproduced in the Appendix to the dissenting opinion of Rutledge, J., in *Everson* v. *Board of Education,* 330 U. S. 1, 63 (2 The Writings of James Madison 183–191 (G. Hunt ed. 1901)):

"We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled 'A Bill establishing a provision for Teachers of the Christian Religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

"1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every

[18] Footnotes omitted.

man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

"2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department

of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

"4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates

of conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

"5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

"6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only

during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

"7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

"8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influence in fact have ecclesiastical establishments

had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

"9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

"10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty

which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

"11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

"12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region

of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

"13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

"14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

"15. Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot

be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the 'basis and foundation of Government,' it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right to suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth."

ROWAN, DBA AMERICAN BOOK SERVICE, ET AL. *v.* UNITED STATES POST OFFICE DEPARTMENT ET AL.

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

No. 399. Argued January 22, 1970—Decided May 4, 1970

Appellants, who are in the mail-order business, brought suit to enjoin the operation of 39 U. S. C. § 4009, challenging its constitutionality. That section provides that a person who has received by mail "a pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," may request the Postmaster General to issue an order "directing the sender and his agents or assigns to refrain from further mailings to the named addressee." Such order would also require the sender to delete the addressee's name from his mailing lists and would prohibit him from trading in lists from which the deletion has not been made. If the Postmaster General believes that his order has been violated, he may notify the sender of his belief and the reasons therefor, and must grant him an opportunity to respond and to have an administrative hearing on whether a violation has occurred. If the Postmaster General thereafter determines that the order has been violated, he may request the Attorney General to seek an order from a district court directing compliance with the prohibitory order. A three-judge court found that § 4009 was constitutional when interpreted to prohibit advertisements similar to those initially mailed to the addressee. *Held:*

1. The statute allows the addressee unreviewable discretion to decide whether he wishes to receive any further material from a particular sender. Pp. 731–735.

2. A vendor does not have a constitutional right to send unwanted material into someone's home, and a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. Pp. 735–738.

3. The statute comports with the Due Process Clause as it provides for an administrative hearing if the sender violates the Postmaster General's prohibitory order, and a judicial hearing prior to issuance of any compliance order by a district court. Pp. 738–739.

4. The statute does not violate due process by requiring that the sender remove the complaining addressee's name from his mailing lists, nor is the statute unconstitutionally vague, as the sender knows precisely what he must do when he receives a prohibitory order. P. 740.

300 F. Supp. 1036, affirmed.

Joseph Taback argued the cause and filed a brief for appellants.

Assistant Attorney General Ruckelshaus argued the cause for appellees. With him on the brief were *Solicitor General Griswold, Peter L. Strauss, Robert V. Zener,* and *Donald L. Horowitz.*

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lloyd G. Milliken* filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance. *David E. McGiffert* filed a brief for the Direct Mail Advertising Association, Inc., as *amicus curiae.*

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

Appellants challenge the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 645, 39 U. S. C. § 4009 (1964 ed., Supp. IV), under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder. The appellants are publishers, distributors, owners, and operators of mail order houses, mailing list brokers, and owners and operators of mail service organizations whose business activities are affected by the challenged statute.

A brief description of the statutory framework will facilitate our analysis of the questions raised in this appeal. Section 4009 is entitled "Prohibition of pandering advertisements in the mails." It provides a pro-

cedure whereby any householder may insulate himself from advertisements that offer for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." 39 U. S. C. § 4009 (a) (1964 ed., Supp. IV).[1]

Subsection (b) mandates the Postmaster General, upon receipt of a notice from the addressee specifying that he has received advertisements found by him to be within the statutory category, to issue on the addressee's request an order directing the sender and his agents or assigns to refrain from further mailings to the named addressee. Additionally, subsection (c) requires the Postmaster General to order the affected sender to delete the name of the designated addressee from all mailing lists owned or controlled by the sender and prohibits the sale, rental, exchange, or other transactions involving mailing lists bearing the name of the designated addressee.

If the Postmaster General has reason to believe that an order issued under this section has been violated, subsection (d) authorizes him to notify the sender by registered or certified mail of his belief and the reasons therefor, and grant him an opportunity to respond and have a hearing on whether a violation has occurred.

If the Postmaster General thereafter determines that the order has been or is being violated, he is authorized to request the Attorney General to seek an order from a United States District Court directing compliance with the prohibitory order. Subsection (e) grants to the district court jurisdiction to issue a compliance order upon application of the Attorney General.

Appellants initiated an action in the United States District Court for the Central District of California upon

[1] Subsection (g) provides that upon the addressee's request the order shall include the names of the addressee's minor children who reside with him and who have not attained their nineteenth birthday.

a complaint and petition for declaratory relief on the ground that 39 U. S. C. § 4009 (1964 ed., Supp. IV) is unconstitutional. They alleged that they had received numerous prohibitory orders pursuant to the provisions of the statute. Appellants contended that the section violates their rights of free speech and due process guaranteed by the First and Fifth Amendments to the United States Constitution. Additionally, appellants argued that the section is unconstitutionally vague, without standards, and ambiguous.

A three-judge court was convened pursuant to 28 U. S. C. § 2284 and it determined that the section was constitutional when interpreted to prohibit advertisements similar to those initially mailed to the addressee.[2] 300 F. Supp. 1036.

The District Court construed subsections (b) and (c) to prohibit "advertisements similar" to those initially mailed to the addressee. Future mailings, in the view of the District Court, "are to be measured by the objectionable material of such first mailing." 300 F. Supp., at 1041. In our view Congress did not intend so restrictive a scope to those provisions.

I. Background and Congressional Objectives

Section 4009 was a response to public and congressional concern with use of mail facilities to distribute unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character. Such mail was found to be pressed upon minors as well as adults who did not seek and did not want it. Use of mailing lists of youth organizations was part of the mode of

[2] Judge Hufstedler, concurring specially but without dissent, would require the District Court prior to issuing a compliance order to determine *de novo* whether the sender is a person who has mailed or has caused to be mailed any pandering advertisements.

doing business. At the congressional hearings it developed that complaints to the Postmaster General had increased from 50,000 to 250,000 annually. The legislative history, including testimony of child psychology specialists and psychiatrists before the House Committee on the Post Office and the Civil Service, reflected concern over the impact of the materials on the development of children. A declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee.

To accomplish these objectives Congress provided in subsection (a) that the mailer is subject to an order "to refrain from further mailings of such materials to designated addressees." Subsection (b) states that the Postmaster General shall direct the sender to refrain from "further mailings to the named addressees." Subsection (c) in describing the Postmaster's order states that it shall "expressly prohibit the sender . . . from making any further mailings to the designated addressees . . . ." Subsection (c) also requires the sender to delete the addressee's name "from all mailing lists" and prohibits the sale, transfer, and exchange of lists bearing the addressee's name.

There are three plausible constructions of the statute, with respect to the scope of the prohibitory order. The order could prohibit all future mailings to the addressees, all future mailings of advertising material to the addressees, or all future mailings of similar materials.

The seeming internal statutory inconsistency is undoubtedly a residue of the language of the section as it was initially proposed. The section as originally reported by the House Committee prohibited "further mailings of such pandering advertisements," § 4009 (a), "further mailings of such matter," § 4009 (b), and "any further mailings of pandering advertisements," § 4009 (c).

H. R. Rep. No. 722, 90th Cong., 1st Sess., 125 (1967). The section required the Postmaster General to make a determination whether the particular piece of mail came within the proscribed class of pandering advertisements, "as that term is used in the *Ginzburg* case." *Id.*, at 69.

The section was subsequently amended by the House of Representatives to eliminate from the Post Office any censorship function. Congressman Waldie, who proposed the amendment, envisioned a minimal role for the Post Office. The amendment was intended to remove "the right of the Government to involve itself in any determination of the content and nature of these objectionable materials . . . ." 113 Cong. Rec. 28660 (1967). The only determination left for the Postmaster General is whether or not the mailer has removed the addressee's name from the mailing list. Statements by the proponents of the legislation in both the House and Senate manifested an intent to prohibit all further mailings from the sender. In describing the effect of his proposed amendment Congressman Waldie stated:

> "So I have said in my amendment that if you receive literature in your household that you consider objectionable . . . you can inform the Postmaster General to have your name stricken from that mailer's mailing list." 113 Cong. Rec. 28660.

The Senate Committee Report on the bill contained similar language:

> "If a person receives an advertisement which . . . he . . . believes to be erotically arousing . . . he may notify the Postmaster General of his determination. The Postmaster General is then required to issue an order to the sender directing him to refrain from sending any further mailings of any kind to such person." S. Rep. No. 801, 90th Cong., 1st Sess., 38.

Senator Monroney, a major proponent of the legislation in the Senate, described the bill as follows:

> "With respect to the test contained in the bill, if the addressee declared it to be erotically arousing or sexually provocative, the Postmaster General would have to notify the sender to send no more mail to that address . . . ." 113 Cong. Rec. 34231 (1967).[3]

The legislative history of subsection (a) thus supports an interpretation that prohibits all future mailings independent of any objective test. This reading is consistent with the provisions of related subsections in the section. Subsection (c) provides that the Postmaster General "shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees." 39 U. S. C. § 4009 (c) (1964 ed., Supp. IV).

It would be anomalous to read the statute to affect only similar material or advertisements and yet require the Postmaster General to order the sender to remove the addressee's name from all mailing lists in his actual or constructive possession. The section was intended to allow the addressee complete and unfettered discretion in electing whether or not he desired to receive further material from a particular sender. See n. 6, *infra*. The impact of this aspect of the statute is on the mailer, not

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[3] Senator Hruska spoke similarly: "Title III would allow the recipient of obscene mail to return it to the Postmaster General with a request that the Postmaster General notify the sender to stop mailings to the addressee . . . ." 113 Cong. Rec. 34232 (1967).

the mail. The interpretation of the statute that most completely effectuates that intent is one that prohibits any further mailings. Limiting the prohibitory order to similar materials or advertisements is open to at least two criticisms: (a) it would expose the householder to further burdens of scrutinizing the mail for objectionable material and possible harassment, and (b) it would interpose the Postmaster General between the sender and the addressee and, at the least, create the appearance if not the substance of governmental censorship.[4] It is difficult to see how the Postmaster General could decide whether the materials were "similar" or possessing touting or pandering characteristics without an evaluation suspiciously like censorship. Additionally, such an interpretation would be incompatible with the unequivocal language in subsection (c).

II. First Amendment Contentions

The essence of appellants' argument is that the statute violates their constitutional right to communicate. One sentence in appellants' brief perhaps characterizes their entire position:

> "The freedom to communicate orally and by the written word and, indeed, in every manner whatsoever is imperative to a free and sane society." Brief for Appellants 15.

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[4] Subsection (d) vests the Postmaster General with the duty to determine whether the sender has violated the order. This determination was intended to be primarily a ministerial one involving an adjudication whether the initial material was an advertisement and whether the sender mailed materials to the addressee more than 30 days after the receipt of the prohibitory order. An interpretation which requires the Postmaster General to determine whether the subsequent material was pandering and/or similar would tend to place him "astride the flow of mail . . . ." *Lamont* v. *Postmaster General,* 381 U. S. 301, 306 (1965).

Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

In *Martin* v. *Struthers,* 319 U. S. 141 (1943), Mr. Justice Black, for the Court, while supporting the "[f]reedom to distribute information to every citizen," *id.,* at 146, acknowledged a limitation in terms of leaving "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home." *Id.,* at 148. Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's

right to communicate must stop at the mailbox of an unreceptive addressee.

The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. See *Martin* v. *Struthers, supra;* cf. *Hall* v. *Commonwealth,* 188 Va. 72, 49 S. E. 2d 369, appeal dismissed, 335 U. S. 875 (1948). In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.

To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. See *Camara* v. *Municipal Court,* 387 U. S. 523 (1967).

Both the absoluteness of the citizen's right under § 4009 and its finality are essential; what may not be provocative to one person may well be to another. In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.

In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence. The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable. Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped.

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. See *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451 (1952). The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

The statutory scheme at issue accords to the sender an "opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 246 (1944). It thus comports with the Due Process Clause of the Fifth Amendment. The statutory scheme accomplishes this by providing that the Postmaster General shall issue a prohibitory order to the sender on the request of the complaining addressee. Only if the sender violates the terms of the order is the Postmaster General authorized to serve a complaint on the sender, who is then allowed 15 days to respond. The sender can then secure an

administrative hearing.[5] The sender may question whether the initial material mailed to the addressee was an advertisement and whether he sent any subsequent mailings. If the Postmaster General thereafter determines that the prohibitory order has been violated, he is authorized to request the Attorney General to make application in a United States District Court for a compliance order;[6] a second hearing is required if an order is to be entered.

The only administrative action not preceded by a full hearing is the initial issuance of the prohibitory order. Since the sender risks no immediate sanction by failing to comply with that order—it is only a predicate for later steps—it cannot be said that this aspect of the procedure denies due process. It is sufficient that all available defenses, such as proof that no mail was sent, may be presented to a competent tribunal before a contempt finding can be made. See *Nickey* v. *Mississippi*, 292 U. S. 393, 396 (1934).

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[5] Although subsection (h) specifically excludes the pre-complaint hearing from the provisions of the Administrative Procedure Act, 5 U. S. C. § 554 *et seq.* (1964 ed., Supp. IV), the Post Office Department has promulgated regulations setting forth procedures governing the departmental administrative hearings. 39 CFR pt. 916.

[6] The function of the district court is similar to that of the Postmaster General. It is to determine whether the initial mailing included advertising material and whether there was a mailing by the sender to the addressee more than 30 days after receipt of the order. We reject the suggestions that the section should be read to require the district judge to make a determination of the addressee's good faith, or to conduct an independent adjudication of the pandering nature of the material. The statute was intended to entrust unreviewable discretion to the addressee to determine whether or not the advertisement was "erotically arousing or sexually provocative." "[T]he sole determination as to whether the literature you receive is objectionable or not is within your discretion and you are not second-guessed on that discretion." 113 Cong. Rec. 28660 (1967) (remarks of Congressman Waldie).

The appellants also contend that the requirement that the sender remove the addressee's name from all mailing lists in his possession violates the Fifth Amendment because it constitutes a taking without due process of law. The appellants are not prohibited from using, selling, or exchanging their mailing lists; they are simply required to delete the names of the complaining addressees from the lists and cease all mailings to those persons.

Appellants next contend that compliance with the statute is confiscatory because the costs attending removal of the names are prohibitive. We agree with the conclusion of the District Court that the "burden does not amount to a violation of due process guaranteed by the Fifth Amendment of the Constitution. Particularly when in the context presently before this Court it is being applied to commercial enterprises." 300 F. Supp., at 1041. See *California State Auto Ins. Bureau* v. *Maloney,* 341 U. S. 105 (1951).

There is no merit to the appellants' allegations that the statute is unconstitutionally vague. A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct. *United States* v. *Cardiff,* 344 U. S. 174, 176 (1952). Here the appellants know precisely what they must do on receipt of a prohibitory order. The complainants' names must be removed from the sender's mailing lists and he must refrain from future mailings to the named addressees. The sender is exposed to a contempt sanction only if he continues to mail to a particular addressee after administrative and judicial proceedings. Appellants run no substantial risk of miscalculation.

For the reasons stated, the judgment appealed from is affirmed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, concurring.

I join the Court's opinion but add a few words. I agree that 39 U. S. C. § 4009 (1964 ed., Supp. IV) is constitutional insofar as it permits an *addressee* to require a mailer to remove *his* name from its mailing lists and to stop all future mailings to the addressee. As the Court notes, however, subsection (g) of § 4009 also allows an addressee to request the Postmaster General to include in any prohibitory order "the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee." In light of the broad interpretation that the Court assigns to § 4009, and see *ante,* at 738, the possibility exists that parents could prevent their children, even if they are 18 years old, from receiving political, religious, or other materials that the parents find offensive. In my view, a statute so construed and applied is not without constitutional difficulties. Cf. *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969); *Ginsberg* v. *New York,* 390 U. S. 629 (1968). In this case, however, there is no particularized attack upon the constitutionality of subsection (g), nor, indeed, is there any indication on this record that under § 4009 (g) children in their late teens have been unwillingly deprived of the opportunity to receive materials. In these circumstances, I understand the Court to leave open the question of the right of older children to receive materials through the mail without governmental interference and also the more specific question whether § 4009 (g) may constitutionally be applied with respect to *all* materials and to *all* children under 19.

BRADY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 270. Argued November 18, 1969—Decided May 4, 1970

Petitioner was indicted in 1959 for kidnaping and not liberating the victim unharmed in violation of 18 U. S. C. § 1201 (a), which imposed a maximum penalty of death if the jury's verdict so recommended. Upon learning that his codefendant, who had confessed, would plead guilty and testify against him, petitioner changed his plea from not guilty to guilty. The trial judge accepted the plea after twice questioning petitioner (who was represented throughout by competent counsel) as to the voluntariness of his plea, and imposed sentence. In 1967, petitioner sought post-conviction relief, in part on the ground that § 1201 (a) operated to coerce his plea. The District Court, after hearing, denied relief, concluding that petitioner's plea was voluntary and had been induced, not by that statute, but by the development concerning his confederate. The Court of Appeals affirmed. Petitioner claims that *United States* v. *Jackson,* 390 U. S. 570 (1968), requires reversal of that holding. *Held:* On the record in this case there is no basis for disturbing the judgment of the courts below that petitioner's guilty plea was voluntary. Pp. 745–758.

(a) Though *United States* v. *Jackson, supra,* prohibits imposition of the death penalty under § 1201 (a), it does not hold that all guilty pleas encouraged by the fear of possible death are involuntary, nor does it invalidate such pleas whether involuntary or not. Pp. 745–748.

(b) A plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty, and here petitioner's plea of guilty met the standard of voluntariness as it was made "by one fully aware of the direct consequences" of that plea. Pp. 749–755.

(c) Petitioner's plea, made after advice by competent counsel, was intelligently made, and the fact that petitioner did not anticipate *United States* v. *Jackson, supra,* does not impugn the truth or reliability of that plea. Pp. 756–758.

404 F. 2d 601, affirmed.

Peter J. Adang, by appointment of the Court, 396 U. S. 809, argued the cause and filed a brief for petitioner.

Joseph J. Connolly argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Marshall Tamor Golding.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1959, petitioner was charged with kidnaping in violation of 18 U. S. C. § 1201 (a).[1] Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea.[2]

[1] "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

[2] Eight days after petitioner pleaded guilty, he was brought before the court for sentencing. At that time, the court questioned petitioner for a second time about the voluntariness of his plea:

"THE COURT: . . . Having read the presentence report and the statement you made to the probation officer, I want to be certain

Petitioner was sentenced to 50 years' imprisonment, later reduced to 30.

In 1967, petitioner sought relief under 28 U. S. C. § 2255, claiming that his plea of guilty was not voluntarily given because § 1201 (a) operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the trial judge had not fully complied with Rule 11 of the Federal Rules of Criminal Procedure.[3]

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that you know what you are doing and you did know when you entered a plea of guilty the other day. Do you want to let that plea of guilty stand, or do you want to withdraw it and plead not guilty?

"DEFENDANT BRADY: I want to let that plea stand, sir.

"THE COURT: You understand that in doing that you are admitting and confessing the truth of the charge contained in the indictment and that you enter a plea of guilty voluntarily, without persuasion, coercion of any kind? Is that right?

"DEFENDANT BRADY: Yes, your Honor.

"THE COURT: And you do do that?

"DEFENDANT BRADY: Yes, I do.

"THE COURT: You plead guilty to the charge?

"DEFENDANT BRADY: Yes, I do." App. 29–30.

[3] When petitioner pleaded guilty, Rule 11 read as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 11 was amended in 1966 and now reads as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If

After a hearing, the District Court for the District of New Mexico denied relief. According to the District Court's findings, petitioner's counsel did not put impermissible pressure on petitioner to plead guilty and no representations were made with respect to a reduced sentence or clemency. The court held that § 1201 (a) was constitutional and found that petitioner decided to plead guilty when he learned that his codefendant was going to plead guilty: petitioner pleaded guilty "by reason of other matters and not by reason of the statute" or because of any acts of the trial judge. The court concluded that "the plea was voluntarily and knowingly made."

The Court of Appeals for the Tenth Circuit affirmed, determining that the District Court's findings were supported by substantial evidence and specifically approving the finding that petitioner's plea of guilty was voluntary. 404 F. 2d 601 (1968). We granted certiorari, 395 U. S. 976 (1969), to consider the claim that the Court of Appeals was in error in not reaching a contrary result on the authority of this Court's decision in *United States* v. *Jackson,* 390 U. S. 570 (1968). We affirm.

I

In *United States* v. *Jackson, supra,* the defendants were indicted under § 1201 (a). The District Court dismissed the § 1201 (a) count of the indictment, holding

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a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In *McCarthy* v. *United States,* 394 U. S. 459 (1969), we held that a failure to comply with Rule 11 required that a defendant who had pleaded guilty be allowed to plead anew. In *Halliday* v. *United States,* 394 U. S. 831 (1969), we held that the *McCarthy* rule should apply only in cases where the guilty plea was accepted after April 2, 1969, the date of the *McCarthy* decision.

the statute unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. This Court held the statute valid, except for the death penalty provision; with respect to the latter, the Court agreed with the trial court "that the death penalty provision . . . imposes an impermissible burden upon the exercise of a constitutional right . . . ." 390 U. S., at 572. The problem was to determine "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." 390 U. S., at 581. The inevitable effect of the provision was said to be to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision "needlessly penalize[d] the assertion of a constitutional right," 390 U. S., at 583, and was therefore unconstitutional.

Since the "inevitable effect" of the death penalty provision of § 1201 (a) was said by the Court to be the needless encouragement of pleas of guilty and waivers of jury trial, Brady contends that *Jackson* requires the invalidation of every plea of guilty entered under that section, at least when the fear of death is shown to have been a factor in the plea. Petitioner, however, has read far too much into the *Jackson* opinion.

The Court made it clear in *Jackson* that it was not holding § 1201 (a) inherently coercive of guilty pleas: "the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that

every defendant who enters a guilty plea to a charge under the Act does so involuntarily." 390 U. S., at 583. Cited in support of this statement, 390 U. S., at 583 n. 25, was *Laboy* v. *New Jersey*, 266 F. Supp. 581 (D. C. N. J. 1967), where a plea of guilty (non vult) under a similar statute was sustained as voluntary in spite of the fact, as found by the District Court, that the defendant was greatly upset by the possibility of receiving the death penalty.

Moreover, the Court in *Jackson* rejected a suggestion that the death penalty provision of § 1201 (a) be saved by prohibiting in capital kidnaping cases all guilty pleas and jury waivers, "however clear [the defendants'] guilt and however strong their desire to acknowledge it in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings." "[T]hat jury waivers and guilty pleas may occasionally be rejected" was no ground for automatically rejecting all guilty pleas under the statute, for such a rule "would rob the criminal process of much of its flexibility." 390 U. S., at 584.

Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201 (a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." See *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969).[4]

[4] The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. See nn. 5 and 6, *infra*. The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice.[5] But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.[6] On neither score was Brady's plea of guilty invalid.

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guilty entered his plea understandingly and voluntarily. This Court has not yet passed on the question of the retroactivity of this new requirement.

[5] *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962); *Waley* v. *Johnston,* 316 U. S. 101, 104 (1942); *Walker* v. *Johnston,* 312 U. S. 275, 286 (1941); *Chambers* v. *Florida,* 309 U. S. 227 (1940); *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927).

[6] See *Brookhart* v. *Janis,* 384 U. S. 1 (1966); *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 275 (1942); *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938); *Patton* v. *United States,* 281 U. S. 276, 312 (1930).

Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel. See *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 (1956); *Von Moltke* v. *Gillies,* 332 U. S. 708 and 727 (1948) (opinions of Black and Frankfurter, JJ.); *Williams* v. *Kaiser,* 323 U. S. 471 (1945). Since *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), it has been clear that a guilty

II

The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. Cf. *Haynes* v. *Washington,* 373 U. S. 503, 513 (1963); *Leyra* v. *Denno,* 347 U. S. 556, 558 (1954). One of these circumstances was the possibility of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty.[7] But

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plea to a felony charge entered without counsel and without a waiver of counsel is invalid. See *White* v. *Maryland,* 373 U. S. 59 (1963); *Arsenault* v. *Massachusetts,* 393 U. S. 5 (1968).

The importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decisions in *McCarthy* v. *United States, supra,* and *Boykin* v. *Alabama,* 395 U. S. 238 (1969). See nn. 3 and 4, *supra.*

[7] Such a possibility seems to have been rejected by the District Court in the § 2255 proceedings. That court found that "the plea of guilty was made by the petitioner by reason of other matters and not by reason of the statute . . . ."

even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty. Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for

the crime charged if a conviction is obtained after the State is put to its proof.

Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations,[8] as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not

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[8] We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.

constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.[9] It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty,[10] a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or

[9] For a more elaborate discussion of the factors that may justify a reduction in penalty upon a plea of guilty, see American Bar Association Project on Standards for Criminal Justice, Pleas of Guilty § 1.8 and commentary, pp. 37–52 (Approved Draft 1968).

[10] It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea. D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial 3 and n. 1 (1966).

the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.

Bram v. *United States,* 168 U. S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be " 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' " 168 U. S., at 542–543. More recently, *Malloy* v. *Hogan,* 378 U. S. 1 (1964), carried forward the *Bram* definition of compulsion in the course of holding applicable to the States the Fifth Amendment privilege against compelled self-incrimination.[11]

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[11] *Malloy* v. *Hogan,* 378 U. S. 1, 7 (1964). See also *Haynes* v. *Washington,* 373 U. S. 503, 513 (1963); *Lynumn* v. *Illinois,* 372 U. S. 528 (1963); *Wilson* v. *United States,* 162 U. S. 613, 622–623 (1896).

Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda* v. *Arizona,* 384 U. S. 436 (1966), held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.[12]

Brady's situation bears no resemblance to Bram's. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to

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[12] "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against compelled self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." *Miranda* v. *Arizona,* 384 U. S. 436, 466 (1966).

the requirements of the law with respect to guilty pleas. Brady's plea, unlike Bram's confession, was voluntary.

The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

> " '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).' 242 F. 2d at page 115." [13]

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.[14]

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[13] *Shelton* v. *United States,* 246 F. 2d 571, 572 n. 2 (C. A. 5th Cir. 1957) (*en banc*), rev'd on confession of error on other grounds, 356 U. S. 26 (1958).

[14] Our conclusion in this regard seems to coincide with the conclusions of most of the lower federal courts that have considered whether a guilty plea to avoid a possible death penalty is involuntary. See *United States ex rel. Brown* v. *LaVallee,* 424 F. 2d 457 (C. A. 2d Cir. 1970); *United States* v. *Thomas,* 415 F. 2d 1216 (C. A. 9th Cir. 1969); *Pindell* v. *United States,* 296 F. Supp. 751 (D. C. Conn. 1969); *McFarland* v. *United States,* 284 F. Supp. 969 (D. C. Md. 1968), aff'd, No. 13,146 (C. A. 4th Cir., May 1, 1969), cert. denied, *post,* p. 1077; *Laboy* v. *New Jersey,* 266 F. Supp. 581 (D. C. N. J. 1967); *Gilmore* v. *California,* 364 F. 2d 916 (C. A. 9th Cir. 1966); *Busby* v. *Holman,* 356 F. 2d 75 (C. A. 5th Cir. 1966); *Cooper* v. *Holman,* 356 F. 2d 82 (C. A. 5th Cir.), cert. denied, 385 U. S. 855 (1966); *Godlock* v. *Ross,* 259 F. Supp. 659 (D. C. E. D. N. C. 1966); *United States ex rel. Robinson* v. *Fay,* 348 F. 2d 705 (C. A. 2d Cir. 1965), cert. denied, 382 U. S. 997

III

The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years. Brady was aware of precisely what he was doing when he admitted that he had kidnaped the victim and had not released her unharmed.

It is true that Brady's counsel advised him that § 1201 (a) empowered the jury to impose the death penalty and that nine years later in *United States* v. *Jackson, supra,* the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly

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(1966); *Overman* v. *United States,* 281 F. 2d 497 (C. A. 6th Cir. 1960), cert. denied, 368 U. S. 993 (1962); *Martin* v. *United States,* 256 F. 2d 345 (C. A. 5th Cir.), cert. denied, 358 U. S. 921 (1958). But see *Shaw* v. *United States,* 299 F. Supp. 824 (D. C. S. D. Ga. 1969); *Alford* v. *North Carolina,* 405 F. 2d 340 (C. A. 4th Cir. 1968), prob. juris. noted, 394 U. S. 956 (1969), restored to calendar for reargument, *post,* p. 1060.

sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. *Von Moltke* v. *Gillies,* 332 U. S. 708 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

The fact that Brady did not anticipate *United States* v. *Jackson, supra,* does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are

necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth.

Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful.

Affirmed.

MR. JUSTICE BLACK, while adhering to his belief that *United States* v. *Jackson,* 390 U. S. 570, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

[For opinion of MR. JUSTICE BRENNAN, concurring in the result, see *post,* p. 799.]

Syllabus

McMANN, WARDEN, ET AL. *v.* RICHARDSON ET AL.

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

No. 153. Argued February 24, 1970—Decided May 4, 1970

Respondents were convicted in state court of felonies, following their pleas of guilty, entered on advice of counsel, which in petitions for collateral relief they claimed, *inter alia,* were the illegal product of coerced confessions. Following denial of relief in the state courts, the District Courts, without evidentiary hearings, denied the petitions. The Court of Appeals reversed in each case, holding that a guilty plea (1) effectively waives pretrial irregularities only if voluntary; (2) is not voluntary if it results from an involuntary confession; and (3) is vulnerable (at least in New York cases like these) where entered prior to *Jackson* v. *Denno,* 378 U. S. 368 (1964). *Held:*

1. A competently counseled defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus. Pp. 768–771.

(a) A defendant who pleads guilty despite his feeling that the evidence against him is weak, apart from a confession he deems inadmissible, is merely refusing to present his federal claims regarding the confession to the state court in the first instance. Such a defendant cannot claim that his bypass of state remedies was not an intelligent act absent incompetent advice by counsel. Pp. 768–769.

(b) A defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack as being involuntary on the ground that his counsel may have misjudged the admissibility of the defendant's confession. Pp. 769–771.

2. A defendant who pleads guilty, thereby waiving his state court remedies, does so under the law then existing and assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts; and in this case the fact that respondents' counsel did not anticipate this Court's decision in *Jackson* v. *Denno, supra,* and did not consider invalid the New York procedures existing at the time their clients pleaded guilty does not mean that respondents were incompetently advised. Pp. 771–774.

408 F. 2d 48 and 658, and 409 F. 2d 1016, vacated and remanded.

Brenda Soloff, Assistant Attorney General of New York, argued the cause for petitioners. With her on the briefs were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen* and *Amy Juviler,* Assistant Attorneys General.

Gretchen White Oberman argued the cause for respondents. With her on the brief were *Grace L. Brodsky* and *Kalman Finkel.*

Michael R. Juviler, by special leave of Court, argued the cause for the District Attorney of New York County as *amicus curiae* urging reversal. With him on the brief were *Frank S. Hogan, pro se,* and *Bennett L. Gershman.*

Melvin L. Wulf filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The petition for certiorari, which we granted, 396 U. S. 813 (1969), seeks reversal of three separate judgments of the Court of Appeals for the Second Circuit ordering hearings on petitions for habeas corpus filed by the respondents in this case.[1] The principal issue before us is whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions or proof that the plea was motivated by a prior coerced confession. We find ourselves in substantial disagreement with the Court of Appeals.

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[1] Our grant of certiorari also included a fourth respondent, another petitioner for habeas corpus, Wilbert Ross. See n. 7, *infra.* However, upon consideration of a subsequent suggestion of mootness by reason of Ross' death, we vacated the Court of Appeals' judgment and remanded to the District Court for the Eastern District of New York with directions to dismiss the petition for habeas corpus as moot. 396 U. S. 118 (1969).

I

The three respondents now before us are Dash, Richardson, and Williams. We first state the essential facts involved as to each.

Dash: In February 1959, respondent Dash was charged with first-degree robbery which, because Dash had previously been convicted of a felony, was punishable by up to 60 years' imprisonment.[2] After pleading guilty to robbery in the second degree in April, he was sentenced to a term of eight to 12 years as a second-felony offender.[3] His petition for collateral relief in the state courts in 1963 was denied without a hearing.[4]

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[2] N. Y. Penal Law § 2125, then in effect, provided that first-degree robbery was punishable by imprisonment for an indeterminate term the minimum of which was to be not less than 10 years and the maximum of which was to be not more than 30 years. Under N. Y. Penal Law § 1941, subd. 1, then in effect, conviction for a second felony was punishable by imprisonment for an indeterminate term with the minimum one-half the maximum set for a first conviction and the maximum twice the maximum set for a first conviction.

In addition to the first-degree robbery charge, Dash was also charged with grand larceny and assault.

[3] Waterman and Devine, two men accused of taking part in the robbery along with Dash, did not plead guilty; after a jury trial they were convicted of first-degree robbery, second-degree grand larceny, and second-degree assault and were sentenced to 15 to 20 years' imprisonment. On appeal these convictions were reversed because of the State's use of post-indictment confessions given by one of the defendants in the absence of counsel. *People* v. *Waterman,* 12 App. Div. 2d 84, 208 N. Y. S. 2d 596 (1960), aff'd, 9 N. Y. 2d 561, 175 N. E. 2d 445 (1961). Waterman and Devine then pleaded guilty to assault in the second degree and were sentenced to imprisonment for 2½ to 3 years.

[4] The denial of relief was affirmed by the Appellate Division of the New York Supreme Court, *People* v. *Dash,* 21 App. Div. 2d 978, 252 N. Y. S. 2d 1016 (1964), aff'd mem., 16 N. Y. 2d 493, 208 N. E. 2d 171 (1965).

Relief was then sought in the United States District Court for the Southern District of New York where his petition for habeas corpus alleged that his guilty plea was the illegal product of a coerced confession and of the trial judge's threat to impose a 60-year sentence if he was convicted after a plea of not guilty. His petition asserted that he had been beaten, refused counsel, and threatened with false charges prior to his confession and that the trial judge's threat was made during an off-the-record colloquy in one of Dash's appearances in court prior to the date of his plea of guilty. Dash also asserted that his court-appointed attorney had advised pleading guilty since Dash did not "stand a chance due to the alleged confession signed" by him. The District Court denied the petition without a hearing because "a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of the proceedings against the defendant," citing *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 915 (1966), and other cases. The allegation of coercion by the trial judge did not call for a hearing since the prosecutor had filed an affidavit in the state court categorically denying that the trial judge ever threatened the defendant. Dash then appealed to the Court of Appeals for the Second Circuit.

Richardson: Respondent Richardson was indicted in April 1963 for murder in the first degree. Two attorneys were assigned to represent Richardson. He initially pleaded not guilty but in July withdrew his plea and pleaded guilty to murder in the second degree, specifically admitting at the time that he struck the victim with a knife. He was convicted and sentenced to a term of 30 years to life. Following the denial without a hearing of his application for collateral relief in the

state courts,[5] Richardson filed his petition for habeas corpus in the United States District Court for the Northern District of New York, alleging in conclusory fashion that his plea of guilty was induced by a coerced confession and by ineffective court-appointed counsel. His petition was denied without a hearing, and he appealed to the Court of Appeals for the Second Circuit, including with his appellate brief a supplemental affidavit in which he alleged that he was beaten into confessing the crime, that his assigned attorney conferred with him only 10 minutes prior to the day the plea of guilty was taken, that he advised his attorney that he did not want to plead guilty to something he did not do, and that his attorney advised him to plead guilty to avoid the electric chair, saying that "this was not the proper time to bring up the confession" and that Richardson "could later explain by a writ of habeas corpus how my confession had been beaten out of me."

Williams: In February 1956, respondent Williams was indicted for five felonies, including rape and robbery. He pleaded guilty to robbery in the second degree in March and was sentenced in April to a term of 7½ to 15 years. After unsuccessful applications for collateral relief in the state courts,[6] he petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York, asserting that his plea was the consequence of a coerced confession and was made without an understanding of the nature of the

[5] The denial of relief was affirmed without opinion by the Appellate Division of the New York Supreme Court, *People* v. *Richardson*, 23 App. Div. 2d 969, 260 N. Y. S. 2d 586 (1965).

[6] The denial of relief on the claims later presented in the Federal District Court was affirmed without opinion by the Appellate Division of the New York Supreme Court, *People* v. *Williams*, 25 App. Div. 2d 620, 268 N. Y. S. 2d 958 (1966).

charge and the consequences of the plea. In his petition and in documents supporting it, allegations were made that he had been handcuffed to a desk while being interrogated, that he was threatened with a pistol and physically abused, and that his attorney, in advising him to plead guilty, ignored his alibi defense and represented that his plea would be to a misdemeanor charge rather than to a felony charge. The petition was denied without a hearing and Williams appealed.

The Court of Appeals for the Second Circuit reversed in each case, sitting *en banc* and dividing six to three in Dash's case [7] and disposing of Richardson's and Williams' cases in decisions by three-judge panels.[8] In each case it was directed that a hearing be held on the petition for habeas corpus.[9] It was the Court of Appeals' view that

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[7] *United States ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (C. A. 2d Cir. 1969). The Court of Appeals' opinion dealt also with the appeal of Wilbert Ross from a denial of habeas corpus without a hearing by the United States District Court for the Eastern District of New York. Ross in his habeas petition alleged that his 1955 plea of guilty to second-degree murder was induced by the State's possession of an unconstitutionally obtained confession. The Court of Appeals held that, like Dash, Ross was entitled to a hearing on his claims. Along with the three respondents dealt with in this opinion, we granted certiorari as to Ross but the matter was subsequently remanded for dismissal as moot after the death of Ross. See n. 1, *supra.*

[8] *United States ex rel. Richardson* v. *McMann,* 408 F. 2d 48 (C. A. 2d Cir. 1969); *United States ex rel. Williams* v. *Follette,* 408 F. 2d 658 (C. A. 2d Cir. 1969).

[9] The same day that the Court of Appeals ordered hearings in the *Dash* and *Richardson* cases, the court, *en banc* and without dissent, held that a hearing was not required in the case of a petitioner for habeas corpus who had pleaded guilty after a trial judge ruled that his confession was admissible in evidence—the Court of Appeals found that the petition for habeas corpus did not allege with sufficient specificity that the plea of guilty was infected by the allegedly coerced confession. *United States ex rel. Rosen* v. *Follette,* 409 F. 2d 1042 (C. A. 2d Cir. 1969).

a plea of guilty is an effective waiver of pretrial irregularities only if the plea is voluntary and that a plea is not voluntary if it is the consequence of an involuntary confession.[10] That the petitioner was represented by counsel and denied the existence of coercion or promises when tendering his plea does not foreclose a hearing on his petition for habeas corpus alleging matters outside the state court record. Although conclusory allegations would in no case suffice, the allegations in each of these cases concerning the manner in which the confession was coerced and the connection between the confession and the plea were deemed sufficient to require a hearing. The law required this much, the Court of Appeals thought, at least in New York, where prior to *Jackson* v. *Denno,* 378 U. S. 368 (1964), constitutionally acceptable procedures were unavailable to a defendant to test the voluntariness of his confession. The Court of Appeals also ordered a hearing in each case for reasons other than that the plea was claimed to rest on a coerced confession which the defendant had no adequate opportunity to test in the state courts. In the *Dash* case, the additional issue to be considered was whether the trial judge coerced the guilty plea by threats as to the probable sentence after trial and conviction on a plea of not guilty; in *Richardson,* the additional issue was the inadequacy of counsel allegedly arising from the

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[10] The majority and concurring opinions in the *Dash* case relied on decisions in several other circuits: *United States ex rel. Collins* v. *Maroney,* 382 F. 2d 547 (C. A. 3d Cir. 1967); *Jones* v. *Cunningham,* 297 F. 2d 851 (C. A. 4th Cir. 1962); *Smith* v. *Wainwright,* 373 F. 2d 506 (C. A. 5th Cir. 1967); *Carpenter* v. *Wainwright,* 372 F. 2d 940 (C. A. 5th Cir. 1967); *Bell* v. *Alabama,* 367 F. 2d 243 (C. A. 5th Cir. 1966), cert. denied, 386 U. S. 916 (1967); *Reed* v. *Henderson,* 385 F. 2d 995 (C. A. 6th Cir. 1967); *Smiley* v. *Wilson,* 378 F. 2d 144 (C. A. 9th Cir. 1967); *Doran* v. *Wilson,* 369 F. 2d 505 (C. A. 9th Cir. 1966).

short period of consultation and counsel's advice to the effect that the confession issue could be raised after a plea of guilty; and in *Williams*, the additional question was the alleged failure of counsel to consider Williams' alibi defense and to make it clear that he was pleading to a felony rather than to a misdemeanor.

II

The core of the Court of Appeals' holding is the proposition that if in a collateral proceeding a guilty plea is shown to have been triggered by a coerced confession—if there would have been no plea had there been no confession—the plea is vulnerable at least in cases coming from New York where the guilty plea was taken prior to *Jackson* v. *Denno, supra.* We are unable to agree with the Court of Appeals on this proposition.

A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged. *Brady* v. *United States, ante,* at 748; *McCarthy* v. *United States,* 394 U. S. 459, 466 (1969). That admission may not be compelled, and since the plea is also a waiver of trial—and unless the applicable law otherwise provides,[11] a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States, ante,* at 748.

[11] New York law now permits a defendant to challenge the admissibility of a confession in a pretrial hearing and to appeal from an adverse ruling on the admissibility of the confession even if the conviction is based on a plea of guilty. N. Y. Code Crim. Proc. § 813–g (Supp. 1969) (effective July 16, 1965). A similar provision permits a defendant to appeal an adverse ruling on a Fourth Amendment claim after a plea of guilty. N. Y. Code Crim. Proc. § 813–c (Supp. 1969) (effective April 29, 1962).

For present purposes, we put aside those cases where the defendant has his own reasons for pleading guilty wholly aside from the strength of the case against him as well as those cases where the defendant, although he would have gone to trial had he thought the State could not prove its case, is motivated by evidence against him independent of the confession. In these cases, as the Court of Appeals recognized, the confession, even if coerced, is not a sufficient factor in the plea to justify relief. Neither do we have before us the uncounseled defendant, see *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 (1956), nor the situation where the circumstances that coerced the confession have abiding impact and also taint the plea. Cf. *Chambers* v. *Florida,* 309 U. S. 227 (1940). It is not disputed that in such cases a guilty plea is properly open to challenge.[12]

The issue on which we differ with the Court of Appeals arises in those situations involving the counseled defendant who allegedly would put the State to its proof if there was a substantial enough chance of acquittal, who would do so except for a prior confession that might be offered against him, and who because of the confession decides to plead guilty to save himself the expense and agony of a trial and perhaps also to min-

[12] *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 (1956), involved a plea of guilty made by a defendant without assistance of counsel. *Herman* did not hold that a plea of guilty, offered by a defendant assisted by competent counsel, is invalid whenever induced by the prosecution's possession of a coerced confession. Likewise, *Chambers* v. *Florida,* 309 U. S. 227 (1940), does not support the position taken by the Court of Appeals in these cases. In *Chambers* the voluntariness of the confessions was properly considered by this Court both because the alleged coercion producing the confessions appeared to carry over to taint the guilty pleas and because the convictions were based on the confessions as well as the guilty pleas. See *Chambers* v. *State,* 136 Fla. 568, 187 So. 156 (1939), rev'd, 309 U. S. 227 (1940).

imize the penalty that might be imposed. After conviction on such a plea, is a defendant entitled to a hearing, and to relief if his factual claims are accepted, when his petition for habeas corpus alleges that his confession was in fact coerced and that it motivated his plea? We think not if he alleges and proves no more than this.

III

Since we are dealing with a defendant who deems his confession crucial to the State's case against him and who would go to trial if he thought his chances of acquittal were good, his decision to plead guilty or not turns on whether he thinks the law will allow his confession to be used against him. For the defendant who considers his confession involuntary and hence unusable against him at a trial, tendering a plea of guilty would seem a most improbable alternative. The sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however guilty he might be. The books are full of cases in New York and elsewhere, where the defendant has made this choice and has prevailed. If he nevertheless pleads guilty the plea can hardly be blamed on the confession which in his view was inadmissible evidence and no proper part of the State's case. Since by hypothesis the evidence aside from the confession is weak and the defendant has no reasons of his own to plead, a guilty plea in such circumstances is nothing less than a refusal to present his federal claims to the state court in the first instance—a choice by the defendant to take the benefits, if any, of a plea of guilty and then to pursue his coerced-confession claim in collateral proceedings. Surely later allegations that the confession rendered his plea involuntary would appear incredible, and whether his plain bypass

of state remedies was an intelligent act depends on whether he was so incompetently advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead.

A more credible explanation for a plea of guilty by a defendant who would go to trial except for his prior confession is his prediction that the law will permit his admissions to be used against him by the trier of fact. At least the probability of the State's being permitted to use the confession as evidence is sufficient to convince him that the State's case is too strong to contest and that a plea of guilty is the most advantageous course. Nothing in this train of events suggests that the defendant's plea, as distinguished from his confession, is an involuntary act. His later petition for collateral relief asserting that a *coerced* confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised, either under the then applicable law or under the law later announced, his plea was an unintelligent and voidable act. The Constitution, however, does not render pleas of guilty so vulnerable.

As we said in *Brady* v. *United States, ante,* at 756–757, the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would

the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.

In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession.[13] Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession

[13] We do not here consider whether a conviction, based on a plea of guilty entered in a State permitting the defendant pleading guilty to challenge on appeal the admissibility of his confession (as in New York after July 16, 1965, see n. 11, *supra*), would be open to attack in federal habeas corpus proceedings on the grounds that the confession was coerced. Cf. *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (C. A. 2d Cir. 1967).

erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel.[14] Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

IV

We hold, therefore, that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus. Nor do we deem the situation substantially different where the defendant's plea was entered prior to *Jackson* v. *Denno,* 378 U. S. 368 (1964). At issue in that case was the constitutionality of the New York procedure for determining the voluntariness of a confession offered in evidence at a jury trial. This

[14] Since *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), it has been clear that a defendant pleading guilty to a felony charge has a federal right to the assistance of counsel. See *White* v. *Maryland,* 373 U. S. 59 (1963); *Arsenault* v. *Massachusetts,* 393 U. S. 5 (1968). It has long been recognized that the right to counsel is the right to the effective assistance of counsel. See *Reece* v. *Georgia,* 350 U. S. 85, 90 (1955); *Glasser* v. *United States,* 315 U. S. 60, 69–70 (1942); *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940); *Powell* v. *Alabama,* 287 U. S. 45, 57 (1932).

procedure, which would have been applicable to the respondents if they had gone to trial, required the trial judge, when the confession was offered and a prima facie case of voluntariness established, to submit the issue to the jury without himself finally resolving disputed issues of fact and determining whether or not the confession was voluntary. The Court held this procedure unconstitutional because it did not "afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment." 378 U. S., at 377. In reaching that conclusion, the Court overruled *Stein* v. *New York,* 346 U. S. 156 (1953), which had approved the New York practice.

Whether a guilty plea was entered before or after *Jackson* v. *Denno,* the question of the validity of the plea remains the same: was the plea a voluntary and intelligent act of the defendant? As we have previously set out, a plea of guilty in a state court is not subject to collateral attack in a federal court on the ground that it was motivated by a coerced confession unless the defendant was incompetently advised by his attorney. For the respondents successfully to claim relief based on *Jackson* v. *Denno,* each must demonstrate gross error on the part of counsel when he recommended that the defendant plead guilty instead of going to trial and challenging the New York procedures for determining the admissibility of confessions. Such showing cannot be made, for precisely this challenge was presented to the New York courts and to this Court in *Stein* v. *New York, supra,* and in 1953 this Court found no constitutional

infirmity in the New York procedures for dealing with coerced-confession claims. Counsel for these respondents cannot be faulted for not anticipating *Jackson* v. *Denno* or for considering the New York procedures to be as valid as the four dissenters in that case thought them to be.

We are unimpressed with the argument that because the decision in *Jackson* has been applied retroactively to defendants who had previously gone to trial, the defendant whose confession allegedly caused him to plead guilty prior to *Jackson* is also entitled to a hearing on the voluntariness of his confession and to a trial if his admissions are held to have been coerced. A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. Whether or not the advice the defendant received in the pre-*Jackson* era would have been different had *Jackson* then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. It might be suggested that if *Jackson* had been the law when the pleas in the cases below were made—if the judge

had been required to rule on the voluntariness of challenged confessions at a trial—there would have been a better chance of keeping the confessions from the jury and there would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any particular case and not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea. The alternative would be a *per se* constitutional rule invalidating all New York guilty pleas that were motivated by confessions and that were entered prior to *Jackson*. This would be an improvident invasion of the State's interests in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time. It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.

V

As we have previously indicated, in each case below the Court of Appeals ruled that a hearing was required to consider claims other than the claim that the plea of guilty rested on a coerced confession and was entered prior to *Jackson* v. *Denno, supra*. With respect to these other claims, we now express no disagreement with the judgments of the Court of Appeals; but since our holding will require reassessment of the petitions for habeas

corpus in the light of the standards expressed herein, the judgments of the Court of Appeals are vacated and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, while still adhering to his separate opinion in *Jackson* v. *Denno,* 378 U. S. 368, 401–423, concurs in the Court's opinion and judgment in this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

In this case the Court moves yet another step toward the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea. Respondents alleged in some detail that they were subjected to physical and mental coercion in order to force them to confess; that they succumbed to these pressures; and that because New York provided no constitutionally acceptable procedures for challenging the validity of their confessions in the trial court they had no reasonable alternative to pleading guilty.[1] Respondents' contention, in short, is that their pleas were the product of the State's illegal action. Notwithstanding the possible truth of the claims, the Court holds that respondents are not even entitled to a hearing which would afford them an opportunity to substantiate their allegations. I

[1] There are additional allegations involved in this case, including Richardson's claim that he was ineffectively represented by counsel when he entered his plea and Dash's contention that he was threatened by the trial judge with imposition of the statutory maximum sentence (60 years) if he elected to stand trial and did not prevail. I understand that the Court does not disturb the Court of Appeals' holding that a hearing is required to consider these additional allegations.

cannot agree, for it is clear that the result reached by the Court is inconsistent not only with the prior decisions of this Court but also with the position adopted by virtually every court of appeals that has spoken on this issue.[2]

I

The basic principle applicable to this case was enunciated for the Court by MR. JUSTICE BLACK in *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 118 (1956): "[A] conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." The critical factor in this formulation is that convictions entered on guilty pleas are not valid if they are "based on" coerced confessions. A defendant who seeks to overturn his guilty plea must therefore demonstrate the existence of a sufficient interrelationship or nexus between the plea and the antecedent confession so that the plea may be said to be infected by the State's prior illegal action. Thus to invalidate a guilty plea more must be shown than the mere existence of a coerced

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[2] The Court does not deny that the decision of the Court of Appeals in the instant case is in complete harmony with the decisions of numerous other courts that have considered the same or similar issues. See, *e. g., Moreno* v. *Beto,* 415 F. 2d 154 (C. A. 5th Cir. 1969); *United States ex rel. McCloud* v. *Rundle,* 402 F. 2d 853 (C. A. 3d Cir. 1968); *Kott* v. *Green,* 387 F. 2d 136 (C. A. 6th Cir. 1967); *Reed* v. *Henderson,* 385 F. 2d 995 (C. A. 6th Cir. 1967); *United States ex rel. Collins* v. *Maroney,* 382 F. 2d 547 (C. A. 3d Cir. 1967); *Smiley* v. *Wilson,* 378 F. 2d 144 (C. A. 9th Cir. 1967); *Carpenter* v. *Wainwright,* 372 F. 2d 940 (C. A. 5th Cir. 1967); *Doran* v. *Wilson,* 369 F. 2d 505 (C. A. 9th Cir. 1966); *White* v. *Pepersack,* 352 F. 2d 470 (C. A. 4th Cir. 1965); *Zachery* v. *Hale,* 286 F. Supp. 237 (D. C. M. D. Ala. 1968); *United States ex rel. Cuevas* v. *Rundle,* 258 F. Supp. 647 (D. C. E. D. Pa. 1966); *People* v. *Spencer,* 66 Cal. 2d 158, 424 P. 2d 715 (1967); *Commonwealth* v. *Baity,* 428 Pa. 306, 237 A. 2d 172 (1968).

confession. The Court of Appeals so held; respondents do not disagree. The critical question, then, is what elements in addition to the coerced confession must be alleged and proved to demonstrate the invalidity of a guilty plea.

The Court abruptly forecloses any inquiry concerning the impact of an allegedly coerced confession by decreeing that the assistance of "reasonably competent" counsel insulates a defendant from the effects of a prior illegal confession. However, as the Court tacitly concedes, the absolute rigor of its new rule must be adjusted to accommodate cases such as *Chambers* v. *Florida,* 309 U. S. 227 (1940). In that case, the four defendants confessed. Subsequently, three of them pleaded guilty, while the fourth pleaded not guilty and was tried before a jury. Each of the defendants, represented by counsel, stated during the trial that he had confessed and was testifying voluntarily.[3] Notwithstanding this testimony in open court, the proffering of guilty pleas, and representation by counsel, the state courts and this Court as well properly permitted a collateral attack upon the judgments of conviction entered on the guilty pleas.

In explication of *Chambers,* the Court notes that the coercive circumstances that compelled the confessions may "have abiding impact and also taint the plea." *Ante,* at 767. Apparently the Court would permit a defendant who was represented by counsel to attack his conviction collaterally if he could demonstrate that coercive pressures were brought to bear upon him at the

[3] "[E]ach of the defendants testified on the trial that the confessions were freely and voluntarily made and that the respective statements of each made upon the trial was the free and voluntary statement of such defendant as a witness in his behalf." *Chambers* v. *State,* 113 Fla. 786, 792, 152 So. 437, 438 (1934), on subsequent appeal, 136 Fla. 568, 187 So. 156 (1939), rev'd, 309 U. S. 227 (1940).

very moment he was called to plead. This position is certainly unexceptionable. I cannot agree, however, that the pleading process is constitutionally adequate despite a coerced confession merely because the coercive pressures that compelled the confession ceased prior to the entry of the plea. In short, the "abiding impact" of the coerced confession may continue to prejudice a defendant's case or unfairly influence his decisions regarding his legal alternatives.

Moreover, our approach in *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 (1956), is inconsistent with the absolute rule that the Court adopts today. We there considered whether, under all the circumstances of the case, the pressures brought to bear on the defendant by the State, including the extraction of a coerced confession, were sufficient to render his guilty plea involuntary. While the fact that the defendant was not assisted by counsel was given considerable weight in determining involuntariness, it was hardly the sole critical consideration. Thus the Court's attempt to distinguish *Claudy* on the basis of counsel's assistance alone is unpersuasive. I would continue to adhere to the approach adopted in *Chambers* and *Claudy* and take into account all of the circumstances surrounding the entry of a plea rather than attach talismanic significance to the presence of counsel.

I concluded in *Parker* v. *North Carolina* and *Brady* v. *United States, post,* at 802, that "the legal concept of 'involuntariness' has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations that the government cannot properly introduce" into the pleading process. In *Parker* and *Brady* the "impermissible factor" introduced by the government was an unconstitutional death penalty scheme; here the improper influence is a coerced confession. In either event the defendant must establish that the unconstitutional influence actually infected the

pleading process, that it was a significant factor in his decision to plead guilty. But if he does so, then he is entitled to reversal of the judgment of conviction entered on the plea.

Harrison v. *United States,* 392 U. S. 219 (1968), lends additional support to this conclusion. There confessions had been illegally procured from a defendant and then introduced at his trial. At a new trial, after reversal of the defendant's conviction, he objected to the introduction of his testimony from the previous trial on the ground that he had been improperly induced to testify at the former trial by the introduction of the inadmissible confessions. We sustained this contention, noting in part that

> "the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor. For the 'essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392.
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> ". . . The question is not *whether* the petitioner made a knowing decision to testify, but *why.* If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." 392 U. S., at 222–223. (Emphasis in original.)

The same reasoning is applicable here. That is, if the coerced confession induces a guilty plea, that plea, no

less than the surrender of the self-incrimination privilege in *Harrison,* is the fruit of the State's prior illegal conduct, and thus is vulnerable to attack.[4]

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[4] Indeed, one of the dissenting opinions in *Harrison* concludes that "[s]imilarly, an inadmissible confession preceding a plea of guilty would taint the plea." 392 U. S., at 234 (WHITE, J., dissenting). In response to this suggestion, the Court noted that "we decide here only a case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief." 392 U. S., at 223 n. 9. Of course, in *Harrison* we did consider a case in which evidence had been introduced at trial. It hardly follows, however, that the fruit-of-the-poisonous-tree rationale has no application apart from the narrow confines of the *Harrison* factual context. See generally *Fahy* v. *Connecticut,* 375 U. S. 85 (1963); *Wong Sun* v. *United States,* 371 U. S. 471 (1963); *Nardone* v. *United States,* 308 U. S. 338 (1939).

There are factual differences between *Harrison* and the instant case, but they are insufficient to undermine the analogy. For example, in *Harrison* the inadmissible confessions had actually been used in proceedings against the defendant, whereas here no more is involved than the potential use of the coerced confessions. However, confessions have traditionally been considered extremely valuable evidentiary material, and, in the ordinary course of events, it is not to be expected that the prosecution would, on its own initiative, refrain from attempting to introduce a relevant confession. Of course, when a guilty plea is attacked on the ground that it was induced by an involuntary confession, it is always open to the prosecution to establish that there was no confession, that any confession was not coerced, or that the prosecution had decided not to use the confession against the defendant and had communicated this fact to him.

Moreover, it is perhaps not as clear in the instant case as it was in *Harrison* that the prosecution's illegality infected the subsequent proceedings involving the respective defendants. In *Harrison,* the defense attorney had initially announced that the defendant would not testify, and the defendant did in fact take the stand only after the prosecution had introduced his confessions. In that circumstance the burden was appropriately placed upon the prosecution to rebut the clear inference that the inadmissible confessions induced the subsequent testimony. By contrast, in the instant case we are dealing with guilty pleas that are usually the culmination of a decision-making process in which the defendant

As in *Parker* and *Brady* the Court lays great stress upon the ability of counsel to offset the improper influence injected into the pleading process by the State's unconstitutional action. However, here again, the conclusions that the Court draws from the role it assigns to counsel are, in my view, entirely incorrect, for it cannot be blandly assumed, without further discussion, that counsel will be able to render effective assistance to the defendant in freeing him from the burdens of his unconstitutionally extorted confession.

In *Parker* and *Brady* there was no action that counsel could take to remove the threat posed by the unconstitutional death penalty scheme. There was no way, in short, to counteract the intrusion of an impermissible factor into the pleading process.

However, where the unconstitutional factor is a coerced confession, it is not necessarily true that counsel's role is so limited. It is a common practice, for example, to hold pretrial hearings or devise other procedures for the purpose of permitting defendants an opportunity to challenge the admissibility of allegedly coerced confessions. If it is assumed that these procedures provide a constitutionally adequate means to attack the validity of the confession, then it must be expected that a defendant who subsequently seeks to overturn his guilty plea will come forward with a persuasive explanation for his failure to invoke those procedures which were readily available to test the validity of his confession.

It does not follow from this that a defendant assisted by counsel can never demonstrate that this failure to

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has taken into account numerous factors. It can therefore hardly be established on the basis of mere allegations that, in a given case, a coerced confession induced the guilty plea. This factual difference indicates no more, however, than that the respondents here may have a more difficult time than the petitioner in *Harrison* in substantiating their respective claims.

invoke the appropriate procedures was justified. The entry of a guilty plea is, essentially, a waiver, or the "intentional relinquishment or abandonment of a known right," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). By pleading guilty the defendant gives up not only his right to a jury trial, *Boykin* v. *Alabama,* 395 U. S. 238 (1969), but also, in most jurisdictions, the opportunity to challenge the validity of his confession by whatever procedures are provided for that purpose. It is always open to a defendant to establish that his guilty plea was not a constitutionally valid waiver, that he did not deliberately bypass the orderly processes provided to determine the validity of confessions. Cf. *Fay* v. *Noia,* 372 U. S. 391, 438–440 (1963). Whether or not there has been a deliberate bypass can be determined, of course, only by a consideration of the total circumstances surrounding the entry of each plea.[5]

II

In the foregoing discussion I have assumed that the State has provided a constitutionally adequate method to challenge an allegedly invalid confession in the trial court. That assumption is not applicable to respondents in this case, however, because, as we held in *Jackson* v. *Denno,* 378 U. S. 368 (1964), the procedure that New York employed at the time their pleas were tendered failed to provide a constitutionally acceptable means to challenge the validity of confessions. Thus, even the

[5] If the procedures for challenging the validity of confessions are constitutionally adequate, then a persuasive justification for the failure to invoke them does not arise from the fear that a confession, erroneously or otherwise, will be determined to be voluntary. If this were not true, then no guilty plea could constitute an effective waiver, for the risk of error or adverse result is inherent in every criminal proceeding, and it would be open to every defendant to contend that this risk induced his guilty plea.

most expert appraisal and advice by counsel necessarily had to take into account a procedure for challenging the validity of confessions that was fundamentally defective, but that had nevertheless been approved by this Court in *Stein* v. *New York,* 346 U. S. 156 (1953). Hence the advice of counsel could not remedy or offset the constitutional defect infused into the pleading process. Therefore, respondents are entitled to relief if they can establish that confessions were coerced from them and that their guilty pleas were motivated in significant part by their inability to challenge the validity of the confessions in a constitutionally adequate procedure.[6] By such a showing they would establish a nexus between the coerced confessions and the subsequent pleas and thereby demonstrate that their respective pleas were the product of the State's illegal action.

The Court seeks to avoid the impact of *Jackson* v. *Denno* upon pre-*Jackson* guilty pleas by adding a new and totally unjustified element to the Court's confused pattern of retroactivity rules. *Jackson* v. *Denno* has been held to be retroactive, at least in the sense that it requires hearings to determine the voluntariness of pre-*Jackson* confessions that were introduced at trial.[7] The

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[6] The Court of Appeals held that a plea of guilty was not voluntary "if the plea was substantially motivated by a coerced confession the validity of which [the defendant] was unable, for all practical purposes, to contest." 409 F. 2d, at 1023. I would accept this formulation with the understanding that a "substantial" motivating factor is any one which is not merely *de minimis.* Ordinarily, a decision to plead guilty is the result of numerous considerations. As long as a defendant was in fact motivated in significant part by the influence of an unconstitutionally obtained confession that he had no adequate means to challenge, I would relieve him of the consequences of his guilty plea.

[7] See, *e. g., Johnson* v. *New Jersey,* 384 U. S. 719, 727–728 (1966); *Tehan* v. *Shott,* 382 U. S. 406, 416 (1966); *Linkletter* v. *Walker,* 381 U. S. 618, 639 and n. 20 (1965).

Court today decides, however, that *Jackson*'s effect is to be limited to situations in which the confession was introduced at trial and is to have no application whatever to guilty pleas. In short, *Jackson* v. *Denno* is now held to be only partially retroactive, a wholly novel and unacceptable result.

As I understand the Court's opinion, there are basically three reasons why the Court rejects the contention that the *Jackson-Denno* defect may unconstitutionally infect the pleading process. The first is the highly formalistic notion that the guilty plea, and not the antecedent confession, is the basis of the judgments against respondents. Of course this is true in the technical sense that the guilty plea is *always* the legal basis of a judgment of conviction entered thereon. However, this argument hardly disposes adequately of the contention that the plea in turn was at least partially induced, and therefore is tainted, by the fact that no constitutionally adequate procedures existed to test the validity of a highly prejudicial and allegedly coerced confession.

The Court's formalism is symptomatic of the desire to ignore entirely the motivational aspect of a decision to plead guilty. As long as counsel is present when the defendant pleads, the Court is apparently willing to assume that the government may inject virtually any influence into the process of deciding on a plea. However, as I demonstrated in *Parker* and *Brady,* this insistence upon ignoring the factors with which the prosecution confronts the defendant before he pleads departs broadly from the manner in which the voluntariness of guilty pleas has traditionally been approached. In short, the critical question is not, as the Court insists, whether respondents knowingly decided to plead guilty but *why* they made that decision. Cf. *Harrison* v. *United States,* 392 U. S. 219, 223 (1968).

Secondly, the Court views the entry of the guilty pleas as waivers of objections to the allegedly coerced confessions. For the reasons previously stated, I do not believe that the pleas were legally voluntary if respondents' allegations are proved. Nor were the pleas the relinquishment of a *known* right, for it was only when *Stein* v. *New York,* 346 U. S. 156 (1953), was overruled by *Jackson* v. *Denno* that it became clear that the New York procedure was constitutionally inadequate. Thus there is no sense in which respondents deliberately bypassed or "waived" state procedures constitutionally adequate to adjudicate their coerced-confession claims. See *Moreno* v. *Beto,* 415 F. 2d 154 (C. A. 5th Cir. 1969); cf. *Smith* v. *Yeager,* 393 U. S. 122 (1968).

Finally, the Court takes the position, in effect, that the defect in the *Stein*-approved New York procedure was not very great—that the procedure was only a little bit unconstitutional—and hence that it is too speculative to inquire whether the difference between the pre-*Jackson* and post-*Jackson* procedures would, in a particular case, alter the advice given by counsel concerning the desirability of a plea. If, indeed, the deficiency in the pre-*Jackson* procedure was not very great, then it is difficult to understand why we found it necessary to invalidate the procedure and, particularly, why it was imperative to apply the *Jackson* decision retroactively. I, for one, have never thought *Jackson* v. *Denno* is so trivial, that it deals with procedural distinctions of such insignificance that they would necessarily make no difference in the plea advice given to a defendant by his attorney. To the contrary, the extent to which the constitutional defect in the pre-*Jackson-Denno* procedure actually infected the pleading process cannot be determined by *a priori* pronouncements by this Court; rather, its effect can be evaluated only after a factual inquiry into the circumstances motivating particular pleas.

Despite the disclaimers to the contrary, what is essentially involved both in the instant case and in *Brady* and *Parker* is nothing less than the determination of the Court to preserve the sanctity of virtually all judgments obtained by means of guilty pleas. There is no other adequate explanation for the surprising notion of partial retroactivity that the Court today propounds. An approach that shrinks from giving effect to the clear implications of our prior decisions by drawing untenable distinctions may have its appeal, but it hardly furthers the goal of principled decisionmaking. Thus, I am constrained to agree with the concurring judge in the Court of Appeals that it is

> "the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-Jackson v. Denno procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them." 409 F. 2d, at 1027.

Lest it be thought that my views would render the criminal process "less effective in protecting society against those who have made it impossible to live today in safety," *Harrison* v. *United States,* 392 U. S. 219, 235 (WHITE, J., dissenting), I emphasize again that the *only* issue involved in this case is whether respondents are entitled to a *hearing* on their claims that coerced confessions and a procedural device that we condemned as unconstitutional deterred them from exercising their constitutional rights. Whether or not these allegations have bases in fact is not before us, for these individuals have never been afforded a judicial forum for the presentation of their claims. In these circumstances, I would not simply slam shut the door of the courthouse in their faces.

III

I agree with the Court of Appeals that a hearing is required for the coerced-confession claims presented in these cases. We have, of course, held that a post-conviction hearing must be afforded to defendants whose allegations of constitutional deprivation raise factual issues and are neither "vague, conclusory, or palpably incredible," *Machibroda* v. *United States,* 368 U. S. 487, 495 (1962), nor "patently frivolous or false," *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 119 (1956).[8] Respondents have raised at least three factual issues that the record in its present form does not resolve: (1) whether confessions were obtained from them; (2) whether these confessions, if given, were coerced; and (3) whether respondents had a justifiable reason for their failure to challenge the validity of the confessions—more specifically, whether the confessions, together with the *Jackson-Denno* defect in New York's procedures, influenced in significant part the decisions to plead guilty. As to each of these issues, respondents of course bear the burden of proof.

Respondents alleged in some detail that they had been coerced by the police into confessing. They also alleged that the *Jackson-Denno* defect in the state procedures rendered futile any attempt to challenge the confessions in the state trial court.[9] The Court of Appeals noted

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[8] Respondents have never had a hearing in the state courts on their coerced-confession claims because the state courts rejected their contentions on the pleadings. In these circumstances, the Court of Appeals properly instructed the District Court to afford the State a reasonable time to proceed with its own hearings, if it be so advised.

[9] For example, respondent Dash stated the following in his petition to the District Court:

"The futility of relator's position is more clearly seen when this Court considers the fact, that the only choice remaining to him—beside the entry of the plea of guilty to a crime that he had not

that, in the ordinary case, additional supporting material, such as an affidavit from the attorney who represented the petitioner, should be appended to his habeas corpus petition. Without elaboration, however, the Court of Appeals concluded that no material in corroboration was necessary in this case.

To be sure, it is difficult, though not impossible, to believe that without any corroborative evidence a petitioner would ultimately succeed with a sophisticated argument such as the contention that a coerced confession, coupled with the *Jackson-Denno* defect, induced his guilty plea. In this connection, the views of the defense attorney when the plea was entered are particularly important because in the ordinary case counsel is in a good position to appraise the factors that actually entered into the decision to plead guilty. As a technical matter of pleading, however, I would not absolutely require that a petitioner, particularly one who is proceeding *pro se,* accompany his petition with extensive supporting materials.[10] It is of course prudent for petitioners who raise a claim such as the one presented in the instant case to append a statement from counsel, or at least an explanation of why such a statement was not procured, for the petitioner who does not do so

committed—was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession. For it was only in the case of *Jackson* v. *Denno* . . . that the Court recognized the insoluble plight of a defendant in New York, faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. Relator had no such remedy when he was faced with this situation."

Respondent Williams' petition contains similar references to *Jackson* v. *Denno*. Respondent Richardson's principal claim relates to the adequacy of the legal assistance afforded him. He concedes that the pre-*Jackson-Denno* procedure played no role in his decision to plead guilty.

[10] See, *e. g., Price* v. *Johnston,* 334 U. S. 266, 292 (1948).

takes a considerable risk that his petition will be denied as vague, conclusory, or frivolous.[11]

The respondents in this case clearly raised the *Jackson-Denno* issue in their petitions to the District Court. Furthermore, this Court has not affected the judgment below insofar as it requires hearings for these respondents on issues other than their coerced-confession claims. In these circumstances, I would not disturb that portion of the Court of Appeals' order that requires the District Court to consider the merits of respondents' coerced-confession allegations.

Accordingly, I would affirm the judgment of the Court of Appeals.

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[11] See, *e. g., United States ex rel. Nixon* v. *Follette,* 299 F. Supp. 253 (D. C. S. D. N. Y. 1969).

PARKER *v.* NORTH CAROLINA

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 268. Argued November 17, 1969—Decided May 4, 1970

Petitioner, a 15-year-old Negro, was arrested for burglary and rape, and later made a confession to police, which he advised his retained counsel had not been prompted by threats, promises, or fear. After being indicted for first-degree burglary (a capital offense in North Carolina), petitioner and his mother, after consulting counsel, authorized the entry of a guilty plea with the understanding that its acceptance would mandate a sentence of life imprisonment. That sentence was imposed after petitioner had assured the trial judge that his plea was freely made. Thereafter petitioner sought post-conviction relief, claiming that his guilty plea was the product of a coerced confession and that the indictment was invalid because Negroes had been systematically excluded from the grand jury that returned the indictment. A state court, after hearing, denied post-conviction relief. The North Carolina Court of Appeals affirmed, finding that petitioner's plea of guilty was intelligent, and rejecting the claim, additionally asserted by petitioner, that his guilty plea was involuntary because North Carolina statutes at that time allowed a defendant to escape the possibility of a death penalty on a capital charge by pleading guilty to that charge. The court refused to consider petitioner's claim concerning the composition of the grand jury since petitioner had failed to comply with a state law requiring that such a contention must, before entry of a guilty plea, be raised by a motion to quash the indictment. *Held:*

1. On the basis of the record in this case, petitioner's guilty plea was voluntary. Pp. 794–796.

(a) An otherwise valid plea is not involuntary because induced by a defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. *Brady* v. *United States, ante,* p. 742. Pp. 794–795.

(b) Even if (despite abundant evidence to the contrary) petitioner's confession should have been found involuntary, the connection between his confession and the guilty plea, entered over a month later, had "become so attenuated as to dissipate the taint." Pp. 795–796.

2. On the record in this case petitioner's guilty plea was an intelligent plea not open to attack on the ground that his counsel misjudged the admissibility of petitioner's confession. *McMann* v. *Richardson, ante,* p. 759. Pp. 796–798.

3. North Carolina procedural law furnished an adequate basis for the refusal of the court below to consider petitioner's racial-exclusion claim regarding the composition of the grand jury that indicted him. Pp. 798–799.

2 N. C. App. 27, 162 S. E. 2d 526, affirmed.

Norman B. Smith argued the cause for petitioner. With him on the brief was *Larry B. Sitton.*

Jacob L. Safron argued the cause for respondent. With him on the brief were *Robert Morgan,* Attorney General of North Carolina, and *Andrew A. Vanore, Jr.*

Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Charles Stephen Ralston, and *Anthony G. Amsterdam* filed a brief for Albert Bobby Childs et al. as *amici curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

At about 11 p. m. on July 16, 1964, petitioner was arrested after entering the yard of a home where a burglary and rape had been committed four days earlier. Petitioner, a Negro boy then 15 years old, was taken to the police station and was questioned for one or two hours. After the questioning, petitioner was placed alone in a dimly lit cell for the remainder of the night. Although petitioner refused to give even his name during the questioning, the police eventually determined his identity and notified petitioner's mother the next day between 3:30 and 4:30 a. m. That morning, petitioner was given drinking water and was then questioned by the police; petitioner almost immediately confessed to the burglary and rape committed several days earlier at the house where he had been arrested. Shortly there-

after, an attorney retained by petitioner's mother came to the police station and talked with petitioner. Petitioner told the attorney that the confession had not been prompted by threats or promises and that he had not been frightened when he made the statement to the police.

Petitioner was indicted for first-degree burglary, an offense punishable by death under North Carolina law.[1] Petitioner's retained attorney discussed with petitioner and his mother the nature and seriousness of the charge. In due course, petitioner and his mother signed written statements authorizing the entry of a plea of guilty. Both petitioner and his mother were aware at the time they signed the authorization for the guilty plea that, if the plea was accepted, petitioner would receive the mandatory sentence of life imprisonment.[2] The prose-

[1] In North Carolina the crime of first-degree burglary is defined as follows:

"There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree." N. C. Gen. Stat. § 14–51 (1969 Repl. vol.).

The punishment for first-degree burglary is death unless the jury recommends that the penalty be life imprisonment:

"Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." N. C. Gen. Stat. § 14–52 (1969 Repl. vol.).

[2] At the time petitioner's plea was entered, North Carolina law provided that if a plea of guilty to first-degree burglary was accepted the punishment would be life imprisonment rather than death:

"(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree,

cutor and the trial judge accepted the plea. In accepting the plea on August 18, 1964, the trial court asked the petitioner if the plea was made in response to any promise or threat and petitioner answered in the negative; petitioner affirmed that he tendered the plea "freely without any fear or compulsion." [3] Upon acceptance of the plea, petitioner was sentenced to life imprisonment.

In 1967, petitioner, assisted by counsel, filed a petition under the North Carolina Post-Conviction Hearing Act [4] to obtain relief from his conviction. In his petition, Parker urged that his plea of guilty was the product of a coerced confession and that the indictment to which

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or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court . . . , may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.

"(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison." N. C. Gen. Stat. § 15–162.1 (1965 Repl. vol.), repealed, effective March 25, 1969, N. C. Laws 1969, c. 117.

[3] The Court: "Has anybody made you any promise or forced you in any way to make this plea?"

Petitioner: "No, sir."

. . . . . .

The Court: "Did you sign this plea freely without any fear or compulsion?"

Petitioner: "Yes, sir."

The Court: "Has any person promised you anything if you do this?"

Petitioner: "No, sir." App. 46.

[4] N. C. Gen. Stat. §§ 15–217 to 15–222 (Supp. 1969).

he pleaded was invalid because members of his race had been systematically excluded from the grand jury which returned the indictment. After a hearing, the Superior Court of Halifax County found that there was no deliberate exclusion of Negroes from the grand jury that indicted petitioner and that petitioner had freely admitted his guilt and had pleaded guilty "freely, voluntarily, without threat, coercion or duress . . . ." The Court of Appeals of North Carolina, the highest state court in which petitioner could seek review,[5] affirmed the conviction after reviewing not only the claims presented to the lower court but also the additional assertion by petitioner that his guilty plea was involuntary because North Carolina statutes at that time allowed a defendant to escape the possibility of a death penalty on a capital charge by pleading guilty to that charge. 2 N. C. App. 27, 162 S. E. 2d 526 (1968). We granted certiorari, 395 U. S. 974 (1969), to consider petitioner's federal constitutional claims. For the reasons presented below, we affirm.

I

Parker would have us hold his guilty plea involuntary and therefore invalid for two reasons: first, because it was induced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a verdict of guilty by a jury; and, second, because the plea was the product of a coerced confession given to the police shortly after petitioner was arrested. Neither reason is sufficient to warrant setting aside Parker's plea.

It may be that under *United States* v. *Jackson,* 390 U. S. 570 (1968), it was unconstitutional to impose the death penalty under the statutory framework which ex-

[5] N. C. Gen. Stat. § 7A–28 (1969 Repl. vol.).

isted in North Carolina at the time of Parker's plea.[6] Even so, we determined in *Brady* v. *United States, ante,* p. 742, that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. In this respect we see nothing to distinguish Parker's case from Brady's.

Nor can we accept the claim that the plea was infirm because it was the product of a coerced confession. According to Parker's testimony at the post-conviction hearing, he was denied food and water, promised unspecified help if he confessed, and denied counsel's advice when he requested it. In the record, however, was an abundance of evidence contradicting Parker's claim of coercion: Parker's statements to his attorney soon after his interrogation that there had been no threats or promises and that he had not been afraid, his similar declarations in his sworn statement authorizing his plea,[7] his answers to the trial judge at the time the plea was accepted,[8] and his failure to complain of any mistreatment by the police until many months after he began serving his sentence. The North Carolina courts accordingly refused to credit his testimony and concluded that his confession was a free and voluntary act.

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[6] The statute authorizing guilty pleas to capital charges was repealed, effective March 25, 1969. See n. 2, *supra.* As a result of the repeal, a person who is charged with a capital offense and who is not allowed to plead to a lesser charge must apparently face a jury trial and a death penalty upon a verdict of guilty unless the jury recommends life imprisonment.

[7] In his affidavit authorizing the entry of a plea of guilty Parker stated that: "I have not been threatened or abused in any manner by any person and no promises have been made to me if I plead guilty to any charge."

[8] See n. 3, *supra.*

We would in any event be reluctant to question the judgment of the state courts in this respect; but we need not evaluate the voluntariness of petitioner's confession since even if the confession should have been found involuntary, we cannot believe that the alleged conduct of the police during the interrogation period was of such a nature or had such enduring effect as to make involuntary a plea of guilty entered over a month later. Parker soon had food and water, the lack of counsel was immediately remedied, and there was ample opportunity to consider the significance of the alleged promises. After the allegedly coercive interrogation, there were no threats, misrepresentations, promises, or other improper acts by the State. Parker had the advice of retained counsel and of his family for the month before he pleaded. The connection, if any, between Parker's confession and his plea of guilty had "become so attenuated as to dissipate the taint." *Nardone* v. *United States,* 308 U. S. 338, 341 (1939); *Wong Sun* v. *United States,* 371 U. S. 471, 491 (1963). As far as this record reveals, the guilty plea was Parker's free and voluntary act, the product of his own choice, just as he affirmed it was when the plea was entered in open court.

II

On the assumption that Parker's confession was inadmissible, there remains the question whether his plea, even if voluntary, was unintelligently made because his counsel mistakenly thought his confession was admissible. As we understand it, Parker's position necessarily implies that his decision to plead rested on the strength of the case against him: absent the confession, his chances of acquittal were good and he would have chosen to stand trial; but given the confession, the evidence was too strong and it was to his advantage to plead guilty and

limit the possible penalty to life imprisonment.[9] On this assumption, had Parker and his counsel thought the confession inadmissible, there would have been a plea of not guilty and a trial to a jury. But counsel apparently deemed the confession admissible and his advice to plead guilty was followed by his client. Parker now considers his confession involuntary and inadmissible. The import of this claim is that he suffered from bad advice and that had he been correctly counseled he would have gone to trial rather than enter a guilty plea. He suggests that he is entitled to plead again, a suggestion that we reject.

For the reasons set out in *McMann* v. *Richardson, ante,* p. 759, even if Parker's counsel was wrong in his assessment of Parker's confession, it does not follow that his error was sufficient to render the plea unintelligent and entitle Parker to disavow his admission in open court that he committed the offense with which he was charged.[10] Based on the facts of record relating to Parker's confession and guilty plea, which we have previously detailed, we think the advice he received was well within the range of competence required of attorneys

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[9] The North Carolina Court of Appeals noted that the prosecution may have had strong evidence against Parker in addition to the confession and that if other strong evidence existed the guilty plea could not be viewed as the product of the confession. 2 N. C. App. 27, 32, 162 S. E. 2d 526, 529 (1968).

[10] We find nothing in the record raising any doubts about the integrity of petitioner's admission. The following appears in the findings entered after the post-conviction hearing in the state trial court:

"[S]aid petitioner defendant freely admitted to his attorney his guilt of the crime with which he was charged, in fact said petitioner defendant Charles Lee Parker, upon cross examination at this hearing, and the Court so finds as a fact, has freely admitted his guilt of the capital offense of burglary and rape . . . ."

representing defendants in criminal cases. Parker's plea of guilty was an intelligent plea not open to attack on the grounds that counsel misjudged the admissibility of Parker's confession.

III

We also have before us the question whether the indictment to which Parker pleaded is invalid because members of his race were allegedly systematically excluded from the grand jury that returned the indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the grand jury must be raised by motion to quash the indictment prior to the entry of the guilty plea.[11] Because Parker had failed to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. See *Fay* v. *Noia,* 372 U. S. 391, 428–429 (1963). We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief. *Ibid.* Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide. Compare *United States ex rel. Goldsby* v.

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[11] "All exceptions to grand jurors on account of their disqualifications shall be taken before the petit jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not taken at that time shall be deemed to be waived. . . ." N. C. Gen. Stat. § 9–23 (1969 Repl. vol.).

See *State* v. *Rorie,* 258 N. C. 162, 128 S. E. 2d 229 (1962). Under North Carolina law, a guilty plea does not waive objections to racial exclusion in the selection of the grand jury if, before the plea of guilty, the defendant raises his objection in a motion to quash the indictment. *State* v. *Covington,* 258 N. C. 501, 128 S. E. 2d 827 (1963).

Harpole, 263 F. 2d 71 (C. A. 5th Cir.), cert. denied, 361 U. S. 838 and 850 (1959), with *Labat* v. *Bennett,* 365 F. 2d 698 (C. A. 5th Cir. 1966), cert. denied, 386 U. S. 991 (1967). See also *McNeil* v. *North Carolina,* 368 F. 2d 313 (C. A. 4th Cir. 1966).

The North Carolina Court of Appeals correctly concluded that petitioner's plea of guilty was intelligent and voluntary, and there was an adequate basis in North Carolina procedural law for the North Carolina Court of Appeals' refusal to consider the claim of racial exclusion in the composition of the grand jury that indicted petitioner.

Affirmed.

MR. JUSTICE BLACK, concurring.

I concur in the judgment of affirmance and also concur in the opinion except that part on pp. 794–795 stating, "It may be that under *United States* v. *Jackson,* 390 U. S. 570 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting in No. 268, and concurring in the result in No. 270, *ante,* p. 742.

In *United States* v. *Jackson,* 390 U. S. 570 (1968), we held that the operative effect of the capital punishment provisions of the Federal Kidnaping Act was unconstitutionally "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U. S., at 581. The petitioners in these cases claim that they were the victims of the very vices we condemned in *Jackson.* Yet the Court paradoxically holds that each of the petitioners must be denied relief even

if his allegations are substantiated.[1] Indeed, the Court apparently holds that never, except perhaps in highly unrealistic hypothetical situations, will the constitutional defects identified in *Jackson* vitiate a guilty plea.[2] In so holding, the Court seriously undermines the rational underpinnings of *Jackson* and departs broadly from our prior approach to the determination of the voluntariness of guilty pleas and also confessions. This is merely one manifestation of a design to insulate all guilty pleas from subsequent attack no matter what influences induced them. I cannot acquiesce in this wholesale retreat from the sound principles to which we have previously adhered.

I

The Court properly notes the grave consequences for a defendant that attach to his plea of guilty; for the

[1] The present discussion, while containing occasional references to the Federal Kidnaping Act, is equally applicable to *Parker*, for, as I shall demonstrate in Part II of this opinion, there is no pertinent distinction between the Kidnaping Act and the North Carolina statutes under which Parker was convicted.

[2] The precise contours of the Court's theory, developed principally in *Brady* v. *United States*, are unclear. The Court initially states that "the possibility of a heavier sentence following a guilty verdict after a trial" is one of the "relevant circumstances" to be taken into account in determining the voluntariness of the guilty plea. *Ante*, at 749. Subsequently, however, after discussing its notion of voluntariness, the Court concludes that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Ante*, at 755. Elsewhere the Court states that "there [is no] evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Ante*, at 750. If the latter is what the Court deems to be the criterion of voluntariness, the holding is totally without precedent, for it has never been thought that an individual's mental state must border on temporary insanity before his confession or guilty plea can be found "involuntary."

plea constitutes a simultaneous surrender of numerous constitutional rights, including the privilege against compulsory self-incrimination and the right to a trial by jury, with all of its attendant safeguards. *McCarthy* v. *United States,* 394 U. S. 459, 466 (1969); *Boykin* v. *Alabama,* 395 U. S. 238, 242–244 (1969). Indeed, we have pointed out that a guilty plea is more serious than a confession because it is tantamount to a conviction. *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927). Accordingly, we have insisted that a guilty plea, like any surrender of fundamental constitutional rights, reflect the unfettered choice of the defendant. See *Boykin* v. *Alabama, supra; Machibroda* v. *United States,* 368 U. S. 487, 493 (1962). In deciding whether any illicit pressures have been brought to bear on a defendant to induce a guilty plea, courts have traditionally inquired whether it was made "voluntarily" and "intelligently" with full understanding and appreciation of the consequences.

The concept of "voluntariness" contains an ambiguous element, accentuated by the Court's opinions in these cases, because the concept has been employed to analyze a variety of pressures to surrender constitutional rights, which are not all equally coercive or obvious in their coercive effect. In some cases where an "involuntary" surrender has been found, the physical or psychological tactics employed exerted so great an influence upon the accused that it could accurately be said that his will was literally overborne or completely dominated by his interrogators, who rendered him incapable of rationally weighing the legal alternatives open to him.[3]

There is some intimation in the Court's opinions in the instant cases that, at least with respect to guilty

[3] See, *e. g., Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 (1956); *Chambers* v. *Florida,* 309 U. S. 227 (1940); *Brown* v. *Mississippi,* 297 U. S. 278 (1936).

pleas, "involuntariness" covers *only* the narrow class of cases in which the defendant's will has been literally overborne. At other points, however, the Court apparently recognizes that the term "involuntary" has traditionally been applied to situations in which an individual, while perfectly capable of rational choice, has been confronted with factors that the government may not constitutionally inject into the decision-making process. For example, in *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), we held a surrender of the self-incrimination privilege to be involuntary when an individual was presented by the government with the possibility of discharge from his employment if he invoked the privilege. So, also, it has long been held that certain promises of leniency or threats of harsh treatment by the trial judge or the prosecutor unfairly burden or intrude upon the defendant's decision-making process. Even though the defendant is not necessarily rendered incapable of rational choice, his guilty plea nonetheless may be invalid.[4]

Thus the legal concept of "involuntariness" has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations that the government cannot properly introduce. The critical question that divides the Court is what constitutes an impermissible factor, or, more narrowly in the context of these cases, whether the threat of the imposition of an unconstitutional death penalty is such a factor.[5]

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[4] See, *e. g., Machibroda* v. *United States,* 368 U. S. 487 (1962); cases cited, n. 7, *infra.*

[5] A further latent ambiguity in the concept of "voluntariness" arises from the notion that a plea is involuntary only if it is the product of coercion directly applied to the accused at the time his plea is entered, and hence that a plea cannot be tainted by prior unconstitutional action on the part of the government. With this view I am in disagreement for reasons more fully set forth in my dissenting opinion in *McMann* v. *Richardson, ante,* p. 775, decided this day.

Even after the various meanings of "involuntary" have been identified, application of voluntariness criteria in particular circumstances remains an elusory process because it entails judicial evaluation of the effect of particular external stimuli upon the state of mind of the accused. See *Haley* v. *Ohio,* 332 U. S. 596, 603 (1948) (separate opinion of Frankfurter, J.). Nevertheless, we have consistently taken great pains to insulate the accused from the more obvious and oppressive forms of physical coercion. Beyond this, in the analogous area of coerced confessions, for example, it has long been recognized that various psychological devices, some of a very subtle and sophisticated nature, may be employed to induce statements. Such influences have been condemned by this Court.[6] Thus, a confession is not voluntary merely because it is the "product of a sentient choice," if it does not reflect a free exercise of the defendant's will. *Id.,* at 606. Indeed, as the Court recognizes, we held in an early case that the concept of "voluntariness" requires that a confession "not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram* v. *United States,* 168 U. S. 532, 542–543 (1897). More recently, we held in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), that the Fifth and Fourteenth Amendments guarantee to every person the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U. S., at 8. Cf. *Garrity* v. *New Jersey,* 385 U. S. 493 (1967).

The Court's answer to the stringent criterion of voluntariness imposed by *Bram* and subsequent cases is

[6] See, *e. g., Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Haynes* v. *Washington,* 373 U. S. 503 (1963); *Rogers* v. *Richmond,* 365 U. S. 534 (1961); *Spano* v. *New York,* 360 U. S. 315 (1959); *Haley* v. *Ohio,* 332 U. S. 596 (1948).

that the availability of counsel to an accused effectively offsets the illicit influence upon him that threats or promises by the government may impose. Of course, the presence of counsel is a factor to be taken into account in any overall evaluation of the voluntariness of a confession or a guilty plea. However, it hardly follows that the support provided by counsel is sufficient by itself to insulate the accused from the effect of any threat or promise by the government.

It has frequently been held, for example, that a guilty plea induced by threats or promises by the trial judge is invalid because of the risk that the trial judge's impartiality will be compromised and because of the inherently unequal bargaining power of the judge and the accused.[7] The assistance of counsel in this situation, of course, may improve a defendant's bargaining *ability*, but it does not alter the underlying inequality of *power*. Significantly, the Court explicitly refrains from expressing its views on this issue. (*Ante*, at 751 n. 8.) This is an unfortunate omission, for judicial promises of leniency in return for a guilty plea provide a useful analogy to what has occurred in the instant cases. Here, the government has promised the accused, through the legislature, that he will receive a substantially reduced sentence if he pleads guilty. In fact, the legislature has simultaneously threatened the accused with the ultimate penalty—death—if he insists

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[7] See, *e. g.*, *Scott* v. *United States*, 135 U. S. App. D. C. 377, 419 F. 2d 264 (1969); *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308 (C. A. 2d Cir. 1963); *Euziere* v. *United States*, 249 F. 2d 293 (C. A. 10th Cir. 1957); *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244 (D. C. S. D. N. Y. 1966); *United States* v. *Tateo*, 214 F. Supp. 560 (D. C. S. D. N. Y. 1963); *Commonwealth* v. *Evans*, 434 Pa. 52, 252 A. 2d 689 (1969). See generally Recent Developments, Judicial Plea Bargaining, 19 Stan. L. Rev. 1082 (1967).

upon a jury trial and has promised a penalty no greater than life imprisonment if he pleads guilty.[8]

It was precisely this statutorily imposed dilemma that we identified in *Jackson* as having the "inevitable effect" of discouraging assertion of the right not to plead guilty and to demand a jury trial. As recognized in *Jackson,* it is inconceivable that this sort of capital penalty scheme will not have a major impact upon the decisions of many defendants to plead guilty. In any particular case, therefore, the influence of this unconstitutional factor must necessarily be given weight in determining the voluntariness of a plea.[9]

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[8] The only alternative to a jury trial available to Parker under the North Carolina statutes was a plea of guilty. Under the Federal Kidnaping Act, however, the possibility existed that a defendant could contest his guilt in a bench trial and simultaneously avoid a potential death penalty. Nothing more appearing, it is arguable that an individual who pleaded guilty without seeking a bench trial did so for reasons other than the fear of the death penalty.

We have previously held, however, that there is no constitutional right to a bench trial, *Singer* v. *United States,* 380 U. S. 24 (1965), and under Fed. Rule Crim. Proc. 23 the consent of both the trial judge and the prosecution is a prerequisite to the waiver of a jury trial. In *Brady* the trial judge indicated that he would not permit the case to be tried without a jury. Thus, in substance, the choice that confronted Brady—jury trial or guilty plea—was the same that faced Parker.

There is room for argument that a direct confrontation between a trial judge and the defendant would have more impact upon the accused than a statute. However, when the accused appears before the trial judge, he at least has an opportunity to present his views to the judge, and, if all else fails, to preserve a record for direct or collateral review of any overreaching by the trial court.

[9] North Carolina argues that *Jackson* ought not to be applied retroactively so as to affect guilty pleas entered prior to that decision. In one sense, of course, the *Jackson* retroactivity problem is chimerical, for the long-standing constitutional requirement that

To be sure, we said in *Jackson* that "the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." [10] 390 U. S., at 583. But that statement merely emphasized the obvious fact that it is perfectly possible that a defendant pleaded guilty for reasons entirely unrelated to the penalty scheme, for example, because his guilt was clear or because he desired to spare himself and his family "the spectacle and expense of pro-

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valid guilty pleas be voluntary and intelligent was not altered by that decision.

However, *Jackson* did apply the standard of voluntariness in a new context by considering the inducement to plead guilty supplied by an unconstitutional capital punishment scheme. In a sense, therefore, *Jackson* did in fact mandate a new application of the voluntariness test. To the extent that the retroactivity issue need be resolved, I have no difficulty in concluding that *Jackson* should be so applied as to provide relief for those who suffered the very constitutional vices that we condemned in that case. The entry of a guilty plea concerns the very essence of the guilt-determining process, and, if that plea is involuntarily induced, the result is "to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott*, 382 U. S. 406, 416 (1966). See *Johnson* v. *New Jersey*, 384 U. S. 719, 727–729 (1966); *Linkletter* v. *Walker*, 381 U. S. 618 (1965).

[10] If this statement means that *no* plea can be rendered involuntary by the statutory scheme, it was at least an obscure, not to say highly misleading, way of saying so. *Laboy* v. *New Jersey*, 266 F. Supp. 581 (D. C. N. J. 1967), cited in *Jackson*, upon which the Court now seizes, is merely an example of a case that rejected an attack upon the voluntariness of a plea allegedly induced by fear of a death penalty. Surely it cannot be relied upon to establish guidelines with respect to the quantum of proof necessary to demonstrate the involuntariness of a plea under a *Jackson*-defective statute, particularly since the District Court in *Laboy* erroneously concluded, in dicta, that the Federal Kidnaping Act contained no constitutional infirmity.

tracted courtroom proceedings." 390 U. S., at 584. The converse, however, is equally clear: not every defendant who pleaded guilty under the Act did so voluntarily, that is, uninfluenced by the highly coercive character of the penalty scheme. This much is merely the teaching of *Jackson.*

The Court has elected to deny this latter aspect of *Jackson,* but in doing so it undermines the rationale on which *Jackson* was decided. In *Jackson* we invalidated the death penalty provision of the Kidnaping Act because the Act's penalty scheme as a whole encouraged guilty pleas and waivers of jury trial, and in the circumstances of particular cases this improper influence could render pleas and waivers constitutionally involuntary. Today the Court appears to distinguish sharply between a guilty plea that has been "encouraged" by the penalty scheme and one that has been entered "involuntarily." However, if the influence of the penalty scheme can never render a plea involuntary, it is difficult to understand why in *Jackson* we took the extraordinary step of invalidating part of that scheme. Apparently in the Court's view, we invalidated the death penalty in *Jackson* because it "encouraged" pleas that are perfectly valid despite the encouragement. Rarely, if ever, have we overturned an Act of Congress for what proves to be so frivolous a reason. Moreover, the Court's present covert rejection of the *Jackson* rationale, together with its acceptance of the result in *Jackson,* leads to a striking anomaly. Since the death penalty provision of the Kidnaping Act remains void, those who resisted the pressures identified in *Jackson* and after a jury trial were sentenced to death receive relief, but those who succumbed to the same pressures and were induced to surrender their constitutional rights are left without any remedy at all. Where the penalty scheme failed to produce its unconstitutional effect, the intended

victims obtain relief; where it succeeded, the real victims have none. Thus the Court puts a premium on strength of will and invulnerability to pressure at the cost of constitutional rights.

Of course, whether in a given case the penalty scheme has actually exercised its pernicious influence so as to make a guilty plea involuntary can be decided only by consideration of the factors that actually motivated the defendant to enter his plea. If a particular defendant can demonstrate that the death penalty scheme exercised a significant influence upon his decision to plead guilty, then, under *Jackson,* he is entitled to reversal of the conviction based upon his illicitly produced plea.

The Court attempts to submerge the issue of voluntariness of a plea under an unconstitutional capital punishment scheme in a general discussion of the pressures upon defendants to plead guilty which are said to arise from, *inter alia,* the venerable institution of plea bargaining. The argument appears to reduce to this: because the accused cannot be insulated from *all* inducements to plead guilty, it follows that he should be shielded from *none.*

The principal flaw in the Court's discourse on plea bargaining, however, is that it is, at best, only marginally relevant to the precise issues before us. There are critical distinctions between plea bargaining as commonly practiced and the situation presently under consideration—distinctions which, in constitutional terms, make a difference. Thus, whatever the merit, if any, of the constitutional objections to plea bargaining generally,[11] those issues are not presently before us.

[11] See generally *Scott* v. *United States,* 135 U. S. App. D. C. 377, 419 F. 2d 264 (1969); D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial (1966); American Bar Association Project on Standards for Criminal Justice, Pleas of

We are dealing here with the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.[12] No such flexibility is built into the capital penalty scheme where the government's harsh terms with respect to punishment are stated in unalterable form.

Furthermore, the legislatively ordained penalty scheme may affect any defendant, even one with respect to whom plea bargaining is wholly inappropriate because his guilt is uncertain.[13] Thus the penalty scheme presents a clear danger that the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty. This hazard necessitates particularly sensitive scrutiny of the voluntariness of guilty pleas entered under this type of death penalty scheme.

The penalty schemes involved here are also distinguishable from most plea bargaining because they involve the imposition of death—the most severe and awesome penalty known to our law. This Court has recognized

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Guilty §§ 3.1–3.4 (Approved Draft 1968); President's Comm'n on Law Enforcement & Administration of Justice, The Challenge of Crime in a Free Society 134–137 (1967); Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387 (1970); Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865 (1964).

[12] See generally D. Newman, Conviction, The Determination of Guilt or Innocence Without Trial 78–104 (1966).

[13] See, *e. g.*, *Bailey* v. *MacDougall*, 392 F. 2d 155, 158 n. 7 (C. A. 4th Cir.), cert. denied, 393 U. S. 847 (1968): "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an *admittedly guilty defendant*." (Emphasis added.)

that capital cases are treated differently in some respects from noncapital cases. See, *e. g., Williams* v. *Georgia,* 349 U. S. 375, 391 (1955). We have identified the threat of a death penalty as a factor to be given considerable weight in determining whether a defendant has deliberately waived his constitutional rights. Thus, for example, in *Green* v. *United States,* 355 U. S. 184 (1957), it was contended that a defendant initially convicted of second-degree murder upon an indictment charging first-degree murder waived his double-jeopardy objections to a second trial for murder in the first degree by taking a successful appeal. We rejected this argument, observing that

> "a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U. S., at 193.

So, also, in *Fay* v. *Noia,* 372 U. S. 391 (1963), it was argued that the petitioner had deliberately failed to seek redress through appeal of his conviction within the state appellate process and thus was not entitled to federal habeas corpus relief. Noting that the petitioner had been confronted with the "grisly choice" of forgoing his appellate rights or facing a possible death sentence if his appeal were successful, we held that the failure to seek state appellate review, motivated by fear of the death penalty, could not be interposed to bar the federal habeas corpus remedy.[14] 372 U. S., at 438–440.

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[14] A perceptive commentator, prior to our decision in *Jackson,* noted the interrelation of guilty pleas and an unconstitutional legislatively mandated capital punishment penalty scheme:

"It is incontrovertible that the [Federal Kidnaping] act promises a person pleading guilty at least substantial security from the imposition of capital punishment, while it threatens him with the ultimate

Finally, under our express holding in *Jackson,* the death penalty in no circumstances could have been constitutionally imposed upon these defendants.[15] If they

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sanction of the law—death. Can not the statute be accurately characterized as containing a *legislative promise of substantial security* from infliction of the death penalty in the event of a plea of guilty by the defendant? Is there any legitimate reason why a defendant's guilty plea under the act should be considered any less the product of coercion because it was induced by a legislative promise of substantial immunity than is a guilty plea induced by the previously mentioned judicial offers of sentencing concessions [in *United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244 (D. C. S. D. N. Y. 1966), and *United States* v. *Tateo,* 214 F. Supp. 560 (D. C. S. D. N. Y. 1963)]? Can it be seriously contended that statements given by police officers in order to avoid being discharged from their employment are any more the product of coercion than is a guilty plea made by a defendant in mortal fear of the executioner's chair [citing *Garrity* v. *New Jersey,* 385 U. S. 493 (1967)]? In a capital case where a defendant is put to plea under the Lindbergh Law, he is faced with a choice 'between the rock and the whirlpool' [385 U. S., at 498], and coercion quite probably is inherent in his choice to waive his right to a jury trial." Note, *United States* v. *Jackson:* The Possible Consequences of Impairing the Right to Trial by Jury, 22 Rutgers L. Rev. 167, 189–190 (1967). (Emphasis in original.)

[15] Of course, no malevolent intent may be ascribed to the prosecution in seeking the death penalty prior to its invalidation in *Jackson.* That the death penalty could not have been exacted in the instant cases is, however, merely a consequence of the retroactive effect of *Jackson.* While the Court denies that *Jackson* affects the validity of guilty pleas, surely the Court would not insist that a sentence of death pronounced prior to our decision in *Jackson* could now be carried out. The Court's position, if I have accurately described it, does contain a certain paradoxical element. That is, any defendant who resisted the inducements of the *Jackson*-defective penalty scheme, received a jury trial and was sentenced to death, is presumably entitled to relief. However, the defendant who succumbed to the unconstitutional influence of that same scheme and pleaded guilty is left to suffer the consequences of his illicitly induced plea. While the relaxation of strict logic may be viewed sympathetically if necessary to prevent executions under an unconstitutional penalty

had been aware of the constitutional deficiency in the penalty scheme, they might well have decided to assert their right to a jury trial since the maximum penalty that could have been imposed after an unfavorable jury verdict was life imprisonment. It is in this narrow context, involving a legislatively mandated unconstitutional death penalty scheme, that the defendant should be relieved of the rigid finality of his plea if he demonstrates that it was a consequence of the unconstitutional scheme.[16]

II

Turning to the facts of these particular cases, I consider first the contention that the North Carolina capital punishment scheme under which Parker was convicted (*ante,* at 792–793, nn. 1, 2), was constitutionally deficient under

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scheme, I am at a loss to understand what values are preserved by the curious inversion the Court has brought about.

[16] The Court apparently takes comfort from the authorities that it cites for the proposition that a guilty plea entered to avoid a possible death penalty is not involuntary. (*Ante,* at 755–756, n. 14.) This reliance is misplaced. In the first instance, most of these authorities antedate *Jackson* and therefore were uninstructed by that decision. For example, it does not appear in those cases whether the capital punishment scheme was defective under *Jackson* or otherwise unconstitutional. In this discussion, I do not consider the case of a death penalty scheme that is not unconstitutional under *Jackson.*

Secondly, several cases decided subsequently to *Jackson* take the position that a constitutionally defective capital penalty scheme may impermissibly induce guilty pleas. See, *e. g., Alford* v. *North Carolina,* 405 F. 2d 340 (C. A. 4th Cir. 1968), prob. juris. noted, 394 U. S. 956 (1969), set for reargument, *post,* p. 1060; *Quillien* v. *Leeke,* 303 F. Supp. 698 (D. C. S. C. 1969); *Wilson* v. *United States,* 303 F. Supp. 1139 (D. C. W. D. Va. 1969); *Shaw* v. *United States,* 299 F. Supp. 824 (D. C. S. D. Ga. 1969); *Breland* v. *State,* 253 S. C. 187, 169 S. E. 2d 604 (1969). See also *United States ex rel. Brown* v. *LaVallee,* 424 F. 2d 457 (C. A. 2d Cir. 1970); *Commonwealth* v. *Hargrove,* 434 Pa. 393, 254 A. 2d 22 (1969).

the standards set forth in *Jackson*. Although the Court assumes *arguendo* that the North Carolina statutes were indistinguishable from the Federal Kidnaping Act, this conclusion is, in my view, inescapable. Under North Carolina law as it formerly existed, the defendant in a capital case had but two choices: he could demand a jury trial and thereby risk the imposition of the death penalty, or he could absolutely avoid that possibility by pleading guilty.[17] If anything, the defect in the North Carolina statutory scheme was more serious than that in the statute considered in *Jackson*, for under the Kidnaping Act a defendant at least had a potential opportunity to avoid the death penalty and to have his guilt determined in a bench trial. Therefore, Parker is entitled to relief if he can demonstrate that the unconstitutional capital punishment scheme was a significant factor in his decision to plead guilty.

Parker comes here after denial of state post-conviction relief. The North Carolina courts have consistently taken the position that *United States* v. *Jackson* has no applicability to the former North Carolina capital pun-

[17] Sophistic arguments cannot alter the fact that this in substance was the effect of the North Carolina penalty scheme. It is contended by North Carolina, for example, that under the state statutes the actual penalty imposed upon conviction was death but that the jury had the power to mitigate punishment to life imprisonment. Under the Federal Kidnaping Act, so the argument goes, the penalty upon conviction was life imprisonment, or a term of years, but the jury had the power to increase the sentence beyond that which the trial judge could impose, thereby "usurping the province of the judge in sentencing the defendant." This is a distinction without a difference. The simple fact is that under both the Kidnaping Act and the North Carolina scheme the jury alone, in its unfettered discretion, could impose the death sentence. In both instances the defendant was promised by the legislature complete insulation from this awesome possibility if he would plead guilty.

ishment scheme.[18] Thus, the merits of Parker's contention that his plea was motivated by the unconstitutional death penalty have not been considered by the state courts. I would, therefore, reverse the judgment of the North Carolina Court of Appeals and remand the *Parker* case to that court for proceedings not inconsistent with the principles elaborated herein.[19]

III

In 1959 Brady was indicted under the Federal Kidnaping Act. The indictment alleged that the kidnaped person had "not been liberated unharmed." Thus Brady was subject to a potential sentence of death if he demanded a jury trial.[20] He ultimately elected to plead guilty, a decision that followed a similar action by his codefendant. Subsequently Brady was sentenced to 50 years' imprisonment. There exists in the record substantial evidence that Brady decided to plead guilty because the similar plea decision of his codefendant seriously undermined his own defense. It is also true that Brady was under the impression that the maximum penalty that could be imposed following a jury trial was the death sentence.

A hearing was held pursuant to Brady's motion under 28 U. S. C. § 2255 to vacate his sentence, at which Brady, his codefendant, and their trial attorneys testified. This

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[18] See, *e. g.*, *State* v. *Spence*, 274 N. C. 536, 164 S. E. 2d 593 (1968); *State* v. *Peele*, 274 N. C. 106, 161 S. E. 2d 568 (1968).

[19] In view of my position on the *Jackson* issue, I need not, in this case, reach Parker's other contentions, in particular that his guilty plea was the product of his allegedly coerced confession. I would direct that Parker's allegations concerning the coerced confession be considered on remand in proceedings not inconsistent with my views as expressed in *McMann* v. *Richardson*, *ante*, p. 775, decided this day.

[20] As previously noted, the trial judge indicated that he would not permit Brady to be tried without a jury. See n. 8, *supra*.

hearing was completed after the District Court had decided the *Jackson* case, but before this Court had spoken in the matter. The District Judge took the position that the death penalty provision of the Federal Kidnaping Act was constitutional. In this respect, of course, he erred. However, the District Judge also concluded that Brady "decided to plead guilty when he learned that his co-defendant was going to plead guilty" and that this decision was not induced or influenced improperly by anything the trial judge or his attorney had told him. The District Court further found that "the plea of guilty was made by [Brady] by reason of other matters and not by reason of [the Kidnaping Act]."

The decision in the Court of Appeals for the Tenth Circuit was rendered after our decision in *Jackson*. The Court of Appeals correctly pointed out that not every plea entered under the Federal Kidnaping Act is necessarily invalid and ultimately concluded that "[t]he finding of the trial court that the guilty plea was not made because of the statute but because of other matters is supported by substantial evidence and is binding on us."

An independent examination of the record in the instant case convinces me that the conclusions of the lower courts are not clearly erroneous. Although Brady was aware that he faced a possible death sentence, there is no evidence that this factor alone played a significant role in his decision to enter a guilty plea. Rather, there is considerable evidence, which the District Court credited, that Brady's plea was triggered by the confession and plea decision of his codefendant and not by any substantial fear of the death penalty. Moreover, Brady's position is dependent in large measure upon his own assertions, years after the fact, that his plea was motivated by fear of the death penalty and thus rests

largely upon his own credibility. For example, there is no indication, contemporaneous with the entry of the guilty plea, that Brady thought he was innocent and was pleading guilty merely to avoid possible execution. Furthermore, Brady's plea was accepted by a trial judge who manifested some sensitivity to the seriousness of a guilty plea and questioned Brady at length concerning his guilt and the voluntariness of the plea before it was finally accepted.

In view of the foregoing, I concur in the result reached by the Court in the *Brady* case.

May 4, 1970

IN RE SPENCER

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 513. Argued April 28, 1970—Decided May 4, 1970

Affirmed by an equally divided Court.

Melvin L. Wulf argued the cause for appellant. With him on the briefs was *Eleanor Holmes Norton.*

Neil Dixon argued the cause for appellee, Williams, Judge. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Herschel M. Downs.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

BELL LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 893. Decided May 4, 1970

306 F. Supp. 209, affirmed.

Harold Hernly, William T. Brotherton, Harry J. Jordan, Robert S. Burk, Robert R. Redmon, James E. Wilson, Edward G. Villalon, and *Charles H. Ephraim* for appellants.

Solicitor General Griswold, Assistant Attorney General McLaren, Robert W. Ginnane, Fritz R. Kahn, and *Nahum Litt* for the United States et al., and *A. Alvis Layne* for Transamerican Freight Lines, Inc., appellees.

PER CURIAM.

The judgment is affirmed. *American Farm Lines* v. *Black Ball Freight Service, ante,* p. 532.

TEX TAN WELHAUSEN CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD

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

No. 1288. Decided May 4, 1970

Certiorari granted; 419 F. 2d 1265, vacated and remanded.

Theo. F. Weiss for petitioners.

Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come, and *Linda Sher* for respondent.

L. N. D. Wells, Jr., for Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, intervenor below.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *H. K. Porter Co.* v. *National Labor Relations Board, ante,* p. 99.

MR. JUSTICE DOUGLAS dissents to the remand.

ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* CATHOLIC MEDICAL CENTER OF BROOKLYN & QUEENS, INC., DIVISION OF ST. MARY'S HOSPITAL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 1379. Decided May 4, 1970

305 F. Supp. 1268, vacated and remanded.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *George D. Zuckerman* and *Lloyd G. Milliken,* Assistant Attorneys General, for appellants.

James M. Hartman and *Richard L. Epstein* for apellees.

PER CURIAM.

The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U. S. C. § 1253. See *Goldstein* v. *Cox,* 396 U. S. 471. The judgment of the District Court is vacated and the case is remanded to that court so that it may enter a fresh decree from which timely appeal may be taken to the Court of Appeals. See *Stamler* v. *Willis,* 393 U. S. 407.

MR. JUSTICE DOUGLAS concurs in the result.

JEFFERSON ET AL. *v.* HACKNEY, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF TEXAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 1345, Misc. Decided May 4, 1970

304 F. Supp. 1332, vacated and remanded.

Ed J. Polk and *Carl Rachlin* for appellants.

Crawford C. Martin, Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Pat Bailey,* Executive Assistant Attorney General, and *W. O. Shultz II,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Texas for further consideration in light of *Rosado* v. *Wyman, ante,* p. 397.

Reporter's Note

The next page is purposely numbered 901. The numbers between 821 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM FEBRUARY 24 THROUGH MAY 14, 1970

FEBRUARY 24, 1970

Miscellaneous Orders

No. 75. IN RE STOLAR. Sup. Ct. Ohio. [Certiorari granted, 396 U. S. 816; restored to calendar, 396 U. S. 999.] Motion of petitioner to remove case from summary calendar denied. *Leonard B. Boudin* on the motion.

No. 241. RASKIN, EXECUTOR *v.* P. D. MARCHESSINI, INC., ET AL. C. A. 2d Cir. Motion to substitute Sidney L. Raskin, Executor of Estate of Margaret Curry, deceased, in place of Margaret Curry, as party petitioner granted. *Jacob Rassner* and *Daniel M. Semel* on the motion.

No. 476. SEARS, ROEBUCK & CO. *v.* CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL–CIO, ET AL. C. A. 10th Cir. [Certiorari granted, 396 U. S. 926.] Motion of respondent union for leave to participate in oral argument granted, and a total of 1½ hours allotted for oral argument for entire case. *David S. Barr* on the motion.

No. 595. NELSON, WARDEN *v.* GEORGE. C. A. 9th Cir. [Certiorari granted, 396 U. S. 955.] Motion of respondent for appointment of counsel granted. It is ordered that *George A. Cumming, Jr., Esquire,* of San Francisco, California, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. —. SNYDER *v.* WARE ET AL. D. C. W. D. La. Application for injunction denied. *J. Minos Simon* for applicant. *Jack P. F. Gremillion,* Attorney General of Louisiana, in opposition.

No. 696. LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., ET AL. *v.* WADMOND ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 396 U. S. 999.] Motion of appellants to remove case from summary calendar denied. *Alan H. Levine* and *Leonard B. Boudin* on the motion. *David W. Peck* for appellees in opposition.

No. 829. LEWIS ET AL. *v.* MARTIN, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL WELFARE, ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 396 U. S. 900.] Motion of Center on Social Welfare Policy and Law et al. for leave to file a brief as *amici curiae* granted. *Martin Garbus* and *Carl Rachlin* on the motion.

No. 927. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. [Certiorari granted, 396 U. S. 955.] Motion of Virgil Jenkins for leave to participate in oral argument as *amicus curiae* denied. *Jack Greenberg* and *Michael Meltsner* on the motion.

No. 1492, Misc. SCHIPANI *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus, prohibition, and other relief denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Jacob P. Lefkowitz* and *Abraham Glasser* on the motion. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States in opposition.

Probable Jurisdiction Noted

No. 670. PERKINS ET AL. *v.* MATTHEWS, MAYOR OF CANTON, ET AL. Appeal from D. C. S. D. Miss. Probable jurisdiction noted. *Armand Derfner* for appellants. *A. F. Summer,* Attorney General of Mississippi, and *William A. Allain,* Assistant Attorney General, for appellees. Reported below: 301 F. Supp. 565.

No. 1066. CITY OF PHOENIX ET AL. *v.* KOLODZIEJSKI. Appeal from D. C. Ariz. Probable jurisdiction noted. *Rex E. Lee* for appellants. *Ivan Robinette* for appellee. Briefs of *amici curiae* were filed by: *Manly W. Mumford* for the City of Tulsa, Oklahoma; *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, and *Joseph H. Sharpley,* Assistant Attorney General, for the State of Texas; *Leonard E. Yokum* for Police Jury of Parish of Tangipahoa, Louisiana; *Myles P. Tallmadge* for Poudre School District R–1, Larimer County, Colorado; *Phillip H. Holm* for Salt Lake City, Utah; *W. Crosby Few* for Special Tax School District No. 1 of the County of Hillsborough, Florida; *Robert M. Robson,* Attorney General, and *James R. Hargis* and *Larry D. Ripley,* Assistant Attorneys General, for the State of Idaho; and *Gary K. Nelson,* Attorney General, for the State of Arizona. Reported below: 313 F. Supp. 209.

No. 896. WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* ROTHSTEIN ET AL. Appeal from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Amy Juviler,* Assistant Attorney General, and *Philip Weinberg* for appellants. *Carl Rachlin* for appellees. Reported below: 303 F. Supp. 339.

No. 977. WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* JAMES ET AL. Appeal from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Application for stay denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that the stay should be granted. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for appellant Wyman. *Jonathan Weiss* for appellees. *Messrs. Lefkowitz* and *Hirshowitz* on the application for stay. *Lee A. Albert* in opposition to the application. Reported below: 303 F. Supp. 935.

Certiorari Granted. (See also Nos. 70, 73, 164, 183, 331, and 449, *ante,* p. 47; No. 226, *ante,* p. 43; No. 623, *ante,* p. 48; No. 861, *ante,* p. 46; No. 873, *ante,* p. 46; and No. 411, Misc., *ante,* p. 48.)

No. 891. MONITOR PATRIOT CO. ET AL. *v.* ROY, EXECUTRIX. Sup. Ct. N. H. Certiorari granted. *Joseph A. Millimet* for petitioners. *Stanley M. Brown* for respondent. Reported below: 309 N. H. 441, 254 A. 2d 832.

No. 947. ROSENBLOOM *v.* METROMEDIA, INC. C. A. 3d Cir. Certiorari granted. *Benjamin Paul* for petitioner. *Bernard G. Segal, Irving R. Segal, Samuel D. Slade,* and *Carleton G. Eldridge, Jr.,* for respondent. Reported below: 415 F. 2d 892.

No. 1033. ABATE ET AL. *v.* MUNDT ET AL. Ct. App. N. Y. Certiorari granted. *Frank P. Barone* for Abate, *Doris Friedman Ulman* for Molof et al., and *Paul H. Rivet* for O'Sullivan et al., petitioners. *J. Martin Cornell* for respondents. Reported below: 25 N. Y 2d 309, 253 N. E. 2d 189.

No. 388. UNITED STATES *v.* HARRIS. C. A. 6th Cir. Motion to dispense with printing brief for respondent granted. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 412 F. 2d 796.

No. 557. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO; and

No. 570. BURNS & ROE, INC., ET AL. *v.* LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari granted. Cases consolidated and a total of 1½ hours allotted for oral argument. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for petitioner in No. 557. *Merritt T. Viscardi* and *Francis A. Mastro* for Burns & Roe, Inc., et al., petitioners in No. 570 and intervenors below in No. 557. *Thomas E. Durkin, Jr.,* for respondent union in both cases. Reported below: 410 F. 2d 5.

No. 642. WILSON, WARDEN *v.* ATCHLEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci* and *William D. Stein,* Deputy Attorneys General, for petitioner. *Charles A. Legge* for respondent. Reported below: 412 F. 2d 230.

Certiorari Denied. (See also No. 1008, *ante,* p. 40; No. 1009, *ante,* p. 41; and No. 1077, *ante,* p. 42.)

No. 875. DAPPER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 71 Cal. 2d 184, 454 P. 2d 905.

No. 95. SCHWEITZER ET AL. *v.* CLERK FOR THE CITY OF PLYMOUTH ET AL. Sup. Ct. Mich. Certiorari denied. *Sheldon M. Meizlish* for petitioners. *Edward Draugelis* for respondents. Reported below: 381 Mich. 485, 164 N. W. 2d 35.

No. 235. GOITIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 409 F. 2d 524.

No. 321. GIDDENS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *Howard K. Berry, Jr.,* for petitioner. *G. T. Blankenship,* Attorney General of Oklahoma, and *W. Howard O'Bryan, Jr.,* and *Duane Lobaugh,* Assistant Attorneys General, for respondent. Reported below: 452 P. 2d 159.

No. 358. RILEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William T. Healy* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 411 F. 2d 1146.

No. 411. DRAPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Raymond Kyle Hayes* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 411 F. 2d 1106.

No. 848. MAYERSOHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Michael S. Fawer* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Marshall Tamor Golding* for the United States. Reported below: 413 F. 2d 641.

No. 746. JAMES ET AL. *v.* UNITED STATES; and

No. 851. HUTCHINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jack Wasserman* and *Michel A. Maroun* for petitioners in No. 746, and *Murry L. Randall* for petitioner in No. 851. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States in both cases. Reported below: 416 F. 2d 467.

No. 845. YOKUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 417 F. 2d 253.

No. 852. STERNMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Gerald Walpin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 415 F. 2d 1165.

No. 853. FEDERAL TRADE COMMISSION *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Friedman,* and *Howard E. Shapiro* for petitioner. *Asa D. Sokolow, Renee J. Roberts,* and *Earl E. Pollock* for respondents. Reported below: 414 F. 2d 974.

No. 858. DOWNES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Samuel W. Barr* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, and *Robert A. Derengoski,* Solicitor General, for respondent.

No. 860. BROWN *v.* LAMB ET AL. C. A. D. C. Cir. Certiorari denied. *Russell Morton Brown,* petitioner, *pro se. J. Edward Goff* for respondents. Reported below: 134 U. S. App. D. C. 314, 414 F. 2d 1210.

No. 859. Historic Smithville Inn et al. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *Godfrey P. Schmidt* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 414 F. 2d 1358.

No. 862. Cox, Penitentiary Superintendent *v.* Wood. C. A. 4th Cir. Certiorari denied. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III* and *W. Luke Witt,* Assistant Attorneys General, for petitioner.

No. 865. Hun Chak Sun *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for respondent. Reported below: 415 F. 2d 791.

No. 867. Mowen *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. *David P. Schippers* and *Samuel J. Betar* for petitioner. Reported below: 109 Ill. App. 2d 62, 248 N. E. 2d 685.

No. 868. Connell Rice & Sugar Co., Inc. *v.* Houston Belt & Terminal Railway Co. C. A. 5th Cir. Certiorari denied. *Cornelius O. Ryan* for petitioner. *Alton F. Curry* for respondent. Reported below: 411 F. 2d 1220.

No. 872. Quality Chevrolet Co., Inc. *v.* Commissioner of Internal Revenue. C. A. 10th Cir. Certiorari denied. *Jack Banner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Meyer Rothwacks* for respondent. Reported below: 415 F. 2d 116.

No. 869. WALLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Wilfred C. Rice* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States.

No. 871. DACEY *v.* FLORIDA BAR, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Arthur Stephen Penn* and *Andrew M. Lawler, Jr.,* for petitioner. *William C. Steel* for respondents. Reported below: 414 F. 2d 195.

No. 876. CAMPIONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 416 F. 2d 486.

No. 878. CREVASSE, SHERIFF *v.* THOMAS. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for petitioner. Reported below: 415 F. 2d 550.

No. 883. COMAN *v.* CHIEF COUNSEL OF THE JUDICIAL INQUIRY ON PROFESSIONAL CONDUCT, NASSAU COUNTY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Ben A. Matthews, Harold Harper,* and *Vincent P. Uihlein* for petitioner. *Edward Margolin, pro se,* and *Donald J. Payton* for respondent.

No. 884. BERRIGAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Harold Buchman, Sidney Albert,* and *Fred E. Weisgal* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 417 F. 2d 1009.

No. 877. Tampa Phosphate Railroad Co. *v.* Seaboard Coast Line Railroad Co. C. A. 5th Cir. Certiorari denied. *James B. McDonough, Jr.*, for petitioner. *William A. Gillen* and *James E. Thompson* for respondent. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Robert W. Ginnane*, and *Jerome Nelson* filed a memorandum in opposition for the United States et al. as *amici curiae*. Reported below: 418 F. 2d 387.

No. 885. Moylan et al. *v.* United States. C. A. 4th Cir. Certiorari denied. *Harold Buchman* and *William N. Kunstler* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Philip R. Monahan* for the United States. Reported below: 417 F. 2d 1002.

No. 887. Ferino *v.* United States. C. A. 5th Cir. Certiorari denied. *C. R. Bolton* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 4.

No. 888. Hanley *v.* United States. C. A. 5th Cir. Certiorari denied. *David W. Walters* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 1160.

No. 890. Bluhm *v.* United States. C. A. 7th Cir. Certiorari denied. *Maurice P. Raizes* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters*, and *Crombie J. D. Garrett* for the United States. Reported below: 414 F. 2d 1240.

No. 894. Reed *v.* The Foylebank et al. C. A. 5th Cir. Certiorari denied. *John R. Martzell* for petitioner. *Leon Sarpy* for respondents. Reported below: 415 F. 2d 838.

No. 892. MAGNA OIL CORP. ET AL. *v.* BATESON; and No. 926. BINYON *v.* BATESON. C. A. 5th Cir. Certiorari denied. *James E. Coleman, Jr.*, for petitioners in No. 892, and *Merrill L. Hartman* and *Carlisle Blalock* for petitioner in No. 926. *Robert H. Hughes* for respondent in both cases. Reported below: 414 F. 2d 128.

No. 908. GREEN ET AL. *v.* AMERICAN TOBACCO CO. C. A. 5th Cir. Certiorari denied. *Lawrence V. Hastings* and *Irma Robbins Feder* for petitioners. *A. Lee Bradford, Janet C. Brown, Abe Krash, Edward C. McLean, Jr., Eugene R. Anderson,* and *Jerome I. Chapman* for respondent. Reported below: 409 F. 2d 1166.

No. 899. COMMUNITY FUNDING CORP. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (WALTON, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. *Howard I. Friedman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for respondent Walton.

No. 901. UNITED BONDING INSURANCE CO. *v.* ASHWOOD CONSTRUCTION CO. ET AL. C. A. 6th Cir. Certiorari denied. *Owen C. Neff* for petitioner. *Bennet Kleinman* for respondent Ashwood Construction Co., *Oscar J. Green* for respondent Central Excavating Co., *Arlene B. Steuer* for respondent Air Compressor Rental Co., and *William T. Monroe* for respondent J. J. Turner, Inc. Reported below: 414 F. 2d 267.

No. 904. CONTINENTAL OIL CO. ET AL. *v.* LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSN., LTD. C. A. 5th Cir. Certiorari denied. *Sweeney J. Doehring* for petitioners. *George W. Renaudin* and *David B. Connery, Jr.*, for respondent. Reported below: 417 F. 2d 1030.

No. 898. WHITE ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Charles K. Rice* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 417 F. 2d 89.

No. 903. BERNARD FOOD INDUSTRIES, INC. *v.* DIETENE CO. C. A. 7th Cir. Certiorari denied. *Leonard Rose* for petitioner. *Richard N. Flint* for respondent. Reported below: 415 F. 2d 1279.

No. 906. BLUM *v.* TENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR. Sup. Ct. App. Va. Certiorari denied. *Robert H. Reiter* for petitioner. Reported below: 210 Va. 5, 168 S. E. 2d 121.

No. 909. HOLAHAN *v.* REYNOLDS, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Blake G. Arata* for petitioner. *Herbert W. Christenberry, Jr.,* for respondent. Reported below: 416 F. 2d 898.

No. 910. STONE *v.* NORTH DAKOTA ET AL. Sup. Ct. N. D. Certiorari denied. *John P. Dosland* for petitioner. *Helgi Johanneson,* Attorney General of North Dakota, and *John E. Adams,* Assistant Attorney General, for respondents. Reported below: 171 N. W. 2d 119.

No. 935. RIVERSIDE PRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Fritz Lanham Lyne* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. *Eugene Cotton* and *Richard F. Watt* for Local 267, Dallas-Fort Worth Lithographers & Photoengravers International Union, AFL–CIO, intervenor below. Reported below: 415 F. 2d 281.

No. 913. MISSLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Edward L. Genn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 414 F. 2d 1293.

No. 925. GLOBUS ET AL. *v.* LAW RESEARCH SERVICE, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Herman E. Cooper* for petitioners. *Donald J. Zoeller* for respondents Blair & Co. et al., and *Lawrence Milberg* for respondent Hoppenfeld. Reported below: 418 F. 2d 1276.

No. 930. BAUMGARTNER ET AL. *v.* GULF OIL CORP. Sup. Ct. Neb. Certiorari denied. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Bernard L. Pachett,* Assistant Attorney General, for petitioners. *James B. Diggs* for respondent. Reported below: 184 Neb. 384, 168 N. W. 2d 510.

No. 931. LEMLICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harold Heller* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 418 F. 2d 212.

No. 934. WYLIE MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Frank F. Fowle* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 417 F. 2d 192.

No. 950. HAMLETT *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. *Raymond A. Brown* for petitioner.

No. 940. OLAH *v.* SAMS ET AL. Sup. Ct. Ga. Certiorari denied. *G. Seals Aiken* for petitioner. *Charles L. Gowen* for respondents. Reported below: 225 Ga. 497, 169 S. E. 2d 790.

No. 941. FRIEND ET AL. *v.* H. A. FRIEND & Co., INC. C. A. 9th Cir. Certiorari denied. *D. Gordon Angus* for petitioners. *John C. Brezina* for respondent. Reported below: 416 F. 2d 526.

No. 943. CONTINENTAL CAN Co., INC. *v.* CROWN CORK & SEAL, INC. C. A. 3d Cir. Certiorari denied. *Helmer R. Johnson* and *William K. Kerr* for petitioner. *H. Francis DeLone* and *Virgil E. Woodcock* for respondent. Reported below: 415 F. 2d 601.

No. 946. SELLARS, ADMINISTRATRIX *v.* LOGAN TOWING Co., INC. C. A. 8th Cir. Certiorari denied. *Fountain D. Dawson* for petitioner. *George G. Matthews* for respondent. Reported below: 414 F. 2d 852.

No. 948. FAIR *v.* DICKINSON, COMPTROLLER OF FLORIDA. Sup. Ct. Fla. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *P. A. Pacyna,* Assistant Attorney General, for respondent.

No. 951. HAWKINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Weldon Holcomb* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 1271.

No. 957. HERNANDEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Joseph Brill* and *Jacob W. Friedman* for petitioner. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent. Reported below: 25 N. Y. 2d 869, 250 N. E. 2d 874.

No. 953. Sears, Roebuck & Co. et al. *v.* Horton et al., Trustees in Bankruptcy. C. A. 10th Cir. Certiorari denied. *Herbert W. DeLaney, Jr.,* for petitioners. Reported below: 413 F. 2d 1281.

No. 954. Hutter et al. *v.* City of Chicago. Sup. Ct. Ill. Certiorari denied. *John A. Hutter, Jr., pro se,* and for other petitioners. *Richard L. Curry, Marvin E. Aspen,* and *Howard C. Goldman* for respondent.

No. 962. South Bay Daily Breeze, a Division of Southern California Associated Newspapers, Inc. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Charles G. Bakaly, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 415 F. 2d 360.

No. 969. Rapoport *v.* Rapoport, aka Sirott. C. A. 9th Cir. Certiorari denied. *Sheldon W. Farber* and *Richard J. Sincoff* for petitioner. Reported below: 416 F. 2d 41.

No. 970. Webb *v.* Nolan. C. A. 4th Cir. Certiorari denied. *H. Gardner Hudson* for respondent.

No. 971. California *v.* Belous. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Arlo E. Smith,* Chief Assistant Attorney General, *William E. James,* Assistant Attorney General, and *Phillip G. Samovar,* Deputy Attorney General, for petitioner. *A. L. Wirin* and *Fred Okrand* for respondent. *Herman F. Selvin, John F. Duff, Richard G. Logan, Richard D. Andrews,* and *James S. De Martini* for Barnes et al. as *amici curiae* in support of the petition. Reported below: 71 Cal. 2d 954, 458 P. 2d 194.

No. 958. S. E. NICHOLS-DOVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *James L. Burke* for petitioners. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 414 F. 2d 561.

No. 973. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. *Jerry D. Anker* and *Chris Dixie* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for National Labor Relations Board, and *W. D. Deakins, Jr.,* for Hess Oil & Chemical Corp., respondents. Reported below: 415 F. 2d 440.

No. 975. OPERATING ENGINEERS LOCAL UNION No. 3 ET AL. *v.* BURROUGHS. C. A. 9th Cir. Certiorari denied. *J. Albert Woll* for petitioners. *Stanley E. Sparrowe* for respondent. Reported below: 417 F. 2d 370.

No. 976. SHAPIRO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. *Luke McKissack* for petitioner.

No. 978. CHAMBLISS *v.* COCA-COLA BOTTLING CO. ET AL. C. A. 6th Cir. Certiorari denied. *Jac Chambliss* and *John A. Chambliss, Jr.,* for petitioner. *Robert T. Keeler* for respondents. Reported below: 414 F. 2d 256.

No. 979. PHELPS *v.* STATE BOARD OF LAW EXAMINERS. Sup. Ct. Kan. Certiorari denied. *B. W. Storey* for petitioner. *Kent Frizzell,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent. Reported below: 204 Kan. 16, 459 P. 2d 172.

No. 983. HARLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Marvin S. Nepom* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States. Reported below: 416 F. 2d 405.

No. 986. WHITE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *Roehm A. West* for petitioner. Reported below: 458 P. 2d 322.

No. 987. ALABAMA-TENNESSEE NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. *Stanley M. Morley, Francis H. Caskin,* and *Louis Flax* for petitioner. *Solicitor General Griswold, Gordon Gooch, Peter H. Schiff,* and *Israel Convisser* for Federal Power Commission, and *Reuben Goldberg, Allan Freidson,* and *William L. Sharp,* for City of Corinth, respondents. Reported below: 417 F. 2d 511.

No. 989. SIEGEL ET UX. *v.* CITY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Hyman Goldman* for petitioners. *Roger Arnebergh* and *Peyton H. Moore, Jr.,* for respondent.

No. 993. PICCINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William Sonenshine* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 591.

No. 994. POLLACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bert B. Rand, Hans A. Nathan,* and *Warren E. Magee* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 417 F. 2d 240.

No. 990. GEORGE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *George T. Davis* for petitioner.

No. 996. PSG CO. ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 9th Cir. Certiorari denied. *Arthur H. Connolly, Jr.*, for petitioners. *Norman J. Wiener* for respondent. Reported below: 417 F. 2d 659.

No. 1000. NOBLE DRILLING CORP. ET AL. *v.* KIMBLE. C. A. 5th Cir. Certiorari denied. *W. Ford Reese* for petitioners. *Donald V. Organ* for respondent. Reported below: 416 F. 2d 847.

No. 1004. SUHREN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George E. Morse* and *Jacob Guice* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Edmund B. Clark* for the United States. Reported below: 399 F. 2d 485 and 414 F. 2d 784.

No. 1005. ZAYRE OF GEORGIA, INC., ET AL. *v.* CITY OF MARIETTA ET AL. C. A. 5th Cir. Certiorari denied. *Hosea Alexander Stephens, Jr.*, for petitioners. Reported below: 416 F. 2d 251.

No. 1007. MORSE *v.* HINDMAN ET AL. C. A. 10th Cir. Certiorari denied. *Robert Martin* for respondents Hindman et al., and *Malcolm Miller* for respondents Tomlinson-Kathol, Inc., et al.

No. 1013. WINSTON *v.* PRUDENTIAL LINES, INC. C. A. 2d Cir. Certiorari denied. *David T. Goldstick* and *John S. Martin, Jr.*, for petitioner. *Robert A. Lilly* for respondent. Reported below: 415 F. 2d 619.

No. 1014. LAMPMAN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *William J. Currer, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for respondent United States. Reported below: 418 F. 2d 215.

No. 1015. LOCAL 189, UNITED PAPERMAKERS & PAPERWORKERS, AFL–CIO, CLC, ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Warren Woods* and *Betty Southard Murphy* for petitioners. *Solicitor General Griswold, Assistant Attorney General Leonard,* and *David L. Rose* for the United States, and *Richard B. Sobol* for Local 189a, United Papermakers & Paperworkers, AFL–CIO, CLC, et al., respondents. Reported below: 416 F. 2d 980.

No. 1018. GORDON *v.* SPUNT. C. A. 1st Cir. Certiorari denied. *Henry Friedman* for petitioner. *Samuel Newman* for respondent.

No. 1019. BRAVOS ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Charles A. Bellows* for petitioners. *William J. Scott,* Attorney General of Illinois, *James R. Thompson, Joel M. Flaum,* and *Morton E. Friedman,* Assistant Attorneys General, and *Elmer C. Kissane* for respondent. Reported below: 114 Ill. App. 2d 298, 252 N. E. 2d 776.

No. 1024. CIMARRON COAL CORP. *v.* DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. *James G. Wheeler* and *W. Stuart McCloy* for petitioner. *Edward L. Carey* and *Willard Owens* for respondents. Reported below: 416 F. 2d 844.

No. 1025. LAIDLAW CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Allen W. Teagle* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 414 F. 2d 99.

No. 1028. SCM CORP. *v.* ADVANCE BUSINESS SYSTEMS & SUPPLY CO. C. A. 4th Cir. Certiorari denied. *William E. Willis, J. Marshall Wellborn, Arthur W. Machen, Jr., Richard Sexton,* and *Jerry Oppenheim* for petitioner. *Robert G. Levy* and *George W. Liebmann* for respondent. Reported below: 415 F. 2d 55.

No. 1034. CAHN, DISTRICT ATTORNEY OF NASSAU COUNTY, NEW YORK, ET AL. *v.* BETHVIEW AMUSEMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. *William Cahn, pro se,* and for other petitioners. *Morton Alpert* for respondents. Reported below: 416 F. 2d 410.

No. 1039. LOCAL 300, UNITED INDUSTRIAL WORKERS OF AMERICA, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* MARRIOTT IN-FLITE SERVICES DIVISION OF MARRIOTT CORP. C. A. 5th Cir. Certiorari denied. *Harold A. Katz, Irving M. Friedman,* and *Howard Schulman* for petitioner. *John T. Weise* and *R. Theodore Clark, Jr.,* for respondent. *Solicitor General Griswold* and *Arnold Ordman* filed a memorandum for National Labor Relations Board in opposition. Reported below: 417 F. 2d 563.

No. 1065. JORDAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edward L. Cragen* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 338.

No. 96. TRUJILLO *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE HARLAN would grant petition for certiorari, vacate judgment of Court of Appeals, and remand to that court for further consideration in light of *Leary* v. *United States,* 395 U. S. 6 (1969). See *Street* v. *New York,* 394 U. S. 576, 586 (1969); *Stromberg* v. *California,* 283 U. S. 359 (1931). *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Jerome M. Feit* for the United States.

No. 573. WATTS ET AL. *v.* SEWARD SCHOOL BOARD ET AL. Sup. Ct. Alaska. Motion to dispense with printing petition and to use record in No. 325, October Term, 1967, granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George Kaufmann* for petitioners. *Theodore M. Pease, Jr.,* for respondents. Reported below: 454 P. 2d 732.

No. 694. PANICO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Abraham Glasser* and *Jerome Lewis* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States. Reported below: 412 F. 2d 1151.

No. 886. O'CONNOR, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Motion to substitute John K. O'Connor, Executor of Estate of Raymond A. O'Connor, deceased, in place of Raymond A. O'Connor, as a party petitioner, granted. Certiorari denied. *Newell S. Boardman* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for respondent. Reported below: 412 F. 2d 304.

No. 725. SCHIPANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Jacob P. Lefkowitz* and *Abraham Glasser* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 414 F. 2d 1262.

No. 897. YOUNGE *v.* STATE BOARD OF REGISTRATION FOR THE HEALING ARTS. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Morris A. Shenker* and *Murry L. Randall* for petitioner. *John C. Danforth,* Attorney General of Missouri, and *Albert J. Stephan, Jr.,* for respondent. Reported below: 451 S. W. 2d 346.

No. 932. NATIONAL ASSOCIATION OF THEATRE OWNERS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Marcus Cohn* for petitioners. *Solicitor General Griswold, Assistant Attorney General McLaren, Henry Geller, John H. Conlin,* and *Lenore G. Ehrig* for Federal Communications Commission, and *Harold David Cohen* and *J. Laurent Scharff* for Zenith Radio Corp. et al., respondents. Reported below: 136 U. S. App. D. C. 352, 420 F. 2d 194.

No. 955. GOLDWASSER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Lawrence Speiser* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Norman G. Knopf* for respondents. Reported below: 135 U. S. App. D. C. 222, 417 F. 2d 1169.

No. 923. HILGENECK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Kenneth S. Jacobs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 418 F. 2d 233.

No. 933. TROUTMAN ET AL. *v.* RUMSFELD, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *O. B. McEwan* for petitioners. *Solicitor General Griswold* for respondents. Reported below: 417 F. 2d 171.

No. 985. DENNISON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Saul I. Weinstein* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jeremiah Jochnowitz,* Assistant Attorney General, for respondent.

No. 1001. KING ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Warner Hodges* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 417 F. 2d 633.

No. 939. WAGNER *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *David P. Schippers* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 558.

No. 1016. EVENING NEWS ASSN. ET AL. *v.* ARBER ET AL.; and

No. 1021. STAHLIN ET AL. *v.* ARBER ET AL. Sup. Ct. Mich. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George E. Brand, Jr.*, and *Rockwell T. Gust* for petitioners in No. 1016; *Lewis A. Engman* for Stahlin, and *Donald E. Shely* for Bagwell, petitioners in No. 1021. *Larry S. Davidow* for respondents in both cases. Reported below: 382 Mich. 300, 170 N. W. 2d 45.

No. 1031. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. *v.* NORTHWEST AIRLINES, INC. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Edward M. Glennon* for petitioners. *Henry Halladay* for respondent. Reported below: 415 F. 2d 493.

No. 1079. ALEXANDER *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William A. Mann* for petitioner. *John W. Benoit, Jr.*, Deputy Attorney General of Maine, for respondent. Reported below: 257 A. 2d 778.

No. 1006. REED *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 416 F. 2d 377.

No. 968. YEAGER, PRINCIPAL KEEPER *v.* DALEY. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Leo Kaplowitz* for petitioner. *Ralph Spritzer* for respondent. Reported below: 415 F. 2d 779.

No. 924. LEVISA STONE CORP. ET AL. *v.* ELKHORN STONE CO., INC. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 411 F. 2d 1208.

No. 952. PENNSYLVANIA *v.* YOUNT. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *James D. Crawford* and *Arlen Specter* for petitioner. *Homer W. King, Francis V. Sabino,* and *Chris F. Gillotti* for respondent. Reported below: 435 Pa. 276, 256 A. 2d 464.

No. 1047. MCMANN, WARDEN *v.* SMITH. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Robert S. Hammer,* Assistant Attorney General, for petitioner. *William E. Hellerstein* and *Phylis Skloot Bamberger* for respondent. Reported below: 417 F. 2d 648.

No. 1074. MCMANN, WARDEN *v.* VANDERHORST. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General, for petitioner. *William E. Hellerstein* for respondent. Reported below: 417 F. 2d 411.

No. 19, Misc. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Jerome M. Feit* for the United States. Reported below: 402 F. 2d 599.

No. 995. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL *v.* PIEDMONT AVIATION, INC. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Samuel J. Cohen* for petitioner. *Whiteford S. Blakeney* for respondent. Reported below: 416 F. 2d 633.

No. 1023. UNITED STATES *v.* GORDON, U. S. DISTRICT JUDGE. C. A. 7th Cir. Motion of Cotton et al. (defendants below) for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. *Franklyn M. Gimbel* and *Stanley P. Gimbel* for Gordon, and *William M. Kunstler* for Cotton et al.

No. 24, Misc. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Acting Assistant Attorney General Kossack,* and *Beatrice Rosenberg* for the United States.

No. 28, Misc. CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 405 F. 2d 875.

No. 89, Misc. NANDIN *v.* UNITED STATES; and

No. 125, Misc. CAZARES-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States in No. 89, Misc., and *Mr. Griswold, Mr. Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States in No. 125, Misc. Reported below: 406 F. 2d 228.

No. 34, Misc. SHILOW *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *William P. Schuler,* Assistant Attorney General, for respondent. Reported below: 252 La. 1105, 215 So. 2d 828.

No. 37, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Carl E. F. Dally* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 403 F. 2d 489.

No. 47, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 405 F. 2d 420.

No. 79, Misc. MORALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 406 F. 2d 1135.

No. 116, Misc. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States.

No. 347, Misc. BLAKNEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 450, Misc. MATOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 1245.

No. 547, Misc. NUTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 178.

No. 488, Misc. BALLENTINE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein* and *Phylis Skloot Bamberger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 410 F. 2d 375.

No. 915, Misc. CHIN DAN FOOK, AKA YOUNG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 1016.

No. 980, Misc. ARCINIAGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 409 F. 2d 513.

No. 1341, Misc. ROLLING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John Sekul* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 416 F. 2d 467.

No. 23, Misc. BIVENS *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 Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States.

Rehearing Denied

No. 344, October Term, 1963. ORMENTO *v.* UNITED STATES, 375 U. S. 940. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 9. NACIREMA OPERATING CO., INC., ET AL. *v.* JOHNSON ET AL.; and

No. 16. TRAYNOR ET AL., DEPUTY COMMISSIONERS *v.* JOHNSON ET AL., 396 U. S. 212;

No. 32. NATIONAL LABOR RELATIONS BOARD *v.* J. H. RUTTER-REX MANUFACTURING CO., INC., ET AL., 396 U. S. 258;

No. 458. JOHNSON ET AL. *v.* MASSACHUSETTS, 396 U. S. 990;

No. 591. CLEVELAND *v.* ILLINOIS, 396 U. S. 986;

No. 592. FLOYD *v.* CITY OF ROCKFORD, 396 U. S. 985;

No. 625. CARLTON ET AL. *v.* CONNER, COMMISSIONER OF AGRICULTURE OF FLORIDA, 396 U. S. 272;

No. 640. SCARSELLETTI *v.* AETNA CASUALTY & SURETY CO., 396 U. S. 987;

No. 172, Misc. GERARDI *v.* UNITED STATES, 396 U. S. 857;

No. 173, Misc. GERARDI *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 396 U. S. 856;

No. 536, Misc. MATHEWSON *v.* MCGRATH, TRUSTEE, 396 U. S. 931;

No. 888, Misc. GREEN *v.* PATE, WARDEN, 396 U. S. 1018;

No. 979, Misc. MANUEL *v.* MANUEL, 396 U. S. 948;

No. 986, Misc. ELI *v.* CALIFORNIA, 396 U. S. 1020;

No. 1003, Misc. CHAMBERS ET UX. *v.* COLONIAL PIPELINE CO., 396 U. S. 1020;

No. 1084, Misc. GROSS *v.* CRAVEN, WARDEN, 396 U. S. 1023; and

No. 1153, Misc. PARRISH *v.* BETO, CORRECTIONS DIRECTOR, 396 U. S. 1026. Petitions for rehearing denied.

No. 240. COVELLO *v.* UNITED STATES, 396 U. S. 879. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1109, October Term, 1968. WEED *v.* BILBREY ET AL., 394 U. S. 1018, 395 U. S. 971; and

No. 224, Misc., October Term, 1968. STURM *v.* CALIFORNIA ADULT AUTHORITY ET AL., 395 U. S. 947, 396 U. S. 870. Motions for leave to file second petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions.

No. 812, Misc. STUART *v.* CORAL GABLES FEDERAL SAVINGS & LOAN ASSN., 396 U. S. 923. Motion for leave to file petition for rehearing denied.

No. 896, Misc. MALONEY *v.* E. I. DU PONT DE NEMOURS & CO., INC., 396 U. S. 1030. Petition for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 613. VAN HOUTEN *v.* RALLS ET AL., 396 U. S. 962. Motion to dispense with printing motion for leave to file petition for rehearing granted. Motion for leave to file petition for rehearing denied.

No. 1476, Misc., October Term, 1967. ZARAGOZA *v.* UNITED STATES, 391 U. S. 969. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

FEBRUARY 25, 1970

Dismissal Under Rule 60

No. 956. WARNER ET AL. *v.* GREGORY ET AL. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Dennis G. Lyons* and *Craig M. Armstrong* for petitioners. *John R. Fielding* for respondents Gregory et al. Reported below: 415 F. 2d 1345.

FEBRUARY 27, 1970

Miscellaneous Orders

No. —. MUCIE *v.* MISSOURI. Sup. Ct. Mo. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Robert G. Duncan* for applicant. *John C. Danforth,* Attorney General of Missouri, and *Dale L. Rollings,* Assistant Attorney General, in opposition.

No. —. DAVIS *v.* SELECTIVE SERVICE BOARD No. 30. C. A. 5th Cir. Application for stay of induction presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

No. 36, Orig. TEXAS *v.* LOUISIANA. Motion for leave to file bill of complaint granted and State of Louisiana allowed 60 days to answer. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Houghton Brownlee, Jr.,* and *J. Arthur Sandlin,* Assistant Attorneys General, and *Price Daniel,* Special Assistant Attorney General, on the motion. *Jack P. F. Gremillion,* Attorney General of Louisiana, *John L. Madden* and *Edward M. Carmouche,* Assistant Attorneys General, and *Jacob H. Morris,* Special Assistant Attorney General, in opposition.

No. 74. TAGGART ET AL. *v.* WEINACKER'S INC. Sup. Ct. Ala. [Certiorari granted, 396 U. S. 813.] Motion for leave to file supplemental brief, after argument, granted. *Carl Taylor* and *Bernard Dunau* for petitioners on the motion.

No. 1296, Misc. LESTER *v.* GEORGIA; and

No. 1324, Misc. WHITE *v.* CARDWELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1147. KELLY *v.* UNITED STATES. C. A. D. C. Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *King David* for applicant. *Solicitor General Griswold* in opposition.

No. 1192. ZICARELLI *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Sup. Ct. N. J. Application for bail denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Michael A. Querques, Daniel E. Isles,* and *Joseph E. Brill* for applicant.

No. 1015, Misc. DAWSON *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Howard J. Schwab,* Deputy Attorney General, in opposition.

No. 290, Misc. CHANCE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ET AL. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* in opposition.

No. 333, Misc. DAWSON *v.* KERR, CHAIRMAN, ADULT AUTHORITY OF CALIFORNIA. Motion for leave to file petition for writ of mandamus denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Howard J. Schwab,* Deputy Attorney General, in opposition.

No. 1126, Misc. WILSON *v.* NEALON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* in opposition.

Probable Jurisdiction Noted

No. 1093. UNITED STATES *v.* PHILLIPSBURG NATIONAL BANK & TRUST CO. ET AL. Appeal from D. C. N. J. Appellees' motion to strike references to agency reports and to order Clerk to redeliver material not in evidence which has been lodged with the Court and the motion to advance denied. Probable jurisdiction noted. *Solicitor General Griswold* and *Assistant Attorney General McLaren* for the United States. *Robert B. Meyner* for appellee Phillipsburg National Bank & Trust Co., and *Philip L. Roache, Jr.,* and *Charles H. McEnerney, Jr.,* for appellee Camp. Reported below: 306 F. Supp. 645.

Certiorari Granted. (See also No. 579, Misc., *ante,* p. 97; and No. 992, Misc., *ante,* p. 96.)

No. 675. USNER *v.* LUCKENBACH OVERSEAS CORP. ET AL. C. A. 5th Cir. Certiorari granted. *H. Alva Brumfield* for petitioner. *Charles Kohlmeyer, Jr.,* and *Benjamin W. Yancey* for respondents. Reported below: 413 F. 2d 984.

No. 942. DONALDSON, AKA SWEET *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari granted. *Louis L. Meldman* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States et al. Reported below: 418 F. 2d 1213.

No. 630, Misc. PICCIRILLO *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *William E. Hellerstein* and *Malvine Nathanson* for petitioner. *Eugene Gold* for respondent. Reported below: 24 N. Y. 2d 598, 249 N. E. 2d 412.

No. 665, Misc. RELFORD *v.* COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to retroactivity and scope of *O'Callahan* v. *Parker,* 395 U. S. 258, and case transferred to appellate docket. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for respondent. Reported below: 409 F. 2d 824.

Certiorari Denied. (See also No. 1062, *ante,* p. 95; and No. 200, Misc., *ante,* p. 95.)

No. 856. VERGARI, DISTRICT ATTORNEY OF WESTCHESTER COUNTY, NEW YORK *v.* 208 CINEMA, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Carl A. Vergari,* petitioner, *pro se. Michael J. Kunstler* and *William M. Kunstler* for respondents 208 Cinema, Inc., et al. *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General, for the State of Georgia as *amicus curiae* in support of the petition.

No. 928. GNOTTA *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. *Rodger J. Walsh* for petitioner. *Solicitor General Griswold* for the United States et al. Reported below: 415 F. 2d 1271.

No. 929. TUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Rufus King* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 416 F. 2d 16.

No. 1035. MCCORMICK *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *David C. Shapard* for petitioner.

No. 1020. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Walter S. Weiss* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 418 F. 2d 215.

No. 1030. HUGH H. WILSON CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Robert Lewis* and *William A. Krupman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Elliott Moore* for respondent. Reported below: 414 F. 2d 1345.

No. 1044. GEORGIA HIGHWAY EXPRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Alexander E. Wilson, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent National Labor Relations Board. Reported below: 134 U. S. App. D. C. 406, 415 F. 2d 986.

No. 1050. TARVESTAD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Robert Vogel* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 418 F. 2d 1043.

No. 1124. WARWICK *v.* SEGAN. C. A. 5th Cir. Certiorari denied. *Wyman C. Lowe* for petitioner.

No. 1052. GROENDYKE TRANSPORT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Payne H. Ratner* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 417 F. 2d 33.

No. 1048. FRIEDLANDER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *H. David Rothman* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 636.

No. 1056. SCHERR ET AL. *v.* UNIVERSAL MATCH CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Herbert Kanon* for petitioners. *Edwin J. Jacob* for Universal Match Corp., and *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Morton Hollander* for the United States, respondents. Reported below: 417 F. 2d 497.

No. 1103. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSN., INC. *v.* LIMAN, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Louis J. Gusmano* and *Charles N. Fiddler* for petitioner. *Ambrose Doskow* for respondent. Reported below: 417 F. 2d 627.

No. 736. BOUNDS, COMMISSIONER OF CORRECTION *v.* CRAWFORD. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Robert Morgan,* Attorney General of North Carolina, *Jacob L. Safron* and *Andrew A. Vanore, Jr.,* for petitioner. *Daniel H. Pollitt* and *William W. Van Alstyne* for respondent.

No. 762. UNITED STATES *v.* HIETT. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. *Joseph A. Calamia* for respondent. Reported below: 415 F. 2d 664.

No. 1106. DYMO INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* for petitioners. *Solicitor General Griswold, Assistant Attorney General McLaren,* and *Howard E. Shapiro* for the United States. Reported below: 418 F. 2d 500.

No. 1061. FEATHERSTON *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gordon G. Hawn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for respondents. Reported below: 418 F. 2d 582.

No. 1010. PHIPPS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *John F. O'Neal* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *William M. Cohen* for the United States.

No. 1045. JUPITER CORP. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *William W. Brackett* for petitioner. *Solicitor General Griswold, Gordon Gooch,* and *Peter H. Schiff* for respondent Federal Power Commission; *Howard C. Westwood, Herbert Dym, Kenneth Heady, John R. Rebman,* and *Willard P. Scott* for respondents Phillips Petroleum Co. et al. Reported below: 137 U. S. App. D. C. 295, 424 F. 2d 783.

No. 137, Misc. HEMPHILL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum,* Assistant Attorney General, for respondent.

No. 999. SHELTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin L. Wulf* for petitioner. *Melvin G. Rueger* and *Leonard Kirschner* for respondent.

No. 1054. TIDEWATER CONSTRUCTION CORP. ET AL., TRADING AS TIDEWATER-RAYMOND-KIEWIT *v.* DUKE. Sup. Ct. App. Va. Motion of respondent to dispense with printing brief in opposition granted. Certiorari denied. *R. Arthur Jett* for petitioners. *Henry E. Howell, Jr.,* and *Willard J. Moody* for respondent. Reported below: 210 Va. 143, 169 S. E. 2d 585.

No. 148, Misc. LANDMAN *v.* VIRGINIA BOARD OF WELFARE AND INSTITUTIONS. C. A. 4th Cir. Certiorari denied. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 152, Misc. FERREE *v.* FRYE, WARDEN. Sup. Ct. Ill. Certiorari denied. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Thomas J. Immel,* Assistant Attorneys General, for respondent.

No. 197, Misc. LLOYD *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *Stanley A. Bass* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum* and *Morton E. Friedman,* Assistant Attorneys General, for respondent. Reported below: 406 F. 2d 617.

No. 220, Misc. NORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 402 F. 2d 73.

No. 260, Misc. FURTAK *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 *Michael Colodner,* Assistant Attorney General, for respondent.

No. 263, Misc. CAHA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *C. C. Sheldon,* Assistant Attorney General, for respondent. Reported below: 184 Neb. 70, 165 N. W. 2d 362.

No. 265, Misc. CARTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Frederick R. Millar, Jr.,* Deputy Attorney General, for respondent.

No. 266, Misc. HENRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States.

No. 276, Misc. DAUGHERTY, ADMINISTRATRIX *v.* SEABOARD COAST LINE RAILWAY CO., FORMERLY ATLANTIC COAST LINE RAILWAY CO. Ct. App. Ga. Certiorari denied. *Joseph B. Bergen* for petitioner. *Frank G. Kurka* for respondent. Reported below: 118 Ga. App. 518, 164 S. E. 2d 269.

No. 283, Misc. FURTAK *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Michael Colodner,* Assistant Attorney General, for respondent.

No. 269, Misc. ROBINSON *v.* BOLSINGER, PROTHONOTARY. C. A. 3d Cir. Certiorari denied. *James D. Crawford* and *Arlen Specter* for respondent.

No. 280, Misc. KENNY *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Gretchen White Oberman, Leon B. Polsky,* and *William E. Hellerstein* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler,* Assistant Attorney General, for respondent. Reported below: 410 F. 2d 1276.

No. 286, Misc. CERRATO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William E. Hellerstein* for petitioner. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent. Reported below: 24 N. Y. 2d 1, 246 N. E. 2d 501.

No. 326, Misc. REDDING *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. *Daniel R. McLeod,* Attorney General of South Carolina, and *Emmet H. Clair,* Assistant Attorney General, for respondent. Reported below: 252 S. C. 312, 166 S. E. 2d 219.

No. 341, Misc. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert J. Polis,* Deputy Attorney General, for respondents.

No. 472, Misc. GONZALEZ *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Allen A. Haim,* Deputy Attorney General, for respondent.

No. 328, Misc. WILSON *v.* GERNERT ET AL. C. A. 3d Cir. Certiorari denied. *William C. Sennett,* Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.,* Deputy Attorney General, for respondents.

No. 345, Misc. GIBBS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Bradley A. Stoutt,* Deputy Attorney General, for respondent.

No. 357, Misc. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *G. T. Blankenship,* Attorney General of Oklahoma, and *Gary F. Glasgow,* Assistant Attorney General, for respondent. Reported below: 448 P. 2d 266.

No. 405, Misc. RODGERS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Ralph H. Gillan,* Assistant Attorney General, for respondent.

No. 417, Misc. CARTER *v.* SEAMANS, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for respondent. Reported below: 411 F. 2d 767.

No. 457, Misc. WEBB *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Lawrence Herman* for petitioner. *Lee C. Falke* for respondent.

No. 462, Misc. LATHAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *William E. Hellerstein* for petitioner. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent.

No. 463, Misc. CUMMINGS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *A. F. Summer,* Attorney General of Mississippi, and *Guy N. Rogers,* Assistant Attorney General, for respondent. Reported below: 219 So. 2d 673.

No. 477, Misc. BENNETT *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent.

No. 500, Misc. LUCKEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty, Marshall J. Hartman,* and *James J. Doherty* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum,* Assistant Attorney General, for respondent. Reported below: 42 Ill. 2d 115, 245 N. E. 2d 769.

No. 512, Misc. FLORES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Russell Iungerich,* Deputy Attorney General, for respondent.

No. 528, Misc. CATANZARO *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. *Edwin L. Gasperini* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General, for respondent. Reported below: 404 F. 2d 296.

No. 570, Misc. BOLOGNESE *v.* MAZURKIEWICZ, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 412 F. 2d 193.

No. 529, Misc. GAWNE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Richard E. Fray* for petitioner Banks. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 409 F. 2d 1399.

No. 568, Misc. PEPITONE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci,* Deputy Attorney General, for respondents.

No. 575, Misc. JOHNSON *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 *Horace Wheatley,* Deputy Attorney General, for respondent.

No. 577, Misc. VASQUEZ *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Edward W. Bergtholdt,* Deputy Attorneys General, for respondent.

No. 640, Misc. KEARNEY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. *A. L. Wirin, Fred Okrand,* and *Laurence R. Sperber* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for respondents. Reported below: 409 F. 2d 847.

No. 737, Misc. IGNACIO ET AL. *v.* PEOPLE OF THE TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. *Frank G. Lujan,* Attorney General of Guam, and *Gerald J. Smith,* Deputy Attorney General, for respondent. *Solicitor General Griswold* for the United States also in opposition. Reported below: 413 F. 2d 513.

No. 674, Misc. In re L. G. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. *James M. Russ* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *James M. Adams,* Assistant Attorney General, in opposition.

No. 679, Misc. Smith *v.* Cox, Penitentiary Superintendent. Sup. Ct. App. Va. Certiorari denied. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 724, Misc. Morse *v.* California. Sup. Ct. Cal. Certiorari denied. *Frank L. Eddens, Jr.,* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Frederick R. Millar, Jr.,* Deputy Attorney General, for respondent. Reported below: 70 Cal. 2d 711, 452 P. 2d 607.

No. 753, Misc. Johnson *v.* United States. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 412 F. 2d 753.

No. 766, Misc. Garcia *v.* California. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert J. Polis,* Deputy Attorney General, for respondent.

No. 916, Misc. Gray *v.* Maryland. Ct. App. Md. Certiorari denied. *Karl G. Feissner* for petitioner. *Francis B. Burch,* Attorney General of Maryland, *Edward F. Borgerding,* First Assistant Attorney General, and *Thomas N. Biddison, Jr.,* Assistant Attorney General, for respondent. Reported below: 254 Md. 385, 255 A. 2d 5.

No. 768, Misc. SAPP *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondents.

No. 769, Misc. PEREA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *W. Peter McAtee* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 65.

No. 792, Misc. CALLISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *W. Edward Morgan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 408 F. 2d 1362.

No. 802, Misc. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert J. Polis,* Deputy Attorney General, for respondents.

No. 813, Misc. BANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States.

No. 921, Misc. HARRIS *v.* COX, PENITENTIARY SUPERINTENDENT. Sup. Ct. App. Va. Certiorari denied. *Seymour Horwitz* for petitioner. *W. Luke Witt*, Assistant Attorney General of Virginia, for respondent.

No. 944, Misc. AMSLEY *v.* WEST VIRGINIA RACING COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. *Edwin F. Lark* for petitioner. Reported below: 410 F. 2d 393.

No. 923, Misc. ANDERSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. *Marshall W. Krause* for petitioner.

No. 927, Misc. FRY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 940, Misc. GRAVES *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 941, Misc. SCANLAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 945, Misc. TOULSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 272 Cal. App. 2d 181, 77 Cal. Rptr. 271.

No. 946, Misc. SNOWDEN ET AL. *v.* UNITED STATES; No. 1000, Misc. POSEY ET AL. *v.* UNITED STATES; and No. 1021, Misc. BOWERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. C. Mike Watkins* for petitioners Snowden et al. in No. 946, Misc., and *Herman W. Alford* and *Laurel G. Weir* for petitioners in No. 1000, Misc. *Solicitor General Griswold, Assistant Attorney General Leonard, John M. Rosenberg,* and *Robert A. Murphy* for the United States in all three cases. Reported below: 416 F. 2d 545.

No. 950, Misc. CAREY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *Samuel D. Slade* for petitioner. Reported below: 409 F. 2d 1210.

No. 1037, Misc. EMERSON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 284 Minn. 540, 169 N. W. 2d 63.

No. 953, Misc. HERBERT *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 958, Misc. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 413 F. 2d 878.

No. 970, Misc. BRIGANTE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Richard G. Harris* and *Don F. Clark* for petitioner. *Thomas C. Lynch,* Attorney General, and *Evelle J. Younger* for the State of California, real party in interest.

No. 976, Misc. STEVENSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1018, Misc. STEIN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. *Norman Dorsen* for petitioner. *Kent Frizzell,* Attorney General of Kansas, and *J. Richard Foth* and *Ernest C. Ballweg,* Assistant Attorneys General, for respondent. Reported below: 203 Kan. 638, 456 P. 2d 1.

No. 1020, Misc. BUHL *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Pat Bailey,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Charles R. Parrett,* Assistant Attorneys General, for respondent.

No. 1038, Misc. ERVING *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 413 F. 2d 593.

No. 1027, Misc. CHAMBERLAIN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. *Sheldon M. Meizlish* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, for respondent. Reported below: 15 Mich. App. 541, 166 N. W. 2d 815.

No. 1035, Misc. URBANO *v.* BOARD OF MANAGERS OF NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. *Arthur J. Sills,* Attorney General of New Jersey, and *Eugene T. Urbaniak,* Deputy Attorney General, for respondent. Reported below: 415 F. 2d 247.

No. 1061, Misc. COLEMAN *v.* KOLOSKI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. *Paul W. Brown,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent. Reported below: 415 F. 2d 745.

No. 1076, Misc. PEPITONE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1078, Misc. URBANO *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 105 Ariz. 13, 457 P. 2d 343.

No. 1079, Misc. HENDRIX *v.* CITY OF SEATTLE ET AL. Sup. Ct. Wash. Certiorari denied. *Michael H. Rosen* for petitioner. *A. L. Newbould* for respondents. Reported below: 76 Wash. 2d 142, 456 P. 2d 696.

No. 1094, Misc. CARTER ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. *Raymond A. Brown* for petitioner Carter. Reported below: 54 N. J. 436, 255 A. 2d 746.

No. 1080, Misc. MAXEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *Carl Lee Compton* for petitioner. *Theodore L. Sendak,* Attorney General of Indiana, and *Walter E. Bravard, Jr.,* Deputy Attorney General, for respondent. Reported below: — Ind. —, 244 N. E. 2d 650.

No. 1091, Misc. IN RE REECE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States in opposition.

No. 1097, Misc. BELL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 442 S. W. 2d 535.

No. 1107, Misc. LEVIER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 203 Kan. 626, 455 P. 2d 534.

No. 1108, Misc. ALVAREZ *v.* IMMIGRATION AND NATURALIZATION SERVICE;

No. 1129, Misc. DE GUZMAN *v.* IMMIGRATION AND NATURALIZATION SERVICE;

No. 1139, Misc. CEBALLOS *v.* IMMIGRATION AND NATURALIZATION SERVICE; and

No. 1140, Misc. DE RAMOS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioner in each case. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for respondent in all four cases.

No. 1147, Misc. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 407 F. 2d 202.

No. 1150, Misc. ROBERTS *v.* CARTER, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 1151, Misc. BRYAN *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 415 F. 2d 314.

No. 1156, Misc. THOMPSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 413 F. 2d 454.

No. 1164, Misc. LLANUSA *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Joseph I. Stone* for petitioner.

No. 1166, Misc. WEEMS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Louis L. Hoynes, Jr.,* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Hillel Hoffman,* Assistant Attorney General, for respondent. Reported below: 414 F. 2d 417.

No. 1168, Misc. POPE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 685.

No. 1169, Misc. BRYANT *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 415 F. 2d 775.

No. 1174, Misc. RICHARDS *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied.

No. 1175, Misc. ZIDE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1186, Misc. CASTRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 891.

No. 1187, Misc. MINK *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Sup. Ct. Mich. Certiorari denied.

No. 1190, Misc. RAMIREZ *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1191, Misc. YLAGAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for respondent.

No. 1192, Misc. MATUTINA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Richard W. Lowery* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for respondent.

No. 1193, Misc. JOHNSON, AKA JOHNSTON *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 414 F. 2d 645.

No. 1194, Misc. SALAZAR *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 1198, Misc. JOSEPH *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 415 F. 2d 150.

No. 1199, Misc. BROWN ET AL. *v.* CHASTAIN ET AL. C. A. 5th Cir. Certiorari denied. *Tobias Simon* for petitioners. *Thomas C. Britton* for respondents. Reported below: 416 F. 2d 1012.

No. 1204, Misc. GEORGE *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1205, Misc. KELEM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 346.

No. 1207, Misc. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 926.

No. 1218, Misc. LEBOSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *William H. Sheil* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 280.

No. 1220, Misc. STURGIS *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied.

No. 1221, Misc. SANDERS *v.* UNITED STATES; and

No. 1223, Misc. BUSCHKOTTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard R. Paradise* for petitioner in No. 1221, Misc., and *Albert Datz* for petitioner in No. 1223, Misc. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States in both cases. Reported below: 416 F. 2d 194.

No. 1222, Misc. RENSING *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1226, Misc. ELY *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1227, Misc. CLARK *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1228, Misc. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 271 Cal. App. 2d 616, 76 Cal. Rptr. 768.

No. 1231, Misc. CAMPBELL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, for respondent. Reported below: 416 F. 2d 949.

No. 1234, Misc. HENRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William E. Hellerstein* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 267.

No. 1235, Misc. ROYBAL *v.* LLOYD, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1236, Misc. WILLIAMS *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1237, Misc. MUELLER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1239, Misc. NORMAN *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 1261, Misc. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 954.

No. 1262, Misc. CRAIG *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. *James D. Davis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Robert E. Kopp* for respondent. Reported below: 416 F. 2d 721.

No. 1263, Misc. HUNT *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1266, Misc. SARTAIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 338.

No. 1268, Misc. FERSNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 403.

No. 1269, Misc. SANCHEZ *v.* IOWA STATE PAROLE BOARD ET AL. Sup. Ct. Iowa. Certiorari denied.

No. 1270, Misc. MINK *v.* ZIEL, CLERK, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 1275, Misc. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1278, Misc. MINK *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1280, Misc. FLINT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1281, Misc. SKOLNICK *v.* MAYOR OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. *Raymond F. Simon, Marvin E. Aspen,* and *Edmund Hatfield* for respondents. Reported below: 415 F. 2d 1291.

No. 1287, Misc. FRITZBERG *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *J. Terrell Williams,* Assistant Attorney General, for respondent. Reported below: 416 F. 2d 917.

No. 1297, Misc. SHIPP *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1290, Misc. BAXTER *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. Reported below: 51 Haw. 157, 454 P. 2d 366.

No. 1311, Misc. HOOD *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1317, Misc. FREEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Melvin G. Rueger* and *Leonard Kirschner* for respondent.

No. 1320, Misc. PALUCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1335, Misc. BURKE *v.* SHARKEY, ACTING WARDEN. C. A. 1st Cir. Certiorari denied.

No. 1364, Misc. TUCKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Donald J. Zoeller, Harry C. Batchelder, Jr.,* and *Thomas R. Esposito* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 415 F. 2d 867.

No. 1375, Misc. WALTON *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1401, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1408, Misc. GORDON *v.* NATIONAL BROADCASTING CO., INC. C. A. 2d Cir. Certiorari denied. *Lawrence J. McKay* for respondent.

No. 1432, Misc. WALLACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 418 F. 2d 876.

No. 1441, Misc. WATTS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1443, Misc. SAFFIOTI *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 417 F. 2d 971.

No. 1457, Misc. CALDWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 1475, Misc. BROWN *v.* COPINGER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1483, Misc. BILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1508, Misc. HAMMOND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *Guy B. Scott, Jr.,* for petitioner. *Arthur K. Bolton,* Attorney General of Georgia, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General, for respondent. Reported below: 225 Ga. 545, 170 S. E. 2d 226.

No. 1529, Misc. SIMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Phylis Skloot Bamberger* and *William E. Hellerstein* for petitioner.

No. 254, Misc. THOMAS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John B. Breckinridge,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent. Reported below: 437 S. W. 2d 512.

No. 145, Misc. BRUNO *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Gretchen White Oberman* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Joel Lewittes,* Assistant Attorney General, for respondent. Reported below: 408 F. 2d 125.

No. 1196, Misc. BLOETH *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1230, Misc. TOMAIOLO *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* for the United States.

No. 183, Misc. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gerald W. Getty* for petitioner. *William J. Scott,* Attorney General of Illinois, and *Joel M. Flaum,* Assistant Attorney General, for respondent. Reported below: 103 Ill. App. 2d 209, 243 N. E. 2d 551.

No. 484, Misc. CROSBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Samuel S. Jacobson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 410 F. 2d 1145.

No. 808, Misc. REYES *v.* KELLY, JUDGE. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George C. Dayton* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent. Reported below: 224 So. 2d 303.

No. 1030, Misc. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Pat Bailey,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Howard M. Fender,* Assistant Attorneys General, for respondent. Reported below: 442 S. W. 2d 698.

No. 1144, Misc. ANDERSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion to defer consideration denied. Certiorari denied. *Robert L. Chipley, Jr.,* and *Betty Sloan* for petitioner.

Rehearing Denied

No. 190. TURNER *v.* UNITED STATES, 396 U. S. 398;

No. 656. AMERICAN SMELTING & REFINING CO. *v.* COUNTY OF CONTRA COSTA ET AL., 396 U. S. 273;

No. 657. ACKER *v.* UNITED STATES, 396 U. S. 1003;

No. 681. FISHKIN ET AL. *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL., 396 U. S. 278;

No. 20, Misc. SMITH *v.* UNITED STATES, 396 U. S. 1027;

No. 918, Misc. NORMAN *v.* UNITED STATES, 396 U. S. 1018; and

No. 931, Misc. STACY *v.* VAN CUREN, CORRECTIONAL SUPERINTENDENT, 396 U. S. 1045. Petitions for rehearing denied.

No. 602, Misc. NEELY *v.* UNITED STATES, 396 U. S. 917, 1031. Motion for leave to file second petition for rehearing denied.

No. 744, Misc. BIRBECK *v.* CALIFORNIA, 396 U. S. 970. Motion for leave to file petition for rehearing denied.

MARCH 2, 1970

Miscellaneous Orders

No. 18, Orig. ILLINOIS *v.* MISSOURI. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs may be filed on or before June 1, 1970. Reply briefs, if any, to such exceptions may be filed on or before July 15, 1970. [For earlier orders herein, see, *e. g.*, 386 U. S. 902.]

No. 18, Misc. FUNICELLO *v.* NEW JERSEY. Sup. Ct. N. J. Motion to dismiss petition for writ of certiorari as to deceased petitioner Forcella granted. *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Anthony Amsterdam, Richard Newman,* and *Gerald T. Foley, Jr.,* on the motion. Reported below: 52 N. J. 263, 245 A. 2d 181.

No. 1517, Misc. DENNIS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 1518, Misc. DINKINS *v.* BLACKWELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 788. BLOUNT, POSTMASTER GENERAL, ET AL. *v.* RIZZI, DBA MAIL BOX. Appeal from D. C. C. D. Cal. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *David Nelson* for appellants. *Stanley Fleishman* for appellee. Reported below: 305 F. Supp. 634.

No. 782. MORRIS ET AL. *v.* SCHOONFIELD, WARDEN, ET AL. Appeal from D. C. Md. Probable jurisdiction noted and case set for oral argument immediately following No. 1089 [*Williams* v. *Illinois*, probable jurisdiction noted, 396 U. S. 1036]. *Robert G. Fisher, Aaron M. Schreiber, Elsbeth Levy Bothe,* and *Melvin L. Wulf* for appellants. *George L. Russell, Jr.,* for Schoonfield, and *Alfred J. O'Ferrall III,* Assistant Attorney General, for the State of Maryland, appellees. Reported below: 301 F. Supp. 158.

No. 812. UNITED STATES ET AL. *v.* BOOK BIN. Appeal from D. C. N. D. Ga. Probable jurisdiction noted and case set for oral argument immediately following No. 788, *supra. Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *David Nelson* for the United States et al. *Robert Eugene Smith* and *Hugh W. Gibert* for appellee. Reported below: 306 F. Supp. 1023.

Certiorari Granted

No. 1058. PHILLIPS *v.* MARTIN MARIETTA CORP. C. A. 5th Cir. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker,* and *Earl M. Johnson* for petitioner. *William Y. Akerman* and *Clark C. Vogel* for respondent. *Solicitor General Griswold, Assistant Attorney General Leonard, Lawrence G. Wallace, Robert T. Moore,* and *Stanley P. Hebert* for the United States as *amicus curiae* in support of the petition. Reported below: 411 F. 2d 1.

Certiorari Denied. (See also No. 1087, *ante,* p. 147; and No. 1181, *ante,* p. 149.)

No. 1053. BEARDEN ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. *Louis A. Fischl* for petitioners. Reported below: 458 P. 2d 909, 914.

No. 870. DeLyra *v.* United States;

No. 966. Parks *v.* United States;

No. 980. Crisona *v.* United States; and

No. 981. DeLyra *v.* United States. C. A. 2d Cir. Certiorari denied. *James M. La Rossa* for petitioner in No. 870; *Eugene J. Moran* for petitioner in No. 966; *Maurice Edelbaum* for petitioner in No. 980; and *Jacob P. Lefkowitz* for petitioner in No. 981. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States in all four cases. Reported below: 416 F. 2d 107.

No. 945. Gossett et al. *v.* United States; and

No. 991. Claridge et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Stephen I. Zetterberg* for petitioners in each case. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Edmund B. Clark* for the United States in both cases. Reported below: No. 945, 416 F. 2d 565; and No. 991, 416 F. 2d 933.

No. 949. Dunn *v.* United States. C. A. 4th Cir. Certiorari denied. *Norman B. Smith* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 418 F. 2d 245.

No. 1012. Serbian Eastern Orthodox Congregation of "St. George," Elizabeth, New Jersey, et al. *v.* Serbian Eastern Orthodox Congregation of "St. George," Elizabeth, New Jersey (Diocese for Eastern States of America and Canada), et al. Super. Ct. N. J. Certiorari denied. *Daniel J. Russell* for petitioners. *Jeremiah D. O'Dwyer* for respondents. Reported below: 106 N. J. Super. 22, 254 A. 2d 119.

No. 961. DEAL ET AL. *v.* NELSON ET AL. Sup. Ct. Ill. Certiorari denied. *William J. Voelker, Jr.*, for petitioners. *William J. Scott*, Attorney General of Illinois, and *Francis T. Crowe*, Assistant Attorney General, for respondents. Reported below: 43 Ill. 2d 192, 251 N. E. 2d 234.

No. 964. ROSENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. W. Gill, Sr.*, and *Geo. M. Leppert* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson*, and *Beatrice Rosenberg* for the United States. Reported below: 417 F. 2d 629.

No. 967. ESTATE OF UPSHAW ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Jack C. Brown* for petitioners. *Solicitor General Griswold* and *Assistant Attorney General Walters* for respondent. Reported below: 416 F. 2d 737.

No. 1059. CHUBET *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg*, and *Robert G. Maysack* for the United States. Reported below: 414 F. 2d 1022.

No. 1060. FISHEL PRODUCTS CO. *v.* COMMODITY CREDIT CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus*, and *Robert V. Zener* for respondents. Reported below: 415 F. 2d 1255.

No. 1063. BURNS ET AL. *v.* BOARD OF SUPERVISORS OF FAIRFAX COUNTY. Sup. Ct. App. Va. Certiorari denied. *Bertie E. Tubaugh* for petitioners. *Donald C. Stevens* for respondent.

No. 1071. KONIGSBERG *v.* CICCONE, MEDICAL CENTER DIRECTOR, ET AL. C. A. 8th Cir. Certiorari denied. *Frederick Bernays Wiener* and *Frank A. Lopez* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 417 F. 2d 161.

No. 1085. COLUMBIA BROADCASTING SYSTEM, INC. *v.* POOS, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 7th Cir. Certiorari denied. *Don H. Reuben* and *Lawrence Gunnels* for petitioner. *J. F. Schlafly* for respondent.

No. 1091. AVERN TRUST ET AL. *v.* CLARKE ET AL. C. A. 7th Cir. Certiorari denied. *Robert A. Sprecher* for petitioners. *John H. Bishop* for respondents. Reported below: 415 F. 2d 1238.

No. 1102. YEARGIN *v.* HAMILTON MEMORIAL HOSPITAL ET AL. Sup. Ct. Ga. Certiorari denied. *Hugh G. Head, Jr.,* and *H. Garland Head III* for petitioner. *Lemuel Hugh Kemp* for respondents. Reported below: 225 Ga. 661, 171 S. E. 2d 136.

No. 1116. E. M. WHITTENTON, INC., ET AL. *v.* NEIGHBORS ET AL. Sup. Ct. Fla. Certiorari denied. *Monterey Campbell III* for petitioners. *Al. J. Cone* for respondents.

No. 1131. CHAMBERS *v.* ROAD DISTRICT NO. 505 OF TANGIPAHOA PARISH, LOUISIANA, ET AL. Sup. Ct. La. Certiorari denied. *Allen B. Pierson, Jr.,* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *Leonard E. Yokum,* and *Fred G. Benton, Sr.,* for respondents. *Bertrand DeBlanc* and *E. E. Huppenbauer, Jr.,* for Acadia Parish School Board as *amicus curiae.* Reported below: 255 La. 55, 229 So. 2d 698.

No. 1126. UNIVERSAL MARINE CORP. ET AL. *v.* ENCYCLOPEDIA BRITANNICA, INC. C. A. 2d Cir. Certiorari denied. *John J. Sullivan* for petitioners. *F. Herbert Prem* for respondent. Reported below: 422 F. 2d 7.

No. 1139. KONIGSBERG *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *Frank A. Lopez* for petitioner. *Frank S. Hogan, Michael R. Juviler,* and *David Otis Fuller, Jr.,* for respondent.

No. 1152. DUGGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Lewis E. Pierce* and *Robert G. Duncan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 201.

No. 1163. UNITED MINE WORKERS OF AMERICA *v.* TENNESSEE CONSOLIDATED COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. *Edward L. Carey, Harrison Combs, Willard P. Owens, E. H. Rayson,* and *M. E. Boiarsky* for petitioner. *William D. Spears, Judson Harwood, William M. Ables, Jr.,* and *John A. Rowntree* for respondents. Reported below: 416 F. 2d 1192.

No. 907. UNITED STATES *v.* 959.68 ACRES OF LAND IN MERCER COUNTY, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Edmund B. Clark* for the United States. *Bernard Goldstone* for respondent. Reported below: 415 F. 2d 401.

No. 1067. WRIGHT *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanley M. Dietz* for petitioner.

No. 1064. General Electric Co. *v.* National Labor Relations Board et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *David L. Benetar* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Eugene B. Granof* for National Labor Relations Board, and *Irving Abramson* and *Ruth Weyand* for International Union of Electrical, Radio & Machine Workers, AFL–CIO, respondents. *Milton A. Smith* for Chamber of Commerce of the United States as *amicus curiae* in support of the petition. Reported below: 418 F. 2d 736.

No. 1078. McClain *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice Brennan would grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand the case to that court for further consideration in light of *Leary* v. *United States,* 395 U. S. 6 (1969). See *Street* v. *New York,* 394 U. S. 576, 586 (1969); *Stromberg* v. *California,* 283 U. S. 359 (1931). *Burton Marks* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 489.

No. 1132, Misc. Dessureault *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. *Z. Simpson Cox* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 104 Ariz. 380 and 439, 453 P. 2d 951 and 454 P. 2d 981.

No. 1158, Misc. Travnikoff *v.* Wood, Rehabilitation Center Superintendent. C. A. 9th Cir. Certiorari denied.

No. 625, Misc. LUGO-BAEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *John L. Boeger* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 412 F. 2d 435.

No. 1154, Misc. MCCAULLEY *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1161, Misc. TOWLES *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1163, Misc. DANIEL *v.* ZELKER, ACTING WARDEN. Ct. App. N. Y. Certiorari denied.

No. 1185, Misc. NEWHOUSE *v.* MISTERLY, SHERIFF. C. A. 9th Cir. Certiorari denied. *S. Carter McMorris* for petitioner. Reported below: 415 F. 2d 514.

No. 1212, Misc. JONES *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 1219, Misc. GORE *v.* ALABAMA. Ct. App. Ala. Certiorari denied. *Fred Blanton, Jr.,* for petitioner. Reported below: 45 Ala. App. 146, 227 So. 2d 432.

No. 1286, Misc. COLLINS *v.* L. M. WHITE CONTRACTING CO. ET AL. Sup. Ct. Ariz. Certiorari denied. *Edward W. Scruggs* for respondent State Compensation Fund. Reported below: 104 Ariz. 485, 455 P. 2d 963.

No. 1302, Misc. CLAUSELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1305, Misc. BARNES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. *John T. Corrigan* for respondent.

No. 1333, Misc. DI FILIPPO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1334, Misc. KNUCKLES *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1337, Misc. BERRY *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1389, Misc. MCENTIRE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 417 F. 2d 626.

No. 1392, Misc. MARRONE *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 458 P. 2d 736.

No. 1395, Misc. BUTLER *v.* HENRY, ADMINISTRATOR. C. A. 4th Cir. Certiorari denied.

No. 1407, Misc. DE CLARA *v.* JOHNSTON. C. A. 2d Cir. Certiorari denied.

No. 1414, Misc. JACKSON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. *Richard Newman* for petitioner.

No. 1422, Misc. TORNABENE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 418 F. 2d 71.

No. 1428, Misc. DOMINGUEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1439, Misc. FEIST *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1444, Misc. JASKO *v.* PATUXENT INSTITUTION DIRECTOR. C. A. 4th Cir. Certiorari denied.

No. 1459, Misc. COOK *v.* SUPERINTENDENT, VIRGINIA PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 1473, Misc. CALMENATE *v.* HOGAN, DISTRICT ATTORNEY OF NEW YORK COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1474, Misc. GOFF *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1476, Misc. CARTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1477, Misc. DEAR *v.* DEAR. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 1479, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 4.

No. 1481, Misc. PLASENCIA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1285, Misc. O'CONNOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leigh Athearn* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 1110.

No. 1486, Misc. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Jeffrey Michael Cohen* for petitioner. Reported below: 223 So. 2d 337.

No. 1487, Misc. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 960.

No. 1488, Misc. STARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Ralph J. Steinberg* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 901.

No. 1491, Misc. BRYANT *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1330, Misc. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Reber F. Boult, Jr., Charles Morgan, Jr., Richard Bellman, Howard Moore, Jr., Melvin L. Wulf,* and *Eleanor H. Norton* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 415 F. 2d 502.

No. 1482, Misc. KEMP *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* for the United States. Reported below: 415 F. 2d 1185.

No. 1614, Misc. SANTOS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William E. Hellerstein* for petitioner. *Frank S. Hogan, Michael R. Juviler,* and *David Otis Fuller, Jr.,* for respondent.

No. 1390, Misc. HOTEL, MOTEL & CLUB EMPLOYEES UNION LOCAL 6 *v.* SHULTZ, SECRETARY OF LABOR. 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 Ruckelshaus,* and *Robert V. Zener* for respondent.

Rehearing Denied

No. 1256, Misc., October Term, 1968. CAMPBELL *v.* UNITED STATES, 393 U. S. 1121, 395 U. S. 954. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 805. SHAPIRO, WELFARE COMMISSIONER OF CONNECTICUT *v.* DOE, 396 U. S. 488; and

No. 928, Misc. SMITH *v.* GEORGIA, 396 U. S. 1045. Petitions for rehearing denied.

No. 631. CARLINER ET AL. *v.* COMMISSIONER OF DISTRICT OF COLUMBIA ET AL., 396 U. S. 987. Motion for leave to file petition for rehearing denied.

MARCH 9, 1970

Miscellaneous Orders

No. —. UPJOHN CO. *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 6th Cir. Application for stay, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Stanley L. Temko* and *Herbert Dym* for applicant. *Solicitor General Griswold* in opposition. *C. Joseph Stetler* for Pharmaceutical Manufacturers Assn. as *amicus curiae* in support of the application.

No. 1400, Misc. EDGE *v.* SMITH, WARDEN; and
No. 1585, Misc. SHEPHERD *v.* WINGO, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1314, Misc. MCDOWELL *v.* PAULSON, CLERK, COURT OF APPEALS. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* in opposition.

Certiorari Granted. (See No. 1136, *ante*, p. 232.)

Certiorari Denied

No. 814. IRWIN ET UX. *v.* DEMPSEY-TEGELER & CO., INC. C. A. 7th Cir. Certiorari denied. *John H. Bishop* for petitioners. *Bernard Weisberg* for respondent. Reported below: 415 F. 2d 1348.

No. 833. HAIRSTON *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. *Marshall Patner* for petitioner. *William J. Scott,* Attorney General of Illinois, and *James R. Thompson, Joel M. Flaum,* and *Warren K. Smoot,* Assistant Attorneys General, for respondents.

No. 847. ACUNTO ET AL. *v.* UNITED STATES; and
No. 902. DINORSCIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Philip Vitello* for petitioners in No. 847, and *Michael A. Querques* for petitioners in No. 902. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States in both cases. Reported below: No. 902, 419 F. 2d 83.

No. 1084. GABLER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John Powers Crowley* for petitioner. Reported below: 111 Ill. App. 2d 121, 249 N. E. 2d 340.

No. 963. District Council of Painters No. 16 of Alameda et al. Counties *v.* Painters Union Local 127 et al. C. A. 9th Cir. Certiorari denied. *Joseph E. Smith* for petitioner. *Francis J. McTernan* for respondents. Reported below: 415 F. 2d 1121.

No. 1043. Barsaloux *v.* United States. C. A. 5th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 419 F. 2d 1299.

No. 1073. MacElvain et al., dba Deep Rock Drilling Co. *v.* Securities and Exchange Commission. C. A. 5th Cir. Certiorari denied. *J. Campbell Palmer III* for petitioners. *Solicitor General Griswold, Philip A. Loomis, Jr.,* and *David Ferber* for respondent. Reported below: 417 F. 2d 1134.

No. 1086. City of Miami Beach *v.* Manilow et al. Sup. Ct. Fla. and Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Raphael Steinhardt* for petitioner. Reported below: 213 So. 2d 589; 226 So. 2d 805.

No. 1088. Thompson et al. *v.* Boyle, U. S. District Judge. C. A. 5th Cir. Certiorari denied. *Donald V. Organ* for petitioners. Reported below: 417 F. 2d 1041.

No. 1096. McWilliams *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. *B. W. Minsky* for petitioner.

No. 1097. Torello *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. *Anna R. Lavin* for petitioner. Reported below: 109 Ill. App. 2d 433, 248 N. E. 2d 725.

No. 1092. PAUL *v.* COLORADO STATE BOARD OF LAW EXAMINERS. Sup. Ct. Colo. Certiorari denied.

No. 1098. PARKER *v.* CARGILL, INC. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* for petitioner. Reported below: 417 F. 2d 772.

No. 1108. CHART ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Richard E. Sommer, pro se,* and for other petitioners. Reported below: 44 Wis. 2d 421, 171 N. W. 2d 331.

No. 1110. CLOVER CO., INC., ET AL. *v.* GENERAL AGENCY, INC., OF PENNSYLVANIA ET AL. C. A. 6th Cir. Certiorari denied. *John G. O'Mara, pro se,* and for other petitioners. *Kenneth L. Anderson* for respondents.

No. 1119. HERRERO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Finton J. Phelan, Jr.,* and *J. C. Arriola* for petitioners. *Solicitor General Griswold, Assistant Attorney General Kashiwa, Edmund B. Clark,* and *William M. Cohen* for the United States. Reported below: 416 F. 2d 945.

No. 1147. KELLY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *King David* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States.

No. 159, Misc. CURRY *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. *James E. Harrington* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *John T. Murphy,* Deputy Attorney General, for respondent. Reported below: 405 F. 2d 110.

No. 1154. KESLER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. *Hyman Gold* for petitioner.

No. 168, Misc. BROECKEL *v.* GREEN, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. *Paul W. Brown,* Attorney General of Ohio, and *Leo J. Conway, Stephen M. Miller,* and *Thomas H. Palmer,* Assistant Attorneys General, for respondent.

No. 351, Misc. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for respondent.

No. 655, Misc. BRADLEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. *John B. Breckinridge,* Attorney General of Kentucky, and *Joseph L. Famularo,* Assistant Attorney General, for respondent. Reported below: 439 S. W. 2d 61.

No. 969, Misc. HIBBITT *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 *Joel H. Sachs,* Assistant Attorney General, for respondent.

No. 1170, Misc. MCLAUGHLIN *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. *James F. Meehan* for respondent Twentieth Century-Fox Film Corp.

No. 1173, Misc. WILSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1217, Misc. ESCARCEGA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas Lisle Schechter* for petitioner. Reported below: 273 Cal. App. 2d 853, 78 Cal. Rptr. 785.

No. 1224, Misc. GONZAGUE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Morton L. Ginsberg* for petitioner.

No. 1243, Misc. GRANT *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1245, Misc. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles K. Cosner* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 1252.

No. 1247, Misc. ALLMAN *v.* SILBERGLITT, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1252, Misc. HILL *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1254, Misc. GUIDO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 376, 256 N. E. 2d 321.

No. 1283, Misc. ALERS *v.* MUNICIPALITY OF SAN JUAN. C. A. 1st Cir. Certiorari denied.

No. 1288, Misc. HANIG *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *Byron N. Scott* for petitioner.

No. 1292, Misc. GILMORE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1294, Misc. DODRILL *v.* WEST VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 1307, Misc. JONES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1319, Misc. TREVATHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 898.

No. 1348, Misc. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James L. Guilmartin* and *Stanley Jay Bartel* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 621.

No. 1393, Misc. BAKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Kasanof* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 419 F. 2d 83.

No. 1434, Misc. MOORE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 104 Ariz. 545, 456 P. 2d 915.

No. 1495, Misc. CHACON *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1558, Misc. BARKLEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Thomas L. Stapleton* for respondent. Reported below: 418 F. 2d 575.

No. 1540, Misc. McDaniels *v.* Pitchess, Sheriff, et al. C. A. 9th Cir. Certiorari denied.

No. 1206, Misc. Gruver *v.* Secretary of Health, Education, and Welfare. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Kathryn H. Baldwin* for respondent. Reported below: —— U. S. App. D. C. ——, 426 F. 2d 1195.

No. 1303, Misc. Robinson *v.* United States. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. *De Long Harris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States.

No. 1448, Misc. Goldsmith *v.* United States. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1506, Misc. Mordecai *v.* United States. C. A. D. C. Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. *Paul Bender* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 137 U. S. App. D. C. 198, 421 F. 2d 1133.

Rehearing Denied

No. 714. Swain et al. *v.* Board of Adjustment of the City of University Park et al., 396 U. S. 277. Petition for rehearing denied.

No. 1285, October Term, 1968. DETROIT VITAL FOODS, INC. *v.* UNITED STATES, 395 U. S. 935; and

No. 687. GINZBURG ET AL. *v.* GOLDWATER, 396 U. S. 1049. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions.

MARCH 16, 1970

Miscellaneous Orders

No. —. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. Motion to vacate order of United States Court of Appeals for the Fourth Circuit and to reinstate order of the United States District Court for the Western District of North Carolina, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *Jack Greenberg, James M. Nabrit III,* and *Conrad O. Pearson* on the motion.

No. —. SHAW INTERNATIONAL THEATRES, INC. *v.* MUNICIPAL COURT FOR THE SAN JOSE-MILPITAS JUDICIAL DISTRICT, COUNTY OF SANTA CLARA (STATE OF CALIFORNIA, REAL PARTY IN INTEREST). Sup. Ct. Cal. Application for stay of action by the Municipal Court for the San Jose-Milpitas Judicial District, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Edward DeGrazia* and *Stanley Fleishman* for applicant. *Thomas C. Lynch,* Attorney General, *Michael J. Phelan,* Deputy Attorney General, and *Albert W. Harris, Jr.,* Assistant Attorney General, for the State of California in opposition.

No. 2, Misc. CHANDLER, U. S. DISTRICT JUDGE *v.* JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES. Motion of *Stephen S. Chandler, pro se,* for leave to file reply brief, after argument, granted. [For earlier orders herein, see, *e. g.,* 396 U. S. 809.]

No. 1210. South Hill Neighborhood Assn., Inc., et al. *v.* Romney, Secretary of Housing and Urban Development, et al. C. A. 6th Cir. Application for injunction, presented to Mr. Justice Stewart, and by him referred to the Court, denied. *Eugene F. Mooney* for petitioners. *Solicitor General Griswold* in opposition.

*Probable Jurisdiction Noted**

Certiorari Granted. (See also No. 1391, Misc., *ante,* p. 246.)

No. 1117. Zenith Radio Corp. *v.* Hazeltine Research, Inc. C. A. 7th Cir. Motion to use record in No. 49, October Term, 1968, granted. Certiorari granted. *Thomas C. McConnell, Philip J. Curtis,* and *Francis J. McConnell* for petitioner. *John T. Chadwell, Victor P. Kayser, Joseph V. Giffin, M. Hudson Rathburn,* and *Laurence B. Dodds* for respondent. Reported below: 418 F. 2d 21.

Certiorari Denied. (See also No. 1090, *ante,* p. 245; and No. 1360, Misc., *ante,* p. 244.)

No. 882. Boston & Providence Railroad Development Group *v.* Bartlett, Trustee in Reorganization, et al. C. A. 1st Cir. Certiorari denied. *Armistead B. Rood* for petitioner. *Charles W. Mulcahy, Jr.,* for respondent Bartlett, *Robert W. Meserve* for respondent Boston & Providence Railroad Corporation Stockholders' Committee, and *James Garfield,* for respondent Smith. Reported below: 413 F. 2d 137.

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*[Reporter's Note: An order noting probable jurisdiction in No. 735, *Whitcomb, Governor of Indiana* v. *Chavis et al.,* No. 761, *Ruckelshaus et al.* v. *Chavis et al.,* and No. 1198, *Whitcomb, Governor of Indiana* v. *Chavis et al.,* issued on March 16, 1970, was revoked on March 23, 1970, on which date probable jurisdiction was noted in No. 1198. See *post,* p. 984.]

No. 1095. MENSEN *v.* BALTIMORE & OHIO RAILROAD CO. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Leonard J. Dunn* for petitioner. *Norman J. Gundlach* for respondent.

No. 1111. RANJEL ET AL. *v.* CITY OF LANSING ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg* for petitioners. *Thomas C. Mayer* for respondents. *Solicitor General Griswold* and *Assistant Attorney General Leonard* for the United States as *amicus curiae* in support of the petition. Reported below: 417 F. 2d 321.

No. 1296. NORRIS ET AL. *v.* ALABAMA REPUBLICAN STATE EXECUTIVE COMMITTEE ET AL. Sup. Ct. Ala. Motion to expedite consideration of petition for writ of certiorari granted. Certiorari denied. *Fred Blanton, Jr.*, for petitioners.

No. 784, Misc. CUADRADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Preben Jensen* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 633.

No. 1006, Misc. PALOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 416 F. 2d 438.

No. 1137, Misc. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Norman H. Schaumberger* for petitioner. *Solicitor General Griswold* for the United States.

No. 261, Misc. ENNEKING ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Earl Faircloth,* Attorney General of Florida, and *Wallace E. Allbritton,* Assistant Attorney General, for respondent.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims beginning March 12, 1970, and ending March 12, 1970, 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.

MARCH 20, 1970

Dismissal Under Rule 60

No. 1773, Misc. PELLITIER *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

MARCH 23, 1970

Miscellaneous Orders

No. 696. LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., ET AL. *v.* WADMOND ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 396 U. S. 999.] Motion of appellants for permission for two attorneys to participate in oral argument and for additional time for oral argument denied. *Alan H. Levine* for Law Students Civil Rights Research Council, Inc., et al., and *Leonard B. Boudin* for Wexler et al., on the motion.

No. ——. HAAG ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA, ET AL. D. C. C. D. Cal. Application for temporary injunction, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *David A. Binder* for applicants.

No. ——. SPINDEL *v.* LAVALLEE, WARDEN. Sup. Ct. N. Y. Application for bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Patrick M. Wall* for applicant. *Frank S. Hogan* and *Michael R. Juviler* in opposition.

No. 565. DYSON ET AL. *v.* STEIN. Appeal from D. C. N. D. Tex. [Probable jurisdiction noted, 396 U. S. 954.] Motion of *Stanley Fleishman, pro se,* for leave to participate in oral argument as *amicus curiae* denied.

No. 726. MITCHELL ET AL. *v.* DONOVAN, SECRETARY OF STATE OF MINNESOTA, ET AL. Appeal from D. C. Minn. [Probable jurisdiction noted, 396 U. S. 1000.] Motion of appellants to remove case from summary calendar granted and 45 minutes allotted to each side. *Lynn S. Castner* on the motion.

No. 1093. UNITED STATES *v.* PHILLIPSBURG NATIONAL BANK & TRUST CO. ET AL. Appeal from D. C. N. J. [Probable jurisdiction noted, *ante,* p. 933.] Motion of appellees to remove case from summary calendar granted. *Philip L. Roache, Jr.,* on the motion.

No. 420, Misc. NORSWORTHY *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Mark L. Christensen,* Deputy Attorney General, in opposition.

No. 1142. ELKANICH *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 396 U. S. 1057.] Motion of petitioner to enlarge record granted. *Charles A. Miller* on the motion.

No. 1382, Misc. IN RE DISBARMENT OF EDWARDS. It having been reported to the Court that William D. Edwards of Columbus, Ohio, has been disbarred from the practice of law by the Supreme Court of Ohio, and this Court, by order of December 8, 1969 [396 U. S. 953], having suspended the said William D. Edwards 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 and no return to the rule having been filed;

IT IS ORDERED that the said William D. Edwards 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. 429, Misc. SZIJARTO *v.* OBERHAUSER ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jimmie E. Tinsley,* Deputy Attorney General, in opposition.

No. 1547, Misc. HUNT *v.* CRAVEN, WARDEN;

No. 1596, Misc. JACKSON ET AL. *v.* SHEYA, JUDGE, ET AL.; and

No. 1625, Misc. HANDSFORD *v.* BLACKWELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1607, Misc. TIME, INC. *v.* BLANKE. Motion for leave to file petition for writ of certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted. *Harold R. Medina, Jr.,* and *Cicero C. Sessions* on the motion.

No. 1260, Misc. WHITE *v.* PADULA ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 1198. WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL.* Appeal from D. C. S. D. Ind. Probable jurisdiction noted. *Theodore L. Sendak,* Attorney General of Indiana, *Richard C. Johnson,* Chief Deputy Attorney General, and *William F. Thompson,* Assistant Attorney General, for appellant. *James Manahan* for appellees. Reported below: 307 F. Supp. 1362.

No. 905. GROVE PRESS, INC., ET AL. *v.* MARYLAND STATE BOARD OF CENSORS. Appeal from Ct. App. Md. Probable jurisdiction noted. *Edward de Grazia, Nathan Lewin, Arnold M. Weiner,* and *Alan M. Dershowitz* for appellants. *Francis B. Burch,* Attorney General of Maryland, and *Thomas N. Biddison, Jr.,* Assistant Attorney General, for appellee. *Thomas R. Asher* and *Melvin L. Wulf* for American Civil Liberties Union et al. as *amici curiae* in support of appellants. Reported below: 255 Md. 297, 258 A. 2d 240.

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*[REPORTER'S NOTE: The Court's order of March 16, 1970, noting probable jurisdiction in No. 735, *Whitcomb, Governor of Indiana* v. *Chavis et al.,* No. 761, *Ruckelshaus et al.* v. *Chavis et al.,* and No. 1198, *Whitcomb, Governor of Indiana* v. *Chavis et al.,* is revoked (see *ante,* p. 979).]

No. 900. UNITED STATES *v.* FANCHER. Appeal from D. C. S. D. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. *Louis K. Freiberg* for appellee.

No. 1221. WISCONSIN *v.* CONSTANTINEAU. Appeal from D. C. E. D. Wis. Probable jurisdiction noted. *Robert W. Warren,* Attorney General of Wisconsin, and *Benjamin Southwick* and *Robert D. Martinson,* Assistant Attorneys General, for appellant. *S. A. Schapiro* for appellee. Reported below: 302 F. Supp. 861.

No. 1082. UNITED STATES *v.* WELLER. Appeal from D. C. N. D. Cal. Motion to remand denied. Further consideration of question of jurisdiction postponed to hearing of case on the merits. *Solicitor General Griswold* on the motion. *Fay Stender* in opposition. Reported below: 309 F. Supp. 50.

No. 1149. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL. *v.* KARALEXIS ET AL. Appeal from D. C. Mass. Motion to vacate order of this Court of December 15, 1969 [396 U. S. 976], denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted. Probable jurisdiction noted and case set for oral argument immediately following No. 905 [probable jurisdiction noted, *supra*].* *Garrett H. Byrne* and *Robert H. Quinn,* Attorney General of Massachusetts, *pro sese,* and *John Wall* and *Lawrence P. Cohen,* Assistant Attorneys General, for appellants. *Edward de Grazia, Nathan Lewin,* and *Alan M. Dershowitz* for appellees. Reported below: 306 F. Supp. 1363.

*[REPORTER'S NOTE: At the time No. 1149 was argued, No. 905 was not ready for argument; thus the cases were not argued together.]

Certiorari Granted. (See also No. 128, *ante,* p. 315; and No. 943, Misc., *ante,* p. 320.)

No. 835. National Association of Securities Dealers, Inc. *v.* Securities and Exchange Commission et al. C. A. D. C. Cir. Certiorari granted. The Chief Justice took no part in the consideration or decision of this petition. *Joseph B. Levin* and *Lloyd J. Derrickson* for petitioner. *Solicitor General Griswold* and *Philip A. Loomis, Jr.,* for Securities and Exchange Commission, and *Archibald Cox* and *Stephen Ailes* for First National City Bank, respondents. Reported below: 136 U. S. App. D. C. 241, 420 F. 2d 83.

No. 843. Investment Company Institute et al. *v.* Camp, Comptroller of the Currency, et al. C. A. D. C. Cir. Certiorari granted and case set for oral argument immediately following No. 835 [certiorari granted, *supra*]. The Chief Justice took no part in the consideration or decision of this petition. *G. Duane Vieth, James F. Fitzpatrick,* and *Robert L. Augenblick* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *C. Westbrook Murphy* for respondent Camp, and *Archibald Cox* and *Stephen Ailes* for respondent First National City Bank. Reported below: 136 U. S. App. D. C. 241, 420 F. 2d 83.

No. 1125. Williams *v.* United States. C. A. 9th Cir. Certiorari granted and case set for oral argument immediately following No. 1142 [*Elkanich* v. *United States,* certiorari granted, 396 U. S. 1057]. *Philip M. Haggerty* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 418 F. 2d 159.

Certiorari Denied. (See also No. 1055, *ante,* p. 315; No. 1107, *ante,* p. 316; No. 943, Misc., *ante,* p. 320; No. 1374, Misc., *ante,* p. 318; and No. 1403, Misc., *ante,* p. 318.)

No. 129. INDUSTRIAL NATIONAL BANK OF RHODE ISLAND *v.* WINGATE CORP.; and

No. 225. CAMP, COMPTROLLER OF THE CURRENCY *v.* WINGATE CORP. C. A. 1st Cir. Certiorari denied. *Matthew W. Goring, Robert W. Meserve,* and *John B. Newhall* for petitioner in No. 129, and *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for petitioner in No. 225. *Eustace T. Pliakas* and *Edward J. Regan* for respondent in both cases. Reported below: 408 F. 2d 1147.

No. 794. BURDETTE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *Lawrence J. Bernard, Jr.,* for petitioner. *Thomas E. Fox,* Deputy Attorney General of Tennessee, and *Lance D. Evans,* Assistant Attorney General, for respondent.

No. 1017. BEAUDINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Raymond E. LaPorte* and *Frank Ragano* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 414 F. 2d 397.

No. 1037. LIKINS-FOSTER HONOLULU CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Valentine Brookes, Bert W. Levit,* and *Edward E. Soule* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Harry Baum,* and *William L. Goldman* for respondent. Reported below: 417 F. 2d 285.

No. 1036. Baker Commodities, Inc. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Carl A. Stutsman, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, William Massar,* and *David English Carmack* for respondent. Reported below: 415 F. 2d 519.

No. 1051. Huckaby *v.* United States. C. A. 6th Cir. Certiorari denied. *James Easly* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 419 F. 2d 1323.

No. 1094. Sitton et ux. *v.* United States et al. C. A. 5th Cir. Certiorari denied. *William T. Andress, Jr.,* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener* for the United States, and *June R. Welch* for American Title Company of Dallas, respondents. Reported below: 413 F. 2d 1386.

No. 1112. Chestnut Hill Co. et al. *v.* City of Snohomish. Sup. Ct. Wash. Certiorari denied. *T. M. Royce* for petitioners. Reported below: 76 Wash. 2d 741, 458 P. 2d 891.

No. 1120. Associated Pipeline Contractors, Inc., et al. *v.* Davis. C. A. 5th Cir. Certiorari denied. *Edmund E. Woodley* for petitioners. Reported below: 418 F. 2d 920.

No. 1123. McEwen Manufacturing Co. *v.* National Labor Relations Board et al. C. A. D. C. Cir. Certiorari denied. *Edward Carmack Cochran* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent National Labor Relations Board. Reported below: 136 U. S. App. D. C. 226, 419 F. 2d 1207.

No. 1132. NEBEL TOWING CO., INC., ET AL. *v.* OLYMPIC TOWING CORP. C. A. 5th Cir. Certiorari denied. *John W. Sims* and *Margot Mazeau* for petitioners. *Malcolm W. Monroe* for respondent. Reported below: 419 F. 2d 230.

No. 1133. KESLER *v.* DEPARTMENT OF MOTOR VEHICLES OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Hyman Gold* for petitioner. Reported below: 1 Cal. 3d 74, 459 P. 2d 900.

No. 1135. MUSCAT ET AL. *v.* NORTE & CO. C. A. 2d Cir. Certiorari denied. *Murray I. Gurfein* for Muscat, and *William R. Glendon* for Huffines, petitioners. *Milton Paulson* for respondent. Reported below: 416 F. 2d 1189.

No. 1138. MCGUIRE ET AL. *v.* SCHUYLER, COMMISSIONER OF PATENTS. C. C. P. A. Certiorari denied. *Bruce B. Krost* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for respondent. Reported below: 57 C. C. P. A. (Pat.) 706, 416 F. 2d 1322.

No. 1143. MIDWESTERN UNITED LIFE INSURANCE CO. *v.* BRENNAN. C. A. 7th Cir. Certiorari denied. *Albert E. Jenner, Jr., Thomas P. Sullivan, John C. Tucker,* and *G. R. Redding* for petitioner. *Charles B. Feibleman* for respondent. Reported below: 417 F. 2d 147.

No. 1144. SOMLO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John G. Premo* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Robert E. Kopp* for the United States. Reported below: 416 F. 2d 640.

No. 1146. American Art Industries, Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Joseph A. Perkins* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 415 F. 2d 1223.

No. 1148. Blair *v.* City of Fargo et al. Sup. Ct. N. D. Certiorari denied. Reported below: 171 N. W. 2d 236.

No. 1150. Green et al. *v.* Wheeler, State Engineer of Oregon. Sup. Ct. Ore. Certiorari denied. *Marvin S. Nepom* for petitioners. Reported below: 254 Ore. 424, 458 P. 2d 938.

No. 1156. Hall *v.* United States. C. A. 2d Cir. Certiorari denied. *William B. Mahoney* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 421 F. 2d 540.

No. 1160. L. B. Foster Co. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Neal Powers, Jr.,* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 418 F. 2d 1.

No. 1206. Patrum *v.* City of Greensburg. C. A. 6th Cir. Certiorari denied. *Theodore Wurmser* for petitioner. *Robert D. Simmons* for respondent. Reported below: 419 F. 2d 1300.

No. 1197. Carter, Trustee in Bankruptcy *v.* Commercial Bank of Middlesboro. C. A. 6th Cir. Certiorari denied. *Charles W. Rolph* for petitioner. *Joseph L. Lenihan* for respondent. Reported below: 418 F. 2d 705.

No. 1162. BOARDMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John G. Brooks* and *William M. Kunstler* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 419 F. 2d 110.

No. 1204. MADOLE *v.* OKLAHOMA EX REL. DEPARTMENT OF HIGHWAYS OF OKLAHOMA. Sup. Ct. Okla. Certiorari denied. *Jerome E. Hemry* for petitioner. *Thomas N. Keltner* for respondent. Reported below: 462 P. 2d 261.

No. 475. JONES *v.* HOPPER ET AL. C. A. 10th Cir. Motion of National Education Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Harry K. Nier, Jr.,* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *John P. Moore,* Deputy Attorney General, *Robert L. Hoecker,* Assistant Attorney General, and *Richard W. Laugesen, Jr.,* Special Assistant Attorney General, for respondents. Briefs of *amici curiae* in support of the petition were filed by *William W. Van Alstyne* and *Herman I. Orentlicher* for American Assn. of University Professors, and *David Rubin, Richard J. Medalie,* and *Alvin Friedman* for National Education Assn. Reported below: 410 F. 2d 1323.

No. 732. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Moses Krislov, D. Bruce Shine,* and *P. D. Maktos* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Sidney M. Glazer* for the United States. Reported below: 414 F. 2d 22.

No. 974. UNITED STATES *v.* AGIUS. C. A. 5th Cir. Motion of respondent to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 413 F. 2d 915.

No. 1080. JONES *v.* GIERACH. Sup. Ct. Ill. Motion to dispense with printing petition granted. Certiorari denied.

No. 1104. IN RE MACKAY. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 237, Misc. MOSES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent.

No. 306, Misc. STEVENS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert F. Katz,* Deputy Attorney General, for respondent.

No. 499, Misc. COMMANDER *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Marilyn Mayer Moffett,* Deputy Attorney General, for respondent.

No. 435, Misc. POPE *v.* CITY AND COUNTY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. *James D. Crawford* and *Arlen Specter* for respondents.

No. 581, Misc. DANIELS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General, for respondent.

No. 607, Misc. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard Kanner* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 415 F. 2d 292.

No. 721, Misc. FELTON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *John W. Packel* for petitioner. *James Douglas Crawford* and *Arlen Specter* for respondent. Reported below: 410 F. 2d 1300.

No. 779, Misc. SERRANO *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 *Michael Colodner,* Assistant Attorney General, for respondent.

No. 824, Misc. PETERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Phillip G. Samovar,* Deputy Attorney General, for respondent. Reported below: 271 Cal. App. 2d 562, 76 Cal. Rptr. 760.

No. 1085, Misc. EARLY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 838, Misc. GRIFFIN *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Daniel J. Kremer,* Deputy Attorneys General, for respondent.

No. 865, Misc. STEWART *v.* BREWER, WARDEN. Sup. Ct. Iowa. Certiorari denied. *Richard C. Turner,* Attorney General of Iowa, and *Michael J. Laughlin,* Assistant Attorney General, for respondent.

No. 942, Misc. COCKRELL *v.* CARTER. C. A. 9th Cir. Certiorari denied. *Burton Marks* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Rose-Marie Gruenwald,* Deputy Attorney General, for respondent. Reported below: 413 F. 2d 256.

No. 1045, Misc. CONWAY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Kirby W. Patterson,* and *Jerome M. Feit* for the United States. Reported below: 415 F. 2d 158.

No. 1092, Misc. PEARSON ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Phillip A. Hubbart* for petitioners. *Earl Faircloth,* Attorney General of Florida, and *Harold Mendelow* and *Arden M. Siegendorf,* Assistant Attorneys General, for respondent. Reported below: 213 So. 2d 616.

No. 1159, Misc. WYNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 415 F. 2d 135.

No. 1149, Misc. JAKUBIAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States.

No. 1211, Misc. CASTILLO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 71 Cal. 2d 692, 456 P. 2d 141.

No. 1215, Misc. TALLEY ET AL. *v.* A & M CONSTRUCTION CO., INC. Sup. Ct. Ala. Certiorari denied. *Charles Morgan, Jr., Reber F. Boult, Jr., Melvin L. Wulf, Eleanor Holmes Norton,* and *George C. Longshore* for petitioners. *Joseph S. Mead* for respondent.

No. 1246, Misc. YORK *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1250, Misc. FREEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Melvin G. Rueger* and *Leonard Kirschner* for respondent.

No. 1256, Misc. MERLE *v.* NORTH CAROLINA MUTUAL LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied.

No. 1259, Misc. WILLIAMS *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 1265, Misc. MALO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 1242.

No. 1298, Misc. MUNDY *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. *David M. Pack,* Attorney General of Tennessee, for respondent. Reported below: 416 F. 2d 432.

No. 1284, Misc. WEINREICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 414 F. 2d 279.

No. 1299, Misc. WATSON *v.* COMMON PLEAS COURT, PHILADELPHIA. C. A. 3d Cir. Certiorari denied.

No. 1300, Misc. BENNETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 237.

No. 1315, Misc. RASNICK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1327, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1328, Misc. CHANDLER ET AL. *v.* MASSA ET AL. C. A. 6th Cir. Certiorari denied. *Albert Walter Buford, Jr.,* for petitioners. *J. Woodrow Norvell* for respondents. Reported below: 415 F. 2d 560.

No. 1329, Misc. FRYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 963.

No. 1332, Misc. REHFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *W. Edward Morgan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 273.

No. 1339, Misc. FELDT *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1340, Misc. CAFFEY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 445 S. W. 2d 642.

No. 1343, Misc. POPE *v.* FERGUSON, JUDGE, ET AL. Sup. Ct. Tex. Certiorari denied. *Tom H. Davis* for petitioner. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Pat Bailey,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Gilbert J. Pena,* Assistant Attorneys General, for respondents.

No. 1346, Misc. LYNCH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1349, Misc. OWENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 1308.

No. 1350, Misc. DIAMOND *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1351, Misc. WILLIAMS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 415 F. 2d 643.

No. 1353, Misc. FREEMAN *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1354, Misc. ALLEN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1355, Misc. GILL *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1356, Misc. POOL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1362, Misc. CARDENAS *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 1359, Misc. FUKUMOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1361, Misc. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 417 F. 2d 1068.

No. 1363, Misc. MOODYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 400 F. 2d 360.

No. 1372, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1373, Misc. GRANT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1376, Misc. SULLIVAN *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. Reported below: 210 Va. 201 and 205, 169 S. E. 2d 577 and 580.

No. 1378, Misc. PERRY *v.* DECKER, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 415 F. 2d 773.

No. 1384, Misc. ROSSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 38.

No. 1387, Misc. SNIPE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1377, Misc. BRADLEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1386, Misc. SHAKUR ET AL. *v.* MCGRATH, COMMISSIONER OF CORRECTION. C. A. 2d Cir. Certiorari denied. *William M. Kunstler* for petitioners. *Frank S. Hogan* for respondent. *Jack Greenberg, Michael Meltsner,* and *Elizabeth B. DuBois* for NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* in support of the petition. Reported below: 418 F. 2d 243.

No. 1404, Misc. CONNOR *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 1405, Misc. MCCLURE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1426, Misc. BROWN *v.* CHARLES, JUDGE. Sup. Ct. Wis. Certiorari denied.

No. 1446, Misc. SHORTS *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1447, Misc. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 229.

No. 1453, Misc. HESS *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 1458, Misc. WOODS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 382 Mich. 795.

No. 1455, Misc. MANIER *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1480, Misc. GALLOWAY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Samuel C. Coleman* for petitioner. *Frank S. Hogan* and *Michael R. Juviler* for respondent. Reported below: 24 N. Y. 2d 935, 249 N. E. 2d 771.

No. 1484, Misc. STEWART *v.* CHICAGO HOUSING AUTHORITY. Sup. Ct. Ill. Certiorari denied. *Marshall Patner* for petitioner. *Henry F. Jankowicz* for respondent. Reported below: 43 Ill. 2d 96, 251 N. E. 2d 185.

No. 1493, Misc. WILLIAMS *v.* IOWA BOARD OF PAROLE ET AL. Sup. Ct. Iowa. Certiorari denied.

No. 1499, Misc. BARTLETT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1501, Misc. PALUMBO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 1502, Misc. CERULLO *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler,* Assistant Attorney General, for respondent. Reported below: 416 F. 2d 156.

No. 1505, Misc. BROOKE *v.* FAMILY COURT OF NEW YORK, COUNTY OF BROOME. C. A. 2d Cir. Certiorari denied. Reported below: 420 F. 2d 296.

No. 1511, Misc. HUGHES *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1527, Misc. DILWORTH *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 274 Cal. App. 2d 27, 78 Cal. Rptr. 817.

No. 1550, Misc. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Gerald E. Williams* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 636.

No. 1559, Misc. COAST *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Leslie A. Bradshaw* for petitioner. Reported below: 32 App. Div. 2d 889, 302 N. Y. S. 2d 1022.

No. 1603, Misc. SMITH *v.* ILLINOIS. App. Ct. Ill., 2d Jud. Dist. Certiorari denied. Reported below: 108 Ill. App. 2d 172, 246 N. E. 2d 689.

No. 1604, Misc. GRIMM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 6 Md. App. 321, 251 A. 2d 230.

No. 1613, Misc. BOHANNON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Jack H. Weiner* for petitioner. *Solicitor General Griswold* for the United States.

No. 1636, Misc. BROWNE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. *Stanford Shmukler* for petitioner. Reported below: 214 Pa. Super. 758, 253 A. 2d 298.

No. 1663, Misc. ROSARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Phylis Skloot Bamberger* and *William E. Hellerstein* for petitioner. Reported below: 420 F. 2d 661.

No. 1583, Misc. DUNNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Krieger* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit* for the United States. Reported below: 425 F. 2d 836.

No. 589, Misc. TRAMMELL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent. Reported below: 23 N. Y. 2d 848, 245 N. E. 2d 727.

No. 1593, Misc. COMBS *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert B. Fiske, Jr.,* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Hillel Hoffman,* Assistant Attorney General, for respondent. Reported below: 417 F. 2d 523.

No. 1630, Misc. ROBINSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William R. Bascom* for petitioner. Reported below: 447 S. W. 2d 71.

No. 1019, Misc. GOOD *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to amend petition or in the alternative to file a supplemental brief granted. Certiorari denied. *Clyde W. Woody* and *Marian S. Rosen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 410 F. 2d 1217 and 415 F. 2d 771.

Rehearing Denied

No. 235, Misc. PORTER *v.* CALIFORNIA, 396 U. S. 1042. Motion for leave to file petition for rehearing denied.

No. 883, Misc., October Term, 1967. PARKER *v.* MARYLAND ET AL., 390 U. S. 982, 1018, 393 U. S. 903. Motion for leave to file third petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 808. BLINCOE ET UX. *v.* WATSON, ASSESSOR, ET AL., 396 U. S. 373;

No. 818. HAWAIIAN OKE & LIQUORS, LTD. *v.* JOSEPH E. SEAGRAM & SONS, INC., ET AL., 396 U. S. 1062;

No. 834. GRAYSON *v.* UNITED STATES, 396 U. S. 1059;

No. 840. LACOB *v.* UNITED STATES, 396 U. S. 1059;

No. 854. STEIN *v.* LUKEN ET AL., 396 U. S. 555;

No. 1014. LAMPMAN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL., *ante,* p. 919;

No. 1020. LEWIS *v.* UNITED STATES, *ante,* p. 935;

No. 559, Misc. PRUESS, EXECUTOR, ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR, 396 U. S. 967;

No. 947, Misc. CUEVAS *v.* CALIFORNIA, 396 U. S. 1045;

No. 1036, Misc. WARRINER *v.* FERNANDEZ ET AL., 396 U. S. 1021;

No. 1212, Misc. JONES *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL., *ante,* p. 966; and

No. 1364, Misc. TUCKER *v.* UNITED STATES, *ante,* p. 955. Petitions for rehearing denied.

No. 23, Misc. BIVENS *v.* UNITED STATES, *ante,* p. 928. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 610. MACKAY *v.* NESBETT, CHIEF JUSTICE, SUPREME COURT OF ALASKA, ET AL., 396 U. S. 960. Motion to dispense with printing petition granted. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS is of the opinion that the motion for leave to file petition for rehearing should be granted.

No. 1124, Misc. DEARINGER *v.* UNITED STATES, 396 U. S. 1030. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

MARCH 30, 1970

Miscellaneous Orders

No. 1066. CITY OF PHOENIX ET AL. *v.* KOLODZIEJSKI. Appeal from D. C. Ariz. [Probable jurisdiction noted, *ante,* p. 903.] Motion to dispense with printing *amici curiae* brief of Elizabeth M. Axtell et al. granted. *Richard H. Frank* on the motion.

No. 628. SCHACHT *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 396 U. S. 984.] Motion of the United States for additional time for oral argument granted and 45 minutes allotted to each side. Motion of David H. Berg for leave to argue *pro hac vice* granted. *Solicitor General Griswold* on the motion for the United States. *Chris Dixie* on the motion for David H. Berg.

No. 670. PERKINS ET AL. *v.* MATTHEWS, MAYOR OF CANTON, ET AL. Appeal from D. C. S. D. Miss. [Probable jurisdiction noted, *ante,* p. 903.] Motion of appellants to advance oral argument denied. *Armand Derfner* on the motion. *A. F. Summer,* Attorney General of Mississippi, and *William A. Allain,* Assistant Attorney General, in opposition.

No. —. HARRIS *v.* UNITED STATES. D. C. E. D. Mich. Application for bail denied. *Solicitor General Griswold* in opposition.

No. 1922, Misc. IN RE DISBARMENT OF ALLISON. It is ordered that Earl W. Allison of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Probable Jurisdiction Noted

No. 1325, Misc. JIMENEZ ET AL. *v.* NAFF, YAKIMA COUNTY AUDITOR, ET AL. Appeal from D. C. E. D. Wash. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Michael Rosen, Thomas H. S. Brucker, Pete Tijerina,* and *Mario Obledo* for appellants. *Slade Gorton,* Attorney General, and *Robert J. Doran* and *Donald H. Brazier, Jr.,* Deputy Attorneys General, for appellees State of Washington et al. Reported below: 299 F. Supp. 587.

Certiorari Granted. (See also No. 718, Misc., *ante,* p. 335.)

No. 1178. UNITED STATES *v.* DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE ET AL. Sup. Ct. Colo. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Kashiwa,* and *Edmund B. Clark* for the United States. *Kenneth Balcomb* and *Robert L. McCarty* for respondents District Court in and for the County of Eagle et al., and *Don H. Sherwood* and *Raphael J. Moses* for respondent New Jersey Zinc Co. Reported below: — Colo. —, 458 P. 2d 760.

No. 1072. Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America et al. *v.* Lockridge. Sup. Ct. Idaho. Certiorari granted. *Isaac N. Groner* and *Earle W. Putnam* for petitioners. *Robert W. Green* for respondent. Reported below: 93 Idaho 294, 460 P. 2d 719.

No. 1179. Ramsey et al., dba Leon Nunley Coal Co., et al. *v.* United Mine Workers of America. C. A. 6th Cir. Certiorari granted. *A. A. Kelly, Sizer Chambliss, William M. Ables, Jr., Clarence Walker,* and *John A. Rowntree* for petitioners. *Edward L. Carey, Harrison Combs, Willard P. Owens, E. H. Rayson,* and *M. E. Boiarsky* for respondent. Reported below: 416 F. 2d 655.

Certiorari Denied

No. 1105. ABC Air Freight Co., Inc., et al. *v.* Civil Aeronautics Board et al. C. A. 2d Cir. Certiorari denied. *Louis P. Haffer* and *Robert N. Meiser* for petitioners. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Joseph B. Goldman,* and *Warren L. Sharfman* for respondent Civil Aeronautics Board, *James M. Verner* and *Eugene T. Liipfert* for respondents CF Air Freight, Inc., et al., and *Homer S. Carpenter* for respondents Yellow Freight System, Inc., et al. Reported below: 419 F. 2d 154.

No. 1159. Simon et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *David W. Peck, Marvin Schwartz,* and *Michael M. Maney* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. *David B. Isbell* for American Institute of Certified Public Accountants as *amicus curiae* in support of the petition. Reported below: 425 F. 2d 796.

No. 1109. SLADE, GUARDIAN *v.* LOUISIANA POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* for petitioner. *Andrew P. Carter* for respondent. Reported below: 418 F. 2d 125.

No. 1129. STOFFEL, ADMINISTRATOR, ET AL. *v.* SLATER ET AL. App. Ct. Ind. Certiorari denied. *Thomas W. Yoder* for petitioners. *Phil M. McNagny, Jr.,* for respondents. Reported below: —— Ind. App. ——, 248 N. E. 2d 378.

No. 1134. SCHULTZ *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 8th Cir. Certiorari denied. *Chester A. Bruvold* and *John S. Connolly* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Morton Hollander,* and *Robert E. Kopp* for respondents. Reported below: 417 F. 2d 775.

No. 1140. KING RADIO CORP., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *O. B. Eidson* and *Kenneth C. McGuiness* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Paul J. Spielberg* for respondent. Reported below: 416 F. 2d 569.

No. 1153. CASHIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Sam J. D'Amico* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States. Reported below: 420 F. 2d 1132.

No. 1157. COX, PENITENTIARY SUPERINTENDENT *v.* NELSON. C. A. 4th Cir. Certiorari denied. *Andrew P. Miller,* Attorney General of Virginia, and *Reno S. Harp III, W. Luke Witt,* and *Gerald L. Baliles,* Assistant Attorneys General, for petitioner. Reported below: 415 F. 2d 1154.

No. 1164. BISHOP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James E. Frasier* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 422 F. 2d 509.

No. 1165. FOMBY ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. *Charles R. Smith* for petitioners. Reported below: 120 Ga. App. 387, 170 S. E. 2d 585.

No. 1166. CARTER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 107 Ill. App. 2d 474, 246 N. E. 2d 320.

No. 1167. ROUX *v.* NEW ORLEANS POLICE DEPARTMENT. Sup. Ct. La. Certiorari denied. *William F. Wessel* for petitioner. Reported below: 254 La. 815, 227 So. 2d 148.

No. 1168. SIGNORELLI *v.* MALLECK. C. A. 2d Cir. Certiorari denied. *William D. Graham* and *Zbigniew S. Rozbicki* for petitioner. *Solicitor General Griswold* for respondent.

No. 1173. UNITED MARINE DIVISION, LOCAL 333, NATIONAL MARITIME UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Richard L. Newman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 417 F. 2d 865.

No. 1177. DUFON *v.* WILBUR CURTIS CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. *Albert Lopatin* for petitioner.

No. 1174. ELDER-BEERMAN STORES CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Jerome Goldman* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 415 F. 2d 1375.

No. 1175. FOUNDING CHURCH OF SCIENTOLOGY *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Leonard J. Linden* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Meyer Rothwacks* for the United States. Reported below: 188 Ct. Cl. 490, 412 F. 2d 1197.

No. 1180. TODD SHIPYARDS CORP. *v.* MASTAN CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. *George L. Varian* and *Francis J. Larkin* for petitioner. *John R. Sheneman* for respondent Mastan Co., Inc. Reported below: 418 F. 2d 177.

No. 1183. ENGELMAN *v.* CAHN, DISTRICT ATTORNEY OF THE COUNTY OF NASSAU, ET AL. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *William Cahn, pro se,* and *George D. Levine* and *Jules E. Orenstein* for respondents. Reported below: 425 F. 2d 954.

No. 1186. SOUTHFIELD POLICE OFFICERS ASSN. ET AL. *v.* CITY OF SOUTHFIELD ET AL. Sup. Ct. Mich. and Ct. App. Mich. Certiorari denied. *Noel A. Gage* for petitioners. *David R. Kratze* and *Sigmund A. Beras* for City of Southfield et al., and *Theodore Sachs* for Southfield Fire Fighters Assn., Local 1029, et al., respondents. Reported below: 16 Mich. App. 511, 168 N. W. 2d 484; 382 Mich. 795.

No. 1185. TAYLER *v.* TAYLER. Ct. App. Md. Certiorari denied.

No. 1193. BURKE ET AL. *v.* HUNT, CONSERVATOR AND TRUSTEE, ET AL. Sup. Ct. Minn. Certiorari denied. *Kenneth W. Green* and *Joe A. Walters* for petitioners. *Douglas M. Head,* Attorney General of Minnesota, *Arne L. Schoeller,* Chief Deputy Attorney General, and *Clay R. Moore,* Special Assistant Attorney General, for respondents Hunt et al., and *Henry Halladay* for respondent Murphy Finance Co. Reported below: 285 Minn. 77, 172 N. W. 2d 292.

No. 1220. CUMIC *v.* KNOTT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. *I. A. Kanarek* for petitioner. *Henry F. Walker* for respondent Knott.

No. 889. HARDY, CORRECTIONS DIRECTOR, ET AL. *v.* MATTHEWS. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Charles T. Duncan, Hubert B. Pair, Richard W. Barton,* and *David P. Sutton* for petitioners. *William W. Greenhalgh* and *Addison Bowman* for respondent. Reported below: 137 U. S. App. D. C. 39, 420 F. 2d 607.

No. 1158. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Charles J. Steele* and *Joseph Sharfsin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States. Reported below: 419 F. 2d 56.

No. 1076. McBride, Administratrix *v.* United States. App. Ct. Ill., 1st Dist. Motion to dispense with printing petition granted. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett* for the United States. Reported below: 110 Ill. App. 2d 200, 249 N. E. 2d 266.

No. 1194. Stewart *v.* Waterman Steamship Corp. et al. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Samuel C. Gainsburgh* and *Raymond H. Kierr* for petitioner. *John W. Sims* for Waterman Steamship Corp., and *Benjamin W. Yancey* and *William E. Wright* for Alcoa Steamship Co., Inc., respondents. Reported below: 409 F. 2d 1045.

No. 1201. Crocker *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Chester A. Bruvold* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. *Leon Friedman, Marvin M. Karpatkin, Alan H. Levine,* and *Melvin L. Wulf* for American Civil Liberties Union et al. as *amici curiae* in support of the petition. Reported below: 420 F. 2d 307.

No. 274, Misc. Riley *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 53 N. J. 575 and 576; 252 A. 2d 153.

No. 1034, Misc. Ortiz *v.* New York. Ct. App. N. Y. Certiorari denied. *William E. Hellerstein* for petitioner. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent.

No. 934, Misc. Napper *v.* Virginia. Sup. Ct. App. Va. Certiorari denied.

No. 425, Misc. BURNETT *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. *Kent Frizzell,* Attorney General of Kansas, and *Ernest C. Ballweg* and *Edward G. Collister, Jr.,* Assistant Attorneys General, for respondent.

No. 747, Misc. WILLIAMS *v.* MCMANN, WARDEN. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Calvin M. Berger,* Assistant Attorney General, for respondent. Reported below: 32 App. Div. 2d 727, 301 N. Y. S. 2d 903.

No. 790, Misc. PONCE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Lola McAlpin-Grant,* Deputy Attorney General, for respondent. Reported below: 409 F. 2d 621.

No. 1010, Misc. THOMPSON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 1059, Misc. CASPER *v.* HUBER ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 85 Nev. 474, 456 P. 2d 436.

No. 1064, Misc. BROWN *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Charles P. Just,* Deputy Attorney General, for respondent.

No. 1118, Misc. VAN GELDERN *v.* SUPERIOR COURT OF THE COUNTY OF VENTURA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Woodruff J. Deem* for respondent.

No. 1146, Misc. EARLY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1165, Misc. ORTIZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *William E. Hellerstein* for petitioner. *Burton B. Roberts* and *Daniel J. Sullivan* for respondent.

No. 1167, Misc. DUKE *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied. *Jerold S. Solovy* for petitioner. Reported below: 415 F. 2d 243.

No. 1180, Misc. BULLOCK *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1184, Misc. JOHNSON *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1208, Misc. JAMERSON *v.* DELHEY ET AL. C. A. 6th Cir. Certiorari denied. *Thomas F. Shea* for respondents Delhey et al.

No. 1229, Misc. YOUNG *v.* UNITED STATES BUREAU OF PRISONS ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1248, Misc. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 1138.

No. 1301, Misc. GROSS ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *A. E. Sheridan* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 1205.

No. 1352, Misc. IRONS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1357, Misc. ALEXANDER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Leo Holt* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 1352.

No. 1365, Misc. MINCHEW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 218.

No. 1370, Misc. SUTTON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1371, Misc. STEVENSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1380, Misc. JACKSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *Elwyn L. Cady, Jr.,* for petitioner. Reported below: 444 S. W. 2d 389.

No. 1383, Misc. WRIGHT *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1396, Misc. BRUTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Daniel P. Reardon, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 310.

No. 1410, Misc. SAILER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1412, Misc. VALDEZ *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1417, Misc. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 851.

No. 1430, Misc. WAGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 558.

No. 1433, Misc. WILLIAMSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 104 Ariz. 571, 456 P. 2d 941.

No. 1435, Misc. URBANO *v.* NEWS SYNDICATE CO., INC. C. A. 2d Cir. Certiorari denied. *James W. Rodgers* for respondent.

No. 1437, Misc. TAYLOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Phylis Skloot Bamberger* and *William E. Hellerstein* for petitioner. *Solicitor General Griswold* for the United States.

No. 1440, Misc. GARY *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. *John W. Castles III* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Stephen P. Seligman,* Deputy Assistant Attorney General, for respondent. Reported below: 418 F. 2d 609.

No. 1490, Misc. CALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 897.

No. 1512, Misc. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1503, Misc. HUNT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States. Reported below: 419 F. 2d 1.

No. 1516, Misc. SEGURA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 276 Cal. App. 2d 589, 80 Cal. Rptr. 794.

No. 1520, Misc. IN RE PINNEY REALTY CO., INC. C. A. 1st Cir. Certiorari denied.

No. 1532, Misc. MAGEE *v.* WHITTAKER, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1533, Misc. RICHARDSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 416 F. 2d 1246.

No. 1552, Misc. HEARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 137 U. S. App. D. C. 60, 420 F. 2d 628.

No. 1557, Misc. WILLIAMS *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 416 F. 2d 483.

No. 1582, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1609, Misc. COLANGELO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1578, Misc. MINK *v.* HARE, SECRETARY OF STATE OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 1645, Misc. EDWARDS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Alexander Boskoff* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States.

No. 1662, Misc. CARTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Fred D. Turnage* and *Donald L. Morgan* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 136 U. S. App. D. C. 308, 420 F. 2d 150.

No. 1677, Misc. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Cullen B. Jones, Jr.,* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 420 F. 2d 946.

No. 1689, Misc. SAUNDERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 71 Cal. 2d 997, 458 P. 2d 449.

No. 1388, Misc. LEMIEUX *v.* ROBBINS, WARDEN. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Vincent L. McKusick* for petitioner. *John W. Benoit, Jr.,* Deputy Attorney General of Maine, for respondent. Reported below: 414 F. 2d 353.

Rehearing Denied

No. 731. JONES *v.* STATE BOARD OF EDUCATION OF TENNESSEE ET AL., *ante*, p. 31;

No. 897. YOUNGE *v.* STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, *ante*, p. 922;

No. 933. TROUTMAN ET AL. *v.* RUMSFELD, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, ET AL., *ante*, p. 923;

No. 978. CHAMBLISS *v.* COCA-COLA BOTTLING CO. ET AL., *ante*, p. 916;

No. 1001. KING ET AL. *v.* UNITED STATES, *ante*, p. 923;

No. 1065. JORDAN ET AL. *v.* UNITED STATES, *ante*, p. 920;

No. 1079. ALEXANDER *v.* MAINE, *ante*, p. 924; and

No. 1175, Misc. ZIDE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante*, p. 950. Petitions for rehearing denied.

No. 602, Misc. NEELY *v.* UNITED STATES, 396 U. S. 917, 1031, and *ante*, p. 959. Motion for leave to file third petition for rehearing denied.

APRIL 1, 1970

Dismissal Under Rule 60

No. 1081. DORTCH ET AL. *v.* STECKLER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Mark W. Gray* for petitioners. *James Manahan* for respondent.

APRIL 3, 1970

Miscellaneous Orders

No. —. BOARD OF PUBLIC INSTRUCTION, MANATEE COUNTY, FLORIDA, ET AL. *v.* HARVEST ET AL. C. A. 5th Cir. Application for stay and other relief, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *William C. Cramer, pro se,* and for other applicants. *Jack Greenberg, James M. Nabrit III,* and *Earl M. Johnson* in opposition.

No. —. Louisville & Nashville Railroad Co. *v.* United States et al. Application for stay of order of March 19, 1970, of United States District Court for the Northern District of Illinois, pending appeal, presented to Mr. Justice Marshall, and by him referred to the Court, granted. Mr. Justice Douglas dissents from the grant of the stay of the District Court's order. *Joseph L. Lenihan* and *James W. Hoeland* for applicant. *Eugene W. Ward, Robert E. Kendrick, Richard L. Curry, William G. Mahoney, Weldon A. Cousins, Chester L. Rigsby, Leon M. Despres,* and *Gordon P. MacDougall* in opposition. *Robert W. Ginnane, Fritz R. Kahn,* and *Raymond M. Zimmet* filed a memorandum for the Interstate Commerce Commission in support of the application.

April 6, 1970

Miscellaneous Orders

No. 1117. Zenith Radio Corp. *v.* Hazeltine Research, Inc. C. A. 7th Cir. [Certiorari granted, *ante,* p. 979.] Motion of petitioner to advance denied. *Thomas C. McConnell* on the motion. *Victor P. Kayser* in opposition.

No. 1905, Misc. O'Bryan *v.* Battisti, U. S. District Judge. D. C. W. D. Okla. Application for stay presented to Mr. Justice White, and by him referred to the Court, denied. Mr. Justice Marshall took no part in the consideration or decision of this application. *Harvey L. Davis* for applicant.

No. 1387. Wells *v.* Rockefeller, Governor of New York, et al. Appeal from D. C. S. D. N. Y. Motion to expedite and advance and for temporary restraining order denied. *Robert B. McKay* on the motion. Reported below: 311 F. Supp. 48.

No. 1250. RELFORD *v.* COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH. C. A. 10th Cir. [Certiorari granted, *ante,* p. 934.] Motion of petitioner for appointment of counsel granted. It is ordered that *Judson W. Detrick, Esquire,* of Denver, Colorado, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1498, Misc. RAY *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA;

No. 1500, Misc. WHIDDON *v.* MOSELEY, WARDEN, ET AL.; and

No. 1651, Misc. MCKEE *v.* MICHIGAN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1634, Misc. FARMER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (GREAT NORTHERN RAILWAY CO., REAL PARTY IN INTEREST). Motion for leave to file petition for writ of mandamus denied. *Clifton Hildebrand* on the motion.

Certiorari Granted

No. 1244. GORDON ET AL. *v.* LANCE ET AL. Sup. Ct. App. W. Va. Certiorari granted. *George M. Scott* for petitioners. *Charles C. Wise, Jr.,* for respondents Lance et al. Reported below: —— W. Va. ——, 170 S. E. 2d 783.

No. 657, Misc. MAYBERRY *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Robert W. Duggan* for respondent. Reported below: 434 Pa. 478, 255 A. 2d 131.

Certiorari Denied

No. 1196. PORTER ET AL. *v.* WILSON ET AL. C. A. 9th Cir. Certiorari denied. *Sterling W. Steves* for petitioners. Reported below: 419 F. 2d 254.

No. 1101. GRASSO *v.* UNITED STATES; and

No. 1224. TROPIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Ira B. Grudberg* for petitioner in No. 1101, and *Abraham Glasser* and *F. Lee Bailey* for petitioner in No. 1224. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice R. Rosenberg* for the United States in both cases. Reported below: 418 F. 2d 1069.

No. 1169. CALABRESE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Mervyn Hamburg* for the United States. Reported below: 421 F. 2d 108.

No. 1184. TUNNELL, EXECUTRIX *v.* EDWARDSVILLE INTELLIGENCER, INC. Sup. Ct. Ill. Certiorari denied. *Milton Richard Allen* for petitioner. Reported below: 43 Ill. 2d 239, 252 N. E. 2d 538.

No. 1187. EYMAN, WARDEN *v.* SCHANTZ. C. A. 9th Cir. Certiorari denied. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for petitioner. *John P. Frank* for respondent. Reported below: 418 F. 2d 11.

No. 1203. DI DOMENICO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Carl M. Walsh* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 420 F. 2d 1201.

No. 1207. C. G. WILLIS, INC. *v.* HEWLETT. C. A. 4th Cir. Certiorari denied. *Harry E. McCoy* for petitioner. *Howard I. Legum* for respondent. Reported below: 418 F. 2d 654.

No. 1205. Bauer *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 111 Ill. App. 2d 211, 249 N. E. 2d 859.

No. 1209. Brown et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Homer Eugene Bostick* for petitioners. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 419 F. 2d 1106.

No. 1215. Jones *v.* United States. C. A. 10th Cir. Certiorari denied. *Paul M. Niebell* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 415 F. 2d 294.

No. 1216. Montos *v.* United States. C. A. 5th Cir. Certiorari denied. *Raymond E. LaPorte* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Sidney M. Glazer* for the United States. Reported below: 421 F. 2d 215.

No. 1228. W. R. Grimshaw Co. *v.* Martin Wright Electric Co. C. A. 5th Cir. Certiorari denied. *Alfred W. Offer* and *Carl Wright Johnson* for petitioner. *Josh H. Groce* and *Jack Hebdon* for respondent. Reported below: 419 F. 2d 1381.

No. 1229. Farmer *v.* Superior Court of California, County of Alameda (Great Northern Railway Co., real party in interest). Ct. App. Cal., 1st App. Dist. Certiorari denied. *Clifton Hildebrand* for petitioner. *Burton Mason* for Great Northern Railway Co.

No. 1252. Wyrick et al. *v.* City of Maryville et al. Sup. Ct. Tenn. Certiorari denied. *Hubert D. Patty* for petitioners. *John C. Crawford, Jr.,* for respondents.

No. 1222. KOEHL ET AL. *v.* RESOR, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. *Philip J. Hirschkop, Herbert A. Rosenthal, Jr., Melvin L. Wulf,* and *Eleanor Holmes Norton* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Donald L. Horowitz* for respondents. Reported below: 417 F. 2d 1338.

No. 1238. TEMPLE *v.* NORTH CAROLINA STATE BAR. Ct. App. N. C. Certiorari denied. *John W. Hinsdale* for petitioner. *Robert B. Morgan,* Attorney General of North Carolina, for respondent. Reported below: 6 N. C. App. 437, 170 S. E. 2d 131.

No. 1240. GROVES *v.* ALEXANDER. Ct. App. Md. Certiorari denied. *Hyman Ginsberg* for petitioner. *Melvin J. Sykes* for respondent. Reported below: 255 Md. 715, 259 A. 2d 285.

No. 1242. DENNISON MFG. CO. *v.* 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: 419 F. 2d 1080.

No. 1295. KAYSER ET AL. *v.* CLEVELAND CLINIC FOUNDATION. Sup. Ct. Ohio. Certiorari denied. *Richard F. Patton* for petitioners. *Thomas V. Koykka* for respondent.

No. 984. LOVE *v.* TAYLOR ET AL. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Robert E. Plunkett* for petitioner. *Marshall Fogelson* for respondents. Reported below: 415 F. 2d 1118.

No. 1099. BANGOR & AROOSTOOK RAILROAD CO. ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Francis M. Shea, Richard T. Conway, William H. Dempsey, Jr.,* and *James A. Wilcox* for petitioners. *Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman,* and *Isaac N. Groner* for respondent. Reported below: 136 U. S. App. D. C. 230, 420 F. 2d 72.

No. 1202. ISENRING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Kenneth S. Jacobs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 419 F. 2d 975.

No. 1223. MEYER *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. *Paul E. Goldstein* and *Marshall Patner* for petitioner. *Richard L. Curry* and *Marvin E. Aspen* for respondent. Reported below: 44 Ill. 2d 1, 253 N. E. 2d 400.

No. 140, Misc. ROBISON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *A. Wells Petersen,* Deputy Attorney General, for respondent.

No. 629, Misc. CANALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jerold A. Krieger,* Deputy Attorney General, for respondent.

No. 1210. South Hill Neighborhood Assn., Inc., et al. *v.* Romney, Secretary of Housing and Urban Development, et al. C. A. 6th Cir. Motion of National Trust for Historic Preservation in the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Eugene F. Mooney* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for respondents Romney et al., and *J. Montjoy Trimble* for respondents City of Lexington et al. *William Stanley, Jr.,* and *Richard B. Stewart* for National Trust for Historic Preservation in the United States as *amicus curiae* in support of the petition. Reported below: 421 F. 2d 454.

No. 692, Misc. Smith *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. *Robert Morgan,* Attorney General of North Carolina, and *Harrison Lewis,* Deputy Attorney General, for respondent.

No. 789, Misc. Ryan *v.* Kropp, Warden. C. A. 6th Cir. Certiorari denied. *Frank J. Kelley,* Attorney General of Michigan, and *Robert A. Derengoski,* Solicitor General, for respondent.

No. 795, Misc. Murillo *v.* Craven, Warden. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Edward A. Hinz, Jr.,* Deputy Attorneys General, for respondent.

No. 1155, Misc. Blakley *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. *Richard C. Turner,* Attorney General of Iowa, and *Michael J. Laughlin,* Assistant Attorney General, for respondent.

No. 904, Misc. SHARPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1179, Misc. PEREZ *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1203, Misc. THURMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 135 U. S. App. D. C. 184, 417 F. 2d 752.

No. 1282, Misc. SCHMID *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1308, Misc. POLHILL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1309, Misc. BLACKMAN *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 1331, Misc. MARTIN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 275 Cal. App. 2d 334, 79 Cal. Rptr. 769.

No. 1366, Misc. VANHOOK *v.* TRAYNOR, CHIEF JUSTICE OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1394, Misc. HENDRICKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Edward Fenig* for the United States. Reported below: 417 F. 2d 225.

No. 1367, Misc. KAUFFMAN *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1369, Misc. LARKIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 617.

No. 1398, Misc. COLE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 827.

No. 1402, Misc. WILLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1415, Misc. LUCAS *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1424, Misc. CAUDILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1427, Misc. KNAUB *v.* MEIER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1461, Misc. LYONS *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. *Luther M. Carr* for Johnson et al., *Vernon L. Goodin* for Tebaldi et al., and *Edward J. Saunders* for Corey, respondents. Reported below: 415 F. 2d 540.

No. 1469, Misc. BRIGGS *v.* TEXAS ET AL. Sup. Ct. Tex. Certiorari denied.

No. 1470, Misc. HOLLINS *v.* BIGGS ET AL. C. A. 7th Cir. Certiorari denied.

No. 1431, Misc. DAVIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan, Michael R. Juviler,* and *William C. Donnino* for respondent.

No. 1472, Misc. PECORA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty* for petitioner. Reported below: 107 Ill. App. 2d 283, 246 N. E. 2d 865.

No. 1489, Misc. MATHIS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 411 F. 2d 1363.

No. 1494, Misc. VIANDS *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1513, Misc. LYNCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 1116.

No. 1521, Misc. PERRY *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. *Robert W. Maxwell II* for petitioner. Reported below: 416 F. 2d 432.

No. 1523, Misc. CORRAL *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1526, Misc. POSEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1528, Misc. SERVEY *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1535, Misc. ALAWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1537, Misc. HALLIDAY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1538, Misc. VEENKANT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 416 F. 2d 93.

No. 1565, Misc. CASEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 413 F. 2d 1303.

No. 1580, Misc. CANSLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan* for the United States. Reported below: 419 F. 2d 952.

No. 1584, Misc. DAVILA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1591, Misc. RILEY *v.* MCKESSON. C. A. 9th Cir. Certiorari denied.

No. 1610, Misc. ROBBINS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner.

No. 1626, Misc. JERNIGAN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Jeffrey Michael Cohen* for petitioner. Reported below: 214 So. 2d 66.

No. 1661, Misc. MOONEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 936.

No. 1687, Misc. LAWRENCE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *Paul E. Gifford* for petitioner. Reported below: 419 F. 2d 1326.

No. 1644, Misc. DeBour *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 1686, Misc. Delespine *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, *Alfred Walker,* Executive Assistant Attorney General, and *Robert C. Flowers* and *Gilbert J. Pena,* Assistant Attorneys General, for respondent. Reported below: 418 F. 2d 871.

No. 1471, Misc. Smith *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *M. M. Roberts* for petitioner. Reported below: 223 So. 2d 657.

No. 1600, Misc. Wood *v.* United States. C. A. 10th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 830.

Rehearing Denied

No. 736. Bounds, Commissioner of Correction *v.* Crawford, *ante,* p. 936;

No. 845. Yokum *v.* United States, *ante,* p. 907;

No. 877. Tampa Phosphate Railroad Co. *v.* Seaboard Coast Line Railroad Co., *ante,* p. 910;

No. 894. Reed *v.* The Foylebank et al., *ante,* p. 910;

No. 898. White et ux. *v.* United States, *ante,* p. 912; and

No. 994. Pollack *v.* United States, *ante,* p. 917. Petitions for rehearing denied.

No. 1010. PHIPPS ET UX. *v.* UNITED STATES, *ante*, p. 937;

No. 1053. BEARDEN ET AL. *v.* OKLAHOMA, *ante*, p. 960;

No. 946, Misc. SNOWDEN ET AL. *v.* UNITED STATES, *ante*, p. 946;

No. 1000, Misc. POSEY ET AL. *v.* UNITED STATES, *ante*, p. 946;

No. 1021, Misc. BOWERS *v.* UNITED STATES, *ante*, p. 946;

No. 1144, Misc. ANDERSON *v.* SOUTH CAROLINA, *ante*, p. 958;

No. 1190, Misc. RAMIREZ *v.* EYMAN, WARDEN, *ante*, p. 951;

No. 1283, Misc. ALERS *v.* MUNICIPALITY OF SAN JUAN, *ante*, p. 975;

No. 1297, Misc. SHIPP *v.* CRAVEN, WARDEN, *ante*, p. 954;

No. 1443, Misc. SAFFIOTI *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK, *ante*, p. 956; and

No. 1474, Misc. GOFF *v.* UNITED STATES, *ante*, p. 968. Petitions for rehearing denied.

No. 395. UNITED STATES *v.* SECKINGER, TRADING AS M. O. SECKINGER CO., *ante*, p. 203. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 766. KAUFFMAN *v.* SECRETARY OF THE AIR FORCE, 396 U. S. 1013; and

No. 1044, Misc. CORRADO ET UX. *v.* PROVIDENCE REDEVELOPMENT AGENCY ET AL., 396 U. S. 1022. Motions for leave to file petitions for rehearing denied.

No. 1006. REED *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL., *ante*, p. 924. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

APRIL 20, 1970

Miscellaneous Orders

No. —. KIRK, GOVERNOR OF FLORIDA, ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion to transfer denied. *Millard F. Caldwell, James G. Mahorner, Gerald Mager,* and *Julius F. Parker, Jr.*, on the motion. *Solicitor General Griswold* for the United States, and *Jack Greenberg, James M. Nabrit III,* and *Earl M. Johnson* for Harvest et al. in opposition.

No. —. DE CARLO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. *Michael P. Direnzo* for De Carlo, and *Michael A. Querques* for Cecere, applicants. *Solicitor General Griswold* in opposition.

No. 642. WILSON, WARDEN *v.* ATCHLEY. C. A. 9th Cir. [Certiorari granted, *ante,* p. 905.] Motion of respondent for appointment of counsel granted. It is ordered that *Charles A. Legge, Esquire,* of San Francisco, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 830. CHAMBERS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. [Certiorari granted, 396 U. S. 900.] Motion of *Carol Mary Los* for leave to argue *pro hac vice* on behalf of respondent granted.

No. 1810, Misc. RODRIGUEZ *v.* LASH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *William C. Erbecker* on the motion.

No. 1033. ABATE ET AL. *v.* MUNDT ET AL. Ct. App. N. Y. [Certiorari granted, *ante*, p. 904.] Motion of petitioners to remove case from summary calendar granted and 45 minutes allotted to each side for oral argument. *Doris Friedman Ulman* for petitioners Molef et al. on the motion.

No. 1103, Misc. RANDO *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, *Pat Bailey*, Executive Assistant Attorney General, and *Robert C. Flowers* and *Allo B. Crow, Jr.*, Assistant Attorneys General, in opposition.

No. 1598, Misc. BUSH *v.* CRAVEN, WARDEN;

No. 1616, Misc. BURGESS *v.* KROPP, WARDEN;

No. 1619, Misc. MERRILL *v.* MOSELEY, WARDEN, ET AL.;

No. 1673, Misc. MCFALL *v.* WARDEN, QUEENS HOUSE OF DETENTION FOR MEN;

No. 1702, Misc. AUSTIN *v.* FITZHARRIS, WARDEN;

No. 1744, Misc. DUNLEAVY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 1761, Misc. SMITH *v.* RODGERS, JAIL SUPERINTENDENT;

No. 1794, Misc. KAUP *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT;

No. 1880, Misc. SHEPHERD *v.* WINGO, WARDEN; and

No. 1883, Misc. WELLNITZ *v.* PAGE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1556, Misc. LEE *v.* POINSETT CIRCUIT COURT, ARKANSAS, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1576, Misc. PETTYJOHN *v.* TAMM ET AL., U. S. CIRCUIT JUDGES. Motion for leave to file petition for writ of mandamus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Martin S. Thaler* on the motion.

No. 1454, Misc. LEWIS *v.* CHIEF JUDGE, U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT; and

No. 1620, Misc. LEWIS *v.* UNITED STATES. Motions for leave to file petitions for writs of mandamus denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions.

No. 1574, Misc. STILTNER *v.* JUDGES OF THE SUPREME COURT OF WASHINGTON ET AL. Motion for leave to file petition for writ of mandamus and/or habeas corpus denied.

No. 1712, Misc. SCOTT *v.* INDIANA PAROLE BOARD ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 1189. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. Probable jurisdiction noted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. *Henry W. Sawyer III* for appellants. *William C. Sennett,* Attorney General of Pennsylvania, for Kurtzman et al., *James E. Gallagher, Jr.,* and *C. Clark Hodgson, Jr.,* for St. Anthony's School et al., and *Henry T. Reath* for Pennsylvania Association of Independent Schools, appellees. Reported below: 310 F. Supp. 35.

Certiorari Granted. (See also No. 1002, *ante,* p. 596.)

No. 1070. California *v.* Byers. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Louise H. Renne,* Deputy Attorney General, for petitioner. Reported below: 71 Cal. 2d 1039, 458 P. 2d 465.

No. 1251. Port of Boston Marine Terminal Assn. et al. *v.* Rederiaktiebolaget Transatlantic. C. A. 1st Cir. Certiorari granted. *John M. Reed* for petitioners Port of Boston Marine Terminal Assn. et al. *George F. Galland* and *Amy Scupi* for respondent. *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Irwin A. Seibel,* and *Gordon M. Shaw* for the United States et al. as *amici curiae* in support of the petition. Reported below: 420 F. 2d 419.

No. 1289. Palmer et al. *v.* Thompson, Mayor of the City of Jackson, et al. C. A. 5th Cir. Motion of James Moore et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. *Ernest Goodman* and *William Kunstler* for petitioners. *John E. Stone, Thomas H. Watkins,* and *Elizabeth W. Grayson* for respondents. *Armand Derfner* for Chinn et al. as *amici curiae* in support of the petition. Reported below: 419 F. 2d 1222.

No. 1302. Finch, Secretary of Health, Education, and Welfare *v.* Perales. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Kathryn Baldwin* for petitioner. Reported below: 412 F. 2d 44; 416 F. 2d 1250.

No. 1544, Misc. In re Burrus et al. Sup. Ct. N. C. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Jack Greenberg* and *Michael Meltsner* for petitioners. *Robert Morgan,* Attorney General of North Carolina, *Ralph Moody,* Deputy Attorney General, and *Andrew A. Vanore, Jr.,* Assistant Attorney General, in opposition. Reported below: 275 N. C. 517, 169 S. E. 2d 879.

Certiorari Denied

No. 1114. American Oil Co. *v.* United States. C. A. 5th Cir. Certiorari denied. *Leroy Denman Moody, Joe R. Greenhill, Jr.,* and *Alfred A. Lohne* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for the United States. Reported below: 417 F. 2d 164.

No. 1118. Williams *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. *F. Lee Bailey* for petitioner. Reported below: 6 Md. App. 511, 252 A. 2d 262.

No. 1141. Autenreith et al. *v.* Cullen, District Director of Internal Revenue, et al. C. A. 9th Cir. Certiorari denied. *Francis Heisler* and *Herbert A. Schwartz* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Meyer Rothwacks,* and *Stuart A. Smith* for respondents. Reported below: 418 F. 2d 586.

No. 1188. Seeburg Corp. *v.* Minthorne et ux.; and

No. 1235. Minthorne et ux. *v.* Seeburg Corp. et al. C. A. 9th Cir. Certiorari denied. *John P. Frank* for petitioner in No. 1188. *John C. Hughes* for petitioners in No. 1235 and for respondents in No. 1188.

No. 1161. Burnett *v.* City of Houston. Sup. Ct. Tex. Certiorari denied. *Walter Carr* for petitioner. *Homer T. Bouldin* for respondent.

No. 1199. Deep Welding, Inc. *v.* Sciaky Bros., Inc. C. A. 7th Cir. Certiorari denied. *Frederick Bernays Wiener, William D. Hall,* and *Elliott I. Pollock* for petitioner. *Edmund C. Rogers* for respondent. Reported below: 417 F. 2d 1227.

No. 1213. United Bonding Insurance Co. *v.* Norfolk Dredging Co. et al. C. A. 5th Cir. Certiorari denied. *Erik J. Blomqvist, Jr.,* for petitioner. Reported below: 417 F. 2d 634.

No. 1214. DeLeo *v.* United States. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 487.

No. 1219. Giordano *v.* United States et al. C. A. 8th Cir. Certiorari denied. *Irl B. Baris* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John P. Burke* for the United States et al. Reported below: 419 F. 2d 564.

No. 1227. International Union of Operating Engineers, Local No. 12, et al. *v.* Fair Employment Practice Commission of California et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Jerry J. Williams* for petitioners. *Thomas C. Lynch,* Attorney General of California, and *Robert H. O'Brien* and *Andrea Sheridan Ordin,* Deputy Attorneys General, for respondent Fair Employment Practice Commission of California. Reported below: 276 Cal. App. 2d 504, 81 Cal. Rptr. 47.

No. 1226. BELOUSEK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 110 Ill. App. 2d 442, 249 N. E. 2d 693.

No. 1230. THORINGTON ET AL. *v.* SCHUYLER, COMMISSIONER OF PATENTS. C. C. P. A. Certiorari denied. *Jay M. Cantor* for petitioners. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Alan S. Rosenthal* for respondent. Reported below: 57 C. C. P. A. (Pat.) 759, 418 F. 2d 528.

No. 1231. SAUNDERS *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 1232. STAUB CLEANERS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Irving L. Kessler* for petitioners. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for respondent. Reported below: 418 F. 2d 1086.

No. 1234. GENERAL FOODS CORP. *v.* PERK FOODS CO. C. A. 7th Cir. Certiorari denied. *Arthur G. Connolly* and *James M. Mulligan, Jr.,* for petitioner. *Maurice S. Weigle* for respondent. Reported below: 419 F. 2d 944.

No. 1237. DEERBOURNE CIVIC & RECREATION ASSN. ET AL. *v.* CITY OF RICHMOND. Sup. Ct. App. Va. Certiorari denied. *Claude C. Farmer, Jr.,* for petitioners. *Horace H. Edwards, Charles S. Rhyne,* and *Alfred J. Tighe, Jr.,* for respondent.

No. 1256. CINCINNATI WINDOW CLEANING CO. ET AL. *v.* WALKER, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. *Albert Spievack* for petitioners.

No. 1241. Daniel Construction Co., Inc. *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. *Robert T. Thompson* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 418 F. 2d 790.

No. 1243. Caiello *v.* United States. C. A. 2d Cir. Certiorari denied. *Philip C. Pinsky* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 420 F. 2d 471.

No. 1246. Rankin *v.* Florida et al. C. A. 5th Cir. Certiorari denied. *Milton E. Grusmark* and *Natalie Baskin* for petitioner. *Earl Faircloth,* Attorney General of Florida, *Gus Efthimiou, Jr.,* Assistant Attorney General, and *T. T. Turnbull* for respondents. Reported below: 418 F. 2d 482.

No. 1248. Carroll *v.* New York, New Haven & Hartford Railroad Co. C. A. 1st Cir. Certiorari denied. *Benjamin E. Gordon* for petitioner. *David W. Walsh* for respondent. Reported below: 417 F. 2d 1025.

No. 1257. Schlegel *v.* United States. Ct. Cl. Certiorari denied. *Norman Dorsen* and *Melvin L. Wulf* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Robert E. Kopp* for the United States. Reported below: 189 Ct. Cl. 30, 416 F. 2d 1372.

No. 1258. Adams *v.* Laird, Secretary of Defense. C. A. D. C. Cir. Certiorari denied. *Norman Dorsen, Melvin L. Wulf,* and *Ralph J. Temple* for petitioner. *Solicitor General Griswold, Assistant Attorney General Yeagley,* and *Robert L. Keuch* for respondent. Reported below: 136 U. S. App. D. C. 388, 420 F. 2d 230.

No. 1259. HUCK *v.* FOSSLEITNER. Sup. Ct. Pa. Certiorari denied. *John B. Nicklas, Jr.,* and *Kelly Litteral* for petitioner. Reported below: 435 Pa. 325, 257 A. 2d 522.

No. 1260. CONE MILLS CORP., UNION BLEACHERY DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Robert T. Thompson* for petitioner. *Solicitor General Griswold* and *Arnold Ordman* for respondent. Reported below: 419 F. 2d 394.

No. 1261. GAJEWSKI ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States et al. Reported below: 419 F. 2d 1088.

No. 1262. BLUM *v.* GREAT LAKES CARBON CORP. C. A. 5th Cir. Certiorari denied. *Chris Dixie* for petitioner. *Joseph B. Donovan* for respondent. Reported below: 418 F. 2d 283.

No. 1264. STEIN ET AL. *v.* MCGUIGAN, SUPERINTENDENT OF EAST MAINE SCHOOL DISTRICT NO. 63, ET AL. C. A. 7th Cir. Certiorari denied. *Yale Stein, pro se,* and for other petitioners. *William J. Scott,* Attorney General of Illinois, and *Francis T. Crowe,* Assistant Attorney General, for respondent Page.

No. 1265. ANGELINI, DBA ANGEL & KAPLAN SPORTS NEWS SERVICE *v.* ILLINOIS BELL TELEPHONE CO. ET AL. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* and *Edward J. Calihan, Jr.,* for petitioner. *Robert V. R. Dalenberg* for Illinois Bell Telephone Co., and *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States, respondents. Reported below: 418 F. 2d 111.

No. 1266. HUGHES, ADMINISTRATRIX *v.* GREAT NORTHERN RAILWAY CO. Sup. Ct. Mont. Certiorari denied. *A. G. Shone* for petitioner. *Edwin S. Booth* for respondent. Reported below: 154 Mont. 329, 462 P. 2d 879.

No. 1268. SILVERSTEIN ET AL., CO-EXECUTORS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *David E. Dickinson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Matthew J. Zinn,* and *Meyer Rothwacks* for the United States. Reported below: 419 F. 2d 999.

No. 1272. JOHNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 421 F. 2d 413.

No. 1275. PACIFIC CAR & FOUNDRY CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Thomas Todd* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *David English Carmack* for the United States. *Michael Waris, Jr.,* for Farm & Industrial Equipment Institute as *amicus curiae* in support of the petition. Reported below: 420 F. 2d 905.

No. 1279. MCGRATH *v.* KIRWAN. Ct. App. N. Y. Certiorari denied. *David Nelson* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *James L. Kalteux,* Assistant Attorney General, for respondent.

No. 1280. GILLILAND *v.* KOCH ET AL. C. A. 10th Cir. Certiorari denied. *Vincent Ross* for petitioner.

No. 1286. SPICER ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1293. REAGON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. *James R. White* for petitioner. *Theodore L. Sendak,* Attorney General of Indiana, and *Mark Peden,* Deputy Attorney General, for respondent. Reported below: —— Ind. ——, 251 N. E. 2d 829.

No. 1294. FARRELL LINES INC. *v.* TITAN INDUSTRIAL CORP. C. A. 2d Cir. Certiorari denied. *George W. Sullivan* and *Francis R. Matera* for petitioner. *Frank L. Wiswall, Jr.,* for respondent. Reported below: 419 F. 2d 835.

No. 1313. SUBVERSIVE ACTIVITIES CONTROL BOARD *v.* BOORDA ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Yeagley, Kevin T. Maroney,* and *Lee B. Anderson* for petitioner. *John J. Abt* and *Joseph Forer* for respondents. Reported below: 137 U. S. App. D. C. 207, 421 F. 2d 1142.

No. 1318. PERFECT FIT INDUSTRIES, INC. *v.* GLEN MFG., INC. C. A. 2d Cir. Certiorari denied. *Arthur H. Seidel* for petitioner. *William J. Stellman* and *James R. Sweeney* for respondent. Reported below: 420 F. 2d 319.

No. 1320. GRIPKEY *v.* SISTERS OF CHARITY OF THE BLESSED VIRGIN MARY. C. A. 9th Cir. Certiorari denied. *W. I. Gilbert, Jr.,* and *Francis J. O'Connor* for respondent.

No. 1336. EUGENE SAND & GRAVEL, INC. *v.* LOWE ET AL. Sup. Ct. Ore. Certiorari denied. *John E. Jaqua* for petitioner.

No. 692. PUBLIC SERVICE COMMISSION OF WYOMING ET AL. *v.* TRI-STATE GENERATION & TRANSMISSION ASSN., INC. C. A. 10th Cir. Motion of National Association of Regulatory Utility Commissioners for leave to file a brief as *amicus curiae* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *James E. Barrett,* Attorney General of Wyoming, *Sterling A. Case,* Deputy Attorney General, and *Don M. Empfield,* Special Assistant Attorney General, for Public Service Commission of Wyoming et al., and *William H. Dempsey, Jr., Ralph J. Moore, Jr., Sidney G. Baucom,* and *Bryce E. Roe* for Cheyenne Light, Fuel & Power Co. et al., petitioners. *Raphael J. Moses, John J. Conway,* and *George P. Sawyer* for respondent. *Paul Rodgers* for National Association of Regulatory Utility Commissioners as *amicus curiae* in support of the petition. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Leonard Schaitman* filed a brief for the United States as *amicus curiae,* by invitation of the Court, 396 U. S. 998, in opposition. Reported below: 412 F. 2d 115.

No. 844. UNITED STATES *v.* FALK. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Crombie J. D. Garrett* for the United States. *Arthur E. Fixel* for respondent. Reported below: 412 F. 2d 369.

No. 930, Misc. DENNIS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edward P. O'Brien* and *Robert R. Granucci,* Deputy Attorneys General, for respondents. Reported below: 414 F. 2d 424.

No. 1041. KRAMM *v.* WORKMEN'S COMPENSATION APPEALS BOARD ET AL. Sup. Ct. Cal. Motion to dispense with printing petition granted. Certiorari denied. *Jerry J. Williams* for petitioner. *Richard E. Ryan* for respondent Workmen's Compensation Appeals Board, and *Sidney A. Stutz* for respondent Hartford Accident & Indemnity Co.

No. 1292. CASSIAGNOL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied. *Philip J. Hirschkop* and *Lawrence E. Freedman* for petitioners. *Solicitor General Griswold* for the United States. Reported below: 420 F. 2d 868.

No. 1172. NEW MEXICO *v.* PAUL. Ct. App. N. M. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *James A. Maloney,* Attorney General of New Mexico, *Gary O'Dowd,* Deputy Attorney General, and *Mark B. Thompson III,* Assistant Attorney General, for petitioner. Reported below: 80 N. M. 521, 458 P. 2d 596.

No. 1276. BIRNBAUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Alan M. Dershowitz* and *Jerome J. Londin* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 421 F. 2d 993.

No. 307, Misc. VALENZUELA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. *W. Edward Morgan* for petitioner. *Gary K. Nelson,* Attorney General of Arizona, and *Carl Waag,* Assistant Attorney General, for respondent. Reported below: 8 Ariz. App. 444, 447 P. 2d 259.

No. 811, Misc. THOMPSON ET AL. *v.* CITY OF ATHENS, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 1063, Misc. WILLIAMS *v.* POPE. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Melvin R. Segal,* Deputy Attorney General, for respondent.

No. 1202, Misc. STATEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Kirby W. Patterson* for the United States.

No. 1210, Misc. MORGAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1321, Misc. NAILOR *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1322, Misc. BURNEY *v.* WEINFELD, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied.

No. 1323, Misc. DOUGHERTY *v.* COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1326, Misc. CAMERON *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1411, Misc. BRAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1418, Misc. CORPOS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1420, Misc. COOLACK *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 1358, Misc. ARMPRIESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 416 F. 2d 28.

No. 1421, Misc. DEARINGER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1423, Misc. SCHLETTE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1429, Misc. LEEPER *v.* BIRZGALIS, STATE HOSPITAL SUPERINTENDENT. Sup. Ct. Mich. Certiorari denied.

No. 1436, Misc. JULIANO *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1438, Misc. BEAMS, ADMINISTRATOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Claude H. Rosenstein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Crombie J. D. Garrett,* and *Carolyn R. Just* for the United States. Reported below: 417 F. 2d 197.

No. 1445, Misc. THEODORE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1449, Misc. GOODWIN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. *Richard J. Bruckner* for petitioner. Reported below: 184 Neb. 537, 169 N. W. 2d 270.

No. 1462, Misc. WOOD *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1456, Misc. HAZEL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1464, Misc. GOLOTY *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 1466, Misc. HINTON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Joseph R. Quinn* for petitioner. Reported below: —— Colo. ——, 458 P. 2d 611.

No. 1485, Misc. WICKWARE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 444 S. W. 2d 272.

No. 1507, Misc. MCCONNELL *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 1509, Misc. MANISCALCO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 417 F. 2d 1056.

No. 1510, Misc. WEIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 32 App. Div. 2d 856, 301 N. Y. S. 2d 186.

No. 1515, Misc. STEVENSON *v.* MANCUSI, WARDEN. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1519, Misc. BURTON *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1522, Misc. ARNETT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1524, Misc. MALAK ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1530, Misc. LOWE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1534, Misc. LOWE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 100.

No. 1542, Misc. JACKSON *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 2d 1324.

No. 1546, Misc. CUMMINGS *v.* NEW YORK. App. Div., Sup Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *William C. Donnino* for respondent.

No. 1548, Misc. HANGSLEBEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 43 Ill. 2d 236, 252 N. E. 2d 545.

No. 1549, Misc. HARDISON *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1551, Misc. REIS *v.* PURDY, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 416 F. 2d 1052.

No. 1553, Misc. MINK *v.* FREEMAN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 1555, Misc. BENDAR *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1560, Misc. WILLIAMS *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 1561, Misc. CRAWFORD *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1562, Misc. MASTRIAN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. *Douglas W. Thomson* and *John A. Cochrane* for petitioner. *Douglas M. Head,* Attorney General of Minnesota, and *William B. Randall* for respondent. Reported below: 285 Minn. 51, 171 N. W. 2d 695.

No. 1566, Misc. JENNINGS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1569, Misc. RHODES *v.* HOUSTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 418 F. 2d 1309.

No. 1570, Misc. BAILEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1581, Misc. BAKER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1588, Misc. LADD *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 415 F. 2d 870.

No. 1594, Misc. WHITE *v.* MAINE ET AL. C. A. 1st Cir. Certiorari denied.

No. 1595, Misc. KING *v.* PAGE, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 1597, Misc. GREAR *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1599, Misc. HAYKEL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1605, Misc. BARCLAY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1606, Misc. CINNAMON *v.* X-RAILWAY EXPRESS CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 1611, Misc. GREENE *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1615, Misc. KERNER ET UX. *v.* CIBA CORP. Sup. Ct. N. J. Certiorari denied. *Joseph Ginsburg* for petitioners.

No. 1617, Misc. CARPENTIER *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1618, Misc. ROSS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. *Robert Morgan,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent. Reported below: 275 N. C. 550, 169 S. E. 2d 875.

No. 1621, Misc. FRASER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1622, Misc. OLIVER *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *John W. Packel* for petitioner. Reported below: 417 F. 2d 305.

No. 1623, Misc. LEAK *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 418 F. 2d 1266.

No. 1624, Misc. CARROLL *v.* CLERK OF THE EIGHTH JUDICIAL DISTRICT COURT OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied.

No. 1627, Misc. SPEAKS *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *John H. Lewis, Jr.,* for petitioner. Reported below: 417 F. 2d 597.

No. 1628, Misc. RUMNEY *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. *Alexander J. Kalinski* for petitioner. *William F. Cann,* Deputy Attorney General of New Hampshire, and *David H. Souter,* Assistant Attorney General, for respondent. Reported below: 109 N. H. 544, 258 A. 2d 349.

No. 1629, Misc. BANKS *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1633, Misc. WILSON *v.* BOLSINGER, PROTHONOTARY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 1637, Misc. COLE *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1638, Misc. TAYLOR *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. *Richard Newman* for petitioner. *Leo Kaplowitz* for respondent.

No. 1639, Misc. CUMMINGS *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1646, Misc. HASLAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Thomas H. Carver* for petitioner. *Solicitor General Griswold* for the United States.

No. 1640, Misc. CHASCO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 276 Cal. App. 2d 271, 80 Cal. Rptr. 667.

No. 1641, Misc. WEISS *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1648, Misc. CASTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 230.

No. 1649, Misc. MASTERS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 171 N. W. 2d 255.

No. 1650, Misc. QUINN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 416 F. 2d 27.

No. 1652, Misc. CARBALLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* and *Michael R. Juviler* for respondent.

No. 1653, Misc. CARONIA *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1655, Misc. KAUP *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1656, Misc. BROADUS-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1666, Misc. MIXON *v.* PENN STEVEDORES, INC. C. A. 2d Cir. Certiorari denied. *William Donald Fleck* for respondent.

No. 1657, Misc. PONCE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1659, Misc. EVANS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Tobias Simon* for petitioner. *Earl Faircloth,* Attorney General of Florida, and *Arden M. Siegendorf* and *Ronald W. Sabo,* Assistant Attorneys General, for respondent. Reported below: 225 So. 2d 548.

No. 1660, Misc. MAXWELL *v.* SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE ET AL. C. A. 5th Cir. Certiorari denied. *H. Alva Brumfield* and *Sylvia Roberts* for petitioner. *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Charles Stephen Ralston,* and *Peter A. Hall* for respondent Southern Christian Leadership Conference. Reported below: 414 F. 2d 1065.

No. 1664, Misc. HAYES *v.* SNYDER. C. A. 7th Cir. Certiorari denied. *L. Stanton Dotson* for respondent.

No. 1667, Misc. BUDD *v.* MADIGAN, SHERIFF. C. A. 9th Cir. Certiorari denied. *George F. Duke* for petitioner. *Thomas C. Lynch,* Attorney General of California, and *William D. Stein,* Deputy Attorney General, for respondent. Reported below: 418 F. 2d 1032.

No. 1672, Misc. PRIMOUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 420 F. 2d 33.

No. 1675, Misc. MITCHELL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 275 Cal. App. 2d 351, 79 Cal. Rptr. 764.

No. 1671, Misc. TURPIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1676, Misc. PREWITT *v.* ARIZONA EX REL. EYMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. *Gary K. Nelson,* Attorney General, and *Carl Waag,* Assistant Attorney General, for respondents State of Arizona et al. Reported below: 418 F. 2d 572.

No. 1680, Misc. NORTH *v.* CUPP, WARDEN. Sup. Ct. Ore. Certiorari denied. *Lawrence A. Aschenbrenner* for petitioner. *Lee Johnson,* Attorney General of Oregon, and *Jacob B. Tanzer,* Solicitor General, for respondent. Reported below: 254 Ore. 451, 461 P. 2d 271.

No. 1684, Misc. PEEBLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *H. Kowalchick* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. Reported below: 419 F. 2d 830.

No. 1690, Misc. NASH *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 418 F. 2d 1333.

No. 1692, Misc. SCHIRO *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1696, Misc. LENTO *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Lloyd W. Roberson* for respondent. Reported below: See 374 F. 2d 113.

No. 1703, Misc. CARTANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 420 F. 2d 362.

No. 1701, Misc. O'Connell *v.* Illinois. Sup. Ct. Ill. Certiorari denied.

No. 1699, Misc. Taylor *v.* Finch, Secretary of Health, Education, and Welfare. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 418 F. 2d 1232.

No. 1700, Misc. Laitinen *v.* Washington. Sup. Ct. Wash. Certiorari denied. *Michael H. Rosen* for petitioner. Reported below: 77 Wash. 2d 130, 459 P. 2d 789.

No. 1704, Misc. Carabello *v.* Parole Board of New York. C. A. 2d Cir. Certiorari denied.

No. 1706, Misc. Moore *v.* United States et al. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold* for the United States et al.

No. 1707, Misc. Daniels *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 1708, Misc. Fryer *v.* United States. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States. Reported below: 419 F. 2d 1346.

No. 1710, Misc. Hopkins *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1713, Misc. Miller *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1721, Misc. Stuart *v.* Yeager, Principal Keeper, et al. C. A. 3d Cir. Certiorari denied. Reported below: 419 F. 2d 126.

No. 1714, Misc. ANTONETTY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1715, Misc. McGEE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *William H. Webster* for petitioner. *John C. Danforth,* Attorney General of Missouri, and *Charles B. Blackmar,* Special Assistant Attorney General, for respondent. Reported below: 447 S. W. 2d 270.

No. 1720, Misc. STEWART *v.* DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 1722, Misc. BENSON *v.* PRENTICE HALL, INC. C. A. 2d Cir. Certiorari denied. *Murray M. Segal* for petitioner. *Thomas A. Diskin* for respondent.

No. 1726, Misc. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1727, Misc. RONDINONE *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied. *Igor I. Sikorsky, Jr.,* for petitioner. *John D. LaBelle* for respondent. Reported below: 424 F. 2d 1307.

No. 1731, Misc. TUCKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Robert G. Maysack* for the United States.

No. 1732, Misc. SLOAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 226 So. 2d 863.

No. 1736, Misc. McNAMARA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 499.

No. 1733, Misc. SAMUELS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. *James J. Casey* for petitioner. Reported below: 6 Md. App. 59, 250 A. 2d 285.

No. 1729, Misc. DALTON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1735, Misc. JOHNSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1738, Misc. GORDON *v.* BRIGHT ET AL. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for respondents. Reported below: 419 F. 2d 835.

No. 1739, Misc. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1740, Misc. HANSEN *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1205.

No. 1765, Misc. DEMARIO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. *Gerald W. Getty, Marshall J. Hartman,* and *James J. Doherty* for petitioner. Reported below: 112 Ill. App. 2d 175 and 420, 251 N. E. 2d 267 and 274.

No. 1766, Misc. SEIPEL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. *Robert Weiner* for petitioner. Reported below: 108 Ill. App. 2d 384, 247 N. E. 2d 905.

No. 1767, Misc. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1787, Misc. TERRY *v.* KEEFE. Sup. Ct. Fla. Certiorari denied.

No. 706, Misc. ORLANDO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Leo Kaplowitz* for respondent.

No. 1564, Misc. RUBY *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. 1665, Misc. EVANS *v.* UNITED STATES. C. A. 8th 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. 1575, Misc. PETTYJOHN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Martin S. Thaler* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 136 U. S. App. D. C. 69, 419 F. 2d 651.

No. 1742, Misc. LEWIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 135 U. S. App. D. C. 187, 417 F. 2d 755.

Rehearing Denied

No. 964. ROSENSON *v.* UNITED STATES, *ante*, p. 962; and

No. 1012. SERBIAN EASTERN ORTHODOX CONGREGATION OF "ST. GEORGE," ELIZABETH, NEW JERSEY, ET AL. *v.* SERBIAN EASTERN ORTHODOX CONGREGATION OF "ST. GEORGE," ELIZABETH, NEW JERSEY (DIOCESE FOR EASTERN STATES OF AMERICA AND CANADA), ET AL., *ante*, p. 961. Petitions for rehearing denied.

No. 1046. HAMILTON ET AL. *v.* MCKEITHEN, GOVERNOR OF LOUISIANA, *ante,* p. 245;

No. 1078. MCCLAIN *v.* UNITED STATES, *ante,* p. 965;

No. 1111. RANJEL ET AL. *v.* CITY OF LANSING ET AL., *ante,* p. 980;

No. 529, Misc. GAWNE ET AL. *v.* UNITED STATES, *ante,* p. 943;

No. 1161, Misc. TOWLES *v.* REINCKE, WARDEN, *ante,* p. 966;

No. 1205, Misc. KELEM *v.* UNITED STATES, *ante,* p. 952;

No. 1256, Misc. MERLE *v.* NORTH CAROLINA MUTUAL LIFE INSURANCE CO., *ante,* p. 995; and

No. 1483, Misc. BILLS *v.* UNITED STATES, *ante,* p. 956. Petitions for rehearing denied.

No. 1064. GENERAL ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., *ante,* p. 965. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 1041, Misc. ROBERTS *v.* ALASKA, 396 U. S. 1022; and

No. 1091, Misc. IN RE REECE, *ante,* p. 949. Motions for leave to file petitions for rehearing denied.

APRIL 22, 1970

Dismissal Under Rule 60

No. 1138, Misc. GREEN *v.* LOCAL BOARD NO. 87, SELECTIVE SERVICE SYSTEM. C. A. 8th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Joel J. Rabin* for petitioner. *Solicitor General Griswold* for respondent. Reported below: 419 F. 2d 813.

APRIL 27, 1970

*Miscellaneous Orders**

No. 21. DUTTON, WARDEN *v.* EVANS. Appeal from C. A. 5th Cir. [Probable jurisdiction noted, 393 U. S. 1076];

No. 50. NORTH CAROLINA *v.* ALFORD. Appeal from C. A. 4th Cir. [Probable jurisdiction noted, 394 U. S. 956];

No. 84. UNITED STATES *v.* JORN. Appeal from D. C. Utah. [Probable jurisdiction noted, 396 U. S. 810]; and

No. 179. ROGERS, SECRETARY OF STATE *v.* BELLEI. Appeal from D. C. D. C. [Probable jurisdiction noted, 396 U. S. 811.] Cases restored to calendar for reargument.

No. 300. TOOAHNIPPAH (GOOMBI), ADMINISTRATRIX, ET AL. *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL., *ante,* p. 598. Motions to substitute Julia Tooahnippah (Goombi), Administratrix, in place of James Tooahimpah Tate, deceased, former Administrator of Estate of Frankie Lee Tooahnippah, deceased, and Estate of Viola Atewoof-takewa (Tate), deceased, as a party petitioner, granted. *Omer Luellen* on the motions.

No. 905. GROVE PRESS, INC., ET AL. *v.* MARYLAND STATE BOARD OF CENSORS. Appeal from Ct. App. Md. [Probable jurisdiction noted, *ante,* p. 984.] Motion of International Film Importers & Distributors of America, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion. *Felix J. Bilgrey* on the motion.

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*[REPORTER'S NOTE: The order of April 27, 1970, in No. 1389, *Mayberry* v. *Pennsylvania,* appointing counsel for petitioner, was revoked by order of May 18, 1970, 398 U. S. 902.]

No. 1058. PHILLIPS *v.* MARTIN MARIETTA CORP. C. A. 5th Cir. [Certiorari granted, *ante*, p. 960.] Motion of National Organization for Women for leave to file a brief as *amicus curiae* granted. *Jacob D. Heyman* on the motion.

No. 1149. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL. *v.* KARALEXIS ET AL. Appeal from D. C. Mass. [Probable jurisdiction noted, *ante*, p. 985.] Motions of National General Corp. et al. and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions. *Stanley Fleishman* and *Sam Rosenwein* for National General Corp. et al., and *Thomas R. Asher, Michael Schneiderman,* and *Melvin L. Wulf* for American Civil Liberties Union et al. on the motions.

No. 1985, Misc. COWLES COMMUNICATIONS, INC. *v.* ALIOTO ET AL. C. A. 9th Cir. and D. C. N. D. Cal. Motion for leave to file petitions for writs of certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion *Charles W. Kenady, R. Barry Churton, Ronald S. Diana,* and *William G. Hundley* on the motion.

No. 1939, Misc. GARRETT *v.* BREWER, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted or Postponed

No. 1155. UNITED STATES *v.* VUITCH. Appeal from D. C. D. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley* for the United States. *Joseph Sitnick* and *Joseph L. Nellis* for appellee. Reported below: 305 F. Supp. 1032.

No. 1270. BLOUNT, POSTMASTER GENERAL *v.* NATIONAL ASSN. OF LETTER CARRIERS. Appeal from D. C. D. C. Probable jurisdiction noted. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Alan S. Rosenthal,* and *Walter H. Fleischer* for appellant. *John W. Karr* and *Ralph J. Temple* for appellee. Reported below: 305 F. Supp. 546.

Certiorari Granted. (See also No. 863, *ante,* p. 662.)

No. 1309. TIME, INC. *v.* PAPE. C. A. 7th Cir. Certiorari granted. *Harold R. Medina, Jr., Don H. Reuben,* and *Lawrence Gunnels* for petitioner. *Patrick W. Dunne, Robert J. Nolan,* and *Edward J. Hladis* for respondent. Reported below: 419 F. 2d 980.

No. 1468, Misc. WHITELEY *v.* WARDEN, WYOMING PENITENTIARY. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to issue of constitutionality of arrest and search, and case transferred to appellate docket. *Richard A. Mullens* for petitioner. *Sterling A. Case,* Deputy Attorney General of Wyoming, and *Jack Speight,* Assistant Attorney General, for respondent. Reported below: 416 F. 2d 36.

Certiorari Denied

No. 1151. DUKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Arthur Vann* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Kirby W. Patterson* for the United States. Reported below: 409 F. 2d 669.

No. 1233. HUTTER NORTHERN TRUST ET AL. *v.* HAEN ET AL. C. A. 7th Cir. Certiorari denied. *John A. Hutter, Jr., pro se,* and for other petitioners.

No. 1200. TERESA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John J. Pichinson* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 420 F. 2d 13.

No. 1212. ELMWOOD PROPERTIES, INC., ET AL. *v.* CONZELMAN ET AL. C. A. 7th Cir. Certiorari denied. *Maurice P. Raizes* for petitioners. *Francis S. Clamitz* for respondents. Reported below: 418 F. 2d 1025.

No. 1236. MONTONEY ET AL. *v.* CRAMER ET AL. Sup. Ct. Ohio. Certiorari denied. *Rankin M. Gibson* for petitioners. *Shelby V. Hutchins* for respondents.

No. 1263. SMITH *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *J. Hugo Madison* for petitioner.

No. 1285. PARHAM *v.* KAISER, EXECUTRIX, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Edward J. Saunders* for petitioner. *Gordon Johnson* for respondents.

No. 1300. ATOMIC OIL CO. OF OKLAHOMA, INC., ET AL. *v.* BARDAHL OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. *Lawrence A. Johnson* and *Robert J. Woolsey* for petitioners. Reported below: 419 F. 2d 1097.

No. 1303. GRIPKEY *v.* GERTY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1305. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jack K. Berman* and *Burton Marks* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 423 F. 2d 621.

No. 1306. DAMISCH *v.* WITHERS ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin S. Adamowski, Francis X. Riley,* and *Paul D. Newey* for petitioner. *Franklin J. Kramer* for respondents Ochsenschlager et al.

No. 1307. NEW ORLEANS STEVEDORING CO., DIVISION OF JAMES J. FLANAGAN SHIPPING CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Ralph L. Kaskell, Jr.,* for petitioner. *Solicitor General Griswold* for the United States.

No. 1308. PHILADELPHIA LOCAL NO. 8, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA *v.* KELSEY. C. A. 3d Cir. Certiorari denied. *Kingsley A. Jarvis* for petitioner. *Edward B. Bergman* for respondent. Reported below: 419 F. 2d 491.

No. 1312. LOCTITE CORP. *v.* BROADVIEW CHEMICAL CORP. C. A. 2d Cir. Certiorari denied. *Walter D. Ames* for petitioner. *Granger Cook, Jr.,* and *James P. Hume* for respondent. Reported below: 417 F. 2d 998.

No. 1314. HAGGERTY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 419 F. 2d 1003.

No. 1324. NATIONAL BUILDING CORP. *v.* BENDIX CORP. ET AL. C. A. 6th Cir. Certiorari denied. *Victor W. Ewen* and *William A. MacKenzie* for petitioner. *William D. Grubbs* for respondent General Motors Corp. Reported below: 415 F. 2d 860.

No. 1325. GRANADER *v.* PUBLIC BANK ET AL. C. A. 6th Cir. Certiorari denied. *Marvin W. Cherrin* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Maurice M. Moule,* Assistant Attorney General, for respondents Financial Institutions Bureau of Michigan et al., and *Leslie H. Fisher* and *Gilbert E. Gove* for respondent Federal Deposit Insurance Corp. Reported below: 417 F. 2d 75.

No. 1332. REXALL CHEMICAL CO., A DIVISION OF REXALL DRUG & CHEMICAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *William L. Keller* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 418 F. 2d 603.

No. 1344. PAUL ET AL. *v.* DADE COUNTY, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. *Alfred Hopkins* for petitioners. *Thomas C. Britton* and *St. Julien P. Rosemond* for respondents. Reported below: 419 F. 2d 10.

No. 1316. BERMAN *v.* BOARD OF ELECTIONS OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Motion of Rabbinical Alliance of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. *J. Lee Rankin, Stanley Buchsbaum,* and *Robert T. Hartmann* for Board of Elections of the City of New York, *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* and *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel H. Sachs,* Assistant Attorney General, for Rockefeller et al., respondents. *Sol Rosen* for Rabbinical Alliance of America as *amicus curiae* in support of the petition. Reported below: 420 F. 2d 684.

No. 1245. SCHOOL DISTRICT OF GREENVILLE COUNTY ET AL. *v.* WHITTENBERG ET AL. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied. *J. Covington Parham, Jr.,* and *C. Thomas Wyche* for petitioners. *Jack Greenberg, James M. Nabrit III, Matthew J. Perry,* and *Donald J. Sampson* for respondents. Reported below: 424 F. 2d 195.

No. 1287. ABERSON *v.* UNITED STATES. 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. *Daniel H. Greenberg* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters,* and *Joseph M. Howard* for the United States. Reported below: 419 F. 2d 820.

No. 1298. NEFF, ADMINISTRATRIX *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Richard W. Galiher* and *Charles J. Steele* for petitioner. *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Kathryn H. Baldwin* for the United States. Reported below: 136 U. S. App. D. C. 273, 420 F. 2d 115.

No. 1176, Misc. KNOX *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Jack R. Winkler,* Deputy Attorney General, for respondent.

No. 1601, Misc. KIGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William C. Erbecker* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 417 F. 2d 1194.

No. 1293, Misc. HUCKABAY *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Frank O. Walther* for petitioner. *Thomas C. Lynch,* Attorney General, *William E. James,* Assistant Attorney General, and *Evelle J. Younger* for the State of California, real party in interest.

No. 1451, Misc. BLACKWELL *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1452, Misc. BROWN *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1536, Misc. GLANDERS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1539, Misc. PARSHAY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 1541, Misc. KERKAI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Gerald I. Roth* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Paul C. Summit* for respondent. Reported below: 418 F. 2d 217.

No. 1608, Misc. HUNTER *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 420 F. 2d 779.

No. 1631, Misc. NEY *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *Edward J. Saunders* for respondents Pickett et al.

No. 1682, Misc. WILKERSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1632, Misc. WILSON *v.* SECRETARY OF THE NAVY. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 417 F. 2d 297.

No. 1647, Misc. EARNHART *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 135 U. S. App. D. C. 130, 417 F. 2d 547.

No. 1674, Misc. SMILEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. *Frank S. Hogan* for respondent.

No. 1679, Misc. BALDERRAMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley* for the United States.

No. 1691, Misc. HAMMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 419 F. 2d 166.

No. 1694, Misc. MILLER *v.* WADE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 489.

No. 1698, Misc. DAUGHERTY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 6.

No. 1717, Misc. MURPHREE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. *J. Robertshaw* for petitioner. Reported below: 228 So. 2d 599.

No. 1718, Misc. GILBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1697, Misc. CONWAY *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 1746, Misc. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1747, Misc. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1749, Misc. FERNANDEZ *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1750, Misc. PATTERSON *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. *Charles B. Bowers* for petitioner. Reported below: 253 S. C. 382, 171 S. E. 2d 235.

No. 1751, Misc. ZUCKERMAN *v.* TATARIAN ET AL. C. A. 1st Cir. Certiorari denied. *Martin Malinou* for petitioner. *Francis V. Reynolds* for respondents. Reported below: 418 F. 2d 878.

No. 1753, Misc. GALLEGOS *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 1754, Misc. GLASS *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 1755, Misc. BROWN *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1756, Misc. DAVIS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1763, Misc. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1757, Misc. BUSHNELL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 1758, Misc. MOORE *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 1759, Misc. BARAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1760, Misc. WITHERSPOON *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 1762, Misc. KEANE *v.* CUCURELLO. Sup. Ct. Conn. Certiorari denied.

No. 1769, Misc. BROWN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 80, 254 N. E. 2d 481.

No. 1777, Misc. HOOD *v.* RICE ET AL. Ct. App. Ga. Certiorari denied. *G. Seals Aiken* for petitioner. *A. C. Latimer* for respondents.

No. 1780, Misc. CRAGG *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1795, Misc. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Stanley Jay Bartel* for petitioner. *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg* for the United States. Reported below: 414 F. 2d 876.

No. 1852, Misc. MCWILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Bernard J. Mellman* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 421 F. 2d 1083.

No. 1825, Misc. LOVANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Harry C. Batchelder, Jr.*, and *Thomas R. Esposito* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 420 F. 2d 769.

No. 1823, Misc. MIDDLETON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1838, Misc. WION *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

Rehearing Denied

No. 282. UNITED STATES *v.* DAVIS ET UX., *ante*, p. 301;

No. 573. WATTS ET AL. *v.* SEWARD SCHOOL BOARD ET AL., *ante*, p. 921;

No. 794. BURDETTE *v.* TENNESSEE, *ante*, p. 987;

No. 1208, Misc. JAMERSON *v.* DELHEY ET AL., *ante*, p. 1013;

No. 1532, Misc. MAGEE *v.* WHITTAKER, SHERIFF, ET AL., *ante*, p. 1016; and

No. 1661, Misc. MOONEY *v.* UNITED STATES, *ante*, p. 1029. Petitions for rehearing denied.

No. 732. JOHNSON *v.* UNITED STATES, *ante*, p. 991. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 882. BOSTON & PROVIDENCE RAILROAD DEVELOPMENT GROUP *v.* BARTLETT, TRUSTEE IN REORGANIZATION, ET AL., *ante*, p. 979. Petition for rehearing and other relief denied.

MAY 4, 1970

Miscellaneous Orders

No. 1033. ABATE ET AL. *v.* MUNDT ET AL. Ct. App. N. Y. [Certiorari granted, *ante,* p. 904.] Motion to advance denied. *Doris Friedman Ulman* on the motion.

No. 1058. PHILLIPS *v.* MARTIN MARIETTA CORP. C. A. 5th Cir. [Certiorari granted, *ante,* p. 960.] Motion of Human Rights for Women, Inc., for leave to file a brief as *amicus curiae* granted. *Sylvia Ellison* on the motion.

No. 1189, Misc. PITTS ET AL. *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Earl Faircloth,* Attorney General of Florida, and *Raymond L. Marky,* Assistant Attorney General, in opposition.

No. 1861, Misc. NORSWORTHY *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

No. 1797, Misc. RUDERER *v.* MEREDITH, U. S. DISTRICT JUDGE; and

No. 1862, Misc. RUDERER *v.* HARPER, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied. *Solicitor General Griswold* in opposition in both cases.

No. 1808, Misc. SETZER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. Motion for leave to file petition for writ of mandamus denied. *Solicitor General Griswold* in opposition.

Probable Jurisdiction Noted

No. 134, Misc. PALMER *v.* CITY OF EUCLID. Appeal from Sup. Ct. Ohio. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Joshua J. Kancelbaum* for appellant. *William T. Monroe* and *Robert M. Debevec* for appellee.

Certiorari Granted. (See also No. 1288, *ante,* p. 819.)

No. 1373. OCALA STAR-BANNER CO. ET AL. *v.* DAMRON. Dist. Ct. App. Fla., 1st Dist. Certiorari granted and case set for oral argument immediately following No. 891 [certiorari granted, *ante,* p. 904]. *Harold B. Wahl* for petitioners. *Wallace Dunn* for respondent. Reported below: 221 So. 2d 459.

No. 1337. DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL. C. A. 7th Cir. Certiorari granted. *Lee A. Freeman* and *Lee A. Freeman, Jr.*, for petitioners. *H. Templeton Brown, Robert L. Stern,* and *Lee N. Abrams* for respondent William Morrow & Co., Inc., *W. Donald McSweeney* for respondents Bobbs-Merrill Co., Inc., et al., *Earl E. Pollock* for respondent Baker & Taylor Co., *Peter Gruenberger* for respondents Charles Scribner's Sons et al., *Conrad W. Oberdorfer* for respondent Houghton Mifflin Co., *Earl A. Jinkinson* for respondent Franklin Watts, Inc., *Edgar E. Barton* for respondent McGraw-Hill Book Co., *Leo Rosen* and *Roger Hunting* for respondents Thomas Y. Crowell Co. et al., *Samuel Weisbard* for respondent Golden Press, Inc., *Bruce Hecker* and *David P. List* for respondent Campbell & Hall, Inc., and *Nathan Blumberg* for respondent Follett Library Book Co. Reported below: 423 F. 2d 487.

No. 1383. EHLERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Mortimer H. Herzstein* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 332.

No. 380, Misc. GRIFFIN ET AL. *v.* BRECKENRIDGE ET AL. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. Reported below: 410 F. 2d 817.

*Certiorari Denied**

No. 1284. FLECK ET AL. *v.* CLEVELAND BAR ASSN. C. A. 6th Cir. Certiorari denied. *Bennet Kleinman* for petitioners. Reported below: 419 F. 2d 1040.

No. 1319. SHLOM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irwin Klein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Walters, Joseph M. Howard,* and *John M. Brant* for the United States. Reported below: 420 F. 2d 263.

No. 1327. OLPIN ET AL. *v.* IDEAL NATIONAL INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied. *Parker M. Nielson* and *J. Vernon Patrick, Jr.,* for petitioners. *David K. Watkiss* for respondents. Reported below: 419 F. 2d 1250.

No. 1329. GILL ET AL. *v.* DUNCAN ET AL. Ct. App. La., 4th Cir. Certiorari denied. *George M. Leppert* for petitioners. Reported below: 227 So. 2d 376 and 386.

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*[REPORTER'S NOTE: The order dated May 4, 1970, denying certiorari in No. 1337, *supra,* was revoked on the same date.]

No. 1321. GREENBERG *v.* DUNKER. Sup. Ct. La. Certiorari denied. *Gilbert P. Cohen* for petitioner. Reported below: 254 La. 1019, 229 So. 2d 83.

No. 1328. BELT & TERMINAL REALTY CO. ET AL. *v.* HOPKINS ET AL. Sup. Ct. Ohio. Certiorari denied. *David J. Hopkins, pro se,* and *James Easly* for Belt & Terminal Realty Co. et al., petitioners. *William F. Snyder* for respondents.

No. 1333. LENSKE ET AL. *v.* STEINBERG ET AL. C. A. 9th Cir. Certiorari denied. *Reuben Lenske, pro se,* and for other petitioners. Reported below: 415 F. 2d 711.

No. 1334. GRUNEBAUM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Walter Freedman* and *Michael I. Smith* for petitioners. *Solicitor General Griswold, Assistant Attorney General Walters, Stuart A. Smith,* and *David English Carmack* for respondent. Reported below: 420 F. 2d 332.

No. 1339. · COPELAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioner. *Solicitor General Griswold* for the United States.

No. 1352. TYMINSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry Mark Holzer* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 418 F. 2d 1060.

No. 1354. VYSE ET AL. *v.* LOWERY ET AL. Ct. App. N. Y. Certiorari denied. *Jay Leo Rothschild* for petitioners. *J. Lee Rankin, Stanley Buchsbaum,* and *Edmund B. Hennefeld* for respondents.

No. 1254. E. B. & A. C. WHITING CO. *v.* SHAW ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. *Irving M. Tullar* for petitioner. *Granville M. Pine* for respondents. Reported below: 417 F. 2d 1097.

No. 1366. LEAVY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Floyd V. Smith* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 1155.

No. 1322. MESILLA VALLEY FLYING SERVICE, INC. *v.* CESSNA FINANCE CORP. Sup. Ct. N. M. Motion to dispense with printing petition granted. Certiorari denied. *James A. Landon* for petitioner. Reported below: 81 N. M. 10, 462 P. 2d 144.

No. 1326. ALASKA *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Motion of Alaska Federation of Natives for leave to file a brief as *amicus curiae* granted. Certiorari denied. *G. Kent Edwards,* Attorney General of Alaska, and *Charles K. Cranston,* Assistant Attorney General, for petitioner. *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill,* and *Edmund B. Clark* for Hickel et al., and *Arthur Lazarus, Jr.,* and *Barry Jackson* for Native Village of Nenana, respondents. *Jay H. Topkis* on the motion for Alaska Federation of Natives as *amicus curiae* in opposition to the petition. Reported below: 420 F. 2d 938.

No. 1568, Misc. WOODS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1244, Misc. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Earl Faircloth,* Attorney General of Florida, and *Melvin Grossman,* Assistant Attorney General, for respondent. Reported below: 217 So. 2d 359.

No. 830, Misc. MCFARLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1200, Misc. MARINO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *B. Nathaniel Richter* for petitioner. *James D. Crawford* and *Arlen Specter* for respondent. Reported below: 435 Pa. 245, 255 A. 2d 911.

No. 1497, Misc. MARX *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Arlene Silverman,* Deputy Assistant Attorney General, for respondent.

No. 1709, Misc. MINK *v.* UPJOHN CO. Sup. Ct. Mich. Certiorari denied.

No. 1719, Misc. MCMURRY *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied.

No. 1723, Misc. STRICKLAND *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 1734, Misc. LASSITER *v.* UNITED STATES POSTAL DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1725, Misc. NISSLEY, ADMINISTRATRIX *v.* PENNSYLVANIA RAILROAD CO. Sup. Ct. Pa. Certiorari denied. *B. Nathaniel Richter* for petitioner. *George J. Miller* for respondent. Reported below: 435 Pa. 503, 259 A. 2d 451.

No. 1737, Misc. CARROLL *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1745, Misc. DURHAM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1748, Misc. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1770, Misc. HARRIS *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 417 F. 2d 479.

No. 1771, Misc. GILMORE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 2d 379.

No. 1774, Misc. RICHESON *v.* SHERIFF OF COLES COUNTY ET AL. Sup. Ct. Ill. Certiorari denied.

No. 1781, Misc. EPPERSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 7 Md. App. 464, 256 A. 2d 372.

No. 1791, Misc. SHUFORD *v.* STENOGRAPHER CLERK, CITY OF BUFFALO. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1790, Misc. STROBLE *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1807, Misc. DEMILLE *v.* ERICKSON. Sup. Ct. Utah. Certiorari denied. *Arthur H. Nielsen* and *David S. Cook* for petitioner. Reported below: 23 Utah 2d 278, 462 P. 2d 159.

No. 1811, Misc. DIAMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 1313.

No. 1812, Misc. CARRILLO *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. *O. R. Adams, Jr.,* for petitioner.

No. 1813, Misc. SMALL *v.* UNITED STATES BOARD OF PAROLE. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 421 F. 2d 1388.

No. 1814, Misc. RESERVA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *J. Perry Langford* for petitioner. Reported below: 2 Cal. App. 3d 151, 82 Cal. Rptr. 333.

No. 1815, Misc. BELTOWSKI *v.* YOUNG, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1817, Misc. VAUGHN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. *William J. Burrell* for petitioner. Reported below: 443 S. W. 2d 632.

No. 1833, Misc. JOHNSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 382 Mich. 632, 172 N. W. 2d 369.

No. 1843, Misc. LEHMAN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. *Gerald T. Foley, Jr.*, for petitioner. *James A. O'Neill* and *Henry Gorelick* for respondent.

No. 1854, Misc. STEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 183.

No. 1845, Misc. COLLINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Richard T. Conway* for petitioner. *Solicitor General Griswold* for the United States.

No. 1850, Misc. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Sam Sparks* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 421 F. 2d 669.

No. 1856, Misc. BECKETT *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. *Robert N. McAllister, Jr.*, for respondent.

No. 1858, Misc. MORALES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1860, Misc. SHERROD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied.

No. 1863, Misc. GUERRERO *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 1865, Misc. DISHMAN *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1868, Misc. VLADIKA *v.* GERNERT. C. A. 3d Cir. Certiorari denied.

No. 1879, Misc. REYES-MEZA DEPOLANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 422 F. 2d 1304.

Rehearing Denied

No. 1328, October Term, 1968. LEVIN ET AL. *v.* MISSOURI PACIFIC RAILROAD CO.; and

No. 1333, October Term, 1968. SLAYTON ET AL. *v.* MISSOURI PACIFIC RAILROAD CO., 395 U. S. 937. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 1900, Misc., October Term, 1968. RISPO *v.* PENNSYLVANIA, 395 U. S. 983, 396 U. S. 871. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 347. CAIN ET AL. *v.* KENTUCKY, *ante,* p. 319;

No. 852. STERNMAN *v.* UNITED STATES, *ante,* p. 907;

No. 1182. OHLSON ET AL. *v.* PHILLIPS ET AL., *ante,* p. 317;

No. 1204. MADOLE *v.* OKLAHOMA EX REL. DEPARTMENT OF HIGHWAYS OF OKLAHOMA, *ante,* p. 991;

No. 1238. TEMPLE *v.* NORTH CAROLINA STATE BAR, *ante,* p. 1023; and

No. 1332, Misc. REHFIELD *v.* UNITED STATES, *ante,* p. 996. Petitions for rehearing denied.

No. 825. HUTUL *v.* UNITED STATES, 396 U. S. 1012. Motion for leave to file petition for rehearing denied.

MAY 12, 1970

Dismissal Under Rule 60

No. 1768, Misc. ROBINSON ET AL. *v.* HACKNEY, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF TEXAS, ET AL. Appeal from D. C. S. D. Tex. Appeal dismissed pursuant to Rule 60 of the Rules of this Court. *Ed J. Polk* and *Peter E. Sitkin* for appellants. *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *W. O. Shultz II* and *John H. Banks,* Assistant Attorneys General, for appellees. Reported below: 307 F. Supp. 1249.

MAY 14, 1970

Miscellaneous Order

No. —. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY *v.* P. B. I. C., INC., ET AL. D. C. Mass. Stay heretofore issued by the United States District Court for the District of Massachusetts staying its injunction dated May 6, 1970, is extended through May 22, 1970. *Garrett H. Byrne, pro se, Robert H. Quinn,* Attorney General of Massachusetts, and *John J. Irwin, Jr.,* and *Lawrence P. Cohen,* Assistant Attorneys General, for applicant. *Harold Katz* in opposition. Reported below: 313 F. Supp. 757.

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ABSTENTION. See also **Procedure,** 1.

State constitutional question—Commercial salmon fishing licenses—Federal-state relations.—District Court should have abstained from deciding case on merits pending resolution of state constitutional question by Alaska courts, a procedure that could conceivably avoid any decision under the Fourteenth Amendment and any possible irritant in the federal-state relationship. Reetz v. Bozanich, p. 82.

ACCOUNTANTS' FEES. See **Taxes,** 2.

ADDRESSEES OF MAIL. See **Constitutional Law,** III, 2; V, 2.

ADEQUATE STATE GROUNDS. See **Pleas,** 3, 5; **Procedure,** 2.

ADMINISTRATION OF JUSTICE. See **Constitutional Law,** IX, 1–2; **Procedure,** 5.

ADMINISTRATIVE HEARINGS. See **Constitutional Law,** III, 2; V, 2.

ADMINISTRATIVE PROCEDURE. See also **Federal-State Relations; Indians; Judicial Review,** 4; **Jurisdiction,** 3; **Mootness; National Labor Relations Board,** 1–2; **Procedure,** 8; **Social Security Act,** 3.

1. *Department of Health, Education, and Welfare—Needy children—Income of man in the house.*—HEW regulation validly implements the Social Security Act since HEW could reasonably conclude that only a person as near as a real or adoptive father would be has the consensual relation to the family that makes it reliably certain that his income is actually available for support of the children in the household. Lewis v. Martin, p. 552.

2. *Interstate Commerce Commission — Agency rules — Compliance.*—These ICC rules are mere aids to exercise of agency's independent discretion and District Court exacted standard of compliance with these procedural rules that was wholly unnecessary to provide an adequate record to review the ICC's decision. American Farm Lines v. Black Ball, p. 532.

3. *Interstate Commerce Commission—Petitions for rehearing—Conflict with District Court.*—ICC's statutory jurisdiction to pass on petitions for rehearing may be exercised to add to or buttress its findings, absent any interference with or injunction from the

ADMINISTRATIVE PROCEDURE—Continued.

District Court. Here the ICC honored the court's stay order and reopened record merely to remedy a deficiency before any judicial review on merits had begun and acted in full harmony with that court's jurisdiction. American Farm Lines v. Black Ball, p. 532.

ADMINISTRATIVE PROCEDURE ACT. See **Bank Service Corporation Act of 1962; Food and Agriculture Act of 1965; Indians; Judicial Review,** 2, 4–5; **Standing to Sue,** 1–2.

ADMINISTRATIVE REMEDIES. See **Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 2.

ADMIRALTY. See also **Employer and Employees; Social Security Taxes.**

Captains and crews of fishing boats—Social security taxes—Employer and employees.—Status of captains and crews under Federal Insurance Contributions Act and Federal Unemployment Tax Act must in this instance be determined under the standards of maritime law, which is the common law of seafaring men. United States v. Webb., Inc., p. 179.

ADOPTIVE FATHERS. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 3.

ADVERTISEMENTS. See **Constitutional Law,** III, 2; V, 2.

ADVICE OF COUNSEL. See **Federal Kidnaping Act; Pleas,** 1–5; **Procedure,** 2.

ADVOCACY OF IDEAS. See **Constitutional Law,** VII; **Procedure,** 6.

AGENCY ACTION. See **Bank Service Corporation Act of 1962; Food and Agriculture Act of 1965; Judicial Review,** 2, 5; **Standing to Sue,** 1–2.

AGENCY RULES. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

AGGRIEVED PERSONS. See **Bank Service Corporation Act of 1962; Food and Agriculture Act of 1965; Judicial Review,** 2, 5; **Standing to Sue,** 1–2.

AGRICULTURAL PRODUCTS. See **Constitutional Law,** I, 1–2.

AGRICULTURAL PROGRAMS. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

AID TO FAMILIES WITH DEPENDENT CHILDREN. See **Administrative Procedure,** 1; **Constitutional Law,** III, 3; IV, 1; **Federal-State Relations; Judicial Review,** 1; **Jurisdiction,** 1–2; **Procedure,** 10; **Social Security Act,** 1–3.

ALABAMA. See **Labor**, 2; **Procedure**, 3.

ALASKA CONSTITUTION. See **Abstention**; **Procedure**, 1.

ALCOHOLIC BEVERAGES. See **Constitutional Law**, VIII.

ALLOTMENTS. See **Indians**; **Judicial Review**, 4.

ALTERNATIVE GROUNDS. See **Constitutional Law**, VII; **Procedure**, 6.

AMENDED REGULATIONS. See **Food and Agriculture Act of 1965**; **Judicial Review**, 5; **Standing to Sue**, 2.

APPEALS. See **Mootness**; **Procedure**, 8.

APPORTIONMENT. See **Constitutional Law**, IV, 2.

APPRAISAL LITIGATION. See **Taxes**, 2, 4.

APPRAISERS' FEES. See **Taxes**, 2.

ARIZONA FRUIT AND VEGETABLE STANDARDIZATION ACT. See **Constitutional Law**, I, 1–2.

ARKANSAS. See **Boundaries.**

ARKANSAS RIVER. See **Indian Treaties**; **Navigable Rivers.**

ARMY RECRUITING STATION. See **Constitutional Law**, VII; **Procedure**, 6.

ASSERTION OF PRIVILEGE. See **Constitutional Law**, IX, 1–2; **Procedure**, 5.

ASSIGNMENTS FOR RENT. See **Food and Agriculture Act of 1965**; **Judicial Review**, 5; **Standing to Sue**, 2.

ASSISTANCE TO CHILDREN. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 1–3.

ASSUMPTION OF INCOME. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 3.

ATTORNEY GENERAL. See **Constitutional Law**, III, 2; V, 2.

ATTORNEYS. See **Federal Kidnaping Act**; **Pleas**, 1–5; **Procedure**, 2.

ATTORNEYS' FEES. See **Taxes**, 2.

ATTRIBUTION. See **Taxes**, 6–7.

"AUTHORIZED" NOTICE OF LIEN. See **Taxes**, 3.

BALTIMORE. See **Constitutional Law**, VII; **Procedure**, 6.

BANKING SERVICES. See **Bank Service Corporation Act of 1962; Judicial Review,** 2; **Standing to Sue,** 1.

BANKRUPTCY ACT. See also **Taxes,** 5.

Federal tax claims—Priority of payment—Chapter X proceedings.—United States is entitled to absolute priority of payment of its tax claims under § 3466 of the Revised Statutes over other claimants in the reorganization here involved, there being no inconsistency between the terms of that section and the provisions of Chapter X of the Bankruptcy Act. United States v. Key, p. 322.

BANK SERVICE CORPORATION ACT OF 1962. See also **Judicial Review,** 2; **Standing to Sue,** 1.

Data processing service—Bank customers—Competition.—Interest sought to be protected by petitioners, which provide data processing services, is arguably within the zone of interests to be protected or regulated by the Act and petitioners are "aggrieved" persons under § 702 of the Administrative Procedure Act. Data Processing Service v. Camp, p. 150.

BEHAVIOR OF DEFENDANT. See **Constitutional Law,** X; **Trials.**

BENEFICIARIES OF ESTATES. See **Indians; Judicial Review,** 4.

BINDING AND GAGGING. See **Constitutional Law,** X; **Trials.**

BOARDS OF EDUCATION. See **Judicial Review,** 3; **School Desegregation.**

BOATS. See **Admiralty; Employer and Employees; Social Security Taxes.**

BONA FIDE PURCHASERS. See **Taxes,** 3.

BOUNDARIES.

Arkansas and Tennessee disputed area—Special Master's Report—Survey to be made.—Special Master's Report, recommending that disputed area along Mississippi River be declared part of Tennessee, is adopted, and Master is appointed as Commissioner to have boundary line surveyed and submitted to Court for approval. Arkansas v. Tennessee, p. 88.

BOYCOTT OF REGISTRATION. See **Constitutional Law,** V, 3; **Procedure,** 4.

BREACH OF DUTY. See **Damages; Labor,** 1, 3; **Procedure,** 9.

BURDEN ON INTERSTATE COMMERCE. See **Constitutional Law,** I, 1–2.

BUREAU OF INDIAN AFFAIRS. See **Indians; Judicial Review,** 4.

BURGLARY. See **Pleas,** 3, 5; **Procedure,** 2.

BUSINESS PURPOSES. See **Taxes,** 6–7.

CALIFORNIA. See **Administrative Procedure,** 1; **Constitutional Law,** I, 1-2; **Federal-State Relations; Social Security Act,** 3.

CAMPUS ACTIVITIES. See **Constitutional Law,** V, 3; **Procedure,** 4.

CANADA. See **Constitutional Law,** VI.

CANTALOUPES. See **Constitutional Law,** I, 1–2.

CAPITAL EXPENDITURES. See **Taxes,** 2, 4.

CAPITAL GAINS. See **Taxes,** 6–7.

CAPITAL OFFENSES. See **Federal Kidnaping Act; Pleas,** 1, 3, 5; **Procedure,** 2.

CAPTAINS AND CREWS. See **Admiralty; Employer and Employees; Social Security Taxes.**

CARRIERS. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

CASE OR CONTROVERSY. See **Bank Service Corporation Act of 1962; Food and Agriculture Act of 1965; Judicial Review,** 2, 5; **Standing to Sue,** 1–2.

CASH RENT. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

CERTIORARI. See **Constitutional Law,** V, 3; **Labor,** 2; **Procedure,** 3–4.

CHANGED CIRCUMSTANCES. See **Labor,** 2; **Procedure,** 3.

CHAPTER X PROCEEDINGS. See **Bankruptcy Act; Taxes,** 5.

CHARTERS. See **Taxes,** 2.

CHECKOFF CLAUSE. See **National Labor Relations Board,** 1.

CHEROKEE NATION. See **Indian Treaties; Navigable Rivers.**

CHICKASAW NATION. See **Indian Treaties; Navigable Rivers.**

CHILDREN. See **Administrative Procedure,** 1; **Constitutional Law,** IV, 1; **Evidence; Federal-State Relations; Social Security Act,** 1–3.

CHOCTAW NATION. See **Indian Treaties; Navigable Rivers.**

CHURCH-STATE RELATIONS. See **Constitutional Law,** V, 1; **Taxes,** 1.

CIVIL ACTIONS. See **Constitutional Law**, IX, 1–2; **Procedure**, 5.

CIVIL CONTEMPT. See **Constitutional Law**, X; **Trials.**

CLOSED CORPORATIONS. See **Taxes**, 6–7.

CODEFENDANTS. See **Constitutional Law**, IX, 1–2; **Federal Kidnaping Act**; **Pleas**, 1; **Procedure**, 5.

COERCED CONFESSIONS. See **Pleas**, 2, 4.

COERCED PLEAS. See **Federal Kidnaping Act**; **Pleas**, 1.

COINS. See **Constitutional Law**, VI.

COLLATERAL ESTOPPEL. See **Constitutional Law**, II, 2.

COLLATERAL RELIEF. See **Pleas**, 3, 5; **Procedure**, 2.

COLLECTIVE BARGAINING. See **National Labor Relations Board**, 1.

COLLEGE STUDENTS. See **Constitutional Law**, V, 3; **Procedure**, 4.

COMANCHE ALLOTMENTS. See **Indians**; **Judicial Review**, 4.

COMMERCE. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3; **National Labor Relations Board**, 1–2.

COMMERCE CLAUSE. See **Constitutional Law**, I.

COMMERCIAL FISHING BOATS. See **Admiralty**; **Employer and Employees**; **Social Security Taxes.**

COMMERCIAL FISHING LICENSES. See **Abstention**; **Procedure**, 1.

COMMISSIONER OF INTERNAL REVENUE. See **Taxes**, 2, 4.

"COMMON-LAW RULES." See **Admiralty**; **Employer and Employees**; **Social Security Taxes.**

COMPARATIVE NEGLIGENCE. See **Government Contracts.**

COMPELLING AGREEMENT. See **National Labor Relations Board**, 1.

COMPETENT COUNSEL. See **Federal Kidnaping Act**; **Pleas**, 1–5; **Procedure**, 2.

COMPETITION. See **Administrative Procedure**, 2–3; **Bank Service Corporation Act of 1962**; **Judicial Review**, 2; **Jurisdiction**, 3; **Standing to Sue**, 1.

COMPLAINT. See **Damages**; **Labor**, 1, 3; **Procedure**, 9.

COMPLIANCE ORDERS. See **Constitutional Law**, III, 2; V, 2.

COMPLIANCE WITH RULES. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

COMPTROLLER OF THE CURRENCY. See **Bank Service Corporation Act of 1962**; **Judicial Review**, 2; **Standing to Sue**, 1.

CONDEMNATION PROCEEDINGS. See **Constitutional Law**, IX, 1–2; **Federal Rules of Civil Procedure**; **Procedure**, 5.

CONDUCT OF TRIAL. See **Constitutional Law**, X; **Trials.**

CONFESSIONS. See **Pleas**, 2, 4.

CONFRONTATION. See **Constitutional Law**, IX, 1–2; X; **Procedure**, 5; **Trials.**

CONSOLIDATED DISTRICTS. See **Constitutional Law**, IV, 2.

CONSTITUTIONAL LAW. See also **Abstention**; **Evidence**; **Federal Rules of Civil Procedure**; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Pleas**, 3, 5; **Procedure**, 1–2; **School Desegregation**; **Social Security Act**, 1–2; **Taxes**, 1; **Trials.**

I. Commerce Clause.

1. *Arizona cantaloupes—Shipping across state lines.*—Arizona official's order prohibiting shipment of cantaloupes outside State unless in approved containers burdens interstate commerce since cantaloupes were destined to be shipped to ascertainable California location immediately after harvest, and application of challenged Arizona statute would require operation now conducted outside State to be performed within State so it can be regulated there. Pike v. Bruce Church, Inc., p. 137.

2. *Origin of cantaloupes—Shipping across state lines.*—Burden on interstate commerce imposed by Arizona official's order is unconstitutional since Arizona's minimal interest in identifying origin of appellee's superior cantaloupes to enhance reputation of Arizona producers cannot justify subjecting appellee to substantial capital expenditure of building and operating in Arizona a packing plant that it does not need. Pike v. Bruce Church, Inc., p. 137.

II. Double Jeopardy.

1. *Municipal ordinances and state crime—Identical offenses.*—State of Florida and its municipalities are not separate sovereign entities each entitled to impose punishment for the same alleged crime, as the judicial power of the municipal courts and state courts of general jurisdiction springs from the same organic law, and District Court of Appeal erred in holding that second trial in state court for the identical offense for which person was tried in a municipal court did not constitute double jeopardy. Waller v. Florida, p. 387.

CONSTITUTIONAL LAW—Continued.

2. *Trial for robbery—Identification of robbers—Collateral estoppel.*—Fifth Amendment guarantee against double jeopardy, applicable here through the Fourteenth Amendment by virtue of *Benton* v. *Maryland,* 395 U. S. 784, embodies collateral estoppel as a constitutional requirement. Since on record here jury in first trial determined by its verdict that petitioner was not one of robbers, the State under doctrine of collateral estoppel was constitutionally foreclosed from relitigating issue in another trial. Ashe v. Swenson, p. 436.

III. Due Process.

1. *Standard of proof—Juvenile delinquents.*—Proof beyond a reasonable doubt, which is required by the Due Process Clause in criminal trials, is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult. In re Winship, p. 358.

2. *Statute permitting addressee discretion to receive mail from particular sender.*—Statute that allows addressee unreviewable discretion to decide whether he wishes to receive further mail from particular sender comports with due process as it provides for an administrative hearing if sender violates Postmaster General's prohibitory order, and judicial hearing prior to issuance of any compliance order by a district court. Statute does not violate due process by requiring sender to remove complaining addressee from his mailing lists, and is not unconstitutionally vague, as sender knows precisely what he must do when he receives a prohibitory order. Rowan v. Post Office Dept., p. 728.

3. *Welfare benefits—Procedural due process.*—Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. Goldberg v. Kelly, p. 254; Wheeler v. Montgomery, p. 280.

IV. Equal Protection of the Laws.

1. *Maryland's maximum grant regulation—Aid to families with dependent children.*—Maryland's maximum grant regulation does not violate the Equal Protection Clause. The concept of overbreadth is not pertinent to state regulation in the social and economic field, and the regulation is rationally supportable and free from invidious discrimination since it furthers the State's legitimate interest in encouraging employment and in maintaining equitable balance between welfare families and families of the working poor. Dandridge v. Williams, p. 471.

CONSTITUTIONAL LAW—Continued.

2. *Trustees of junior college districts—Unequal districts.*—When state or local government selects persons by popular election to perform public functions, the Equal Protection Clause requires that each qualified voter have equal opportunity to participate in the election, and when members of elected body are chosen from separate districts, each district must be established on basis that as far as practicable will insure that equal numbers of voters can vote for proportionally equal numbers of officials. Hadley v. Junior College District, p. 50.

V. First Amendment.

1. *Establishment and Free Exercise Clauses—Tax exemptions.*—The First Amendment tolerates neither governmentally established religion nor governmental interference with religion. Freedom from taxation for two centuries has not led to an established church or religion and on the contrary has helped to guarantee the free exercise of all forms of religious beliefs. Walz v. Tax Commission, p. 664.

2. *Right to communicate—Addressee's discretion to receive further material.*—Statute (39 U. S. C. § 4009) which allows addressee unreviewable discretion to decide whether he wishes to receive any further material from a particular sender is constitutional, as vendor does not have constitutional right to send unwanted material into someone's home, and mailer's right to communicate must stop at mailbox of unreceptive addressee. Rowan v. Post Office Dept., p. 728.

3. *Suspension of university student—Certiorari dismissed.*—Writ of certiorari to determine if indefinite suspension from state university where petitioner was student violated his First Amendment rights dismissed as improvidently granted since it developed that suspension was partly based on finding that he lied at hearing on charges against him. Jones v. Board of Education, p. 31.

VI. Fourth Amendment.

Detention of packages—First class mail.—A 29-hour detention of packages, not subject to discretionary inspection since the type of mailing was first class, occasioned mainly by time differential in obtaining information about an addressee before a search warrant was obtained, is not "unreasonable" under the Fourth Amendment. United States v. Van Leeuwen, p. 249.

VII. Freedom of Speech.

Disorderly conduct—Alternative grounds.—Petitioners' convictions for violating Maryland's disorderly conduct statute stemming from

CONSTITUTIONAL LAW—Continued.

demonstration protesting Vietnam conflict must be set aside, as jury's general verdict, in light of judge's instructions, could have rested on several grounds, including "the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area," and a conviction on that ground would violate constitutional protection for advocacy of unpopular ideas. Bachellar v. Maryland, p. 564.

VIII. Search and Seizure.

Liquor licensees—Forcible entries.—Congress, which has broad authority to fashion standards of reasonableness for searches and seizures respecting the liquor industry, has made it an offense under 26 U. S. C. § 7342 for liquor licensee to refuse admission to a federal inspector, a sanction that precludes forcible entries without a warrant. Colonnade Corp. v. United States, p. 72.

IX. Self-Incrimination.

1. *Corporate officer—Assertion of privilege.*—Corporate officer, who was not barred from asserting his privilege against self-incrimination because the corporation had no privilege of its own or because the proceeding was civil rather than criminal, failed to assert his privilege and cannot now claim that he was forced to testify against himself. United States v. Kordel, p. 1.

2. *Right of confrontation—Corporate officer.*—Corporate officer who answered no interrogatories and did not assert the privilege, can hardly claim compulsory self-incrimination; and he cannot claim that his right to confrontation was violated by use in criminal case against him of his codefendant's admissions, which were never introduced into evidence. United States v. Kordel, p. 1.

X. Sixth Amendment.

Right of confrontation—Removal of defendant from courtroom.—Defendant can lose right to be present at trial, if, following judge's warning that he will be removed if his disruptive behavior continues, he nevertheless insists on conducting himself in such manner that trial cannot proceed if he remains in courtroom. On facts here trial judge did not abuse his discretion, respondent through his disruptive behavior having lost his right of confrontation under the Sixth and Fourteenth Amendments. Illinois v. Allen, p. 337.

CONTEMPT. See **Constitutional Law, X; Trials.**

CONTINUING OFFENSE. See **Selective Service Act; Statute of Limitations.**

CONTRACT LIABILITY CLAUSE. See **Government Contracts.**

CONTRACTORS. See **Government Contracts.**

CONTRACTS. See **National Labor Relations Board,** 1.

CONTRIBUTORY NEGLIGENCE. See **Government Contracts.**

CORPORATE CHARTERS. See **Taxes,** 2.

CORPORATE OFFICERS. See **Constitutional Law,** IX, 1–2; **Procedure,** 5.

CORPORATIONS. See **Constitutional Law,** IX, 1–2; **Procedure,** 5; **Taxes,** 2, 4, 6–7.

COSTS OF LITIGATION. See **Taxes,** 4.

COTTON FARMERS. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

COUNSEL. See **Constitutional Law,** III, 3; **Federal Kidnaping Act; Pleas,** 1–5; **Procedure,** 2.

COURSE OF PLANNING. See **Federal Rules of Civil Procedure; Procedure,** 7.

COURT ORDERS. See **Judicial Review,** 3; **School Desegregation.**

COURTROOM BEHAVIOR. See **Constitutional Law,** X; **Trials.**

COURTS. See **Constitutional Law,** II, 1.

CREDITORS. See **Taxes,** 4.

CREDITORS' CLAIMS. See **Bankruptcy Act; Taxes,** 5.

CREWS OF FISHING BOATS. See **Admiralty; Employer and Employees; Social Security Taxes.**

CREWS OF FOREIGN SHIPS. See **National Labor Relations Board,** 2.

CRIMINAL CONTEMPT. See **Constitutional Law,** X; **Trials.**

CRIMINAL LAW. See **Constitutional Law,** II, 1–2; III, 1; VI–X; **Evidence; Federal Kidnaping Act; Pleas,** 1–5; **Procedure,** 2, 5–6; **Selective Service Act; Statute of Limitations; Trials.**

CRUISE SHIPS. See **National Labor Relations Board,** 2.

CUSTOMER OBSTRUCTION. See **Labor,** 2; **Procedure,** 3.

CUSTOMS OFFICIALS. See **Constitutional Law,** VI.

DAMAGES. See also **Government Contracts; Labor,** 1, 3; **Procedure,** 9.

Suit against union—Breach of duty of fair representation—Employer.—Union can be sued alone for breach of its duty of fair representation, and it cannot complain if separate actions are brought against it and the employer for the portion of total damages caused by each where the union and the employer have independently caused damage to the employees. Czosek v. O'Mara, p. 25.

DATA PROCESSING SERVICE. See **Bank Service Corporation Act of 1962; Judicial Review,** 2; **Standing to Sue,** 1.

DAUGHTERS. See **Indians; Judicial Review,** 4.

DEATH PENALTY. See **Federal Kidnaping Act; Pleas,** 1, 3, 5; **Procedure,** 2.

DEBTOR AND CREDITORS. See **Bankruptcy Act; Taxes,** 5.

DECEDENTS' ESTATES. See **Indians; Judicial Review,** 4.

DECEPTIVE PACKAGING. See **Constitutional Law,** I, 1–2.

DECLARATORY JUDGMENTS. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

DEDUCTIONS. See **Taxes,** 2, 4.

DEFENSE TRANSPORTATION. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

DELAYS. See **Constitutional Law,** VI.

DELETION FROM MAILING LISTS. See **Constitutional Law,** III, 2; V, 2.

DEMONSTRATIONS. See **Constitutional Law,** VII; **Procedure,** 6.

DEPARTMENT OF DEFENSE. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Administrative Procedure,** 1; **Constitutional Law,** IV, 1; **Federal-State Relations; Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 1–3.

DEPARTMENT OF THE INTERIOR. See **Indians; Judicial Review,** 4.

DEPENDENT CHILDREN. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 1–3.

DESEGREGATION. See **Judicial Review,** 3; **School Desegregation.**

DETENTION OF MAIL. See **Constitutional Law,** VI.

DEVISE OF INDIAN ALLOTMENTS. See **Indians; Judicial Review,** 4.

DILUTION OF VOTES. See **Constitutional Law,** IV, 2.

DISAPPROVAL OF WILL. See **Indians; Judicial Review,** 4.

DISCOVERY. See **Constitutional Law,** IX, 1–2; **Procedure,** 5.

DISCRETION. See **Administrative Procedure,** 2–3; **Constitutional Law,** III, 2; V, 2; **Jurisdiction,** 3.

DISCRETIONARY INSPECTION. See **Constitutional Law**, VI.

DISCRETION OF JUDGES. See **Constitutional Law**, X; **Trials.**

DISCRIMINATION. See **Damages**; **Judicial Review**, 3; **Labor**, 1, 3; **Pleas**, 3, 5; **Procedure**, 2, 9; **School Desegregation.**

DISINHERITANCE OF DAUGHTER. See **Indians**; **Judicial Review**, 4.

DISORDERLY CONDUCT. See **Constitutional Law**, VII; **Procedure**, 6.

DISPUTED AREAS. See **Boundaries.**

DISRUPTIVE BEHAVIOR. See **Constitutional Law**, X; **Trials.**

DISSENTING SHAREHOLDERS. See **Taxes**, 4.

DISTRIBUTION OF LEAFLETS. See **Constitutional Law**, VII; **Procedure**, 6.

DISTRIBUTIONS. See **Taxes**, 6–7.

DISTRICT COURTS. See **Abstention**; **Administrative Procedure**, 2–3; **Constitutional Law**, III, 2; V, 2; **Judicial Review**, 1; **Jurisdiction**, 1–3; **Procedure**, 1; **Social Security Act**, 2.

DISTRICTS. See **Constitutional Law**, IV, 2.

DIVIDENDS. See **Taxes**, 6–7.

DOUBLE JEOPARDY. See **Constitutional Law**, II.

DRAFT. See **Selective Service Act**; **Statute of Limitations.**

DUAL SCHOOL SYSTEMS. See **Judicial Review**, 3; **School Desegregation.**

DUE PROCESS. See **Constitutional Law**, III; **Evidence**; **Procedure**, 10.

DUES CHECKOFF. See **National Labor Relations Board**, 1.

DUTY OF FAIR REPRESENTATION. See **Damages**; **Labor**, 1, 3; **Procedure**, 9.

DUTY TO REGISTER. See **Selective Service Act**; **Statute of Limitations.**

ECONOMIC INJURY. See **Bank Service Corporation Act of 1962**; **Judicial Review**, 2; **Standing to Sue**, 1.

ELECTIONS. See **Constitutional Law**, IV, 2.

EMINENT DOMAIN. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

EMPLOYER AND EMPLOYEES. See also **Admiralty; Damages; Government Contracts; Labor,** 1–3; **National Labor Relations Board,** 1–2; **Procedure,** 3, 8–9; **Social Security Taxes.**

Social security taxes—Captains and crews of fishing boats—Maritime law.—Status of captains and crews under the Federal Insurance Contributions Act and Federal Unemployment Tax Act must in this instance be determined under the standards of maritime law, which is the common law of seafaring men. United States v. Webb, Inc., p. 179.

ENHANCEMENT IN VALUE. See **Federal Rules of Civil Procedure; Procedure,** 7.

ENROLLMENT STATISTICS. See **Judicial Review,** 3; **School Desegregation.**

ENTRIES. See **Constitutional Law,** VIII.

EQUAL PROTECTION OF THE LAWS. See **Abstention; Constitutional Law,** IV; **Judicial Review,** 1, 3; **Jurisdiction,** 2–3; **Pleas,** 3, 5; **Procedure,** 2; **School Desegregation; Social Security Act,** 1–2.

EQUITABLE STANDARDS. See **Bankruptcy Act; Taxes,** 5.

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ERIE LACKAWANNA RAILROAD. See **Damages; Labor,** 1, 3; **Procedure,** 9.

EROTICALLY AROUSING. See **Constitutional Law,** III, 2; V, 2.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** V, 1; **Taxes,** 1.

EVIDENCE. See also **Constitutional Law,** III, 1; V, 3; **Procedure,** 4.

Juvenile delinquents—N. Y. Family Court Act—Standard of proof.—Proof beyond a reasonable doubt, which is required by the Due Process Clause in criminal trials, is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult. In re Winship, p. 358.

EVIDENTIARY HEARINGS. See **Constitutional Law,** III, 3; **Procedure,** 10.

EXAMINER OF INHERITANCE. See **Indians; Judicial Review,** 4.

EXCLUSIVE JURISDICTION. See **National Labor Relations Board,** 2.

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EXHAUSTION OF ADMINISTRATIVE REMEDIES. See **Damages; Judicial Review,** 1; **Jurisdiction,** 1–2; **Labor,** 1, 3; **Procedure,** 9; **Social Security Act,** 2.

EXPENSES OF APPRAISAL. See **Taxes,** 2.

EXPRESSION OF VIEWS. See **Constitutional Law,** VII; **Procedure,** 6.

EXTENSION OF CHARTER. See **Taxes,** 2.

FACULTY INTEGRATION. See **Judicial Review,** 3; **School Desegregation.**

FAILURE TO REGISTER. See **Selective Service Act; Statute of Limitations.**

FAIR HEARINGS. See **Constitutional Law,** III, 3; **Procedure,** 10.

FAIR MARKET VALUE. See **Federal Rules of Civil Procedure; Procedure,** 7.

FAIR REPRESENTATION. See **Damages; Labor,** 1, 3; **Procedure,** 9.

FAIR VALUE. See **Taxes,** 4.

FAMILY ALLOWANCES. See **Constitutional Law,** III, 3; IV, 1; **Judicial Review,** 1; **Jurisdiction,** 1–2; **Procedure,** 10; **Social Security Act,** 1–3.

FAMILY COURT ACT. See **Constitutional Law,** III, 1; **Evidence.**

FARMERS. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

FEDERAL COURTS. See **Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 2.

FEDERAL EMINENT DOMAIN. See **Federal Rules of Civil Procedure; Procedure,** 7.

FEDERAL FOOD, DRUG, AND COSMETIC ACT. See **Constitutional Law,** IX, 1–2; **Procedure,** 5.

FEDERAL INSPECTORS. See **Constitutional Law,** VIII.

FEDERAL INSURANCE CONTRIBUTIONS ACT. See **Admiralty; Employer and Employees; Social Security Taxes.**

FEDERAL KIDNAPING ACT. See also **Pleas,** 1.

Plea of guilty—Avoidance of death penalty—Voluntariness.—Though *United States* v. *Jackson,* 390 U. S. 570, prohibits imposition of death penalty under 18 U. S. C. § 1201 (a), it does not hold that all guilty pleas encouraged by fear of possible death are involuntary, nor does it invalidate such pleas whether involuntary or not. Brady v. United States, p. 742.

FEDERALLY ASSISTED PROGRAMS. See **Constitutional Law**, III, 3; IV, 1; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Procedure**, 10; **Social Security Act**, 1–3.

FEDERAL RULES OF CIVIL PROCEDURE. See also **Procedure**, 7.

Jury trial—Eminent domain proceedings—Just compensation.—Right to jury trial afforded by Rule 71A (h) in federal eminent domain proceeding on issue of just compensation does not extend to question whether condemned "lands were probably within the scope of the project from the time the Government was committed to it" (either by the original plans or during the course of planning or original construction), and that question is for the trial judge to decide. United States v. Reynolds, p. 14.

FEDERAL-STATE RELATIONS. See also **Abstention; Administrative Procedure**, 1; **Constitutional Law**, IV, 1; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Labor**, 2; **National Labor Relations Board**, 2; **Pleas**, 3, 5; **Procedure**, 1–3; **Social Security Act**, 1–3; **Taxes**, 3, 5.

Social Security Act—Aid to families with dependent children—Income of man in the house.—California, which is foreclosed from arguing that the assumption-of-income provisions comport with the Act as applied to MARS (man assuming role of spouse), may seek to show on remand only that those provisions may be retained under the Act as applied to nonadoptive stepfathers if it can demonstrate that their legal obligation under state law is consistent with that under federal law. Lewis v. Martin, p. 552.

FEDERAL TAX CLAIMS. See **Bankruptcy Act; Taxes**, 5.

FEDERAL TAX LIENS. See **Taxes**, 3.

FEDERAL TORT CLAIMS ACT. See **Government Contracts.**

FEDERAL UNEMPLOYMENT TAX ACT. See **Admiralty; Employer and Employees; Social Security Taxes.**

FEES. See **Taxes**, 2.

FIFTH AMENDMENT. See **Constitutional Law**, IX, 1–2; **Federal Rules of Civil Procedure; Procedure**, 5.

FILING OF TAX LIENS. See **Taxes**, 3.

FINAL ADJUDICATION. See **Mootness; Procedure**, 8.

FINANCIAL AID. See **Constitutional Law**, III, 3; IV, 1; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Procedure**, 10; **Social Security Act**, 1–3.

FIRST AMENDMENT. See **Constitutional Law,** V; VII; **Procedure,** 4, 6; **Taxes,** 1.

FIRST CLASS MAIL. See **Constitutional Law,** VI.

FIRST-DEGREE BURGLARY. See **Pleas,** 3, 5; **Procedure,** 2.

FISCAL RELATIONSHIP. See **Constitutional Law,** V, 1; **Taxes,** 1.

FISHING AREAS. See **Abstention; Procedure,** 1.

FISHING BOATS. See **Admiralty; Employer and Employees; Social Security Taxes.**

FIXED-PRICE CONTRACTS. See **Government Contracts.**

FLORIDA. See **Constitutional Law,** II, 1; **National Labor Relations Board,** 2.

FOOD AND AGRICULTURE ACT OF 1965. See also **Judicial Review,** 5; **Standing to Sue,** 2.

Tenant farmers—Zone of protected interests—Administrative Procedure Act.—Petitioners are clearly within the zone of interests protected by the Act and they are persons "aggrieved by agency action within the meaning of a relevant statute," as set forth in § 702 of the Administrative Procedure Act. The statutory scheme evinces a congressional intent that there may be judicial review of the action of the Secretary of Agriculture in amending the regulation. Barlow v. Collins, p. 159.

FOOD AND DRUG ADMINISTRATION. See **Constitutional Law,** IX, 1–2; **Procedure,** 5.

FOOD, DRUG, AND COSMETIC ACT. See **Constitutional Law,** IX, 1–2; **Procedure,** 5.

FORCIBLE ENTRIES. See **Constitutional Law,** VIII.

FORECLOSURE OF LIENS. See **Taxes,** 3.

FOREIGN-FLAG SHIPS. See **National Labor Relations Board,** 2.

FOURTEENTH AMENDMENT. See **Abstention; Constitutional Law,** II–IV; V, 1, 3; VII; X; **Evidence; Judicial Review,** 1, 3; **Jurisdiction,** 1–2; **Pleas,** 3, 5; **Procedure,** 1–2, 4, 6, 10; **School Desegregation; Social Security Act,** 1–3; **Taxes,** 1; **Trials.**

FOURTH AMENDMENT. See **Constitutional Law,** VI; VIII.

FREEDOM FROM TAXATION. See **Constitutional Law,** V, 1; **Taxes,** 1.

FREEDOM OF SPEECH. See **Constitutional Law,** V, 2–3; VII; **Procedure,** 4, 6.

FREEDOM TO COMMUNICATE. See **Constitutional Law**, III, 2; V, 2.

FREE EXERCISE OF RELIGION. See **Constitutional Law**, V, 1; **Taxes**, 1.

FRUIT. See **Constitutional Law**, I, 1–2.

GENERAL VERDICTS. See **Constitutional Law**, VII; **Procedure**, 6.

GOLD COINS. See **Constitutional Law**, VI.

GOOD-FAITH PURCHASERS. See **Taxes**, 3.

GOVERNMENT COMMITMENT. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

GOVERNMENT CONTRACTS.

Injury to employee—Indemnification—Comparative negligence.—Though the Government under the contract clause involved here cannot recover for its own negligence, it is entitled to indemnity from the contractor on a comparative basis to the extent that it can prove that the contractor's negligence contributed to the employee's injuries. United States v. Seckinger, p. 203.

GRAND JURIES. See **Pleas**, 3, 5; **Procedure**, 2.

GRAND LARCENY. See **Constitutional Law**, II, 1.

GRAND RIVER. See **Indian Treaties**; **Navigable Rivers.**

GUILTY PLEAS. See **Federal Kidnaping Act**; **Pleas**, 1, 3, 5; **Procedure**, 2.

HABEAS CORPUS. See **Pleas**, 2, 4.

HEARINGS. See **Constitutional Law**, III, 2–3; V, 2–3; **Pleas**, 2, 4; **Procedure**, 4, 10.

HEIRS. See **Indians**; **Judicial Review**, 4.

HOME RELIEF PROGRAM. See **Constitutional Law**, III, 3; **Procedure**, 10.

HOTEL COMPANY MERGERS. See **Taxes**, 4.

IDENTICAL OFFENSES. See **Constitutional Law**, II, 1.

IDENTIFICATION OF ROBBERS. See **Constitutional Law**, II, 2.

ILLEGAL IMPORTATION. See **Constitutional Law**, VI.

ILLINOIS. See **Constitutional Law**, X; **Trials.**

IMPORTATION OF COINS. See **Constitutional Law**, VI.

INCOME. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 3.

INCOME TAXES. See **Taxes**, 2, 4, 6–7.

INDEMNIFICATION. See **Government Contracts.**

INDIANS. See also **Judicial Review**, 4.

Devise of allotments—Disapproval of will by Secretary of the Interior.—Whatever may be the scope of the Secretary's power under 25 U. S. C. § 373, there is nothing in the statute, its history, or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects an Indian testator's rational testamentary scheme simply because of a subjective feeling that the disposition was not "just and equitable." On this record the disapproval was arbitrary and capricious. Tooahnippah v. Hickel, p. 598.

INDIAN TREATIES. See also **Navigable Rivers.**

Land grants—Title to river beds—Arkansas River.—Under various treaties and patents issued thereunder, petitioner Indian Nations received title to land underlying the navigable portion of the Arkansas River from its confluence with the Grand River in Oklahoma to the Oklahoma-Arkansas border, contrary to the claims of Oklahoma and other respondents. Choctaw Nation v. Oklahoma, p. 620.

INDICTMENTS. See **Pleas**, 3, 5; **Procedure**, 2.

INGRESS AND EGRESS. See **Labor**, 2; **Procedure**, 3.

INJUNCTIONS. See **Administrative Procedure**, 2–3; **Constitutional Law**, I, 1–2; III, 2; V, 2; **Jurisdiction**, 3; **Labor**, 2; **Mootness**; **National Labor Relations Board**, 2; **Procedure**, 8; **Taxes**, 1.

INJURY. See **Bank Service Corporation Act of 1962**; **Government Contracts**; **Judicial Review**, 2; **Standing to Sue**, 1.

IN REM ACTIONS. See **Constitutional Law**, IX, 1–2; **Procedure**, 5.

INSOLVENCY. See **Bankruptcy Act**; **Taxes**, 5.

INSPECTION OF MAIL. See **Constitutional Law**, VI.

INSPECTORS. See **Constitutional Law**, VIII.

INSTRUCTIONS TO JURY. See **Constitutional Law**, VII; **Procedure**, 6.

INTEGRATION. See **Judicial Review**, 3; **School Desegregation.**

INTERIOR DEPARTMENT. See **Indians**; **Judicial Review**, 4.

INTERNAL REVENUE CODE. See **Taxes**, 3, 6–7.

INTERROGATORIES. See **Constitutional Law**, IX, 1–2; **Procedure**, 5.

INTERSTATE COMMERCE. See **Constitutional Law**, I, 1–2.

INTERSTATE COMMERCE COMMISSION. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

INVOLVEMENT BETWEEN CHURCH AND STATE. See **Constitutional Law**, V, 1; **Taxes**, 1.

IOWA. See **Taxes**, 2.

JUDGE'S INSTRUCTIONS. See **Constitutional Law**, VII; **Procedure**, 6.

JUDICIAL REVIEW. See also **Administrative Procedure**, 2–3; **Bank Service Corporation Act of 1962**; **Food and Agriculture Act of 1965**; **Indians**; **Jurisdiction**, 1–3; **Mootness**; **Procedure**, 8; **School Desegregation**; **Social Security Act**, 2; **Standing to Sue**, 1–2.

1. *Challenge by welfare recipients—New York welfare law—Duty of federal courts.*—Congress has not foreclosed judicial review to welfare recipients who are most directly affected by the administration of the program and it is the duty of the federal courts to resolve disputes as to whether federal funds allocated to States for welfare programs are properly expended. Rosado v. Wyman, p. 397.

2. *Comptroller of the Currency ruling—Banking services—Competition.*—Congress did not preclude judicial review of the Comptroller's rulings as to scope of activities statutorily available to national banks. Data Processing Service v. Camp, p. 150.

3. *Court of Appeals — School desegregation — Memphis public schools.*—Court of Appeals erred in substituting its finding that the Board of Education is not now operating a dual school system for the District Court's contrary findings which were based on substantial evidence. Northcross v. Bd. of Education, p. 232.

4. *Indian wills—Disapproval by Secretary of the Interior.*—The Secretary's disapproval of an Indian's will is subject to judicial review, as there is no language in 25 U. S. C. § 373 (enacted as § 2 of the Act of June 25, 1910) evincing an intention to make the Secretary's action unreviewable, and the finality language of § 1 of the 1910 Act cannot be carried over to the other sections of that Act. Tooahnippah v. Hickel, p. 598.

5. *Tenant farmers—Amended agricultural regulation—Administrative Procedure Act.*—Petitioners are clearly within the zone of interests protected by the Food and Agriculture Act of 1965 and

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they are persons "aggrieved by agency action within the meaning of a relevant statute," as set forth in § 702 of the Administrative Procedure Act. The statutory scheme evinces a congressional intent that there may be judicial review of the action of the Secretary of Agriculture in amending the regulation. Barlow v. Collins, p. 159.

JUNIOR COLLEGE DISTRICTS. See **Constitutional Law,** IV, 2.

JUNIOR CREDITORS. See **Bankruptcy Act; Taxes,** 5.

JURISDICTION. See also **Administrative Procedure,** 2–3; **Constitutional Law,** II, 1; **Judicial Review,** 1; **National Labor Relations Board,** 1–2; **Pleas,** 3, 5; **Procedure,** 2; **Social Security Act,** 2.

1. *District Court—Challenge to New York welfare law—Administrative procedure.*—District Judge properly did not decline jurisdiction to allow HEW to resolve controversy, as neither "exhaustion of administrative remedies" nor "primary jurisdiction" doctrine is applicable here. Petitioners do not seek review of an administrative ruling nor could they have obtained such ruling since HEW does not permit welfare recipients to trigger or participate in review of state welfare programs. Rosado v. Wyman, p. 397.

2. *District Court—Federal statutory challenge to New York welfare law—Pendent claim.*—Jurisdiction over primary claim at all stages of the litigation is not prerequisite to resolution of the pendent claim, and mootness of equal protection claim does not eliminate jurisdiction of District Judge over pendent statutory claim. Rosado v. Wyman, p. 397.

3. *Interstate Commerce Commission—Petitions for rehearing—Interference with District Court.*—ICC's statutory jurisdiction to pass on petitions for rehearing may be exercised to add to or buttress its findings, absent any interference with or injunction from the District Court. Here the ICC honored the court's stay order and reopened record merely to remedy a deficiency before any judicial review on merits had begun and acted in full harmony with that court's jurisdiction. American Farm Lines v. Black Ball, p. 532.

JURY'S VERDICT. See **Constitutional Law,** VII; **Procedure,** 6.

JURY TRIAL. See **Federal Rules of Civil Procedure; Procedure,** 7.

JUST COMPENSATION. See **Federal Rules of Civil Procedure; Procedure,** 7.

JUVENILE DELINQUENTS. See **Constitutional Law,** III, 1; **Evidence.**

KANSAS CITY SCHOOL DISTRICT. See **Constitutional Law,** IV, 2.

KIDNAPING. See **Federal Kidnaping Act; Pleas,** 1.

LABOR. See also **Damages; Mootness; National Labor Relations Board,** 1–2; **Procedure,** 3, 8–9.

1. *Duty of fair representation—Damages—Employer.*—Union can be sued alone for breach of its duty of fair representation, and it cannot complain if separate actions are brought against it and the employer for the portion of total damages caused by each where the union and the employer have independently caused damage to the employees. Czosek v. O'Mara, p. 25.

2. *Picketing — Only remnant of original controversy — Obscure record.*—In light of obscure record, the physical circumstances of the narrow sidewalk, the state court's finding of customer obstruction by picketing, together with the fact that only a bare remnant of the original controversy still exists, writ of certiorari is dismissed as improvidently granted. Taggart v. Weinacker's, Inc., p. 223.

3. *Railway Labor Act—Union's duty of fair representation.*—Employees' complaint against the union was sufficient to survive motion to dismiss. Claim for breach of union's duty of fair representation is discrete claim, being distinct from right of individual employees under the Act to pursue their employer before the Adjustment Board. Czosek v. O'Mara, p. 25.

LAND GRANTS. See **Indian Treaties; Navigable Rivers.**

LANDLORD AND TENANTS. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

LARCENY. See **Constitutional Law,** III, 1; **Evidence.**

LARGE FAMILIES. See **Constitutional Law,** IV, 1; **Social Security Act,** 1.

LEGAL DUTY OF SUPPORT. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 3.

LIBERIAN SHIPS. See **National Labor Relations Board,** 2.

LICENSES. See **Constitutional Law,** VIII.

LICENSES TO FISH. See **Abstention; Procedure,** 1.

LIENS. See **Taxes,** 3.

LIQUOR LICENSEES. See **Constitutional Law,** VIII.

LITIGATION COSTS. See **Taxes,** 4.

LONGSHOREMEN. See **National Labor Relations Board,** 2.

LYING AT HEARING. See **Constitutional Law**, V, 3; **Procedure**, 4.

MAIL. See **Constitutional Law**, VI.

MAILING LISTS. See **Constitutional Law**, III, 2; V, 2.

MAIL ORDER BUSINESSES. See **Constitutional Law**, III, 2; V, 2.

MAJORITY SHAREHOLDERS. See **Taxes**, 4.

"MAKING A CROP." See **Food and Agriculture Act of 1965**; **Judicial Review**, 5; **Standing to Sue**, 2.

MALAPPORTIONMENT. See **Constitutional Law**, IV, 2.

MAN ASSUMING ROLE OF SPOUSE. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 3.

MAN IN THE HOUSE. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 3.

MARITIME LAW. See **Admiralty**; **Employer and Employees**; **Social Security Taxes.**

MARKET VALUE. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

MARYLAND. See **Constitutional Law**, IV, 1; VII; **Procedure**, 6; **Social Security Act**, 1.

MASTER AND SERVANTS. See **Admiralty**; **Employer and Employees**; **Social Security Taxes.**

MAXIMUM GRANTS. See **Constitutional Law**, IV, 1; **Social Security Act**, 1.

MEMPHIS. See **Judicial Review**, 3; **School Desegregation.**

MENHADEN. See **Admiralty**; **Employer and Employees**; **Social Security Taxes.**

MERGERS. See **Taxes**, 4.

MICHIGAN. See **Taxes**, 3.

MILITARY DRAFT. See **Selective Service Act**; **Statute of Limitations.**

MINERAL RIGHTS. See **Indian Treaties**; **Navigable Rivers.**

MINORITY SHAREHOLDERS. See **Taxes**, 4.

MINORS. See **Constitutional Law**, III, 1; **Evidence.**

MISSISSIPPI RIVER. See **Boundaries.**

MISSOURI. See **Constitutional Law**, IV, 2.

MOOTNESS. See also **Judicial Review,** 1; **Jurisdiction,** 2–3; **Procedure,** 8; **Social Security Act,** 2.

National Labor Relations Act—Injunctive relief—Regional Director.—Since any injunctive relief to which petitioner company might have been entitled under § 10 (*l*) of the Act terminated "upon final adjudication of the Board," albeit respondent union is seeking judicial review of the order, the question whether petitioner or only the Regional Director could appeal the denial of an injunction is moot. Sears, Roebuck v. Carpet Layers, p. 655.

MOTION TO DISMISS. See **Damages; Labor,** 1, 3; **Procedure,** 9.

MOTION TO QUASH INDICTMENT. See **Pleas,** 3, 5; **Procedure,** 2.

MOTOR CARRIERS. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

MUNICIPAL COURTS. See **Constitutional Law,** II, 1.

MUNICIPAL ORDINANCES. See **Constitutional Law,** II, 1.

MURALS. See **Constitutional Law,** II, 1.

NARROW SIDEWALKS. See **Labor,** 2; **Procedure,** 3.

NATIONAL BANK ACT. See **Bank Service Corporation Act of 1962; Judicial Review,** 2; **Standing to Sue,** 1.

NATIONAL BANKS. See **Bank Service Corporation Act of 1962; Judicial Review,** 2; **Standing to Sue,** 1.

NATIONAL LABOR RELATIONS ACT. See **Mootness; Procedure,** 8.

NATIONAL LABOR RELATIONS BOARD.

1. *Collective bargaining contract — Require negotiations — No power to compel agreement.*—Though the NLRB has power under the National Labor Relations Act to require employers and employees to negotiate, it does not have power to compel either to agree to any substantive contractual provision, here a dues checkoff clause. Porter Co. v. NLRB, p. 99.

2. *Jurisdiction—Foreign-flag ships—Longshoremen at American docks.*—Since this dispute centered on wages to be paid American longshoremen working on American docks and did not concern ships' "internal discipline and order," it was not within scope of "maritime operations of foreign-flag ships," which are outside jurisdiction of NLRB. Petitioner's peaceful primary picketing arguably constituted protected activity under § 7 of the National Labor Relations Act and thus the NLRB's jurisdiction was exclusive and pre-empted that of the Florida courts. Longshoremen v. Ariadne Co., p. 195.

NATIONAL RAILROAD ADJUSTMENT BOARD. See **Damages; Labor,** 1, 3; **Procedure,** 9.

NAVIGABLE RIVERS. See also **Indian Treaties.**

Land grants—Indian treaties—Title to river beds.—Under various treaties and patents issued thereunder, petitioner Indian Nations received title to land underlying the navigable portion of the Arkansas River from its confluence with the Grand River in Oklahoma to the Oklahoma-Arkansas border, contrary to the claims of Oklahoma and other respondents. Choctaw Nation v. Oklahoma, p. 620.

NEEDY CHILDREN. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 3.

NEGLIGENCE. See **Government Contracts.**

NEGOTIATIONS. See **National Labor Relations Board,** 1.

NEGROES. See **Judicial Review,** 3; **Pleas,** 3, 5; **Procedure,** 2; **School Desegregation.**

NEW YORK. See **Constitutional Law,** III, 1, 3; V, 1; **Evidence; Judicial Review,** 1; **Jurisdiction,** 1–2; **Pleas,** 2, 4; **Procedure,** 10; **Social Security Act,** 2; **Taxes,** 1, 4.

NEW YORK CITY. See **Constitutional Law,** V, 1; **Taxes,** 1.

NIECES. See **Indians; Judicial Review,** 4.

NONADOPTIVE STEPFATHERS. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 3.

NORTH CAROLINA. See **Pleas,** 3, 5; **Procedure,** 2.

NOTICE AND HEARING. See **Constitutional Law,** III, 3; **Procedure,** 10.

NOTICE OF TAX LIENS. See **Taxes,** 3.

OBLIGATION OF SUPPORT. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 3.

OBSCURE RECORD. See **Labor,** 2; **Procedure,** 3.

OBSTRUCTING CUSTOMERS. See **Labor,** 2; **Procedure,** 3.

OFFENSES. See **Constitutional Law,** II, 1.

OKLAHOMA. See **Indian Treaties; Navigable Rivers.**

OLD-AGE BENEFITS. See **Constitutional Law,** III, 3.

"ONE MAN, ONE VOTE." See **Constitutional Law,** IV, 2.

ORDINANCES. See **Constitutional Law,** II, 1.

ORDINARY EXPENSES. See **Taxes,** 2, 4.

ORIGINAL CONSTRUCTION. See **Federal Rules of Civil Procedure; Procedure**, 7.

ORIGINAL JURISDICTION. See **Boundaries.**

ORIGIN OF CLAIM. See **Taxes**, 2.

OVERBREADTH. See **Constitutional Law**, IV, 1; **Social Security Act**, 1.

PACKAGES. See **Constitutional Law**, VI.

PACKING SHEDS. See **Constitutional Law**, I, 1–2.

PANAMANIAN SHIPS. See **National Labor Relations Board**, 2.

PANDERING ADVERTISEMENTS. See **Constitutional Law**, III, 2; V, 2.

PARENTS. See **Administrative Procedure**, 1; **Federal-State Relations; Social Security Act**, 3.

PATENTS TO LANDS. See **Indian Treaties; Navigable Rivers.**

PAYMENT OF TAX CLAIMS. See **Bankruptcy Act; Taxes**, 5.

PEACEFUL PICKETING. See **National Labor Relations Board**, 2.

PENALTIES. See **Federal Kidnaping Act; Pleas**, 1.

PENDENT CLAIMS. See **Judicial Review**, 1; **Jurisdiction**, 1–2; **Social Security Act**, 2.

PERPETUAL EXTENSION OF CHARTER. See **Taxes**, 2.

PETITIONS FOR REHEARING. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

PICKETING. See **Labor**, 2; **Mootness; National Labor Relations Board**, 2; **Procedure**, 3, 8.

PLANS OF DESEGREGATION. See **Judicial Review**, 3; **School Desegregation.**

PLEAS. See also **Federal Kidnaping Act; Procedure**, 2.

1. *Plea of guilty—Avoidance of death penalty—Validity.*—Plea of guilty is not invalid merely because entered to avoid possibility of death penalty, and here petitioner's plea met the standard of voluntariness as it was made "by one fully aware of the direct consequences," and was made after advice by competent counsel. Fact that petitioner did not anticipate *United States* v. *Jackson*, 390 U. S. 570, does not impugn truth or reliability of that plea. Brady v. United States, p. 742.

2. *Plea of guilty—Coerced confessions—Habeas corpus.*—Competently counseled defendant who alleges that he pleaded guilty be-

PLEAS—Continued.

cause of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus. McMann v. Richardson, p. 759.

3. *Plea of guilty—Confession—Advice of counsel.*—On the record here petitioner's guilty plea was an intelligent plea not open to attack on ground that his counsel misjudged the admissibility of petitioner's confession. Parker v. North Carolina, p. 790.

4. *Plea of guilty—Risk of error—Advice of counsel.*—Defendant who pleads guilty does so under law then existing and assumes risk of ordinary error in either his or his attorney's assessment of the law and facts; and here fact that counsel did not anticipate *Jackson* v. *Denno,* 378 U. S. 368, and did not consider invalid New York's existing procedures does not mean that advice was incompetent. McMann v. Richardson, p. 759.

5. *Plea of guilty—Voluntariness of plea—Capital offense.*—An otherwise valid plea is not involuntary because induced by defendant's desire to limit possible maximum penalty in capital case to less than that authorized if there is a jury trial. Parker v. North Carolina, p. 790.

PLUMBING CONTRACTORS. See **Government Contracts.**

POKER PLAYERS. See **Constitutional Law,** II, 2.

POST-CONVICTION RELIEF. See **Federal Kidnaping Act; Pleas,** 1.

POSTMASTER GENERAL. See **Constitutional Law,** III, 2; V, 2.

POST OFFICES. See **Constitutional Law,** VI.

PRE-EMPTION. See **National Labor Relations Board,** 2.

PREFERRED STOCK. See **Taxes,** 6–7.

PREPONDERANCE OF EVIDENCE. See **Constitutional Law,** III, 1; **Evidence.**

PRESENCE AT TRIAL. See **Constitutional Law,** X; **Trials.**

PRESIDENTIAL PROCLAMATIONS. See **Selective Service Act; Statute of Limitations.**

PRE-TERMINATION HEARINGS. See **Constitutional Law,** III, 3; **Procedure,** 10.

PRIMARY JURISDICTION. See **Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 2.

PRIMARY PURPOSE. See **Taxes,** 2, 4.

PRIOR HEARINGS. See **Constitutional Law**; III, 3; **Procedure**, 10.

PRIORITY OF PAYMENTS. See **Bankruptcy Act**; **Taxes**, 5.

PRIORITY OF TAX CLAIMS. See **Bankruptcy Act**; **Taxes**, 5.

PRIORITY OF TAX LIENS. See **Taxes**, 3.

PROCEDURAL DUE PROCESS. See **Constitutional Law**, III, 3; **Procedure**, 10.

PROCEDURE. See also **Abstention**; **Administrative Procedure**, 2–3; **Bank Service Corporation Act of 1962**; **Constitutional Law**, II, 1–2; III, 1, 3; V, 3; VII; IX, 1–2; X; **Damages**; **Evidence**; **Federal Kidnaping Act**; **Federal Rules of Civil Procedure**; **Indians**; **Judicial Review**, 1–2; **Jurisdiction**, 1–3; **Labor**, 1–3; **Mootness**; **Pleas**, 3, 5; **Social Security Act**, 2; **Standing to Sue**, 1; **Trials.**

1. *Abstention—State constitutional question—Alaska salmon fishing licenses—Federal-state relations.*—District Court should have abstained from deciding case on merits pending resolution of state constitutional question by Alaska courts, a procedure that could conceivably avoid any decision under the Fourteenth Amendment and any possible irritant in the federal-state relationship. Reetz v. Bozanich, p. 82.

2. *Attack on grand jury composition—North Carolina procedure—Adequate state ground.*—North Carolina procedural law furnished an adequate basis for refusal of court below to consider petitioner's racial-exclusion claim regarding composition of grand jury that indicted him. Parker v. North Carolina, p. 790.

3. *Certiorari—Obscure record—Only remnant of original controversy.*—In light of obscure record, the physical circumstances of the narrow sidewalk, the state court's finding of customer obstruction by picketing, together with the fact that only a bare remnant of the original controversy still exists, writ of certiorari is dismissed as improvidently granted. Taggart v. Weinacker's, Inc., p. 223.

4. *Certiorari—Suspension of university student—First Amendment claim.*—Writ of certiorari to determine if indefinite suspension from state university where petitioner was student violated his First Amendment rights dismissed as improvidently granted since it developed that suspension was partly based on finding that he lied at hearing on charges against him. Jones v. Board of Education, p. 31.

5. *Civil condemnation proceeding—Interrogatories—Use in criminal trial.*—On this record, in case involving issue of use of interroga-

PROCEDURE—Continued.

tories to obtain evidence in nearly contemporaneous civil proceeding, respondents have not established violation of due process or departure from proper standards in administration of justice requiring exercise of Court's supervisory power. United States v. Kordel, p. 1.

6. *Disorderly conduct statute—Alternative grounds—Freedom of speech.*—Petitioners' convictions for violating Maryland's disorderly conduct statute stemming from demonstration protesting Vietnam conflict must be set aside, as jury's general verdict, in light of judge's instructions, could have rested on several grounds, including "the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area," and a conviction on that ground would violate constitutional protection for advocacy of unpopular ideas. Bachellar v. Maryland, p. 564.

7. *Eminent domain proceedings—Jury trial—Just compensation.*—Right to jury trial afforded by Rule of Civil Procedure 71A (h) in federal eminent domain proceeding on issue of just compensation does not extend to question whether condemned "lands were probably within the scope of the project from the time the Government was committed to it" (either by the original plans or during the course of planning or original construction), and that question is for the trial judge to decide. United States v. Reynolds, p. 14.

8. *National Labor Relations Act—Appeal from denial of injunctive relief—Mootness.*—Since any injunctive relief to which petitioner company might have been entitled under § 10 (*l*) of the Act terminated "upon final adjudication of the Board," albeit respondent union is seeking judicial review of the order, the question whether petitioner or only the Regional Director could appeal the denial of an injunction is moot. Sears, Roebuck v. Carpet Layers, p. 655.

9. *Suit against union—Breach of duty of fair representation—Railway Labor Act.*—Employees' complaint against the union was sufficient to survive motion to dismiss. Claim for breach of union's duty of fair representation is discrete claim, being distinct from right of individual employees under the Act to pursue their employer before the Adjustment Board. Czosek v. O'Mara, p. 25.

10. *Termination of welfare payments—Pre-termination hearing—Procedural due process.*—Procedural due process requires that a pre-termination evidentiary hearing be provided welfare recipient whose relief payments are to be terminated. Such hearing need not take form of a trial, but recipient must have timely and ade-

PROCEDURE—Continued.

quate notice detailing reasons for termination, effective opportunity to defend by confronting adverse witnesses and by presenting arguments and evidence orally before an impartial decisionmaker, and must be allowed to retain counsel if he so desires. Goldberg v. Kelly, p. 254.

PROHIBITORY ORDERS. See **Constitutional Law**, III, 2; V, 2.

PROOF BEYOND REASONABLE DOUBT. See **Constitutional Law**, III, 1; **Evidence.**

PROPERTY TAXES. See **Constitutional Law**, V, 1; **Taxes**, 1.

PROTECTED INTERESTS. See **Bank Service Corporation Act of 1962**; **Judicial Review**, 2; **Standing to Sue**, 1.

PROTEST MARCHERS. See **Constitutional Law**, VII; **Procedure**, 6.

PUBLIC ASSISTANCE. See **Constitutional Law**, III, 3; IV, 1; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Procedure**, 10; **Social Security Act**, 1–3.

PUBLIC OFFICIALS. See **Constitutional Law**, IV, 2.

PUBLIC SCHOOLS. See **Judicial Review**, 3; **School Desegregation.**

PUBLIC SIDEWALKS. See **Labor**, 2; **Procedure**, 3.

PUBLIC WELFARE. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 3.

PUNISHMENT. See **Federal Kidnaping Act**; **Pleas**, 1.

PURCHASE OF STOCK. See **Taxes**, 2.

PURCHASERS OF REALTY. See **Taxes**, 3.

PUTATIVE DAUGHTERS. See **Indians**; **Judicial Review**, 4.

RACIAL DISCRIMINATION. See **Pleas**, 3, 5; **Procedure**, 2.

RAILROAD EMPLOYEES. See **Damages**; **Labor**, 1, 3; **Procedure**, 9.

RAILWAY LABOR ACT. See **Damages**; **Labor**, 1, 3; **Procedure**, 9.

REAL PROPERTY. See **Federal Rules of Civil Procedure**; **Indian Treaties**; **Navigable Rivers**; **Procedure**, 7; **Taxes**, 3.

"REAL VALUE." See **Taxes**, 2.

REASONABLE TIME. See **Constitutional Law**, VI.

RECIPIENTS OF WELFARE. See **Administrative Procedure**, 1; **Constitutional Law**, III, 3; IV, 1; **Federal-State Relations**; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Procedure**, 10; **Social Security Act**, 1–3.

RECONSIDERATION. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

RECONSTRUCTION FINANCE CORPORATION LOAN. See **Taxes**, 6–7.

RECORD. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3; **Labor**, 2; **Procedure**, 3.

RECORDATION OF LIENS. See **Taxes**, 3.

RECREATIONAL FACILITIES. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

RECRUITING STATION. See **Constitutional Law**, VII; **Procedure**, 6.

REDEMPTION OF STOCK. See **Taxes**, 6–7.

REFUSAL TO BARGAIN. See **National Labor Relations Board**, 1.

REGIONAL DIRECTOR. See **Mootness**; **Procedure**, 8.

REGIONAL SOLICITOR. See **Indians**; **Judicial Review**, 4.

REGISTER OF DEEDS. See **Taxes**, 3.

REGISTRATION. See **Selective Service Act**; **Statute of Limitations.**

REGULATIONS. See **Administrative Procedure**, 1; **Federal-State Relations**; **Food and Agriculture Act of 1965**; **Judicial Review**, 5; **Social Security Act**, 3; **Standing to Sue**, 2.

REHEARINGS. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

RELIEF. See **Administrative Procedure**, 1; **Federal-State Relations**; **Social Security Act**, 3.

RELIEF PROGRAMS. See **Constitutional Law**, III, 3; IV, 1; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Procedure**, 10; **Social Security Act**, 1–2.

RELIGIOUS ORGANIZATIONS. See **Constitutional Law**, V, 1; **Taxes**, 1.

REMEDIES. See **Damages**; **Government Contracts**; **Labor**, 1, 3; **Procedure**, 9.

REMOVAL FROM COURTROOM. See **Constitutional Law**, X; **Trials.**

REOPENING RECORD. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

REORGANIZATION PLANS. See **Bankruptcy Act**; **Taxes**, 5.

REPRESENTATION. See **Damages**; **Labor**, 1, 3; **Procedure**, 9.

REPUTATION OF PRODUCERS. See **Constitutional Law**, I, 1–2.

RESERVOIRS. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

RESTRAINING ORDERS. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

RETROACTIVITY. See **Constitutional Law**, II, 2.

RFC LOAN. See **Taxes**, 6–7.

RIGHT OF CONFRONTATION. See **Constitutional Law**, IX, 1–2; X; **Procedure**, 5; **Trials.**

RIVER BEDS. See **Indian Treaties**; **Navigable Rivers.**

ROBBERY. See **Constitutional Law**, II, 2; X; **Trials.**

RULES. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

RULES OF ATTRIBUTION. See **Taxes**, 6–7.

RULES OF CIVIL PROCEDURE. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

ST. PETERSBURG. See **Constitutional Law**, II, 1.

SALE OF PREFERRED STOCK. See **Taxes**, 6–7.

SALMON FISHING. See **Abstention**; **Procedure**, 1.

SCHOOL DESEGREGATION. See also **Judicial Review**, 3.

Desegregation plans—Court orders—Memphis public schools.—Court of Appeals erred (1) in substituting its finding that the Board is not now operating a dual system for the District Court's contrary findings which were based on substantial evidence; (2) in ruling prematurely that the Board had converted to a unitary system, since neither revised plan nor school zones and enrollment figures were properly before it for review; and (3) in holding that *Alexander* v. *Holmes County Board*, 396 U. S. 19, is inapplicable to this case. Northcross v. Bd. of Education, p. 232.

SCHOOL DISTRICTS. See **Constitutional Law**, IV, 2.

SCHOOL ENUMERATION. See **Constitutional Law**, IV, 2.

SCOPE OF THE PROJECT. See **Federal Rules of Civil Procedure**; **Procedure**, 7.

SEAFARERS. See **Admiralty; Employer and Employees; Social Security Taxes.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VI; VIII.

SEARCH OF PACKAGES. See **Constitutional Law,** VI.

SEARCH WARRANTS. See **Constitutional Law,** VI; VIII.

SECONDARY PICKETING. See **Mootness; Procedure,** 8.

SECRETARY OF AGRICULTURE. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

SECRETARY OF THE INTERIOR. See **Indians; Judicial Review,** 4.

SECRETARY OF THE TREASURY. See **Bankruptcy Act; Taxes,** 5.

SEGREGATION. See **Judicial Review,** 3; **School Desegregation.**

SELECTIVE SERVICE ACT. See also **Statute of Limitations.**

Failure to register—Statute of limitations—Not a continuing offense.—The offense of failing to register as required by § 3 of the Universal Military Training and Service Act is not a continuing one but was committed by petitioner's failure to register within five days of his 18th birthday, when the statute of limitations began to run. Toussie v. United States, p. 112.

SELF-INCRIMINATION. See **Constitutional Law,** IX; **Procedure,** 5.

SENTENCES. See **Federal Kidnaping Act; Pleas,** 1.

SEXUALLY PROVOCATIVE. See **Constitutional Law,** III, 2; V, 2.

SHIPPERS. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

SIDEWALKS. See **Labor,** 2; **Procedure,** 3.

SIXTH AMENDMENT. See **Constitutional Law,** IX, 1–2; X; **Procedure,** 5; **Trials.**

SIZE OF FAMILIES. See **Constitutional Law,** IV, 1; **Social Security Act,** 1.

SOCIAL SECURITY ACT. See also **Administrative Procedure,** 1; **Constitutional Law,** III, 3; IV, 1; **Federal-State Relations; Judicial Review,** 1; **Jurisdiction,** 1–2; **Procedure,** 10.

1. *Aid to families with dependent children—Maryland's maximum grant regulation.*—Maryland's maximum grant regulation is not barred by the Act, as a State has great latitude in dispensing its available funds, and given Maryland's finite resources available

SOCIAL SECURITY ACT—Continued.

for public welfare, it is not prevented by the Act from sustaining as many families as it can and providing the largest families with somewhat less than their ascertained per capita standard of need. Dandridge v. Williams, p. 471.

2. *Aid to families with dependent children—New York welfare law—Standards of need.*—New York's program is incompatible with § 402 (a) (23) of the Act and petitioners are entitled to an injunction by the District Court against payment of federal monies according to the State's new schedules, should New York not develop a conforming plan within a reasonable time. Rosado v. Wyman, p. 397.

3. *Aid to families with dependent children—Parents—Duty of support.*—AFDC aid can be granted under the Act if "a parent" of the needy child is continually absent from the home, the term "parent" including only a person with a legal duty of support. Lewis v. Martin, p. 552.

SOCIAL SECURITY TAXES. See also **Admiralty; Employer and Employees.**

Captains and crews of fishing boats—Employer and employees—Maritime law.—Status of captains and crews under the Federal Insurance Contributions Act and Federal Unemployment Tax Act must in this instance be determined under the standards of maritime law, which is the common law of seafaring men. United States v. Webb, Inc., p. 179.

SOCIAL SERVICES LAW. See **Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 2.

SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT. See **Food and Agriculture Act of 1965; Judicial Review,** 5; **Standing to Sue,** 2.

SOLE STOCKHOLDER. See **Taxes,** 6–7.

SOVEREIGN ENTITIES. See **Constitutional Law,** II, 1.

SPECIAL GRANTS. See **Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 2.

SPECIAL MASTER. See **Boundaries.**

STANDARD OF PROOF. See **Constitutional Law,** III, 1; **Evidence.**

STANDARDS OF NEED. See **Constitutional Law,** IV, 1; **Judicial Review,** 1; **Jurisdiction,** 1–2; **Social Security Act,** 1–2.

STANDARDS OF REASONABLENESS. See **Constitutional Law,** VIII.

STANDING TO SUE. See also **Bank Service Corporation Act of 1962; Food and Agriculture Act of 1965; Judicial Review,** 2, 5.

1. *Case or controversy—Data processing service—Banks.*—Petitioners, which provide data processing services, satisfy the "case" or "controversy" test of Article III of the Constitution, as they allege that the banks' competition causes them economic injury. Data Processing Service v. Camp, p. 150.

2. *Case or controversy—Tenant farmers—Amended agricultural regulation.*—Petitioners, who are tenant farmers eligible for payments under the upland cotton program enacted as part of the Food and Agriculture Act of 1965 and who challenge an amended regulation that permits assignment of the payments to secure "payment of cash rent," have the personal stake and interest that impart the concrete adverseness required by Article III of the Constitution. Barlow v. Collins, p. 159.

STATE BOUNDARIES. See **Boundaries.**

STATE COURTS. See **Constitutional Law,** II, 1.

STATE OF ORIGIN. See **Constitutional Law,** I, 1–2.

STATE'S FISCAL BURDENS. See **Constitutional Law,** III, 3; IV, 1; **Procedure,** 10; **Social Security Act,** 1.

STATE UNIVERSITIES. See **Constitutional Law,** V, 3; **Procedure,** 4.

STATE WELFARE PROGRAMS. See **Constitutional Law,** III, 3; IV, 1; **Judicial Review,** 1; **Jurisdiction,** 1–2; **Procedure,** 10; **Social Security Act,** 1–2.

STATUTE OF LIMITATIONS. See also **Selective Service Act.**

Criminal law—Failure to register for the draft—Not a continuing offense.—The offense of failing to register as required by § 3 of the Universal Military Training and Service Act is not a continuing one but was committed by petitioner's failure to register within five days of his 18th birthday, when the statute of limitations began to run. Toussie v. United States, p. 112.

STAY ORDERS. See **Administrative Procedure,** 2–3; **Jurisdiction,** 3.

STEPFATHERS. See **Administrative Procedure,** 1; **Federal-State Relations; Social Security Act,** 3.

STEVEDORES. See **National Labor Relations Board,** 2.

STOCKHOLDERS. See **Taxes,** 2, 4.

STUDENTS. See **Constitutional Law**, V, 3; **Procedure**, 4.

SUBSTANDARD WAGE RATES. See **National Labor Relations Board**, 2.

SUPERIOR PRODUCTS. See **Constitutional Law**, I, 1–2.

SUPPORT. See **Administrative Procedure**, 1; **Federal-State Relations; Social Security Act**, 3.

SUPREME COURT.

Assignment of Mr. Justice Reed (retired) to United States Court of Claims, p. 981.

SURVEY OF BOUNDARY. See **Boundaries.**

SUSPENSIONS FROM UNIVERSITY. See **Constitutional Law**, V, 3; **Procedure**, 4.

TAXES. See also **Admiralty; Bankruptcy Act; Constitutional Law**, V, 1; **Employer and Employees; Social Security Taxes.**

1. *Exemption of religious organizations—Establishment of religion.*—Legislative purpose of tax exemptions is not aimed at establishing, sponsoring, or supporting religion, and New York's legislation simply spares the exercise of religion from the burden of property taxation levied on private profit institutions. Walz v. Tax Commission, p. 664.

2. *Expenses of stock appraisal—Capital expenditures—Deductions.*—Expenses incurred by majority stockholders of Iowa corporation, who voted for perpetual extension of corporate charter and became obliged to purchase at "real value" stock of minority shareholder who voted against extension, for appraisal litigation must be treated as part of cost in acquiring stock rather than ordinary expenses since appraisal proceeding was merely substitute provided by state law for process of negotiation to fix purchase price. Standard is origin of claim litigated rather than taxpayers' "primary purpose" in incurring appraisal litigation expenses. Woodward v. Commissioner, p. 572.

3. *Federal tax lien—Recordation in District Court—Good-faith purchasers of realty.*—Government's tax lien was properly filed in District Court and was thus entitled to priority. Any reliance that good-faith purchasers of realty placed on lower court's construction of § 3672 of the Internal Revenue Code, which the Government never accepted and which this Court rejected in *U. S. v. Union Central Life Ins. Co.*, 368 U. S. 291, would not, on these facts, foreclose applicability of that decision here. United States v. Estate of Donnelly, p. 286.

TAXES—Continued.

4. *Litigation expenses—Appraisal of stock—Passage of title.*—Litigation costs arising out of acquisition of capital asset are capital expenses whether or not taxpayer incurred them for purpose of defending or protecting title, and the functional nature of appraisal remedy as a forced purchase of dissenting stockholders' shares is the same, regardless of whether title passes before or after price of stock was determined. United States v. Hilton Hotels, p. 580.

5. *Priority of payment of federal tax claims—Bankruptcy Act—Chapter X proceeding.*—United States is entitled to absolute priority of payment of its tax claims under § 3466 of the Revised Statutes over other claimants in the reorganization here involved, there being no inconsistency between the terms of that section and the provisions of Chapter X of the Bankruptcy Act. United States v. Key, p. 322.

6. *Redemption of stock—Sole stockholder—Capital gains treatment.*—Regardless of business purpose, redemption is always "essentially equivalent to a dividend" within meaning of § 302 (b)(1) of the Internal Revenue Code if it does not change shareholder's proportionate interest in the corporation. Since taxpayer here (after application of attribution rules) was the corporation's sole shareholder both before and after redemption he did not qualify for capital gains treatment under that test. United States v. Davis, p. 301.

7. *Rules of attribution—Redemption of stock—Sole stockholder.*—Attribution rules of § 318 (a) of the Internal Revenue Code apply to all of § 302, and for purpose of deciding whether distribution here is "not essentially equivalent to a dividend" under § 302 (b)(1), taxpayer must be deemed owner of all shares of company's common stock. United States v. Davis, p. 301.

TAX EXEMPTIONS. See **Constitutional Law**, V, 1; **Taxes**, 1.

TAX LIENS. See **Taxes**, 3.

TEMPORARY OPERATING AUTHORITY. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

TEMPORARY RESTRAINING ORDERS. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

TENANT FARMERS. See **Food and Agriculture Act of 1965; Judicial Review**, 5; **Standing to Sue**, 2.

TENNESSEE. See **Boundaries; Judicial Review**, 3; **School Desegregation.**

TENNESSEE A. & I. STATE UNIVERSITY. See **Constitutional Law**, V, 3; **Procedure**, 4.

TERMINATION OF WELFARE. See **Constitutional Law**, III, 3; **Procedure**, 10.

TESTATORS. See **Indians; Judicial Review**, 4.

TESTIMONY. See **Constitutional Law**, II, 2.

THREE-JUDGE COURTS. See **Administrative Procedure**, 1–3; **Constitutional Law**, III, 2; V, 2; **Federal-State Relations; Judicial Review**, 1; **Jurisdiction**, 1–3; **Social Security Act**, 2–3.

TIME DIFFERENTIALS. See **Constitutional Law**, VI.

TIMELY WARRANTS. See **Constitutional Law**, VI.

TITLE TO RIVER BEDS. See **Indian Treaties; Navigable Rivers.**

TITLE TO STOCK. See **Taxes**, 4.

TORTFEASORS. See **Government Contracts.**

TRANSFER PLANS. See **Judicial Review**, 3; **School Desegregation.**

TRANSPORTATION. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

TREATIES WITH INDIANS. See **Indian Treaties; Navigable Rivers.**

TREATY OF DANCING RABBIT CREEK. See **Indian Treaties; Navigable Rivers.**

TREATY OF NEW ECHOTA. See **Indian Treaties; Navigable Rivers.**

TRESPASS. See **Labor**, 2; **Procedure**, 3.

TRIAL BY JURY. See **Federal Rules of Civil Procedure; Procedure**, 7.

TRIAL COURTS. See **Constitutional Law**, VII; **Procedure**, 6.

TRIAL JUDGES. See **Constitutional Law**, X; **Federal Rules of Civil Procedure; Procedure**, 7; **Trials.**

TRIALS. See also **Constitutional Law**, X.

Criminal law — Defendant's disruptive conduct — Discretion of judge.—Trial judge confronted by defendant's disruptive conduct can exercise discretion to meet circumstances of case; and there are at least three constitutionally permissible approaches for handling

TRIALS—Continued.

obstreperous defendant: (1) bind and gag him as last resort; (2) cite him for criminal or civil contempt; or (3) remove him from courtroom, while trial continues, until he promises to conduct himself properly. Illinois v. Allen, p. 337.

TRUCKING SERVICE. See **Administrative Procedure**, 2–3; **Jurisdiction**, 3.

TRUSTEES. See **Constitutional Law**, IV, 2.

UNEQUAL DISTRICTS. See **Constitutional Law**, IV, 2.

UNFAIR LABOR PRACTICES. See **Mootness**; **National Labor Relations Board**, 1; **Procedure**, 8.

UNIONS. See **Damages**; **Labor**, 1–3; **Mootness**; **National Labor Relations Board**, 1–2; **Procedure**, 3, 8–9.

UNITARY SCHOOL SYSTEMS. See **Judicial Review**, 3; **School Desegregation.**

UNIVERSAL MILITARY TRAINING AND SERVICE ACT. See **Selective Service Act**; **Statute of Limitations.**

UNIVERSITY STUDENTS. See **Constitutional Law**, V, 3; **Procedure**, 4.

UNPOPULAR IDEAS. See **Constitutional Law**, VII; **Procedure**, 6.

UNREASONABLE DETENTION OF MAIL. See **Constitutional Law**, VI.

UPLAND COTTON PROGRAM. See **Food and Agriculture Act of 1965**; **Judicial Review**, 5; **Standing to Sue**, 2.

VAGUENESS. See **Constitutional Law**, III, 2; V, 2.

VALUE OF STOCK. See **Taxes**, 4.

VERDICT OF JURY. See **Constitutional Law**, II, 2.

VERDICTS. See **Constitutional Law**, VII; **Procedure**, 6.

VIETNAM. See **Constitutional Law**, VII; **Procedure**, 6.

VOLUNTARINESS OF PLEAS. See **Federal Kidnaping Act**; **Pleas**, 1, 3, 5; **Procedure**, 2.

VOTERS. See **Constitutional Law**, IV, 2.

WAGE RATES. See **National Labor Relations Board**, 2.

WAIVERS. See **Pleas**, 2, 4.

WARRANTLESS SEARCHES. See **Constitutional Law**, VIII.

WARRANTS. See **Constitutional Law**, VI.

WELFARE OFFICIALS. See **Constitutional Law**, III, 3; **Procedure**, 10.

WELFARE PAYMENTS. See **Administrative Procedure**, 1; **Constitutional Law**, III, 3; IV, 1; **Federal-State Relations**; **Judicial Review**, 1; **Jurisdiction**, 1–2; **Procedure**, 10; **Social Security Act**, 1–3.

WILLS OF INDIANS. See **Indians**; **Judicial Review**, 4.

WORDS.

1. *"Common law rules."* 26 U. S. C. §§ 3121 (d) and 3306 (i). United States v. Webb, Inc., p. 179.

2. *"Employee."* 26 U. S. C. §§ 3121 (d) and 3306 (i). United States v. Webb, Inc., p. 179.

3. *"Essentially equivalent to a dividend."* Internal Revenue Code § 302 (b)(1), 26 U. S. C. § 302 (b)(1). United States v. Davis, p. 301.

4. *"Making a crop."* § 8 (g) Soil Conservation and Domestic Allotment Act, 16 U. S. C. § 590h (g). Barlow v. Collins, p. 159.

5. *"Pending final adjudication of the Board."* § 10 (*l*) National Labor Relations Act, 29 U. S. C. § 160 (*l*). Sears, Roebuck v. Carpet Layers, p. 655.

WRONGFUL DISCHARGE. See **Damages**; **Labor**, 1, 3; **Procedure**, 9.

ZONE BOUNDARIES. See **Judicial Review**, 3; **School Desegregation.**

ZONE OF PROTECTED INTERESTS. See **Bank Service Corporation Act of 1962**; **Food and Agriculture Act of 1965**; **Judicial Review**, 2, 5; **Standing to Sue**, 1–2.