U. S. Supreme Court

# UNITED STATES REPORTS

## VOLUME 398

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1969

MAY 18 THROUGH JUNE 19, 1970

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HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1971

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Washington, D.C. 20402 - Price $6.50 (Buckram)

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS*

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WARREN E. BURGER, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.[1]

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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

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*Notes on p. IV.

NOTES

[1] The Honorable Harry A. Blackmun, of Minnesota, formerly a Judge of the United States Court of Appeals for the Eighth Circuit, was nominated by President Nixon to be an Associate Justice of this Court on April 15, 1970; the nomination was confirmed by the Senate on May 12, 1970; he was commissioned on May 14, 1970; and he took the oath and his seat on June 9, 1970. See *post*, p. xi.

[2] For retirement of Mr. Davis as Clerk of the Court, to be effective June 22, 1970, and appointment of his successor, Mr. E. Robert Seaver, see *post*, pp. vii, 946.

## SUPREME COURT OF THE UNITED STATES

### Allotment of Justices

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

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

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, Harry A. Blackmun, Associate Justice.

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

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

June 9, 1970.

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(For next previous allotment, see 396 U. S. p. iv.)

## RETIREMENT OF CLERK OF THE COURT AND APPOINTMENT OF SUCCESSOR

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 8, 1970

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

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THE CHIEF JUSTICE said:

On behalf of the Court I announce with regret the retirement of one of its able and trusted officers, Mr. John F. Davis, Clerk of the Court since 1961. For many years before he was appointed senior officer of the Court, Mr. Davis was one of the able advocates who appeared regularly before the Court.

Your departure is an occasion for regret on our part, Mr. Davis, but we wish you happiness and continued success in the years ahead.

Today's order list announces the appointment of Mr. Davis' successor who is Mr. E. Robert Seaver of Virginia. Mr. Seaver has had a career of government service for more than 20 years, including service in the Department of Justice, as General Counsel of the Federal Maritime Commission, and as a Federal Hearing Examiner.

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For order of appointment of Mr. Seaver, entered June 8, 1970, see *post*, p. 946.

# RESIGNATION OF DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS AND APPOINTMENT OF SUCCESSOR

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 8, 1970

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

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THE CHIEF JUSTICE said:

Today's order list also includes announcement of the appointment by the Court of the Director of the Administrative Office of the United States Courts succeeding Mr. Ernest Friesen, who resigned in February to become Director of the Institute of Court Management, at the University of Denver. The new director is Mr. Rowland F. Kirks, a member of the District of Columbia Bar, and a former Assistant Attorney General of the United States. Mr. Kirks will assume the duties of the office of Director July 1, 1970.

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For order of appointment of Mr. Kirks, entered June 8, 1970, see *post,* p. 946.

# APPOINTMENT OF MR. JUSTICE BLACKMUN

SUPREME COURT OF THE UNITED STATES

TUESDAY, JUNE 9, 1970

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

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THE CHIEF JUSTICE said:

In this special sitting of the Court, we will receive the commission of the Justice-designate, and at this time the Court recognizes the Attorney General.

Mr. Attorney General Mitchell said:

MR. CHIEF JUSTICE, may it please the Court:

I am happy to advise that the President of the United States has nominated, the Senate has consented and the President has appointed Judge Harry A. Blackmun of Minnesota, as an Associate Justice of the Supreme Court of the United States.

I bear with me the commission, dated May 14, 1970, signed by the President of the United States, and attested by me as Attorney General, and with the permission of the Court, I will turn the commission over to the Clerk of the Court.

THE CHIEF JUSTICE said:

The commission is accepted, Mr. Attorney General.

Thank you.

The Clerk then read the commission as follows:

RICHARD NIXON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

*To all who shall see these Presents, Greeting:*

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

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

Done at the City of Washington this fourteenth day of May, in the year of our Lord one thousand nine hundred and seventy, and of the Independence of the United States of America the one hundred and ninety-fourth.

[SEAL] RICHARD M. NIXON.

By the President:

JOHN N. MITCHELL,

*Attorney General.*

---

The oath of office was then administered by THE CHIEF JUSTICE, and MR. JUSTICE BLACKMUN was escorted by the Marshal to his seat on the bench.

The oath taken by MR. JUSTICE BLACKMUN is in the following words, *viz.:*

I, Harry Andrew Blackmun, do solemly swear that I will administer justice without respect to persons, and

do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the Constitution of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

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THE CHIEF JUSTICE said:

Mr. Justice Blackmun, on behalf of all members of the Court, I welcome you to this bench and we look forward to many years of work together in our common calling.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1969

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## NASH ET AL. *v.* UNITED STATES

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

No. 678. Argued April 21, 1970—Decided May 18, 1970

Petitioners were members of a partnership that reported its income on the accrual method and used the reserve method of accounting for bad debts provided in § 166 (c) of the Internal Revenue Code, permitting a taxpayer to take a current deduction for the amount of accounts receivable that it is estimated will become worthless in later years. Petitioners formed corporations and transferred partnership assets, including the net worth of the accounts receivable (the face value less the amount of the reserve), to the corporations in exchange for the corporations' stock. The transfer was within the terms of § 351 of the Code, which provides that no gain or loss shall be recognized if property is transferred to a corporation in exchange for stock, if after the exchange the transferors are in control of the corporation. The Commissioner of Internal Revenue determined that the partnership should have included in income the amount of the bad debt reserve because the partnership no longer needed the reserve account. Petitioners paid the deficiencies assessed and sued for refunds. The District Court allowed recovery but the Court of Appeals reversed. *Held:* The so-called tax benefit rule, that recovery of an item that has produced an income tax benefit in a prior year is to be added to income in the year of recovery, is not applicable here as the partnership, although its business

terminated and it had no "need" for the reserve, received no gain as a result of the transaction and there was thus no "recovery" of the benefit of the bad debt reserve. Pp. 3–5.

414 F. 2d 627, reversed.

*Harold I. Apolinsky* argued the cause for petitioners. With him on the brief were *Joseph S. Bluestein* and *Alex W. Newton.*

*Matthew J. Zinn* argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Walters, Gilbert E. Andrews,* and *Stuart A. Smith.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners were partners operating eight finance offices in Alabama. The partnership reported its income on the accrual method of accounting and instead of deducting bad debts within the taxable year as permitted by § 166 (a) of the Internal Revenue Code of 1954 it used the reserve method of accounting as permitted by § 166 (c). Under the reserve method of accounting a taxpayer includes in his income the full face amount of a receivable on its creation and adjusts at the end of each taxable year the reserve account so that it equals that portion of current accounts receivable that is estimated to become worthless in subsequent years. Any additions necessary to increase the reserve are currently deductible. When an account receivable becomes worthless during the year, the reserve account is decreased and no additional bad debt deduction is allowed. As of May 31, 1960, the partnership books showed accounts receivable of $486,853.69 and a reserve for bad debts of $73,028.05.

On June 1, 1960, petitioners formed eight new corporations and transferred the assets of the eight partner-

ship offices, including the accounts receivable, to the corporations in exchange for shares of the corporations—a transfer that concededly provided no gain or loss under § 351 of the Code.

The Commissioner determined that the partnership should have included in income the amount of the bad debt reserve ($73,028.05) applicable to the accounts receivable that had been transferred. Tax deficiencies were computed; and petitioners, having paid them, brought this suit for refunds. The District Court allowed recovery and the Court of Appeals reversed, 414 F. 2d 627. We granted the petition for certiorari to resolve the conflict between the Fifth and the Ninth Circuits [1] on this question of law. 396 U. S. 1000. We share the view of the Ninth Circuit and reverse the present judgment.

There is no provision of the Code that deals precisely with this question. But the Commissioner's basic premise [2] rests on the so-called tax benefit rule, *viz.*, that a recovery of an item that has produced an income tax benefit in a prior year is to be added to income in the year of recovery.[3] The Commissioner argues that that rule, applicable here, means that unused amounts in a bad debt reserve must be restored to income when the reserve is found to be no longer necessary, as it was here, when the partnership's "need" for the reserve ended with the termination of its business. Congress could make the end of "need" synonymous with "recovery" in the meaning of the tax benefit rule and make

[1] *Estate of Schmidt* v. *Commissioner*, 355 F. 2d 111.

[2] See Rev. Rul. 62–128, 1962–2 Cum. Bull. 139.

[3] Section 111 (a) of the 1954 Code provides:

"Gross income does not include income attributable to the recovery during the taxable year of a bad debt, prior tax, or delinquency amount, to the extent of the amount of the recovery exclusion with respect to such debt, tax, or amount."

the rule read: "[A] bad debt reserve that has produced an income tax benefit in a prior year is to be added to income in the year when it was recovered or when its need is ended." The semantics would then be honored by the Commissioner's ruling. But we do not feel free to state the tax benefit rule in those terms in the present context. We deal with § 351 (a) of the Code which provides:

> "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control . . . of the corporation."

All that petitioners received from the corporations were securities equal in value to the net worth of the accounts transferred, that is the face value less the amount of the reserve for bad debts. If, as conceded, there is no "gain" or "loss" recognized as a result of the transaction, it seems anomalous to treat the bad debt reserve as "income" to the transferor.[4]

Deduction of the reserve from the face amount of the receivables transferred conforms to the reality of the transaction, as the risk of noncollection was on the transferee. Since the reserve for purposes of this case was deemed to be reasonable and the value of the stock received upon the transfer was equal to the *net value* of the receivables, there does not seem to us to have been any "recovery." A tax benefit was received by the

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[4] As stated in *Geyer, Cornell & Newell, Inc.* v. *Commissioner*, 6 T. C. 96, 100: "A reserve consists of entries upon books of account. It is neither an asset nor a liability. It has no existence except upon the books, and, unlike an asset or a liability, it can not be transferred to any other entity."

partnership when the bad debt reserve was originally taken as a deduction from income. There would be a double benefit to the partnership if securities were issued covering the face amount of the receivables. We do not, however, understand how there can be a "recovery" of the benefit of the bad debt reserve when the receivables are transferred less the reserve.[5] That merely perpetuates the status quo and does not tinker with it for any double benefit out of the bad debt reserve.

For these reasons, the Court of Appeals in the *Schmidt* case [6] held that although the "need" for the reserve ended with the transfer, the end of that need did not mark a "recovery" within the meaning of the tax benefit cases, 355 F. 2d, at 113. We agree and accordingly reverse the judgment below.

*Reversed.*

MR. JUSTICE BLACK and MR. JUSTICE STEWART, dissenting.

We agree with the reasoning of Judge Tuttle's opinion for the Court of Appeals in this case, 414 F. 2d 627, and with Judge Raum's opinion for the Tax Court in *Schuster* v. *Commissioner*, 50 T. C. 98. Accordingly, we would affirm the judgment.

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[5] "[T]he infirmities in the accounts receivable which justify the bad debt reserve carry over to those accounts in the hands of the corporation. Presumably the amount that will ultimately be collected by the corporation will not be the gross amount of the receivables, but rather the net amount after deducting the bad debt reserve. Thus, the stock received in exchange for such accounts receivable can only be worth what the receivables themselves are worth, namely, the net collectable amount rather than the gross amount." Arent, Reallocation of Income and Expenses in Connection with Formation and Liquidation of Corporations, 40 Taxes 995, 998 (1962).

[6] N. 1, *supra*.

# GREENBELT COOPERATIVE PUBLISHING ASSN., INC., ET AL. *v.* BRESLER

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 413. Argued February 24–25, 1970—
Decided May 18, 1970

At public meetings before the Greenbelt, Maryland, City Council, the efforts of respondent, a prominent real estate developer and state legislator, to secure zoning variances for certain land he owned while the city was trying to acquire other land of his on which to build a school were vigorously discussed. In publishing in their newspaper full accounts of the meetings, petitioners reported that various citizens had characterized respondent's negotiating position as "blackmail." Respondent, concededly a "public figure," brought this libel action against petitioners for publishing the reports notwithstanding their knowledge that he had not committed the crime of blackmail. The trial judge instructed the jury that respondent could recover if petitioners' publications had been made with malice (defined as including "spite, hostility, or deliberate intention to harm") *or* reckless disregard of whether they were true or false, and that malice could be found from the "language" of the publication itself. The jury found for respondent, and the judgment was affirmed on appeal. *Held:*

1. The trial court's instructions, which permitted the jury to find liability merely on the basis of the reported hostile remarks made during a debate on a public issue, violated the First Amendment as made applicable to the States by the Fourteenth Amendment, whether respondent is considered to be a "public official" or a "public figure." *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130. Pp. 8–11.

2. In the circumstances of this case, where it is undisputed that petitioners' reports of the meetings were accurate, the word "blackmail" was not slanderous when spoken, or libelous when reported by petitioners, as there is no evidence whatsoever that the word was used to impute a crime to respondent or was intended as more than a vigorous epithet. Pp. 11–14.

253 Md. 324, 252 A. 2d 755, reversed and remanded.

*Roger A. Clark* argued the cause and filed briefs for petitioners.

*Abraham Chasanow* argued the cause for respondent. With him on the brief was *Howard S. Chasanow.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners are the publishers of a small weekly newspaper, the Greenbelt News Review, in the city of Greenbelt, Maryland. The respondent Bresler is a prominent local real estate developer and builder in Greenbelt, and was, during the period in question, a member of the Maryland House of Delegates from a neighboring district. In the autumn of 1965 Bresler was engaged in negotiations with the Greenbelt City Council to obtain certain zoning variances that would allow the construction of high-density housing on land owned by him. At the same time the city was attempting to acquire another tract of land owned by Bresler for the construction of a new high school. Extensive litigation concerning compensation for the school site seemed imminent, unless there should be an agreement on its price between Bresler and the city authorities, and the concurrent negotiations obviously provided both parties considerable bargaining leverage.

These joint negotiations evoked substantial local controversy, and several tumultuous city council meetings were held at which many members of the community freely expressed their views. The meetings were reported at length in the news columns of the Greenbelt News Review. Two news articles in consecutive weekly editions of the paper stated that at the public meetings some people had characterized Bresler's negotiating position as "blackmail." The word appeared several times,

both with and without quotation marks, and was used once as a subheading within a news story.[1]

Bresler reacted to these news articles by filing the present lawsuit for libel, seeking both compensatory and punitive damages. The primary thrust of his complaint was that the articles, individually and along with other items published in the petitioners' newspaper, imputed to him the crime of blackmail. The case went to trial, and the jury awarded Bresler $5,000 in compensatory damages and $12,500 in punitive damages. The Maryland Court of Appeals affirmed the judgment. 253 Md. 324, 252 A. 2d 755. We granted certiorari to consider the constitutional issues presented. 396 U. S. 874.

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, we held that the Constitution permits a "public official" to recover money damages for libel only if he can show that the defamatory publication was not only false but was uttered with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 280. In *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, we dealt with the constitutional restrictions upon a libel suit brought by a "public figure."

In the present case Bresler's counsel conceded in his opening statement to the jury that Bresler was a public figure in the community. This concession was clearly correct. Bresler was deeply involved in the future development of the city of Greenbelt. He had entered into agreements with the city for zoning variances in the past, and was again seeking such favors to permit the construction of housing units of a type not contemplated in the original city plan. At the same time the city was trying to obtain a tract of land owned by Bresler for the purpose

[1] The relevant portions of these news articles are printed as an appendix to this opinion.

of building a school. Negotiations of significant public concern were in progress, both with school officials and the city council. Bresler's status thus clearly fell within even the most restrictive definition of a "public figure." *Curtis Publishing Co.* v. *Butts, supra,* at 154–155 (opinion of HARLAN, J.). See also *Pauling* v. *Globe-Democrat Publishing Co.,* 362 F. 2d 188, 195–196, cert. denied, 388 U. S. 909.

Whether as a state legislator representing another county, or for some other reason, Bresler was a "public official" within the meaning of the *New York Times* rule is a question we need not determine. Cf. *Time, Inc.* v. *Hill,* 385 U. S. 374, 390; *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 n. 12. For the instructions to the jury in this case permitted a finding of liability under an impermissible constitutional standard, whichever status Bresler might be considered to occupy. In his charge to the members of the jury, the trial judge repeatedly instructed them that Bresler could recover if the petitioners' publications had been made with malice *or* with a reckless disregard of whether they were true or false. This instruction was given in one form or another half a dozen times during the course of the judge's charge.[2]

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[2] The following excerpts from the trial judge's charge are illustrative:

"Accordingly . . . you must find for the defendant on the issue of fair comment, unless you determine by a preponderance of the evidence that the comment or criticism . . . was published with malice or a reckless disregard of whether it was true or false.

". . . And such statements repeated and/or published, unless with actual malice, or knowledge that they are false, reckless disregard for whether they are true or false, is not libel.

"The law recognizes the importance of free discussion and criticism and matters of public interest to the extent that it grants immunity even with respect to the publication of foolish and prejudicial criticism if they are not published with malice, knowledge

The judge then defined "malice" to include "spite, hostility or deliberate intention to harm." Moreover, he instructed the jury that "malice" could be found from the "language" of the publication itself.[3] Thus the jury was permitted to find liability merely on the basis of a combination of falsehood and general hostility.

This was error of constitutional magnitude, as our decisions have made clear. "This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; '[w]e held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.'" *Rosenblatt* v. *Baer, supra,* at 84. "[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it

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of their not being true, it is knowledge they are false, or reckless disregard of whether they are true or false. . . .

. . . . . .

"[Y]our verdict should be for the defendant unless you find that the publication was made with actual malice, knowledge of its falsity, or reckless disregard of whether it was true or false.

. . . . . .

"[Y]our verdict should be for the defendant unless you find again the publication was with actual malice, knowledge of its being false or reckless disregard of whether it was true or false."

[3] The trial judge said:

"With respect to your consideration of presence of actual malice on the part of defendant, you may infer its presence from the language or circumstances of the publication, but this may be done only if the character of the publication is so excessive, intemperate, unreasonable and abusive as to defy any other reasonable conclusion than that the defendant was moved by actual malice toward the plaintiff."

will be proved in court that he spoke out of hatred . . . ." *Garrison* v. *Louisiana,* 379 U. S. 64, 73. See also *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 82. And the constitutional prohibition in this respect is no different whether the plaintiff be considered a "public official" or a "public figure." *Curtis Publishing Co.* v. *Butts, supra.*

The erroneous instructions to the jury would, therefore, alone be enough to require the reversal of the judgment before us. For when "it is impossible to know, in view of the general verdict returned" whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed and the case remanded." *New York Times Co.* v. *Sullivan, supra,* at 284. See *Time, Inc.* v. *Hill, supra,* at 394–397; *Rosenblatt* v. *Baer, supra,* at 82; *Stromberg* v. *California,* 283 U. S. 359, 367–368.

This, however, does not end the inquiry. As we noted in *New York Times,* "[t]his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U. S., at 285.

This case involves newspaper reports of public meetings of the citizens of a community concerned with matters of local governmental interest and importance. The very subject matter of the news reports, therefore, is one of particular First Amendment concern. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Stromberg* v. *Cali-*

*fornia, supra,* at 369. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102.[4] Because the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability.[5]

It is not disputed that the articles published in the petitioners' newspaper were accurate and truthful reports of what had been said at the public hearings before the city council.[6] In this sense, therefore, it cannot even be claimed that the petitioners were guilty of any "departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," *Curtis Publishing Co.* v. *Butts, supra,* at 155 (opinion of HARLAN, J.), much less the knowing use of falsehood or a

[4] See also Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642, 644–645; Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 592–593.

[5] Cf. *Pauling* v. *Globe-Democrat Publishing Co.,* 362 F. 2d 188, cert. denied, 388 U. S. 909; Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 221.

[6] The mayor of the city testified, "Certainly nothing in here that reports the meeting any different from the way it happened. This is pretty much the way it happened. If I would say anything, it is rather conservative in presenting some of the comments."

The reporter who wrote one of the articles testified: "[T]he people were really mad and that word 'blackmail' was used not once or twice like in my story, but over and over and over again.

"Q. By who?

"A. By people at the meeting. And I felt if I left that out I really wouldn't be writing a truthful article."

reckless disregard of whether the statements made were true or false. *New York Times Co.* v. *Sullivan, supra,* at 280.

The contention is, rather, that the speakers at the meeting, in using the word "blackmail," and the petitioners in reporting the use of that word in the newspaper articles, were charging Bresler with the crime of blackmail, and that since the petitioners knew that Bresler had committed no such crime, they could be held liable for the knowing use of falsehood. It was upon this theory that the case was submitted to the jury, and upon this theory that the judgment was affirmed by the Maryland Court of Appeals. 253 Md. 324, 360–364, 252 A. 2d 755, 775–778. For the reasons that follow, we hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word "blackmail" in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review.

There can be no question that the public debates at the sessions of the city council regarding Bresler's negotiations with the city were a subject of substantial concern to all who lived in the community. The debates themselves were heated, as debates about controversial issues usually are. During the course of the arguments Bresler's opponents characterized the position he had taken in his negotiations with the city officials as "blackmail." The Greenbelt News Review was performing its wholly legitimate function as a community newspaper when it published full reports of these public debates in its news columns. If the reports had been truncated or distorted in such a way as to extract the word "blackmail" from the context in which it was used at the public meetings, this would be a different case. But the reports were accurate and full. Their headlines, "School

Site Stirs Up Council—Rezoning Deal Offer Debated" and "Council Rejects By 4–1 High School Site Deal," made it clear to all readers that the paper was reporting the public debates on the pending land negotiations. Bresler's proposal was accurately and fully described in each article, along with the accurate statement that some people at the meetings had referred to the proposal as blackmail, and others had indicated they thought Bresler's position not unreasonable.

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense.[7] On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments.

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[7] Under the law of Maryland the crime of blackmail consists in threatening to accuse any person of an indictable crime or of anything which, if true, would bring the person into contempt or disrepute, with a view to extorting money, goods, or things of value. See Md. Ann. Code, Art. 27, §§ 561–563 (1967 Repl. Vol.). There is, of course, no indication in any of the articles that Bresler had engaged in anything approaching such conduct.

Accordingly, we reverse the judgment and remand the case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

*It is so ordered.*

## APPENDIX TO OPINION OF THE COURT

On October 14, 1965, the following story appeared in the Greenbelt News Review:

### SCHOOL SITE STIRS UP COUNCIL REZONING DEAL OFFER DEBATED

By Dorothy Sucher

Delay in construction of a new Greenbelt high school is the lever by which a local developer is pressuring the city to endorse his bid for higher density rezoning of two large tracts of land; so citizens heard at a well-attended special meeting of the City Council on Monday night, Oct. 11.

For the past nine months, the Board of Education has been trying to acquire land owned by Consolidated Syndicates, Inc. (Charles Bresler-Theodore Lerner), for a high school site. The landowners, developers of Charlestowne Village, also own other tracts of undeveloped land in Greenbelt.

The developer has refused to accept the Board of Education's price, and condemnation proceedings have already been delayed three times . . . . Originally, it was hoped the new school would open September 1966.

Some time ago, it became known that the developer would agree on the price, provided the city would help him obtain higher density rezoning for two of his tracts (Parcels 1 and 2, totaling 230 acres) near the center of Greenbelt. If the city refused, he threatened to delay

the school site acquisition as long as possible through the courts.

This "deal" as it was termed by several citizens at Monday's meeting, has been rumored for months, but only became public knowledge recently. It was categorically opposed by Nathan Shinderman, a Board member of Greenbelt Homes, Inc. (GHI), who read a lengthy statement by GHI president Charles Schwan . . . .

Blackmail

"It seems that this is a slight case of blackmail," commented Mrs. Marjorie Bergemann on Monday night, and the word was echoed by many speakers from the audience.

Councilman David Champion, however, denied that it was "blackmail," explaining that he would rather "refer to it (i. e., the negotiations—Ed.) as a two-way street."

Speaking from the floor, Gerald Gough, commented: "Everyone knows there's a need for a school—just walk through the halls of High Point. The developer knows there's a need and says, 'we'll meet your need if you meet our need.' In my opinion, it's highly unethical."

. . . . . .

Delay Probable

Mayor Edgar Smith remarked that it should be made clear that refusing the developer's terms did not necessarily mean the loss of the school site; that it would, however, probably mean a two or three year delay in the construction of the school.

. . . . . .

Among the parents who spoke was Mrs. Joseph Rosetti, who said: "I have several children going into high school, but I would rather adhere to the Greenbelt

Master Plan than overcrowd the town with dense development. I would stand for my children's discomfort, rather than give in to a blackmailing scheme."

The following week, the News Review carried the sequel to its earlier story:

COUNCIL REJECTS BY 4–1
HIGH SCHOOL SITE DEAL

By Mary Lou Williamson

More than 150 citizens came to hear how the new City Council would respond to pressure by a local developer for higher density zoning on a large tract of land in exchange for uncontested consummation of the sale of a Greenbelt senior high school site to the Board of Education at the Council meeting Monday night.

Council sat quietly listening for more than an hour to citizen statements before voting to reject the proposal (4–1) with Councilman Dave Champion dissenting.

. . . . .

Citizens Speak

A procession of citizens took the floor to make impassioned speeches—some from prepared texts, some extemporaneously. The mayor occasionally had to caution them to refrain from engaging in personalities.

Albert Herling suggested skulduggery in the September court postponement. Although he praised most of the City Manager's report, he criticized the section entitled "Risks and Conclusions," saying they appeared negative in the extreme. He suggested a list of positive steps that council ought to take: 1) fight Bresler's "blackmail"; 2) make clear to the Board of Education—no deals; 3) make clear to the District Council (zoning authority) unanimous opposition to the requested R–30 zoning; and 4) seek the swiftest possible court settlement. "For anything less," charged Herling, "Would

be other than what you believe. And when the chips are down, this is exactly what you'll do."

. . . . .

Pilski asked if anyone in the audience cared to speak in support of Bresler's proposal.

Only James Martin took the floor. He suggested that Bresler's action was not "blackmail" but the legitimate advance of his rights to develop his land. Martin suggested, by way of example, that GHI's long-range planning committee had been doing much the same thing some months ago. He alleged that the density of the "frame homes (GHI) is far more atrocious than anything Bresler's considering."

MR. JUSTICE WHITE, concurring.

I concur in the judgment of reversal and join the opinion of the Court insofar as it rests reversal on the erroneous definition of malice contained in the instructions given to the jury. I do not, however, join the remainder of the Court's opinion.

Respondent Bresler charged that he had been libeled by at least four statements published in petitioners' newspaper: (1) a statement that Bresler's conduct amounted to "a slight case of blackmail," accompanied by the use of the word "blackmail" as a column subheading; (2) a charge that Bresler had engaged in an "unethical trade"; (3) an allegation that Bresler had been guilty of "skulduggery," a word used by the newspaper to characterize statements made by others about Bresler; and (4) a statement that Bresler had had legal proceedings "started against him for failure to make construction corrections in accordance with county standards." Petitioners contended that the use of the word blackmail had not been intended in the criminal sense and was not libelous and that in any event the newspaper had not made its publications with malice, that is, with knowl-

edge that any of the statements were false or with reckless disregard of the falsity of any of them.

In instructing the jury the trial court defined libel as:

> "the publication of words, pictures or symbols which imputes to a person a crime or a disgraceful or dishonest or immoral conduct or is otherwise injurious to the private character or credit of the person in the minds of a considerable and respectable class in the community. . . .
>
> "[T]he burden is upon the plaintiff to establish by a preponderance of the evidence that the publication imputed to him a crime, or disgraceful, dishonest or immoral conduct or was otherwise injurious to his private character or credit . . . ." App. E. 189.

With respect to the dispute over the sense with which the charge of blackmail had been used the court told the jury:

> "[I]f you are unable to conclude from the preponderance of the evidence that the publication bears a meaning ascribed to it by the plaintiff, or if you find that the evidence is equally balanced on that issue, then your verdict must be for the defendant.
>
> . . . . .
>
> "In considering the publication complained of, you must consider the publication as a whole—the Court would say in this case we are talking about serious, [*sic*] number of publications—and determine the meaning of the publication and how it would be understood by ordinary readers from the entire context thereof with the other facts and circumstances shown by the evidence.
>
> "Where a publication is susceptible of two meanings one of those which would be libelous and the

> other not, it is up to you to say which of the two meanings would be attributable to it, by those to whom it is addressed or by whom it may be read. In reaching your decision you can consider all the circumstances surrounding the publication, which includes all of the evidence which has been admitted." *Id.*, at E. 189–190.

The court also defined the crime of blackmail and told the jury that in this sense the defendant newspaper did not claim that the allegations were true.

Petitioners took exception to none of the foregoing instructions although in their motion for judgment n. o. v. or for a new trial, error was claimed in not instructing the jury that the failure to plead truth meant only that the defendants did not adopt the meaning of the words alleged by the plaintiff. See App. E. 10–11.

The jury returned a verdict for plaintiff, and judgment was entered on the verdict for both compensatory and punitive damages.

The Court of Appeals of Maryland affirmed. The court held that aside from federal constitutional protections urged by petitioners, the jury's verdict and subsequent judgment thereon were supported by the evidence. With respect to the blackmail charge the court said:

> "In the instant case the word 'blackmail' was used as a sub-heading without qualification. The charge of blackmail was stated in the News Review issue of October 14, 1965, and was again repeated in the next week in the issue of October 21. The appellants argue that the word 'blackmail' was used in a noncriminal sense, but the intended meaning was for the jury to determine. *American Stores* v. *Byrd, supra.* The jury found against the appellants.
>
> . . . . .

> "The charging of Mr. Bresler with having committed blackmail could be found by the jury (as it was) to charge him with the commission of a crime." 253 Md. 324, 351–352, 252 A. 2d 755, 770 (1969).

The court also dealt with the other publications:

> "In addition to the publications that Mr. Bresler had committed blackmail, there were publications that he had engaged in 'An unethical trade,' had been guilty of 'skulduggery,' had had legal proceedings 'started against him for failure to make construction corrections in accordance with county standards.' These allegations were injurious to Mr. Bresler in his business as a contractor and were libelous *per se*." *Id.*, at 354, 252 A. 2d, at 772.

As for the issue of malice, the Court of Appeals noted that the newspaper knew the blackmail charge was false in the criminal sense. With reference to the charge of "skulduggery" the court pointed out that the newspaper had not quoted another source in using that word; rather, it was the publishers' own characterization of the events.

> "There is little doubt that the word 'skulduggery' was intended to indicate dishonest conduct on the part of Bresler and to hold him up to ridicule and contempt. . . . The jury could properly conclude that the reports of the hearing were not accurately reported and were, also, published with a knowledge of their falsity or with serious doubt of their truthfulness." *Id.*, at 360, 252 A. 2d, at 775.

The court also held that the allegations that homeowners had started legal proceedings against Bresler in regard to construction defects in their homes built by him had been made with reckless disregard for the truth.

In reversing the Maryland Court of Appeals, the Court does not deny that the Constitution would permit recov-

ery for charging the crime of blackmail, or even for falsely accusing one of "blackmail" in a noncriminal but derogatory sense "injurious to the private character or credit of the person." The Court does not deny that the jury was told it had the authority to decide in what sense a word was used or understood, nor does the Court question the conclusion of the Court of Appeals that the jury had found that the word had been used and understood in the criminal sense. What the Court does hold on the cold record is that the trial judge, the jury, and the Maryland Court of Appeals were quite wrong in concluding that "ordinary readers" could have understood that a crime had been charged. If this conclusion rests on the proposition that there was no evidence to support a judgment that the charge of blackmail would be understood by the average reader to import criminal conduct, I cannot agree. The very fact that the word is conceded to have a double meaning in normal usage is itself some evidence; and without challenging the reading of the jury's verdict by the Maryland Court of Appeals, I cannot join the majority claim of superior insight with respect to how the word "blackmail" would be understood by the ordinary reader in Greenbelt, Maryland.

Although the Court does not so hold, arguably the newspaper should not be liable if it had no intention of charging a crime and had a good-faith, nonreckless belief that it was not doing so. Should *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), be extended to preclude liability for injury to reputation caused by employing words of double meaning, one of which is libelous, whenever the publisher claims in good faith to have intended the innocent meaning? I think not. The *New York Times* case was an effort to effectuate the policies of the First Amendment by recognizing the difficulties of ascer-

taining the truth of allegations about a public official whom the newspaper is investigating with an eye to publication. Absent protection for the nonreckless publication of "facts" that subsequently prove to be false, the danger is that legitimate news and communication will be suppressed. But it is quite a different thing, not involving the same danger of self-censorship, to immunize professional communicators from liability for their use of ambiguous language and their failure to guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the eyes of the average reader. I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood—if they are—by the ordinary reader of their publications. If it is thought that the First Amendment requires more protection for the media in this respect in accurately reporting events and statements occurring at official meetings, it would be preferable directly to carve out a wider privilege for such reporting.

I agree with the Court that there was error in the instructions concerning malice. The error, however, is irrelevant to the "blackmail" phase of this case as I view it: if one assumes that the jury found that the crime of blackmail was charged, "malice" is conceded, since the defendants admittedly knew such a charge was false.

Nevertheless, the jury returned a general verdict; it might have found that the blackmail statement did not impute a crime, but that the other damaging statements published by the newspaper were libelous. Indeed, this was the most likely course for the jury to have taken if the Court is correct that there was so little reason for

basing liability on the blackmail allegation. Given this possibility, the error in the instructions requires reversal of the judgment. *Stromberg* v. *California,* 283 U. S. 359 (1931).

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurs in the judgment of the Court for the reasons set out in MR. JUSTICE BLACK's concurring opinion in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (1964), in his concurring and dissenting opinion in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 170 (1967), and in MR. JUSTICE DOUGLAS' concurring opinion in *Garrison* v. *Louisiana,* 379 U. S. 64, 80 (1964).

# NATIONAL LABOR RELATIONS BOARD *v.* RAYTHEON CO. ET AL.

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

No. 440. Argued February 26, 1970—Decided May 18, 1970

Where a National Labor Relations Board order sets aside a representation election because of an employer's unfair labor practices and proscribes such conduct in the future, judicial proceedings to enforce the order are not rendered moot by an intervening valid election. Pp. 26–28.

408 F. 2d 681, reversed and remanded.

*Deputy Attorney General Kleindienst* argued the cause for petitioner. On the brief were *Solicitor General Griswold, Peter L. Strauss, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher.*

*Charles H. Resnick* argued the cause for respondents. With him on the brief was *Alfred C. Phillips.*

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

This case was brought here on certiorari by the National Labor Relations Board for review of the dismissal of its petition for enforcement of a cease-and-desist order forbidding certain conduct of the Raytheon Company found to be in violation of § 8 (a)(1) of the National Labor Relations Act, 29 U. S. C. § 158 (a)(1).

After it lost a representation election conducted by the Board on February 4, 1965, the International Union of Electrical, Radio and Machine Workers, AFL–CIO, filed objections to the election and unfair labor practice charges, both based on pre-election misconduct of the company. On October 19, 1965, an unfair labor practice complaint issued alleging violations of § 8 (a)(1). The

proceedings on that charge were consolidated with the objections to the election case, and a hearing was held before a Trial Examiner. Thereafter, on October 5, 1966, the Board rendered its decision, ordering that a new election be held and that the company cease and desist certain anti-union activity.

On February 8, 1968, pursuant to § 10 (e) of the Act, 29 U. S. C. § 160 (e), the Board filed a petition in the Court of Appeals for the Ninth Circuit seeking enforcement of its unfair labor practice order. The company answered, urging that enforcement be denied on the merits and on the ground that the proceedings were moot because a second election had been held in the interim. After the case was briefed and argued on the merits, the company called to the attention of the court that yet a third election had been held and that this time the result (a majority vote for "no union") had been certified by the Board. The question whether this intervening election had mooted the case was briefed on all sides; and, on the authority of its earlier decision in *General Engineering, Inc.* v. *NLRB*, 311 F. 2d 570 (C. A. 9th Cir. 1962), the Court of Appeals dismissed the proceedings with a brief *per curiam*. 408 F. 2d 681 (C. A. 9th Cir. 1969). We granted certiorari, 396 U. S. 900 (1969), and we reverse.

As stated by the Court of Appeals, the ground upon which the petition was dismissed was "that since [it was] filed the Board has held a new representation election and certified the result." Thus, without more, the Court followed its decision in *General Engineering* that an intervening election "makes moot all portions of the order under review which relate to the representation case." 311 F. 2d, at 572. We cannot agree to the automatic effect accorded in *General Engineering* to a later valid election and rather find correct the decisions of the two circuits that have specifically refused to adopt the

reasoning of that case. *NLRB* v. *Metalab-Labcraft,* 367 F. 2d 471 (C. A. 4th Cir. 1966); *NLRB* v. *Marsh Supermarkets, Inc.,* 327 F. 2d 109 (C. A. 7th Cir. 1963); cf. *NLRB* v. *Clark Bros.,* 163 F. 2d 373 (C. A. 2d Cir. 1947).

In *NLRB* v. *Mexia Textile Mills,* 339 U. S. 563, 567–568 (1950), this Court held:

> "We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. . . . A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. . . . The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices."

Properly viewed, this holding controls the present case. The later election and certification here are simply evidence that the company complied with the Board order during the pendency of the election. The Act, however, is not designed merely to protect a particular election or organizational campaign. It is designed to protect employees in the exercise of their organizational rights, and that protection cannot be affected merely because a particular labor organization has chosen an immediate election rerun rather than to await enforcement of the Board order.

Undoubtedly, as the Court recognized in *NLRB* v. *Jones & Laughlin Steel Corp.,* 331 U. S. 416, 428 (1947), there are situations where an enforcement proceeding will become moot because a party can establish that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 633 (1953). But this is not such a case.

Nothing in the record here shows that the specific acts complained of have not been repeated or gives any assurance that they will not be repeated in the future. Cf. *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); *Wirtz* v. *Local 153, Glass Blowers Assn.*, 389 U. S. 463, 474–475 (1968).

The Board, established by Congress with primary responsibility for the protection of the public interest in this area, see *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969), has determined that the company engaged in illegal activities and that a remedial order is called for. Under these circumstances, the employees cannot be denied the protection of the order (with the possible sanction of contempt proceedings for violations) in the absence of a decision on the merits. "[I]f the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." *NLRB* v. *Marsh Supermarkets, Inc., supra,* at 111.

In this Court, the company essentially admits that the judgment below cannot be "based on mootness in its classical sense" and instead attempts to support it on other grounds. Thus, the company says—and we agree—that it is the courts of appeals that are charged with the primary and usual responsibility for granting or denying enforcement of Board orders. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). From this proposition and the fact that the Court of Appeals had before it the entire record in the case, the company urges that the decision below "should be construed as a determination, in the exercise of the discretion vested in the Court by Section 10 (e) of the Act, that on the basis of all of the circumstances, including the subsequent certification, enforcement was inappropriate."

We need not pause to consider whether such a determination would have been proper on the facts of this

case. The simple answer is that the Court of Appeals did not pass upon the merits of the Board's petition for enforcement. While the company is, of course, free to argue on remand either that there was no violation, or that if there was it was so marginal as not to justify judicial enforcement, or both, these questions are for the Court of Appeals in the first instance. We will not pass on how that court might have regarded the case had it not erroneously concluded that the election and certification mooted the proceedings.

The judgment of the Court of Appeals dismissing the petition for enforcement is reversed and the case is remanded for consideration of the petition on its merits.

*It is so ordered.*

# DICKEY *v.* FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 728. Argued January 21, 1970—Decided May 25, 1970

During a period of over seven years while petitioner was in federal custody and available to the State of Florida, which had issued a warrant for his arrest on a state criminal charge, petitioner made repeated but unsuccessful efforts to secure a prompt trial in the state court. During that period two witnesses died, another potential defense witness allegedly became unavailable, and possibly relevant police records were lost or destroyed. Thereafter the State filed an information against petitioner and, following denial of petitioner's motion to quash on the ground that he had been denied his right to a speedy trial under the Sixth Amendment as made applicable to the States by the Fourteenth Amendment, petitioner was convicted and the appellate court affirmed. *Held:* On the record in this case where petitioner was at all times available to the State and there was no valid excuse for the prejudicial delay, the judgment against petitioner must be vacated by the trial court. Pp. 36–38.

215 So. 2d 772, reversed and remanded.

*John D. Buchanan, Jr.*, argued the cause and filed a brief for petitioner.

*George R. Georgieff*, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Earl Faircloth*, Attorney General.

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

We granted the writ in this case to consider the petitioner's claim that he had been denied his Sixth Amendment right to a speedy trial: he was tried in 1968 on charges of alleged criminal acts committed in 1960.

Prior to the commencement of his jury trial in 1968 for armed robbery petitioner, Robert Dickey, moved to quash the information against him, alleging, *inter alia,* that if he were tried he would be denied his right to a speedy trial, as guaranteed by § 11 of the Declaration of Rights of the Florida Constitution [1] and the Sixth Amendment to the United States Constitution.[2] The motion was denied. Dickey was subsequently tried and convicted. He appealed to the Florida District Court of Appeal, First District, alleging error in the trial court's denial of his motion to quash. The Court of Appeal affirmed the conviction in a brief order. 215 So. 2d 772 (1968). We granted Dickey leave to proceed *in forma pauperis* and granted his petition for a writ of certiorari. 396 U. S. 816 (1969). We reverse.

## I

At about 2 o'clock in the morning of June 28, 1960, Clark's Motor Court in Quincy, Gadsden County, Florida, was robbed by a lone armed robber. The victim and only eyewitness was Mrs. Ralph Clark. She immediately reported the crime to Deputy County Sheriff Martin and gave a description of the robber to him; this description was routinely recorded for later reference. Shortly thereafter, Dickey was taken into custody on federal bank robbery charges and placed in the

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[1] The Declaration of Rights, Florida Constitution, reads in pertinent part:

Section 11. Rights of accused; speedy trial; etc.—

"In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed . . . ."

[2] The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

Jackson County Jail, Marianna, Florida. Apparently the description Mrs. Clark had given Deputy Martin was sufficiently similar to Dickey that on July 1, 1960, he showed Mrs. Clark a picture of Dickey. Mrs. Clark and Deputy Martin then went to the Jackson County Jail where she identified Dickey as her assailant. Later that day Deputy Martin secured an arrest warrant charging Dickey with armed robbery.[3]

From July 1, 1960, to September 2, 1960, Dickey remained in the Jackson County Jail. The Gadsden County Sheriff's Office knew of his whereabouts but made no effort to serve the warrant or gain custody for the purpose of trial. On September 2, 1960, Dickey, having been convicted on federal charges, was removed from Florida, first to Leavenworth and then Alcatraz. On the same day, the Gadsden County warrant was sent to the Chief United States Marshal, Atlanta, Georgia, and a formal detainer was lodged against Dickey.

In 1962 Dickey filed in the Gadsden County Circuit Court a petition styled "writ of habeas corpus ad prosequendum" naming the State Attorney for Gadsden County as respondent and asking that he be required to show cause why he should not be ordered to either take the steps necessary to obtain Dickey's presence in Florida for trial or withdraw the detainer for failure to provide Dickey with a speedy trial, as guaranteed by the Sixth Amendment. The Circuit Court, in an order dated December 1, 1962, denied the petition on several grounds: first, that Dickey's unavailability for trial in Florida was the result of his voluntary commission of a federal crime, the natural consequence of which was incarceration in a federal penal institution; second, that

[3] Under Florida law this step tolled the statute of limitations. See *Rosengarten* v. *State*, 171 So. 2d 591 (Dist. Ct. App. Fla. 1965); *Dubbs* v. *Lehman*, 100 Fla. 799, 130 So. 36 (1930); *State* v. *Emanuel*, 153 So. 2d 839 (Dist. Ct. App. Fla. 1963).

the speedy-trial issue was prematurely raised because only at the time of trial can a determination be made as to whether the delay has made a fair trial impossible; third, that even if the denial of an immediate trial was violative of Dickey's Sixth Amendment rights, it was a deprivation caused wholly by the federal officials having custody of his person, and any relief had to flow from those authorities.

Dickey filed papers raising substantially the same contentions on two later occasions, April 1, 1963, and March 28, 1966. The Circuit Court denied both petitions, simply citing the prior denial dated December 1, 1962.

Dickey next petitioned the Supreme Court of Florida to issue a writ of mandamus ordering the Circuit Court to either secure his return for trial or withdraw the detainer against him. The Circuit Court judge filed as a return the orders of December 1962, April 1963, and April 1966. Thereafter the Attorney General of Florida filed a brief in opposition arguing that Dickey should not be heard to complain that he had not received a speedy trial in Gadsden County because his unavailability was caused by the voluntary commission of criminal acts. Counsel was appointed for Dickey and the Florida Supreme Court heard argument on the petition for mandamus.

The Florida Supreme Court rejected the State's claim that a person incarcerated for one crime has no right to demand his constitutionally guaranteed right to a speedy trial on another charge. *Dickey* v. *Circuit Court,* 200 So. 2d 521 (1967). The court held that incarceration does not make the accused unavailable since there have long been means by which one jurisdiction, for the purpose of a criminal trial, can obtain custody of a prisoner held by another. That court also held that the prisoner's demand upon the accusing State gives rise

to an obligation to act affirmatively to secure his presence for trial; failure of the accusing State to promptly obtain the defendant from the detaining sovereign might invalidate any judgment ultimately obtained, if the time lapse is sufficiently great and is not excused.[4] The Florida Supreme Court concluded that once the discretionary decision to charge a prisoner with a crime has been made, an obligation arises to act diligently toward procuring the accused for trial and that obligation is a ministerial duty subject to a writ of mandamus. However, since Dickey had named the Circuit Court as the respondent, rather than the appropriate State Attorney, the petition was dismissed without prejudice to his right to file another petition naming the appropriate respondent.

On September 1, 1967, Dickey filed with the Circuit Court a motion to have the court order the Gadsden County State Attorney to dismiss the detainer warrant because he had been denied his right to a speedy trial. The State Attorney then filed a petition for a writ of habeas corpus *ad prosequendum* to secure Dickey's return to Florida for trial. On December 15, 1967, the Circuit Court issued the writ, and on the same day the State Attorney filed an information charging Dickey with the armed robbery allegedly committed in 1960. Dickey was returned to Florida on January 23, 1968. On January 30, the day before the trial was to begin, Dickey's appointed counsel filed a motion for a continuance so that the whereabouts of two witnesses could

[4] The decision of the Florida Supreme Court was based upon both the Florida Constitution's guarantee of a speedy trial, see n. 1, *supra,* and the similar guarantee in the Sixth Amendment, the latter being applicable to the States through the Fourteenth Amendment's Due Process Clause. *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967). The Florida court treated these guarantees as substantively coterminous. See 200 So. 2d 521, 524, 526–527.

be determined, and a motion asking that the information be quashed on the ground that the delay of over seven years amounted to a denial of Dickey's right to a speedy trial. The motion alleged that the delay was sufficiently prejudicial to make a fair trial impossible.[5] The Circuit Court granted the continuance but took the motion to quash under advisement. The trial was set for February 13.

Dickey's counsel filed another motion for a continuance, dated February 12, stating that one of the witnesses could not be located and that more time was needed.[6] The court denied the motion and, before the commencement of the trial on the next day, denied the motion to quash.

At the trial Mrs. Clark testified from memory as to the description she had given the deputy after the crime, that she had identified Dickey in the Jackson County Jail, and that he was the robber. She stated that she could not recall having seen Dickey before the night of the crime. Deputy Martin also testified concerning the identification at the Jackson jail, noting that the jailer who had been present when Mrs. Clark viewed Dickey had since died. He further testified as to the description of the robber Mrs. Clark had given him, admitting that his memory was hazy and that the notes he

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[5] The motion to quash stated that an essential and material witness, Mrs. Hazel Varnadore, Dickey's sister, had died in 1964. The motion further stated that had she been available she would have testified that Dickey called her at 12:15 o'clock in the morning of June 28, 1960, from Waycross, Georgia. The motion was accompanied by an affidavit to the same effect, signed by Dickey.

[6] In both the January 30 and February 12 motions for a continuance Dickey's counsel asserted that he had been unable to locate one A. C. Strickland. The defense expected this witness to testify that he had been with Dickey in Waycross, Georgia, on June 28, 1960, the date of the crime. This witness was never located.

had made while investigating the crime had long since been destroyed.

The record indicates that Dickey's defense consisted of his claim that he was in Waycross, Georgia, at the time of the crime and of testimony of another witness that he and Dickey had visited the victimized motel several times. From this latter evidence the defense argued the unlikelihood that Dickey would commit robbery at a place where he was known and would be recognized.

Dickey was convicted and sentenced to 10 years' imprisonment in the State Penitentiary, the sentence to run consecutively with the federal term he was then serving. He then sought review in the Florida District Court of Appeal, alleging that the trial judge had erred in not granting his motion to quash. That court affirmed the conviction without opinion, saying only that "appellant . . . failed to demonstrate reversible error . . . ." 215 So. 2d 772, 773.

II

The record in this case shows that petitioner was available to the State at all times during the seven-year period before his trial. The State suggests no tenable reason for deferring the trial in the face of petitioner's diligent and repeated efforts by motions in the state court in 1962, 1963, and 1966 to secure a prompt trial. In the interval two witnesses died and another potential defense witness is alleged to have become unavailable. Police records of possible relevance have been lost or destroyed.

Florida argues that the right of the petitioner under the Federal Constitution did not arise until this Court's decision in *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967), and that not until *Smith* v. *Hooey,* 393 U. S. 374 (1969), was there a constitutional requirement that the

State press for trial of a defendant in custody in another jurisdiction.

As noted by the Court in *Smith* v. *Hooey,* the holding of the *Klopfer* case was that

> "the Fourteenth Amendment, [applying] the Sixth Amendment right to a speedy trial is enforceable against the States as 'one of the most basic rights preserved by our Constitution.'" 393 U. S., at 374–375.

From this the Court went on to hold that on demand a State had a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial. In *Smith* we remanded the case to the state court without deciding whether the defendant, when available for trial in the state court, would be required to show prejudice arising from the delay.

Here the State of Florida brought the petitioner back to Florida, tried, and convicted him. Petitioner's challenge is directly to the power of the State to try him after the lapse of almost eight years during which he repeatedly demanded and was denied a trial.

The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases.[7] Although a great many accused persons seek to put

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[7] Cf. American Bar Association Project on Standards for Criminal Justice, Speedy Trial § 4.1 (Approved Draft 1968).

off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.[8] This is brought sharply into focus when, as here, the accused presses for an early confrontation with his accusers and with the State. Crowded dockets, the lack of judges or lawyers, and other factors no doubt make some delays inevitable. Here, however, no valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law.

In addition to exerting every effort to require the State to try him, there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records. This is sufficient to make a remand on that issue unnecessary.[9] We therefore reverse and remand to the District Court of Appeal of Florida, First District, with directions to vacate the judgment appealed from and direct the dismissal of any proceedings arising out of the charges on which that judgment was based.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with the following reservation and comment.

I think that claims such as those of the petitioner in this case, arising out of a state proceeding, should be

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[8] Cf. American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function § 2.9 (Tent. Draft Mar. 1970).

[9] Cf. *Regina* v. *Robins*, 1 Cox Crim. Cas. 114 (Somerset Winter Assizes, 1844).

judged by the principles of procedural fairness required by the Due Process Clause of the Fourteenth Amendment, and not by "incorporating" or "absorbing" into the Fourteenth Amendment the "speedy trial" provision of the Sixth Amendment. See my concurring opinion in *Klopfer* v. *North Carolina,* 386 U. S. 213, 226 (1967), and my separate opinion in *Smith* v. *Hooey,* 393 U. S. 374, 383 (1969). This reservation reflects the hope that some day the Court will return to adjudicating state criminal cases in accordance with the historic meaning of the Due Process Clause of the Fourteenth Amendment, see, *e. g.,* my dissenting opinion in *Duncan* v. *Louisiana,* 391 U. S. 145, 171 (1968).

However, whether it be the Due Process Clause or the Sixth Amendment that is deemed to apply, I fully agree that petitioner's federal constitutional rights were violated by Florida's actions in this instance.

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

I

In *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967), this Court held that the Sixth Amendment standards governing speedy trial are made obligatory on the States by the Fourteenth Amendment Due Process Clause. Petitioner's prosecution, however, began in July 1960, nearly seven years before our decision in *Klopfer.* Accordingly, assuming, *arguendo,* that *Klopfer* is not retroactive, the question here is whether petitioner's trial was unconstitutionally delayed under the test of due process applicable to the States prior to *Klopfer.* See, *e. g., Beasley* v. *Pitchess,* 358 F. 2d 706 (C. A. 9th Cir. 1966); *United States ex rel. Von Cseh* v. *Fay,* 313 F. 2d 620 (C. A. 2d Cir. 1963); *Germany* v. *Hudspeth,* 209 F. 2d 15,

18–19 (C. A. 10th Cir. 1954).[1] Petitioner has established his claim. Although the Florida police secured an arrest warrant in 1960 charging petitioner with armed robbery, he was not tried until 1968; he demanded a speedy trial as early as 1962; he has shown that he was substantially prejudiced by the delay; and the State, it appears, was deliberately slow in prosecuting him. Thus, I join the Court's opinion.

I do not read the Court's opinion as deciding that in post-*Klopfer* cases (1) the defendant can challenge only delay occurring after his arrest; (2) he is not entitled to a speedy trial unless he demands it at the time of the delay; (3) he must prove actual prejudice, or (4) the delay must be deliberately caused by the government. It is timely to note that the Court has as yet given scant attention to these and other questions essential to the definition of the speedy-trial guarantee. Before *Klopfer,* only three of our opinions dealt at any length with the right, and each was decided with little analysis of its scope and content. See *Beavers* v. *Haubert,* 198 U. S. 77 (1905); *Pollard* v. *United States,* 352 U. S. 354 (1957); *United States* v. *Ewell,* 383 U. S. 116 (1966). *Klopfer* itself attempted no extensive analysis; nor did our later decision, *Smith* v. *Hooey,* 393 U. S. 374 (1969). And today we do not consider the effect of the application of the Speedy Trial Clause to the States. Thus, although we said in *Klopfer* that the right to a speedy trial is "one of the most basic rights preserved by our Constitution," 386 U. S., at 226, a guarantee "as fundamental as any of the rights secured by the Sixth Amendment," *id.,* at 223, we have yet even

[1] Cf. *In re Oliver,* 333 U. S. 257 (1948), where, without reliance on the Sixth Amendment, the Court held that a State violates the Due Process Clause by denying an accused a public trial. The Sixth Amendment, of course, links the rights of speedy and public adjudication, guaranteeing in one phrase "a speedy and public trial."

to trace its contours. Accordingly, I think it appropriate to point out certain of the major problems that courts must consider in defining the speedy-trial guarantee.

II

In my view, there are two groups of issues to be met in interpreting the right: first, those concerned with when during the criminal process the speedy-trial guarantee attaches, and second, those concerned with the criteria by which to judge the constitutionality of the delays to which the right does attach. These questions, of course, must be answered in light of the purposes of the Speedy Trial Clause.[2] The evils at which the Clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process. The Court recognized in *Ewell, supra,* at 120, that the speedy-trial right "is an important safeguard to prevent undue and oppressive incarceration prior to trial." We also recognized in *Ewell* that a speedy trial is intended "to minimize anxiety and concern accompanying public accusation." *Ibid.* As we observed in *Klopfer, supra,* at 222, lengthy prosecution may subject an accused to

[2] Records of the intent of its Framers are sparse. There is, for example, no account of the Senate debate, and the House deliberations give little indication of the Representatives' intent. See Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 484–485 (1968). Nonetheless, there appears to have been general agreement among the Framers that a speedy trial is essential to fundamental fairness. The principal opposition to the Clause was insignificant: it came from a Representative concerned lest trial be so speedy that an accused not have an opportunity to secure witnesses material to his defense. See 1 Annals of Cong. 756; F. Heller, The Sixth Amendment 31 (1951). The Framers seem clearly to have understood and valued the right in the context of its common-law antecedents. See the historical discussion in *Klopfer, supra,* at 223–226.

"public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."

These disabilities, singly or in league, can impair the accused's ability to mount a defense. The passage of time by itself, moreover, may dangerously reduce his capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of his witnesses may fade. Some defenses, such as insanity, are likely to become more difficult to sustain; as one court has stated, "[p]assage of time makes proof of any fact more difficult. When the fact at issue is as subtle as a mental state, the difficulty is immeasurably enhanced." *Williams* v. *United States,* 102 U. S. App. D. C. 51, 55, 250 F. 2d 19, 23 (1957). See also *Ewell, supra,* at 120.

The Speedy Trial Clause protects societal interests, as well as those of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. See *Ponzi* v. *Fessenden,* 258 U. S. 254, 264 (1922). Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.[3]

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[3] See American Bar Association Project on Standards for Criminal Justice, Speedy Trial 10–11 (Approved Draft 1968); *United States ex rel. Solomon* v. *Mancusi,* 412 F. 2d 88, 93 (C. A. 2d Cir. 1969) (Feinberg, J., dissenting).

Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such a circumstance, the fair administration of criminal justice is imperiled. The Speedy Trial Clause then serves the public interest by penalizing official abuse of the criminal process and discouraging official lawlessness. See, *e. g., United States* v. *Provoo,* 17 F. R. D. 183 (D. C. Md.), aff'd *per curiam,* 350 U. S. 857 (1955). Thus the guarantee protects our common interest that government prosecute, not persecute, those whom it accuses of crime.

## III

Against this background of the purposes of the speedy-trial safeguard, I turn to the question of when during the criminal process the right attaches. A criminal prosecution has many stages, and delay may occur during or between any of them. It may take place at the beginning of the process: between the time at which the government decides to prosecute a man and has sufficient evidence to proceed against him and the actual time of his arrest or indictment.[4] Or it may occur, for instance, between arrest and indictment,[5] during trial, or between trial and sentencing.

Authorities agree that delay between indictment and trial is subject to the speedy-trial safeguard, *e. g., Lucas* v. *United States,* 363 F. 2d 500, 502 (C. A. 9th Cir. 1966), and there is substantial authority that the right attaches upon arrest, *e. g., Hardy* v. *United States,* 119 U. S. App. D. C. 364, 365, 343 F. 2d 233, 234 (1964). But see, *e. g., Reece* v. *United States,* 337 F. 2d 852 (C. A. 5th Cir. 1964). Similarly, it has been generally held that the Speedy

[4] Delay may also occur during the appellate process or during collateral proceedings. I do not consider those situations here.

[5] By "indictment" I refer to the bringing of charges against a defendant, whether by information, indictment, or some analogous procedure.

Trial Clause applies to intervals between separate indictments or between separate trials on the same charge, *e. g., Williams* v. *United States, supra.* This Court has assumed, *arguendo,* but has not decided, that the interval between judgment and sentencing is governed by the clause, *Pollard* v. *United States, supra,* at 361; see also *Welsh* v. *United States,* 348 F. 2d 885 (C. A. 6th Cir. 1965). I have found no cases dealing with delay during the trial. With some exceptions,[6] it has been held that the right to speedy trial does not apply to delays that occur before the defendant's arrest or indictment, *e. g., Parker* v. *United States,* 252 F. 2d 680, 681 (C. A. 6th Cir. 1958); *Terlikowski* v. *United States,* 379 F. 2d 501, 503–504 (C. A. 8th Cir. 1967).

Does the speedy-trial guarantee apply to all delays between a defendant's arrest and his sentencing? The view that it does is not without support in the wording of the Sixth Amendment. The Constitution says that an "accused" is entitled to a speedy trial "[i]n all criminal prosecutions." Can it be that one becomes an "accused" only after he is indicted, or that the Sixth Amendment subdivides "prosecution" into various stages, granting the right to speedy trial in some and withholding it in others? In related contexts involving other clauses of the Sixth Amendment, we have held that the "prosecution" of an "accused" can begin before his indictment; for example, in *Escobedo* v. *Illinois,* 378 U. S. 478, 490 (1964), we spoke of the time when "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." And as regards realization of the purposes of the Speedy Trial Clause, the

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[6] See, *e. g., Mann* v. *United States,* 113 U. S. App. D. C. 27, 29–30, n. 4, 304 F. 2d 394, 396–397, n. 4 (1962); *United States* v. *Reed,* 285 F. Supp. 738, 740 (D. C. D. C. 1968); cf. *Sanchez* v. *United States,* 341 F. 2d 225, 228 n. 3 (C. A. 9th Cir. 1965).

possibility of harm to interests protected by the clause is certainly great whenever delay occurs after arrest.[7]

The applicability of the safeguard to delays occurring *before* arrest or indictment poses a more difficult question. A few courts have reasoned that the language of the Sixth Amendment precludes its application then,[8] and prior to arrest or indictment not all of the interests protected by the right are threatened. The accused suffers no preconviction penalty, since his freedom is not impaired by actual imprisonment or conditioned release. He suffers none of the personal or social disabilities that flow from public accusation. And, so far as society's interest in the effective prosecution of criminal cases is concerned, delay on the government's part need not impair its ability to prove the defendant's guilt beyond a reasonable doubt.[9]

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[7] At whatever point delay then occurs, the accused can suffer the penalties and disabilities of a prolonged prosecution. His stock of emotional and financial resources continues to be spent. His capacity to defend himself may be undermined. It is true that once trial has begun, or after one trial has been completed, he should have less difficulty in defending himself; but even then delay can result in the loss of witnesses or deterioration in the value of available testimony, and, of course, issues for which no preparation was previously made can arise with the passage of time. The government's ability to prove its case can also suffer from delay; even should a conviction be obtained, its deterrent value would be lessened by its distance from the offense. And if governmental delay is deliberate, intended to harm the accused, it strikes at the fairness of our criminal process.

[8] See, *e. g., People* v. *Jordan,* 45 Cal. 2d 697, 708, 290 P. 2d 484, 491 (1955). Again, however, it can be argued that it is unrealistic for speedy-trial purposes to say that a man is not an "accused" once the government has decided to prosecute him and has sufficient evidence to move against him, or that his "prosecution" does not begin at that time.

[9] The government may delay for a variety of reasons, *e. g.,* to gain time in which to strengthen and document its case while the potential defendant remains unaware, or in the hope that

Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterrent value of any conviction obtained. And it very probably reduces the capacity of the accused to defend himself; unlike the prosecution, he may remain unaware that charges are pending and thus fail to take steps necessary to his defense.[10] Accordingly, some of the interests protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment. Thus, it may be that for the purposes of the clause to be fully realized, it must apply to any delay in the criminal process that occurs after the government decides to prosecute and has sufficient evidence for arrest or indictment.[11]

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the passage of time will deny him certain witnesses or evidence. The government may also delay, not with a view to ensuring the conviction of the accused, but to use the threat of his trial to coerce him into assisting police operations or becoming a prosecution witness in other cases. Delay, of course, may also result because the government lacks sufficient resources to move more quickly or because it negligently fails to act. When delay is not the result of an intentional attempt to strengthen the government's case, it will very likely make more difficult proof of the accused's guilt.

[10] Such a person is in much the same position as an accused imprisoned in one jurisdiction who is unaware that another jurisdiction has formal charges outstanding against him. The latter has been held to have the protection of the Speedy Trial Clause, *e. g.*, *Fouts* v. *United States*, 253 F. 2d 215, 218 (C. A. 6th Cir. 1958).

[11] This would not necessarily mean that the government should be denied broad discretion to determine that its evidence is insufficient to make worthwhile an arrest or indictment, or that it may not have legitimate reasons for delay other than insufficient evidence; moderate delay necessary for law enforcement operations, such as the completion of undercover work involving a number of suspects, may be compatible with the Speedy Trial Clause. And, of course, the question whether, after an accused has been arrested or indicted, he may challenge prior governmental delay is wholly distinct from the question whether before arrest or indictment he may bring an action to compel the government to begin formal proceedings against him.

Some lower courts have held that the applicable statute of limitations provides the exclusive control over governmental delay prior to arrest or indictment. See, *e. g., United States* v. *Panczko,* 367 F. 2d 737, 739 (C. A. 7th Cir. 1966), which found delay in bringing charges "limited *only* by the statute of limitations." We said in *Ewell, supra,* at 122, that "the applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges." Such legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay. But for some crimes there is no statute of limitations. None exists, for example, in prosecutions of federal capital offenses, 18 U. S. C. § 3281. And, even when there is an applicable statute, its limits are subject to change at the will of the legislature, and they are not necessarily co-extensive with the limits set by the Speedy Trial Clause. Judge Wright, concurring in the result in *Nickens* v. *United States,* 116 U. S. App. D. C. 338, 343 n. 4, 323 F. 2d 808, 813 n. 4 (1963), observed: "The legislature is free to implement the [speedy-trial] right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statute." Cf. *Nickens, supra,* at 340 n. 2, 323 F. 2d, at 810 n. 2.

## IV

What are the criteria to be used in judging the constitutionality of those delays to which the safeguard applies? This Court has stated that "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v. *Haubert, supra,* at 87. We have also observed that "[w]hile justice should be administered with dispatch, the essential ingredient is

orderly expedition and not mere speed." *Smith* v. *United States,* 360 U. S. 1, 10 (1959). It appears that consideration must be given to at least three basic factors in judging the reasonableness of a particular delay: the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the Speedy Trial Clause.[12]

A defendant may be disentitled to the speedy-trial safeguard in the case of a delay for which he has, or shares, responsibility. It has been held, for example, that an accused cannot sustain a speedy-trial claim when delay results from his being a fugitive from justice, making dilatory pleadings or motions, failing to object when a continuance is granted the government,[13] or from delay occasioned by his incompetence to stand trial, *e. g., United States* v. *Davis,* 365 F. 2d 251, 255 (C. A. 6th Cir. 1966).

It has also been held that the defendant's failure, upon being confronted with delay, to demand a speedy trial justifies the denial of his claim.[14] In other words, his silence—or inaction—has been construed as an implied relinquishment of the right to speedy trial, *e. g., United States* v. *Lustman,* 258 F. 2d 475, 478 (C. A. 2d

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[12] Four factors—length of the delay, the reason for it, prejudice to the defendant caused by it, and waiver by the accused of speedy trial—are often mentioned as the determinants of reasonableness. See, *e. g., United States* v. *Simmons,* 338 F. 2d 804, 807 (C. A. 2d Cir. 1964). The length of the delay, however, appears to be significant principally as it affects the legitimacy of the reasons for delay and the likelihood that it had prejudicial effects. And waiver by the accused seems relevant primarily to the source of the delay.

[13] See the cases cited in Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1598–1599 (1965).

[14] But see the rejection by some States of the view that the right to speedy trial can be lost by silence or inaction. Representative cases are cited in 51 Va. L. Rev., *supra,* n. 13, at 1604 n. 87.

Cir. 1958).[15] The view that an accused loses his right to a speedy trial by silence or inaction is open to question on at least three grounds. First, it rests on what may be an unrealistic understanding of the effect of delay. One court in explaining the "demand" rule stated that it "is based on the almost universal experience that delay in criminal cases is welcomed by defendants as it usually operates in their favor." *United States ex rel. Von Cseh* v. *Fay,* 313 F. 2d 620, 623 (C. A. 2d Cir. 1963). It is true that delay may be welcomed by an accused, especially if he greatly fears the possible consequences of his trial. See *United States* v. *Chase,* 135 F. Supp. 230, 233 (D. C. N. D. Ill. 1955). But an accused may just as easily object to delay for its prolongation of the time in which he must live in uncertainty, carrying the emotional and financial burdens of accusation, and possessing the conditioned freedom of a potential felon. Moreover, the passage of time may threaten the ability of both the defendant and the government to prepare and present a complete case; in this regard, delay does not inherently benefit the accused any more than it does the prosecution.

Second, the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), we defined "waiver" as "an intentional relinquishment or abandonment of a known right or privilege." We have made clear that courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393 (1937), and that they should "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Util-*

[15] For elaboration of the "demand" rule, see generally Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 852–855 (1957); 51 Va. L. Rev., *supra,* n. 13, at 1601–1609.

*ities Comm'n,* 301 U. S. 292, 307 (1937). In *Klopfer, supra,* at 223, we held that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." It is a safeguard of the interests of both the accused and the community as a whole. Thus, can it be that affirmative action by an accused is required to *preserve*—rather than to *waive*—the right?

Third, it is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. The accused has no duty to bring on his trial. He is presumed innocent until proved guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial. Judge Weinfeld of the District Court for the Southern District of New York has observed, "I do not conceive it to be the duty of a defendant to press that he be prosecuted upon an indictment under penalty of waiving his right to a speedy trial if he fails to do so. It is the duty of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to speedy trial." *United States* v. *Dillon,* 183 F. Supp. 541, 543 (1960).[16]

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[16] The defendant, in any event, cannot force the beginning of his trial, even if he takes affirmative steps to that end. The present case provides a striking instance of this fact. The government, on the other hand, can and does set the case for trial. Thus, constitutional right aside, the government might reasonably bear the burden of going forward with the trial since it alone has the ultimate capacity to do so. The burden, moreover, might reasonably fall

If the defendant does not cause the delay of his prosecution, the responsibility for it will almost always rest with one or another governmental authority. The police and prosecutor are not the only governmental officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well, *e. g., Pollard* v. *United States, supra; Marshall* v. *United States,* 119 U. S. App. D. C. 83, 337 F. 2d 119 (1964). And the public officials responsible for delay may not even be associated with law enforcement agencies or the courts. Delay, for example, may spring from a refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for speedy trials. See, *e. g., King* v. *United States,* 105 U. S. App. D. C. 193, 195, 265 F. 2d 567, 569 (1959).

When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "purposeful or oppressive," is unjustifiable. *Pollard* v. *United States, supra,* at 361. See also *United States* v. *Provoo, supra.* The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin.[17] A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate

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on the government since the prosecutor is the initiating party in criminal proceedings. Cf. Fed. Rule Civ. Proc. 41 (b) (dismissal for failure to prosecute by the plaintiff).

[17] It has been held that negligent delay violates the Speedy Trial Clause, *Hanrahan* v. *United States,* 121 U. S. App. D. C. 134, 139, 348 F. 2d 363, 368 (1965); *United States* v. *Reed,* 285 F. Supp. 738, 741 (D. C. D. C. 1968). Cf. Fed. Rule Crim. Proc. 48 (b), which gives the federal courts discretion to dismiss an indictment if there has been "unnecessary" delay in prosecution.

misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect. Perhaps the most important reason for the delay of one criminal prosecution is to permit the prosecution of other criminal cases that have been in process longer than the case delayed. But surely even this objective cannot justify interminable interruption of a prosecution.[18]

Finally, what is the role of prejudice in speedy-trial determinations? The discharge of a defendant for denial of a speedy trial is a drastic step, justifiable only when further proceedings against him would harm the interests protected by the Speedy Trial Clause. Thus it is unlikely that a prosecution must be ended simply because the government has delayed unnecessarily, without the agreement of the accused. The courts below, however, are divided in their conclusions regarding prejudice. One court has stated that "we think that a showing of

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[18] As the court stated in *King* v. *United States,* 105 U. S. App. D. C. 193, 195, 265 F. 2d 567, 569 (1959), "[C]ases have to take their turn. The case on trial is entitled to deliberate consideration; the others on the calendar stack up. At the same time, too much heed to practicalities may encroach upon the individual's rights. If the legislature were to refuse to install sufficient judicial machinery to perform the judicial tasks, it might be necessary to turn some accused persons loose."

prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment," *United States* v. *Lustman,* 258 F. 2d 475, 477–478 (C. A. 2d Cir. 1958). Some have held that prejudice may be assumed after lengthy delays, *e. g., Hedgepeth* v. *United States,* 124 U. S. App. D. C. 291, 294 and n. 3, 364 F. 2d 684, 687 and n. 3 (1966). Others have insisted that its existence be shown by the defendant, *e. g., United States* v. *Jackson,* 369 F. 2d 936, 939 (C. A. 4th Cir. 1966), though some courts have shifted the burden of proof to the government after long delay, *e. g., Williams* v. *United States,* 102 U. S. App. D. C. 51, 53–54, 250 F. 2d 19, 21–22 (1957).

Although prejudice seems to be an essential element of speedy-trial violations, it does not follow that prejudice—or its absence, if the burden of proof is on the government—can be satisfactorily shown in most cases. Certainly, as the present case indicates, it can be established in some instances. It is obvious, for example, if the accused has been imprisoned for a lengthy period awaiting trial, or if the government has delayed in clear bad faith. But concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As was stated in *Ross* v. *United States,* 121 U. S. App. D. C. 233, 238, 349 F. 2d 210, 215 (1965): "[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter. . . . In a very real sense, the extent to which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of

that prejudice." Similarly, there is usually little chance of conclusively showing the harm sustained by an accused as a result of public accusation. One commentator has stated that "[t]here is no way of proving the prejudice to the accused which occurs outside the courtroom . . . the public suspicion, the severing of family and social ties, and the personal anxiety." Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 864. Nor, of course, is there any ready way of establishing the prejudice to community interests from delay.

Despite the difficulties of proving, or disproving, actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice," *United States* v. *Wade,* 388 U. S. 218, 227 (1967), to the interests protected by the Speedy Trial Clause. The speedy-trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions. We said in *Ewell, supra,* at 120, that the guarantee of a speedy trial "is an important safeguard . . . to limit the possibilities that long delay will impair the ability of an accused to defend himself," and Judge Frankel of the District Court for the Southern District of New York has stated that "prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years." *United States* v. *Mann,* 291 F. Supp. 268, 271 (1968).

Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, an impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process.[19] Because potential substantial

[19] See the cases cited in 20 Stan. L. Rev., *supra,* n. 2, at 494–495.

prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is shown to have been denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice *must* be assumed, or constitutional rights will be denied without remedy. Prejudice is an issue, as a rule, only if the government wishes to argue harmless error. See *Chapman* v. *California,* 386 U. S. 18 (1967). When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution.

The difficulty in such an approach, of course, lies in determining how long a prosecution must be delayed before prejudice is assumed. It is likely that generalized standards would have to be developed to indicate when during the course of a delay there arises a probability of substantial prejudice. Until delay exceeds that point, the burden most probably would remain on the accused to show that he was actually harmed. Once, however, delay exceeds that point, prejudice would cease to be an issue, unless the government wished to argue harmless error.[20] Though one temporal standard could very likely govern most prosecutions, account would need to be taken of those types of cases that diverge from the norm.[21]

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[20] We have indicated that "there are some constitutional rights [such as assistance of counsel during trial] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman, supra,* at 23. The same may be true of prosecutorial delays of great length. Cf. *United States* v. *Chase,* 135 F. Supp. 230, 233 (D. C. N. D. Ill. 1955).

[21] For example, less than average delay might give rise to the probability of prejudice in cases where the evidence consists of the testimony of a few witnesses, as opposed to documentary evidence. See the discussion in 20 Stan. L. Rev., *supra,* n. 2, at 499–500.

Thus, it may be that an accused makes out a prima facie case of denial of speedy trial by showing that his prosecution was delayed beyond the point at which a probability of prejudice arose and that he was not responsible for the delay, and by alleging that the government might reasonably have avoided it. Arguably the burden should then shift to the government to establish, if possible, that the delay was necessary, by showing that the reason for it was of sufficient importance to justify the time lost.[22] General standards could be developed by determining, first, the weight to be given various grounds for delay and, then, how great a delay is justifiable for each. Some grounds, such as an attempt to gain an advantage over the accused, would have no value; legitimate reasons might have different weights, an attempt to locate a minor prosecution witness having less justificatory force than an attempt to locate a witness on whose testimony the prosecution hinges.

## V

These comments provide no definitive answers. I make them only to indicate that many—if not most—of the basic questions about the scope and context of the speedy-trial guarantee remain to be resolved. Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest or indictment; similar arguments exist that an accused does not lose his right to a speedy trial by silence or inaction, that governmental delay that might reasonably have been

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[22] The government might appropriately bear this burden, since it, far more than the defendant, is likely to know why the delay took place. Courts below, however, have generally required the defendant to show that the delay was unnecessary, *e. g., Schlinsky* v. *United States,* 379 F. 2d 735, 737 (C. A. 1st Cir. 1967).

avoided is unjustifiable, and that prejudice ceases to be an issue in speedy-trial cases once the delay has been sufficiently long to raise a probability of substantial prejudice. Insofar as these arguments are meritorious, they suggest that the speedy-trial guarantee should receive a more hospitable interpretation than it has yet been accorded.

# SCHACHT *v.* UNITED STATES

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

No. 628. Argued March 31, 1970—Decided May 25, 1970

Petitioner, who participated in a skit performed several times in front of an Armed Forces induction center demonstrating opposition to American involvement in the Vietnam conflict, was convicted by a jury of violating 18 U. S. C. § 702, which makes criminal the unauthorized wearing of an American military uniform or part thereof. Petitioner alleged that he was authorized to wear the uniform by 10 U. S. C. § 772 (f), which permits wearing of a uniform while one is portraying a member of an armed force in a theatrical or motion picture production "if the portrayal does not tend to discredit that armed force." His conviction was affirmed by the Court of Appeals and he filed a petition for certiorari after the time specified in Supreme Court Rule 22 (2) had expired. *Held:*

1. The street skit in which petitioner participated was a "theatrical production" within the meaning of § 772 (f). Pp. 61–62.

2. The words "if the portrayal does not tend to discredit that armed force" in § 772 (f) impose an unconstitutional restraint on freedom of speech and must be stricken from the section to preserve its constitutionality. Pp. 62–63.

3. The time requirement of Rule 22 (2) is not jurisdictional and may be waived by the Court. Pp. 63–65.

414 F. 2d 630, reversed.

*David H. Berg* argued the cause for petitioner, *pro hac vice.* With him on the brief was *Chris Dixie.*

*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.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Daniel Jay Schacht, was indicted in a United States District Court for violating 18 U. S. C. § 702, which makes it a crime for any person "without authority [to wear] the uniform or a distinctive part thereof . . . of any of the armed forces of the United States . . . ." [1] He was tried and convicted by a jury, and on February 29, 1968, he was sentenced to pay a fine of $250 and to serve a six-month prison term, the maximum sentence allowable under 18 U. S. C. § 702. There is no doubt that Schacht did wear distinctive parts of the uniform of the United States Army [2] and that he was not a member of the Armed Forces. He has defended his conduct since the beginning, however, on the ground that he was authorized to wear the uniform by an Act of Congress, 10 U. S. C. § 772 (f), which provides as follows:

> "When wearing by persons not on active duty authorized.
>
> . . . . .
>
> "(f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a

[1] Title 18 U. S. C. § 702 provides as follows:

"Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both."

[2] Schacht wore a blouse of the type currently authorized for Army enlisted men with a shoulder patch designating service in Europe. The buttons on his blouse were of the official Army design. On his head Schacht wore an outmoded military hat. Affixed to the hat in an inverted position was the eagle insignia currently worn on the hats of Army officers.

> theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force.*" (Emphasis added.)

Schacht argued in the trial court and in this Court that he wore the army uniform as an "actor" in a "theatrical production" performed several times between 6:30 and 8:30 a.m. on December 4, 1967, in front of the Armed Forces Induction Center at Houston, Texas. The street skit in which Schacht wore the army uniform as a costume was designed, in his view, to expose the evil of the American presence in Vietnam and was part of a larger, peaceful antiwar demonstration at the induction center that morning. The Court of Appeals' opinion affirming the conviction summarized the facts surrounding the skit as follows:

> "The evidence indicates that the demonstration in Houston was part of a nationally coordinated movement which was to take place contemporaneously at several places throughout the country. The appellants and their colleagues prepared a script to be followed at the induction center and they actually rehearsed their roles at least once prior to the appointed day before a student organization called the 'Humanists.'
>
> . . . . .
>
> "The skit was composed of three people. There was Schacht who was dressed in a uniform and cap. A second person was wearing 'military colored' coveralls. The third person was outfitted in typical Viet Cong apparel. The first two men carried water pistols. One of them would yell, 'Be an able American,' and then they would shoot the Viet Cong with their pistols. The pistols expelled a red liquid which, when it struck the victim, created the impres-

sion that he was bleeding. Once the victim fell down the other two would walk up to him and exclaim, 'My God, this is a pregnant woman.' Without noticeable variation this skit was reenacted several times during the morning of the demonstration." 414 F. 2d 630, 632.

I

Our previous cases would seem to make it clear that 18 U. S. C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face. See, *e. g., United States* v. *O'Brien,* 391 U. S. 367 (1968). But the general prohibition of 18 U. S. C. § 702 cannot always stand alone in view of 10 U. S. C. § 772, which authorizes the wearing of military uniforms under certain conditions and circumstances including the circumstance of an actor portraying a member of the armed services in a "theatrical production." 10 U. S. C. § 772 (f). The Government's argument in this case seems to imply that somehow what these amateur actors did in Houston should not be treated as a "theatrical production" within the meaning of § 772 (f). We are unable to follow such a suggestion. Certainly theatrical productions need not always be performed in buildings or even on a defined area such as a conventional stage. Nor need they be performed by professional actors or be heavily financed or elaborately produced. Since time immemorial, outdoor theatrical performances, often performed by amateurs, have played an important part in the entertainment and the education of the people of the world. Here, the record shows without dispute the preparation and repeated presentation by amateur actors of a short play designed to create in the audience an understanding of and opposition to our participation in the Vietnam war. *Supra,* at 60 and this page. It may be that the performances were crude and

amateurish and perhaps unappealing, but the same thing can be said about many theatrical performances. We cannot believe that when Congress wrote out a special exception for theatrical productions it intended to protect only a narrow and limited category of professionally produced plays.[3] Of course, we need not decide here all the questions concerning what is and what is not within the scope of § 772 (f). We need only find, as we emphatically do, that the street skit in which Schacht participated was a "theatrical production" within the meaning of that section.

This brings us to petitioner's complaint that giving force and effect to the last clause of § 772 (f) would impose an unconstitutional restraint on his right of free speech. We agree. This clause on its face simply restricts § 772 (f)'s authorization to those dramatic portrayals that do not "tend to discredit" the military, but, when this restriction is read together with 18 U. S. C. § 702, it becomes clear that Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or

[3] The precise language of 10 U. S. C. § 772 (f) derives from the 1956 revision of Titles 10 and 32, which was undertaken for the purpose of combining laws affecting the Armed Forces, eliminating duplicate provisions, and clarifying statutory language. At that time the phrase "actor in a theatrical or motion-picture production" was substituted for the previous phrase "in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military . . . character . . . ." 39 Stat. 216–217. Although the 1956 revision and codification were not in general intended to make substantive changes, changes were made for the purpose of clarifying and updating language. The shift to the present version of § 772 (f) clearly reflects an intent to move to broader, more flexible language which, for example, would include television as well as other types of theatrical productions wherever presented. H. R. Rep. No. 970, 84th Cong., 1st Sess., 8; Statements of Senators O'Mahoney and Wiley, 102 Cong. Rec. 13944, 13953 (July 23, 1956).

policies of the Armed Forces. An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of § 772 (f) denies this constitutional right to an actor who is wearing a military uniform by making it a crime for him to say things that tend to bring the military into discredit and disrepute. In the present case Schacht was free to participate in any skit at the demonstration that praised the Army, but under the final clause of § 772 (f) he could be convicted of a federal offense if his portrayal attacked the Army instead of praising it. In light of our earlier finding that the skit in which Schacht participated was a "theatrical production" within the meaning of § 772 (f), it follows that his conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of § 772 (f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. To preserve the constitutionality of § 772 (f) that final clause must be stricken from the section.

## II

The Government's brief and argument seriously contend that this Court is without jurisdiction to consider and decide the merits of this case on the ground that the petition for certiorari was not timely filed under Rule 22 (2) of the Rules of this Court. This Rule provides that a petition for certiorari to review a court of appeals' judgment in a criminal case "shall be deemed in time when . . . filed with the clerk within thirty days after the entry of such judgment." We cannot accept the

view that this time requirement is jurisdictional and cannot be waived by the Court. Rule 22 (2) contains no language that calls for so harsh an interpretation, and it must be remembered that this rule was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. See 18 U. S. C. § 3772; Rule 37, Fed. Rules Crim. Proc. The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require. This discretion has been expressly declared in several opinions of the Court. See *Taglianetti* v. *United States,* 394 U. S. 316, n. 1 (1969); *Heflin* v. *United States,* 358 U. S. 415, 418 n. 7 (1959). See also R. Stern & E. Gressman, Supreme Court Practice 242–244 (4th ed. 1969), and the cases cited therein. It is true that the *Taglianetti* and *Heflin* cases dealt with this time question only in footnotes. But this is no reason to disregard their holdings and in fact indicates the Court deemed a footnote adequate treatment to give the issue.

When the petition for certiorari was filed in this case it was accompanied by a motion, supported by affidavits, asking that we grant certiorari despite the fact that the petition was filed 101 days after the appropriate period for filing the petition had expired. Affidavits filed with the motion, not denied or challenged by the Government, present facts showing that petitioner had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control. Without detailing these circumstances, it is sufficient to note here that after consideration of the motion and affidavits this Court on December 15, 1969, granted the motion, three Justices dissenting. The

decision of this Court waiving the time defect and permitting the untimely filing of the petition was thus made several months ago, and no new facts warranting a reconsideration of that decision have been presented to us.

For the reasons stated in Parts I and II of this opinion, the judgment of the Court of Appeals is

*Reversed.*

MR. JUSTICE HARLAN, concurring.

I join Part I of the Court's opinion. With respect to Part II, I agree with the Court's rejection of the Government's "jurisdictional" contention premised on the untimely filing of the petition for certiorari. In my view, however, that contention deserves fuller consideration than has been accorded it in the Court's opinion.

I

The Court's opinion does not fully come to grips with the Solicitor General's position. The Court rejects the argument that untimeliness under Rule 22 (2) should be given jurisdictional effect by stating, in part, that the Rule "contains no language that calls for so harsh an interpretation." In this regard, however, the time limitation found in Rule 22 (2) is no different from those established by statute; [1] neither makes explicit reference to waivers of the limitation. In the absence of language providing for waiver, we have without exception treated the statutory limitations as jurisdictional.[2] The Solicitor General asks why we should not do the same under our Rule. This issue, *i. e.*, why we treat time require-

[1] Compare Rule 22 (2) with, *e. g.*, 28 U. S. C. §§ 2101 (b), (c). Both the Rule and this statute provide for limited extensions of time. There was, however, no extension in the case before us.

[2] *E. g., Matton Steamboat Co., Inc.* v. *Murphy,* 319 U. S. 412 (1943); *Department of Banking* v. *Pink,* 317 U. S. 264 (1942); *Citizens Bank* v. *Opperman,* 249 U. S. 448 (1919).

ments under our Rule differently from the requirements imposed by statute, is hardly acknowledged in the Court's opinion. Moreover, although it is true that *Taglianetti* v. *United States*, 394 U. S. 316, n. 1 (1969), and *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959), held that the Court could waive untimeliness under our Rule, neither opinion explained why this is so. The Solicitor General does not belittle those two cases merely because each dealt with the problem in a footnote, but rather urges that they are inconclusive because neither gave reasons for the conclusion.[3]

## II

My own analysis of the issue presented here begins with an examination of the statutory authority for Rule 22 (2). This is found in what is now 18 U. S. C. § 3772,[4] a provision authorizing this Court to prescribe

[3] The Government relies on language in *United States ex rel. Coy* v. *United States*, 316 U. S. 342 (1942), a case not cited by the Court, as support for its claim that the 30-day limit established by rule was "jurisdictional." The issue in that case was which time limit—the 30-day limit imposed by what was then Rule XI or instead the 90-day limit of the general statutory provision—applied to a petition for certiorari for review of a circuit court affirmance of a district court denial of a motion to correct sentence in a criminal case. After noting that the petition was filed more than 30 days after the judgment of the Court of Appeals, the Court said: "If the judgment of the Court of Appeals is one to which Rule XI applies, the petition for certiorari was filed too late and we are without jurisdiction," *id.*, at 344. In disposing of the case, however, the opinion simply stated that the "writ will . . . be dismissed for failure to comply with Rule XI," *id.*, at 346, not for want of jurisdiction. In any event, the Court in *Coy* did not focus on the issue of whether for good cause Rule XI might be waived, thereby removing a time limitation that otherwise might be termed jurisdictional.

[4] 18 U. S. C. § 3772 derives from 47 Stat. 904 (1933) and 48 Stat. 399 (1934). Before these enactments, certiorari in criminal cases was governed by the general three-month time limitation provided by § 8 (a) of the Judiciary Act of February 13, 1925, 43 Stat. 940.

post-verdict rules of practice and procedure in criminal cases. Section 3772 specifically delegates to this Court the power to promulgate rules prescribing "the times for and manner of taking appeals [to the Courts of Appeals] and applying for writs of certiorari . . . ." While the legislative history of this provision evinces a congressional concern over undue delays in the disposition of criminal cases,[5] the broad terms of the statutory language, as well as what was written in the committee reports,[6] convince me that Congress' purpose was to give this Court the freedom to decide what time limits should apply.

Under the unqualified delegation found in § 3772, I have no doubts concerning this Court's authority to promulgate a rule that required certiorari petitions to be filed within 30 days of the judgment below but that expressly provided that this requirement could be waived for good cause shown, in order to avoid unfairness in extraordinary cases. I also think the Court might promulgate a rule that expressly provided that untimeliness could not be waived even for "excusable neglect"—in other words a "jurisdictional rule." [7]

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[5] See H. R. Rep. No. 2047, 72d Cong., 2d Sess., 2 (1933); S. Rep. No. 257, 73d Cong., 2d Sess., 1 (1934).

[6] See H. R. Rep. No. 2047, *supra,* at 2 ("A statutory code of procedure is not flexible; changes made desirable by experience can not be promptly made. The overwhelming weight of opinion among judges and lawyers is that matters of practice and procedure may better be controlled by rule than by statute.").

[7] See *United States* v. *Robinson,* 361 U. S. 220 (1960), where we held that under the Federal Rules of Criminal Procedure the Court of Appeals could not enlarge the time for filing an appeal even though it has found "excusable neglect." The Court thought, *inter alia,* that time extensions were inconsistent with the express language of Rule 45 (b), and the "deliberate intention" of its drafters.

In that case, the Court decided that the "conflicting considerations" in favor of or against an "excusable-neglect" provision should be "resolved through the rule-making process and not by judicial

Rule 22 (2), as promulgated, contains no express provision allowing for waiver. It is clear from prior decisions that the Court has interpreted the rule to allow for such a waiver, however.[8] So interpreted, I find Rule 22 (2) no less authorized under 18 U. S. C. § 3772 than would be a rule that by its terms provided expressly for the possibility of a waiver.

Nor do I find it at all anomalous that this Court on occasion waives the time limitations imposed by its own Rules and yet treats time requirements imposed by statute as jurisdictional. As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional. On the other hand, for the time requirement of Rule 22 (2), established under a broad statutory delegation, it is appropriate to apply 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,' " *American Farm Lines* v. *Black Ball,* 397 U. S. 532, 539 (1970), quoting from *NLRB* v. *Monsanto Chemical Co.,* 205 F. 2d 763, 764 (C. A. 8th Cir. 1953).

## III

Although I therefore conclude that this Court possesses the discretion to waive the time requirements of Rule

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decision," given the rather clear indications from the language and background of the existing rule that the omission had been deliberate. Although the Government relies heavily on *Robinson* here, neither the language nor the background of Rule 22 (2) indicates a "deliberate intention" to preclude waiver.

[8] See, *e. g., Heflin* v. *United States, supra; Taglianetti* v. *United States, supra.*

22 (2), it must be recognized that such requirements are essential to an orderly appellate process. Consequently, I believe our discretion must be exercised sparingly, and only when an adequate reason exists to excuse noncompliance with our Rules. In the present case, I agree with the Court that petitioner has adequately explained why he failed to meet our time requirements. On this basis I concur in Part II of the Court's opinion.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring in the result.

I agree that Congress cannot constitutionally distinguish between those theatrical performances that do and those that do not "tend to discredit" the military, in authorizing persons not on active duty to wear a uniform. I do not agree, however, with the Court's conclusion that as a matter of law petitioner must be found to have been engaged in a "theatrical production" within the meaning of 10 U. S. C. § 772 (f). That issue, it seems to me, is properly left to the determination of the jury.

The United States has argued that the exception for "theatrical productions" must be limited to performances in a setting equivalent to a playhouse or theater where observers will necessarily be aware that they are watching a make-believe performance. Under this interpretation, the Government suggests, petitioner must be found as a matter of law not to have been engaged in a "theatrical production"; hence, his conviction for unauthorized wearing of the uniform is lawful without regard to the validity of the "tend to discredit" proviso to § 772 (f). The Court, on the other hand, while refusing to assay a definition of the statutory language, flatly declares that under any interpretation, Congress could not possibly have meant to exclude petitioner's "street skit" from the class of "theatrical productions." Neither extreme, in my view, is correct. The critical question

in deciding what is to count as a "theatrical production" ought to be whether or not, considering all the circumstances of the performance, an ordinary observer would have thought he was seeing a fictitious portrayal rather than a piece of reality. And, although the judge's instructions here did not precisely reflect this interpretation, this question seems eminently suited to resolution by the jury.

Under proper instructions, then, a jury could have concluded that no theatrical production was involved, in which case the verdict should be sustained. However, the judge's instructions also permitted conviction on a finding that petitioner was engaged in a theatrical production, but that the production tended to discredit the military. See App. 51–54. Since the general verdict does not disclose which of these findings—only one of which can constitutionally entail conviction—was the actual finding, the conviction must of course be reversed. *Stromberg* v. *California,* 283 U. S. 359 (1931). I thus join the judgment of reversal but find it neither necessary nor correct to hold that petitioner's "theatrics" perforce amounted to a "theatrical production."

## MONKS *v.* NEW JERSEY

CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY

No. 127. Argued February 26, 1970—Decided May 25, 1970

Certiorari dismissed as improvidently granted.

*Anthony G. Amsterdam,* by appointment of the Court, 395 U. S. 942, argued the cause for petitioner. With him on the brief was *Michael Meltsner.*

*Archibald Kreiger* argued the cause for respondent. With him on the brief was *John G. Thevos.*

PER CURIAM.

Having scrutinized the record and considered the briefs and oral arguments submitted on both sides, we are satisfied that petitioner's claim of coercion respecting his confession, given by him over 12 years ago upon his apprehension as an alleged juvenile delinquent, does not merit the plenary review that we thought it might deserve at the time petitioner's *pro se* petition for certiorari was granted. 395 U. S. 903. The other claims tendered in such petition fare no better.

The further claim advanced by petitioner's appointed counsel in this Court respecting the alleged unconstitutional application of N. J. Stat. Ann. § 2A:4–37 (b) has been raised for the first time upon this writ and the state courts have had no opportunity to pass upon it.

Accordingly we conclude that the writ of certiorari should be dismissed as improvidently granted, without prejudice to any further appropriate proceedings below.

*It is so ordered.*

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

Petitioner, a 15-year-old boy, was arrested at 1 o'clock in the morning of February 16, 1957, removed to the

police station, and questioned by detectives for several hours about two purse-snatching incidents. He was then held in confinement in the Children's Shelter for 10 days during which time he was questioned at least three times by two detectives in the presence of a juvenile probation officer. Further questioning began on other crimes including two murders in the same area as the purse snatchings.

During the entire 10-day period this 15-year-old boy was without advice of his parents, lawyer, or friends. Indeed, his mother first learned he was in custody after he confessed to the two murders. During the entire 10-day period petitioner was never told he had a right to remain silent, or to refuse to answer the questions by the two detectives.

The end came on February 26, 1957. Petitioner arose at 7 o'clock in the morning, questioning began at 10 o'clock and continued off and on for 15 hours before the confession was typed. During this period he was moved from the Children's Shelter to the courthouse, the grand jury room, and an adjacent room. He was given several lie-detector tests and confronted with alleged witnesses. He had no sleep. He was given sandwiches for his lunch and dinner.

Certainly, such treatment so clearly violates the holdings of *Haley* v. *Ohio,* 332 U. S. 596 (1948); *Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Haynes* v. *Washington,* 373 U. S. 503 (1963); and *Greenwald* v. *Wisconsin,* 390 U. S. 519 (1968), as to require a reversal in this case.

Per Curiam

## DANIEL, DIRECTOR, COOK COUNTY DEPARTMENT OF PUBLIC AID, ET AL. *v.* GOLIDAY ET AL.

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

No. 1211. Decided May 25, 1970

District Court should consider bearing of *Goldberg* v. *Kelly,* 397 U. S. 254, and *Wheeler* v. *Montgomery,* 397 U. S. 280, on question of entitlement of welfare recipients to notice and hearing before reduction of benefits.

305 F. Supp. 1224, vacated and remanded.

PER CURIAM.

The court below has held that the Due Process Clause of the Fourteenth Amendment requires a State to provide a recipient of public welfare benefits with notice and a hearing prior to "termination, suspension, or reduction" of benefits. This Court's subsequent decisions in *Goldberg* v. *Kelly,* 397 U. S. 254, and *Wheeler* v. *Montgomery,* 397 U. S. 280, decided March 23, 1970, dealt only with termination and suspension, not reduction, of benefits. We think that the bearing of those decisions on the treatment of benefit reductions should be determined in the first instance by the District Court on a record developed by the parties with specific attention to that issue. Accordingly, the judgment is vacated and the case is remanded to the District Court for further proceedings in conformity with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE STEWART dissent.

# CHANDLER, U. S. DISTRICT JUDGE *v.* JUDICIAL COUNCIL OF THE TENTH CIRCUIT

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

No. 2, Misc. Argued December 10, 1969—Decided June 1, 1970

On December 13, 1965, respondent, the Judicial Council of the Tenth Circuit, acting under 28 U. S. C. § 332, issued an order finding that petitioner was unable or unwilling to discharge his duties efficiently as a district judge for the Western District of Oklahoma (hereafter the district) and directing that he should not act in any case then or thereafter pending therein, that until the Council's further order no cases filed in the district were to be assigned to petitioner, and that if all the active judges in the district could not agree upon the division of business and case assignments necessitated by the order, the Council, acting under 28 U. S. C. § 137, would make such division and assignments as it deemed proper. Petitioner filed with this Court a motion for leave to file a petition for a writ of prohibition and/or mandamus directed to the Council and sought a stay of its order. The Court denied a stay on the ground that the order was interlocutory and that petitioner would be permitted to appear at further proceedings before the Council. A hearing, scheduled for February 10, 1966, was not held, the Council having been advised that no district judge, including petitioner, desired a hearing. On February 4 the Council, acting under §§ 137 and 332, issued an order, which superseded its previous orders dealing with petitioner, authorizing petitioner to sit on cases assigned to him before December 28, 1965, and assigning to other judges of the district cases filed thereafter. On September 1, 1967, those judges and petitioner (who had previously expressed disagreement with the February 4 Order and the Council's "illegal effort" to create a situation in which it could assign cases under 28 U. S. C. § 137) advised the Council that "the current order for the division of business in this district is agreeable under the circumstances." The Council, which had considered modifying the February 4, 1966, Order in view of the small number of cases petitioner had then pending, thereupon let the February 4 Order stand. Petitioner contends that the Council's orders relating to the assignment of cases in

the district impose unlawful conditions on the exercise of his constitutional powers as a judge and usurp the impeachment powers vested in Congress. He claims that his acquiescence in the division of the business of the district resulted from "duress" of the December 13 Order and that it was also a matter of "strategy" to avoid the appearance of the absence of agreement among the district judges as to a division of work which would enable the Council to act under § 137. The Council contends, *inter alia,* that its action was solely administrative and cannot be reviewed as an original proceeding by this Court. *Held:* Whether or not the Council's action is reviewable here, petitioner, in the present posture of this case, is not entitled to the extraordinary remedy that he seeks since, after expressly acquiescing in the division of business in the district, following revocation of the Order of December 13, 1965, by the Order of February 4, 1966, he has not sought relief either from the Council or other tribunal, and such relief may yet be open to him. Pp. 84–89.

Motion denied.

*Thomas J. Kenan* argued the cause and filed a brief for petitioner.

*Charles Alan Wright* argued the cause and filed a brief for respondent.

*Carl L. Shipley* argued the cause and filed briefs as *amicus curiae* in support of petitioner.

*Solicitor General Griswold* argued the cause and filed a brief for the United States as *amicus curiae* in support of respondent.

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

Petitioner, a United States District Judge, filed a motion for leave to file a petition for a writ of mandamus or alternatively a writ of prohibition addressed to the Judicial Council of the Tenth Circuit. His petition seeks resolution of questions of first impression concerning, *inter*

*alia*, the scope and constitutionality of the powers of the Judicial Councils under 28 U. S. C. §§ 137 and 332.[1] The Judicial Council of each federal circuit is, under the present statute, composed of the active circuit judges of the circuit. Petitioner has asked this Court to issue an order under the All Writs Act[2] telling the Council to "cease acting [in] violation of its powers and in violation of Judge Chandler's rights as a federal judge and an Amer-

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[1] 28 U. S. C. § 137. "Division of business among district judges.

"The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders."

28 U. S. C. § 332. "Judicial Councils.

"The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

"The council shall be known as the Judicial Council of the circuit.

"The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

"Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

[2] 28 U. S. C. § 1651. "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

ican citizen." The background facts are of some importance.

1

On December 13, 1965, the Judicial Council of the Tenth Circuit convened in special session [3] and adopted an order which reflected a long history of controversy between petitioner and the Council concerning the conduct of the work of the District Court assigned to petitioner. The Order of December 13 purported to issue under the authority of 28 U. S. C. § 332, *supra,* n. 1, and recited that during

> "the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business. . . ."

The Order noted that during that period petitioner had been a party defendant in both civil and criminal litigation, as well as the subject of two applications to disqualify him in litigation in which on challenge petitioner had refused to disqualify himself.[4] The Order continued with a finding that

> "Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that

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[3] Chief Judge Alfred P. Murrah took no part in the proceedings.

[4] The civil suit was an action brought by one O'Bryan charging petitioner with malicious prosecution; the complaint was dismissed by the District Court, aff'd *en banc,* 352 F. 2d 987 (C. A. 10th Cir. 1965), cert. denied, 384 U. S. 926 (1966). The criminal indictment charging conspiracy to cheat and defraud the State of Oklahoma was quashed.

In both cases seeking disqualification of petitioner, including one decided after the signing of the Order here challenged, writs of

> a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made."

Expressly invoking the powers of the Judicial Council under 28 U. S. C. § 332, *supra,* n. 1, the Order directed that

> "until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.
>
> "It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U. S. C. § 137 and make such division and assignment as it deems proper."

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mandamus issued against petitioner. See *Occidental Petroleum Corp.* v. *Chandler,* 303 F. 2d 55 (C. A. 10th Cir. 1962) (*en banc*), cert. denied, 372 U. S. 915 (1963); and *Texaco, Inc.* v. *Chandler,* 354 F. 2d 655 (C. A. 10th Cir. 1965) (*en banc*), cert. denied, 383 U. S. 936 (1966).

Copies of the above Order were filed in the Court of Appeals for the Tenth Circuit and in the United States District Court for the Western District of Oklahoma on December 27 and 28, respectively. Another copy was served on Judge Chandler by a U. S. Marshal.

On January 6, 1966, as previously noted, Judge Chandler filed with this Court his motion for leave to file a petition for a writ of prohibition and/or mandamus directed to the Judicial Council. He also sought a stay of its Order. The Solicitor General, appearing on behalf of the Judicial Council, asked this Court to deny the stay application on the Council's representation that the Order of December 13 was only temporary pending prompt further inquiry into Judge Chandler's administration of the business of his court. The stay was denied on January 21, 1966, on the ground that the Order was "entirely interlocutory in character pending prompt further proceedings . . . and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel . . . ." 382 U. S. 1003.

On January 24, 1966, Judge Chandler addressed a letter to his fellow district judges indicating that he objected to the removal and reassignment of cases previously assigned and pending before him on December 28, 1965, but that he was *not* in disagreement with them as to the assignment of all new cases to judges other than himself. Judge Chandler asserted continuing judicial authority, however, over the cases pending before him as of December 28. The following day the judges of the Western District of Oklahoma advised the Judicial Council that all judges of that District had agreed on the division of new business filed in that court, but that they could not agree on the assignment to other judges of cases then pending before Judge Chandler.

On January 27, 1966, the Judicial Council again convened in special session and ordered a hearing on Feb-

ruary 10, 1966, in Oklahoma City at which Judge Chandler was invited to appear, with counsel if he desired. However, by February 4, when the Council met again, it had been advised that no judge of the Western District, including Judge Chandler, desired to be heard pursuant to the order for hearing. Accordingly, no hearing took place.

At this same meeting on February 4, 1966, the Council concluded that there was a disagreement among the District Judges of the Western District as to the division of business; it reached this conclusion on the basis of the disagreement between Judge Chandler and the other District Judges as to the reassignment of cases previously assigned to Judge Chandler as of December 28, 1965. The Council accordingly, acting under 28 U. S. C. §§ 137 and 332, entered an order authorizing Judge Chandler to continue to sit on cases filed and assigned to him prior to December 28, 1965; the Order assigned to the other judges of the Western District cases filed after that date. This Order of February 4 recited further that

> "4. The division of business and assignment of cases made herein may be amended or modified by written order signed by all active judges of the Western District of Oklahoma, provided that nothing contained herein shall be construed as preventing Judge Chandler from surrendering any pending cases for re-assignment to another active judge or to prevent transfer between judges to whom new business is assigned pursuant to this order.
>
> "5. This order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966, entitled 'In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma' and shall remain in effect until the further order of the Council."

On February 9, 1966, the Solicitor General filed a memorandum on behalf of the Council suggesting that in light of the above developments, namely the confirmation of Judge Chandler's authority to dispose of the case load then before him and the assignment of new business in accordance with an order previously agreed to by Judge Chandler, the case had become moot since there was nothing more to argue about. To this memorandum Judge Chandler filed a reply on February 25, 1966, contesting the suggestion that he had acquiesced in the Council's actions. Judge Chandler argued that his acquiescence in the division of new business settled upon by his fellow district judges was given deliberately for reasons of "strategy" in order to prevent any possibility that the Council could find that "the district judges . . . are unable to agree upon the adoption of rules or orders" for the distribution of business and assignment of cases under 28 U. S. C. § 137.

A supplemental memorandum filed by the Solicitor General on behalf of the Council expressed the latter's position that Judge Chandler should dispose of his pending docket of pre-December 28, 1965, cases before seeking assignment of new cases. In view of Judge Chandler's expressed disagreement with the February 4 Order the Solicitor General withdrew the suggestion of mootness. Later in March 1966 Judge Chandler submitted a reply to that supplemental memorandum asserting that the Council was continuing to act beyond its authority by purporting to require that he certify to it his subsequent willingness and ability to undertake new business. He contended that the supplemental memorandum setting forth the condition that he must apply for assignment was in effect a new order fixing still another condition on the exercise of his judicial office.

On July 12, 1967, the Judicial Council convened and, in light of a report from the District Judges of the

Western District showing that Judge Chandler had only 12 cases then pending, concluded that a modification of the Order of February 4, 1966, might be in order. The Council transmitted a copy of the minutes of the meeting to the District Judges and asked them to consider anew and agree upon a division of business within the Western District. On August 28, 1967, Judge Chandler wrote his district judge colleagues claiming that the Council's action of July 12 was but another "illegal effort" to create a situation in which the Council could assert its powers under 28 U. S. C. § 137 to assign and apportion cases.

On September 1, 1967, the Western District Judges, including Judge Chandler, advised the Judicial Council that "the current order for the division of business in this district *is agreeable* under the circumstances." (Emphasis added.) When the Council convened two weeks later, it noted the letter expressing agreement and concluded that there need be no new order in the case; accordingly the Order of February 4 was left in effect. All of these developments were reported to the Clerk of this Court and are part of the record.

2

In essence petitioner challenges all orders of the Judicial Council relating to assignment of cases in the Western District of Oklahoma as fixing conditions on the exercise of his constitutional powers as a judge. Specifically, petitioner urges that the Council has usurped the impeachment power, committed by the Constitution to the Congress exclusively. While conceding that the statute here invoked confers some powers on the Judicial Council, petitioner contends that the legitimate administrative purposes to which it may be turned do not include stripping a judge of his judicial functions as he claims was done here.

The Judicial Council contends that petitioner seeks to invoke the original jurisdiction of this Court in a case to which such jurisdiction does not extend. The Council argues that the purely administrative action taken in this case has never been reviewed by any court and cannot now be reviewed in an original proceeding under the guise of a claim under the All Writs Act.

The Judicial Council also contends that the Order of December 13, 1965, has been altogether superseded by the Order of February 4, 1966. The latter, in accordance with petitioner's desire, gave back those cases that had been temporarily withdrawn from Judge Chandler. It also continued in force the assignment and division of judicial business agreed upon by the District Judges including Judge Chandler. Alternatively, the Council contends that even absent petitioner's agreement on the division of cases, nonetheless the Council's action is authorized by 28 U. S. C. §§ 137 and 332.

The Solicitor General, who has filed a brief as *amicus curiae,* contends that this Court has jurisdiction to entertain the petition for a writ of mandamus or prohibition when a Judicial Council order is directed to a district judge because it acted as a judicial, not an administrative, tribunal for purposes of meeting the requirement that the case fall within this Court's appellate jurisdiction. The Solicitor General suggests that the Council is nothing more nor less than the Court of Appeals sitting *en banc,* and that the proceedings in the present case may be analogized to a disbarment.[5] From this the

[5] We note that nothing in the statute or its legislative history indicates that Congress intended or anyone considered the Circuit Judicial Councils to be courts of appeals *en banc.* Moreover, it should be noted that proposals to include a district judge as a member of each Circuit Judicial Council have been made; obviously, a Council so constituted could hardly be equated to an *en banc* court.

Solicitor General concludes that the case falls within the extraordinary relief available through the All Writs Act. That conclusion in turn rests on the further assumption that this Court's supervisory authority over lower courts under §§ 13 and 14 of the first Judiciary Act, 1 Stat. 80, 81, was not withdrawn when the latter two sections were repealed in favor of the All Writs Act by the revision of the Judicial Code in 1948. The Solicitor General concludes, however, that even though there is appellate jurisdiction in this Court, nonetheless it ought not to be exercised since the Order of December 13 has been superseded for four years by the Order of February 4, the terms of which have been expressly approved by petitioner. The respondent Council also urges this point.

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Whether the action taken by the Council with respect to the division of business in Judge Chandler's district falls to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence is the ultimate question on which review is sought in the petition now before us. The dissenting view of this case seems to be that the action of the Judicial Council relating to assignment of cases is an impingement on judicial independence. There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to

these things—and indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?

The legislative history of 28 U. S. C. § 332 and related statutes is clear that some management power was both needed and granted.[6] That is precisely what a group of distinguished chief judges and others seem to have had in mind when, in 1939, Congress was urged by Chief Justice Hughes, Chief Judge Groner, Judges Parker, Stephens and Biggs, and others to give judges a statutory framework and power whereby they might "put their own house in order."

Many courts—including federal courts—have informal, unpublished rules which, for example, provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his "backlog." These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. These internal rules do not come to public notice simply because reasonable judges acknowledge their necessity and abide by their intent. But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.

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[6] Congress, by its use of the mandatory "shall" in § 332, appears to have intended that district judges carry out administrative directives of the judicial councils. Congress did not spell out procedures for giving coercive effect to council orders, and the legislative history sheds no light on whether Congress intended this statute to be implemented by regulations. Standing alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of Council orders are called for.

These questions have long been discussed and debated; they are not easy questions and the risks suggested by the dissents are not to be lightly cast aside. But for the reasons that follow we do not find it necessary to answer them because the threshold question in this case is whether we have jurisdiction to entertain the petition for extraordinary relief.

The authority of this Court to issue a writ of prohibition or mandamus "can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction. *Marbury* v. *Madison,* 1 Cranch 137, 173–80." *Ex parte Peru,* 318 U. S. 578, 582 (1943). If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal,[7] then perhaps it could be reviewed by this Court without doing violence to the constitutional requirement that such review be appellate. As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat. It is an exercise we decline to perform since we conclude that in the present posture of the case other avenues of relief on the merits may yet be open to Judge Chandler. See *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–575 (1947).

Judge Chandler contends that his acquiescence in the division of business agreed upon by his fellow judges was

[7] We find nothing in the legislative history to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a "board of directors" for the circuit. Whether that characterization is valid or not, we find no indication that Congress intended to or did vest traditional judicial powers in the Councils. We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make "all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit."

given under some kind of duress flowing from the Council's Order of December 13, and that it was also given as a matter of "strategy," specifically in order to avoid the appearance of an absence of agreement among the District Judges as to a division of work. By so doing he sought to avoid creating a situation in which the Council would undoubtedly have had jurisdiction under § 137. The Council, however, noting that the judges had been unable to reach agreement as to those cases previously assigned to Judge Chandler, found nonetheless that a disagreement existed. Despite his apparent acquiescence, Judge Chandler contends that his actions since then belie his words; specifically that his subsequent attack in this Court established his disagreement.

Whatever the merits of this apparent attempt to have it both ways, one thing is clear: except for the effort to seek the aid of this Court, Judge Chandler has never once since giving his written acquiescence in the division of business sought any relief from either the Council or some other tribunal.[8] Were he to disagree with the present division of business, the Judicial Council would thereupon be obliged to "make the necessary orders." 28 U. S. C. § 137. He chose to avoid that course. As MR. JUSTICE HARLAN'S concurring opinion points out, Judge Chandler apparently desires to have the *status quo ante* restored without the bother of either disagreeing with the present order of the Council or persuading his fellow district judges to enter another. To say the least this is a remarkable litigation posture for a lawyer to assert in his own behalf.

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[8] We express no opinion as to whether he could, for instance, have brought an 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 him, 28 U. S. C. § 1361, on the theory that this was agency action.

Instead, Judge Chandler brought an immediate challenge in this Court to the Order of December 13. As noted above, *supra,* at 79, we denied any relief on the ground that that Order was "entirely interlocutory in character pending prompt further proceedings . . . and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel . . . ." He expressly refused to attend the hearing called by the Council for February 10, 1966, in response to this Court's order; in his brief he gives as a reason that he was unwilling to "attend a hearing conducted by a body whose jurisdiction he challenged . . . ."[9] As a result of that refusal we have no record, no petition for relief addressed to any agency, court or tribunal of any kind other than this Court, and a very knotty jurisdictional problem as well.[10] Parenthetically it might be noted that Chandler could have appeared, in person or by counsel, and challenged the jurisdiction of the Council without impairing his claim that it had no power in the matter.

As noted above, and as conceded by the dissents, the Order of December 13, 1965, was terminated by the Order of February 4, 1966. Judge Chandler has twice expressed agreement with the disposition of judicial business effected by that latter Order. Nothing in this record suggests that, were he to express disagreement, relief would not be forthcoming. On the contrary, on July 12, 1967, the Council expressly invited the judges of Chandler's district to agree among themselves upon a new rule or order for the division of business, and all the judges

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[9] Petitioner's Brief 7.

[10] Although it is not necessary to reach or decide the issue, the action of the Judicial Council here complained of has few of the characteristics of traditional judicial action and much of what we think of as administrative action. Nor are we called upon to decide whether administrative action is reviewable when it deals only with the internal operation of a court. See nn. 6, 7, *supra.*

wrote back advising the Council that "the current order for the division of business in this district is agreeable under the circumstances."

Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition. The motion for leave to file the petition is therefore

*Denied.*

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

MR. JUSTICE HARLAN, concurring in the denial of an extraordinary writ.

This opinion sets forth my reasons for concluding (1) that the subsisting Order of the Judicial Council of February 4, 1966, raises issues that are adequately presented to this Court and should be faced by it; (2) that this Court does have jurisdiction to pass upon them; and (3) that promulgation and effectuation of the Order of February 4, 1966, are within the Council's authority, and hence this petition for an extraordinary writ should be denied. The novelty and unusual character of these questions require, regrettably, an opinion of some length.

I

I am perplexed by the Court's explanation for its failure to reach the issues presented by Judge Chandler's petition. As the Court states, the issues are whether this Court has jurisdiction to review the orders of the Judicial Council, and, if so, whether those orders are invalid because beyond the statutory and constitutional bounds of the Council's authority. The Court says, correctly I believe, that "the threshold question in this case is whether we have jurisdiction to entertain the peti-

tion for extraordinary relief." *Ante*, at 86. However, that question is never decided, and the Court's opinion closes with the statement that whether or not we have jurisdiction, "plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition." The predicate for this conclusion appears to be that Judge Chandler has an adequate remedy available before the Council, which he must invoke before seeking relief here. As authority for this unusual disposition, the Court cites only *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947), a decision that I do not consider lends itself to the gloss the Court today places upon it.

It is clear that, although the Council's Order of December 13, 1965, has been revoked, the subsequent Order of February 4, 1966, is still outstanding and is attacked by Judge Chandler as beyond the authority constitutionally exercisable by the Council under either § 137 or § 332 of the Judicial Code. Judge Chandler has twice certified to the Council his acquiescence in the allocation of business mandated by the February 4 Order; indeed, his first certification was relied upon by the then Solicitor General, appearing for the Council in February 1966, as a basis for suggesting that the case was moot. Judge Chandler immediately responded that he did not in any way concede the Council's power to enter the February 4 Order, and that his indication of acquiescence made to the Council did not constitute such a concession. In light of this continued challenge to the order, the Solicitor General in March 1966 agreed "that the case can no longer be deemed moot."

The case thus reached the posture in which it now stands: Judge Chandler unequivocally asserts that the February 4 Order is beyond the Council's authority. If his contention were sound, the only validly outstanding directives for the allocation of business in the District

Court would be those "rules and orders" of that court, issued under § 137, that were in effect prior to December 13, 1965. Though the terms of those rules and orders are not before us, it is evident that they provided for assignment to Judge Chandler of a portion of the cases continually filed in his court. In challenging the validity of the Council's attempts to modify the previous allocation of business, and in requesting restoration of the *status quo ante,* Judge Chandler seeks to achieve a marked departure from the manner in which business is currently allocated.

Judge Chandler claims a right to accomplish this result *without* the necessity of mobilizing all the judges of his district to change the assignment of business by unanimous action, as the February 4 Order allows them to do. Further, since he denies the Council's authority to deprive him of all new business, he of course denies that he should be required to request the Council to renege as a condition of obtaining review of its outstanding order. He claims that it is illegal for the Council to deprive him of new cases, and equally so for the Council to condition his access to new cases upon his making a request to it that is tantamount to a form of a certification of disagreement under § 137.

Although the Court states that it does not decide the merits of this claim, see *ante,* at 87, I can read its opinion only as a determination that the claim is insubstantial. The Court states that it is a "remarkable litigation posture" for Judge Chandler to argue that the Council has no authority to force him to choose between remaining without new business, seeking further action by the Council, or seeking unanimous action by the District Judges. The Court denies relief because "[n]othing in this record suggests that, were he to express disagreement, relief would not be forthcoming," a decision that can only be

premised on a holding that he is denied no rights by being relegated to that course of action. *Ante,* at 87, 88–89. But this is the contrary of what Judge Chandler contends, and a conclusion with which two members of this Court sharply differ. As explained in Part III, *infra,* I too believe that Judge Chandler now lacks meritorious ground for complaint. However, I do not believe that the Court can properly make that holding without first determining its jurisdiction to consider the question.

*Rescue Army, supra,* provides no authority for such a procedure. That decision represents one branch of the long-settled doctrine that this Court will not determine constitutional questions unnecessarily or in a case that does not present them with sufficient clarity to make possible the circumspect consideration they require. See generally *id.,* at 568–585; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346 (1936) (Brandeis, J., concurring). Because the constitutional issues in *Rescue Army* were presented in a highly abstract and speculative form, and were clouded by factors not present in this case,[1] the Court dismissed the appeal, declining to adju-

[1] The appeal in *Rescue Army* involved review of a state prohibition proceeding in which was challenged, before trial, the complex state statutory scheme under which an appellant had been criminally charged. The Court observed that the meanings of the various statutory provisions, and their relationships to one another, were left undefined by the ambiguous opinion of the State Supreme Court; and since the attack was on the face of the statutes, the Court found it unclear which statutes were being challenged and even what the charges were against the appellant. In contrast, the present case involves two brief federal enactments that are challenged, not on their face, but as applied by specific orders of the Council relating to Judge Chandler.

The Court states that because the scheduled hearing below was canceled, "we have no record, no petition for relief addressed to any agency, court or tribunal of any kind other than this Court, and a very knotty jurisdictional problem as well." We do, however, have a record, consisting primarily of the several orders of the

dicate them. It concluded that an appellant there, faced with state criminal charges, would have to undergo a trial on the charges before obtaining review in this Court of his constitutional claims. As in this case, the Court's action had the effect of rejecting the appellant's claim of a right to obtain relief without further proceedings in a lower tribunal, see 331 U. S., at 584. However, the Court made that disposition only *after* carefully determining that it had jurisdiction in the case. See *id.*, at 565–568.

The Court does suggest, by footnote, an alternative basis for its refusal to consider Judge Chandler's petition. *Ante,* at 87 n. 8. If an adequate means of review of Council orders were available in the Federal District Court under 28 U. S. C. § 1361, that might justify this Court's staying its hand until such review had been sought. However, as pointed out by the United States as *amicus curiae,* it seems wholly unrealistic to suggest

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Council and the minutes of the meetings at which it dealt with this matter. The Council's February 4 Order, unlike that of December 13, which was "entirely interlocutory," effects a change of indefinite duration in the allocation of District Court business. It was incumbent on the Council to take such action only on a record that would support it; if the record fails to support the Council's action, that does not obfuscate Judge Chandler's claims but strengthens them. His claims for the most part do not depend on his establishing from the record the existence of particular factual circumstances, cf. *DeBacker* v. *Brainard,* 396 U. S. 28 (1969), but on the alleged lack of possible justification in the record for the Council's action. Nothing in *Rescue Army* seems to justify a refusal to adjudicate the issue thus presented. I find that the February 4 Order is justified on the record in this case, see Part III, *infra.*

The significance of Judge Chandler's failure to seek review in a tribunal other than this Court depends, of course, on the resolution of the "knotty jurisdictional problem" presented by his petition to this Court. I fail to see how it justifies not reaching that question at all.

that an appropriate remedy could be obtained from a District Court. The District Court mandamus statute, § 1361, extends to "officers," "employees," and "agencies" of the United States; there is no indication that it empowers the District Courts to issue mandamus to other judicial tribunals. Thus, as the Judicial Council seems to concede, the availability of a remedy under that statute hinges on a determination, which the Court avoids making, whether the Council's actions under review were judicial or not. Brief for Respondent 19. Beyond that, direct review by a district judge of the actions of circuit judges would present serious incongruities and practical problems certainly not contemplated when § 1361 was enacted. It is unrealistic for the Court to imply that § 1361 presents an appropriate avenue of relief justifying this Court's refusal to exercise its jurisdiction.

I do not disagree with the Court that the issues presented by Judge Chandler's petition are troublesome ones that we might wish to avoid deciding. However, I can perceive no reasoned justification for the Court's refusal to decide them. Chief Justice Marshall long ago enunciated the principle that should govern us here:

> "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821).

That principle has not been abrogated by the *Rescue Army* decision, which merely undertook to define the limits of our ability to adjudicate constitutional issues in cases that adequately present them. I find no license in that decision for the action taken by the Court today.

## II

Before Judge Chandler's attack on the orders of the Judicial Council can be considered, it must be determined whether the Court possesses jurisdiction to entertain his petition for a writ of mandamus or prohibition. While I agree with my Brothers BLACK and DOUGLAS that the Court does have jurisdiction, I think that the question warrants fuller treatment than they have given it.

### A. CONSTITUTIONAL JURISDICTION

Any discussion of the scope of this Court's authority under the Constitution must take as its point of departure *Marbury* v. *Madison,* 1 Cranch 137 (1803), where the Court held that except in those instances specifically enumerated in Article III of the Constitution,[2] this Court may exercise only appellate—not original—jurisdiction. Because this suit is not cognizable as an original cause, the question initially to be faced is whether it is within our appellate jurisdiction.

The Court was asked in *Marbury* to issue a writ of mandamus to compel the Secretary of State to deliver to an appointed justice of the peace his previously signed commission. After noting that the suit did not fall within any of the enumerated heads of original jurisdiction, the Court, through Chief Justice Marshall, concluded: "To enable this court, then, to issue a *mandamus,* it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the Court] to exercise appellate jurisdiction." *Id.,* at 175. The Court held that issuance of mandamus to a nonjudicial federal officer would not be an exercise of appellate, but of original,

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[2] "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." U. S. Const., Art. III, § 2, cl. 2.

jurisdiction. Thus the statute that purported to authorize such action by the Supreme Court was ineffective. See 2 J. Story, Commentaries on the Constitution of the United States § 1761 (5th ed. 1891).

The Chief Justice stated, as the "essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." 1 Cranch, at 175. Beyond cavil, the issuance of a writ of mandamus to an inferior *court* is an exercise of appellate jurisdiction. *In re Winn,* 213 U. S. 458, 465–466 (1909). If the challenged orders of the Judicial Council in this instance were "an exercise of judicial power," this Court is constitutionally vested with jurisdiction to review them, absent any statute curtailing such review. *Williams* v. *United States,* 289 U. S. 553, 566 (1933); *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 723 (1929); *In re Sanborn,* 148 U. S. 222, 224 (1893). On the other hand, if they were not, *Marbury* alone is sufficient authority to support a conclusion that this suit is beyond this Court's power under Article III. An analysis of the nature of the Council's orders must begin with consideration of the statute by which the Council was created.

The Judicial Councils of the circuits were brought into being by the Act of August 7, 1939, which was termed "An act to provide for the administration of the United States courts, and for other purposes." 53 Stat. 1223. The major purposes of the Act were to free the federal courts from their previous reliance on the Justice Department in budgetary matters, and "to furnish to the Federal courts the administrative machinery for self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice." H. R. Rep. No. 702, 76th Cong., 1st Sess., 2 (1939). To this end the Act established the Administrative Office

of the United States Courts, headed by a Director, to compile statistical data on the operation of the courts and to provide support services of a logistical nature.[3] The Act further established two new entities in each of the judicial circuits: the Judicial Council, composed of all the active circuit judges, and the Judicial Conference, composed of circuit and district judges along with participating members of the bar. The Council, in regular meetings, was to consider the reports of the Director and take "such action . . . thereon" as might be necessary;[4] the Conference was to meet annually "for the purpose of considering the state of the business of the courts and advising ways and means of improving the administration of justice within the circuit."[5]

As these statutory provisions indicate, Congress envisioned quite different functions for the three new bodies. The role of the Administrative Office, and its Director, was to be "administrative" in the narrowest sense of that term. The Director was entrusted with no authority over the performance of judicial business—his role with respect to such business was, and is, merely to collect information for use by the courts themselves. Chief Justice Groner of the Court of Appeals for the District of Columbia, who was chairman of the committee of circuit judges that participated in drafting the bill, stressed to the Senate Committee on the Judiciary that the bill would give the Director no "supervision or control over the exercise of purely judicial duties," because to grant such power to an administrative officer "would be to destroy the very fundamentals of our theory of government. The administrative officer [the Director] proposed in this bill is purely an administrative

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[3] 53 Stat. 1223, as amended, 28 U. S. C. §§ 601, 604.

[4] 53 Stat. 1224, as amended, 28 U. S. C. § 332.

[5] 53 Stat. 1225, as amended, 28 U. S. C. § 333.

officer." Hearings on S. 188 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., 12 (1939) (response to question by Senator Hatch). See also *id.*, at 36 (statement of A. Holtzoff).

The Judicial Conference for each circuit was given a complementary role, again divorced from direct involvement in the disposition by the courts of their judicial business. Patterned in large part after the voluntary conferences that had been held for years in the Fourth Circuit, the Conference was intended to provide an opportunity for friendly interchange among judges and between bench and bar, out of which might grow increased understanding of problems of judicial administration and enhanced cooperation toward their solution. Its function, as indicated by the statutory language quoted above, was to be "purely advisory." See Hearings on H. R. 5999 before the House Committee on the Judiciary, 76th Cong., 1st Sess., 11–12, 17, 23–24 (1939).

The Judicial Council, on the other hand, was designed as an actual participant in the management of the judicial work of the circuit. The Act provided that, "[t]o the end that the work of the district courts shall be effectively and expeditiously transacted," the circuit judges of each circuit were to meet as a council at least twice a year. After consideration of the statistical reports submitted by the Administrative Office, "such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." [6] This provision exists today as § 332 without

[6] This provision stated in full:

"To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council

relevant change, except that the 1948 revision of the Judicial Code added a declaration that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," and correspondingly directed the district judges to carry out all such "orders." The reviser's note explained this amendment as merely a change in "phraseology," embodying in new words the original understanding of the powers of the councils. H. R. Rep. No. 308, 80th Cong., 1st Sess., A46 (1947).

The most helpful guide in determining the role envisaged for the Judicial Councils is the testimony of Chief Justice Groner, who shouldered most of the task of explaining the purposes of the bill to the committees of both Houses of Congress. He explained that under existing law the circuit judges had "no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, . . . for which he may be responsible." Hearings on S. 188, *supra,* at 11. In contrast, under the proposed bill the Administrative Office would "observe and see that whatever is wrong in the administration of justice, from whatever sources it

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composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2) [now 28 U. S. C. § 604 (a) (2)], and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed." 53 Stat. 1224.

may arise, is brought to the attention of the judicial council that it may be corrected, by the courts themselves." *Id.*, at 12–13.

As examples of the kinds of action a Judicial Council might be expected to take under the proposed bill, Chief Justice Groner suggested that if the statistics showed a particular district court to be falling behind in its work, the Council would "see to it, either that the particular judge who is behind in his work catches up with his work, or that assistance is given to him whereby the work may be made current." *Id.*, at 11. If it appeared that a particular judge "had been sick for 4 or 5 months and had been unable to hold any court, or had been unable, by reason of one thing or another, to transact any business, . . . immediate action could be taken to correct that situation." Hearings on H. R. 5999, *supra,* at 11. Asked by Representative Walter Chandler "what power is given there to require a judge to decide a case that he has had under advisement for months and years," he responded that the Council, after considering the matter, could issue directions that would be "final." *Id.*, at 13. Any "lazy judge's work would be reported to the council, [which] would take the correct action." *Id.*, at 27.[7]

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[7] The testimony of Judge Parker of the Fourth Circuit was to the same effect. He explained:

"The importance of the bill, to my mind, is in unifying the administration of justice in the hands of the chief judicial officers of the courts, and clothing them with responsibility for the exercise of that power.

. . . . . .

"Now, with your knowledge of human nature, you can understand it is one thing for me, as the senior circuit judge, to say to Judge Jones, 'The work is getting behind in your district. You have a number of cases that ought to be decided. I think you should decide them.' That is a very different thing from a council of all of the judges of the circuit saying, 'Judge Jones, you are

Judge Parker stated his view that

> "what we have done is this, up to this point: We have given to the Circuit Court of Appeals supervisory power over the decisions of the district judges, but we have given them no power whatever over administration by the district judges.
>
> "If Judge Jones decides a case contrary to the views of the majority of the Circuit Court of Appeals, we can tell him so and reverse him. But if he holds a case under advisement for 2 years, instead of deciding it promptly, there is nothing that we are authorized by the law to do about it in the absence of an application for mandamus. Now, this [bill] authorizes us to do something about it; and I agree with you that something ought to be done about it." *Id.*, at 21.

In place of the inadequate extraordinary remedy of mandamus, which could correct only the extreme abuse in a particular case, the circuit judges, sitting as the Judicial Council, were given the authority for continuous supervision of the flow of work through the district courts.

In short, the proposed Judicial Council was intended to fill the hiatus of authority that existed under the then-current arrangements, whereby the Attorney Gen-

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behind with your work and we think that the cases that you have under advisement ought to be decided, and we direct that they be decided, and we will send Judge Smith into your district and he will assist you in holding court in your district until this arrearage is cleared up.'

. . . . .

"In other words, you would have a man speaking with authority of law and not merely exercising his personal and persuasive influence.

"I think that that provision for a council in each circuit is one of the best provisions in the bill, . . . and will give the circuit judges the power to utilize the judicial man power on each circuit to the best advantage." *Id.*, at 20–21.

eral collected data about the operation of the courts but had no power to take corrective action, "except, perhaps, as a result of the moral suasion of his office." The proposed bill would allow compilation of more complete information, and would "provide a method, a legitimate, valid, legal method, by which, if necessary, and when necessary, the courts may clean their own house"; it would "give a body, in which the authority is firmly lodged, the power to do that and to do it expeditiously." *Id.*, at 8. See generally Report on the Powers and Responsibilities of the Judicial Councils, H. R. Doc. No. 201, 87th Cong., 1st Sess. (1961); Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. Chi. L. Rev. 203 (1970).

This legislative history lends support to a conclusion that, at least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal for purposes of this Court's appellate jurisdiction under Article III. It seems clear that the sponsors of the bill considered the power to give such orders something that could not be entrusted to any purely "administrative" agency—not even to the Administrative Office, which was to be an arm of the judicial branch of government and under the direct control of the Supreme Court and the Judicial Conference of the United States. Chief Justice Groner, in the passage quoted above, stated that to give such power to an administrative agency "would be to destroy the very fundamentals of our theory of government." Instead, any problems unearthed by the Director's studies were to be "corrected, by the courts themselves." Hearings on S. 188, *supra,* at 12–13. See also Hearings on H. R. 5999, *supra,* at 8.

There were further references throughout the hearings and committee reports to the fact that the corrective power would be exercised by the courts themselves. *E. g.,* Hearings on S. 188, *supra,* at 16 (statement of

A. Vanderbilt); *id.*, at 31–32 (statement of Hon. Harold M. Stephens); *id.*, at 36 (statement of A. Holtzoff); H. R. Rep. No. 702, 76th Cong., 1st Sess., 4 (1939). The House report quoted with approval an endorsement of the bill by the American Judicature Society, stating that "there is no way to fortify judicial independence equal to that of enabling the judges to perform their work under judicial supervision." *Ibid.* These statements indicate that the power to direct trial judges in the execution of their decision-making duties was regarded as a judicial power, one to be entrusted only to a judicial body.

In this regard it is important to note that an earlier draft of the 1939 Act would have given responsibility for supervising the lower courts to the Supreme Court and the Chief Justice of the United States. The idea of devolving the authority to councils at the circuit level was suggested by Chief Justice Hughes, who believed that the supervision could be made most effective by "concentration of responsibility in the various circuits . . . with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit." H. R. Doc. No. 201, *supra,* at 3. It is equally notable that, while the draftsmen did consider giving district judges some representation on the Councils, see *id.*, at 4–5, there was apparently no thought given to including nonjudicial officers. These indications leave no doubt that the Councils' architects regarded the authority granted the Councils as closely bound up with the process of judging itself.[8]

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[8] I find little guidance for our interpretive problem in the fact that the terms "administration" and "administrative" were sometimes used by witnesses or Congressmen to characterize the duties of the Councils. Those terms are not talismanic; they may, in various contexts, bear a range of related meanings. Certainly the phrase "judicial administration" is often used to characterize judicial tasks

Because the legislative history shows Congress intended the Councils to act as judicial bodies in supervising the district judges, there is no need to decide

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performed by the courts as incidents to their primary function of rendering definitive adjudications of disputes. Since the legislative history as a whole indicates that Congress regarded the direction of the trial courts' handling of cases as a judicial function, I conclude that it used the term "administrative" in the sense in which the term is applied, for example, to many trial-court rulings that do not dispose of issues in a case but merely determine its course through the judicial process.

Nor do I find an obstacle to my construction of § 332 in Congress' failure to make express provision for the imposition of sanctions on a district judge who might contravene an order of the Judicial Council. When the question of sanctions was broached at the hearings, Chief Justice Groner stated:

"I doubt but what a judge could properly say, 'I am not going to decide this case any sooner than I choose to decide it. It is my case, and I am conducting my court, and you have no authority, except by impeachment.'" Hearings on H. R. 5999, *supra,* at 14. At this, Representative Celler reminded the witness of the provision in the bill making it the "duty" of district judges to carry out the Council's directions. The witness replied:

"I cannot conceive of a district judge anywhere, and I do not believe there is any, but, when he is admonished by this council of judges that he must do in accordance with the report made to him a particular thing to correct what is regarded as an abuse, that he will fail to do it. If he does fail to do it, then I think there would be imposed on the council the duty of bringing the matter in some way to the attention of the only power in existence, in a matter of that kind, which could apply the correct remedy; that is, the Congress of the United States." *Ibid.*

Similarly, Judge Parker, in response to a question whether the bill would "put any restraint on the council at all," stated:

"I do not think this bill does. Of course, I assume this is true: That the council will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter."

Representative Sumners queried: "Then you are limited by what you can do to a judge in the way of punishment?" "Absolutely,"

whether placement of this authority in a nonjudicial body would violate the constitutional separation of powers, as Chief Justice Groner seems to have believed. It is sufficient to conclude from reason and analogy that this responsibility is of such a nature that it *may* be placed in the hands of Article III judges to be exercised as a judicial function.

An order by the Council to a district judge, directing his handling of one or many cases in his court, is an integral step in the progress of those cases from initial filing to final adjudication. Like the district judge's own orders setting a time for discovery or trial, or transferring a case to another district pursuant to 28 U. S. C. § 1404 (a), such an order, even though concerned with a matter of "judicial administration," is part of the official

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replied Judge Parker. *Id.*, at 22. See also Hearings on S. 188, *supra*, at 18–19 (statement of A. Vanderbilt).

There is no need to determine in this case the correctness of these witnesses' apparent assumption that no form of discipline short of impeachment would be permissible for disobedience to an order of the Council, or of their possible assumption that such disobedience would be an impeachable offense. It seems clear that the witnesses' statements do not detract from the conclusion drawn from the rest of the legislative history, and from the language of the statute itself, that the determinations of the Judicial Council were intended to create legal duties on the part of district judges to whom they were addressed. As Judge Parker said, the Council would be "speaking with authority of law and not merely exercising [a] personal and persuasive influence." Hearings on H. R. 5999, *supra*, at 21. Even under the present statutory scheme, certain sanctions might be available in particular circumstances, such as the invalidation on appeal of orders entered by a judge in a case that had been ordered transferred from his docket. At any rate, this is only an aspect of the general problem of determining the permissible and appropriate sanctions for any kind of unlawful judicial conduct. The fact that the enforcement mechanisms are problematic does not destroy the legal nature of the Council's orders. See H. R. Doc. No. 201, *supra*, at 8; cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937); *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933); n. 9, *infra*.

conduct of judicial business. Unlike the more common orders of the district court, the Council's orders involve supervision of a subordinate judicial officer. But in this regard they are not unlike the extraordinary writ of mandamus, which Judge Parker thought the Council's orders would supplement, or the orders entered by courts in proceedings for disbarment of an attorney. In short, the function of the Council in ordering the district judges to take certain measures related to the cases before them is, as the legislative history indicates Congress understood, judicial in nature.[9]

To support a contrary conclusion, respondent points to the language of Justice Holmes in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908), defining a "judicial inquiry" as one that "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," as contrasted to legislation, which "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." The Court in *Prentis* held that a ratemaking

[9] For similar reasons I have little difficulty in characterizing as a "case or controversy" within the Article III judicial power a challenge to an order of the Council that regulates a district judge in the exercise of his official duties. Where, as here, the purpose and effect of the order are to restrict the judge's performance of judicial tasks, and he alleges illegal interference with the exercise of his office, his petition presents a cognizable case or controversy just as does a petition for review of the disbarment of an attorney. See Note, The Exclusiveness of the Impeachment Power under the Constitution, 51 Harv. L. Rev. 330, 334 (1937); cf. *Ex parte Bradley*, 7 Wall. 364 (1869); *Ex parte Robinson*, 19 Wall. 505 (1874); *Ex parte Wall*, 107 U. S. 265 (1883) (mandamus to review disbarment orders of lower federal courts). If a litigant in a case before the district court considered himself aggrieved by a Council order involving his case, his complaint also would seem to raise a justiciable case or controversy, although it is not necessary to decide now in what manner he might obtain review of the order.

proceeding in the Virginia State Corporation Commission was legislative in character, despite the fact that the Commission was assumed to function as a court in performing other duties. Similarly, in *United States* v. *Ferreira,* 13 How. 40 (1852), this Court concluded that the act of a district judge in passing on claims under a treaty, subject to approval by the Secretary of the Treasury, was not a judicial one; the Court held that Congress, in giving this authority to judges, referred to them by their office "merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends." *Id.,* at 47. See also *Gordon* v. *United States,* 2 Wall. 561 (1865); *In re Metzger,* 5 How. 176 (1847); *Hayburn's Case,* 2 Dall. 409 (1792).

Respondent argues that the functions of the Judicial Council under § 332 are, under Justice Holmes' definitions, legislative, or administrative, rather than judicial; and that the statutory provision making the membership of the Council coextensive with that of the Court of Appeals for each circuit [10] is merely a means of designating the individual members by reference to their office. Certainly respondent is correct in urging that Congress' designation of circuit judges as the members of the Council does not in itself make the Council's function judicial. I think, however, that the Council's orders directing the official business of the district courts are judicial within the general definition of that term in *Prentis.* In urging that the Council's function merely "looks to the future and changes existing conditions by making a new rule," respondent disregards the fact that each of the Council's orders, such as those challenged here, is rooted in the factual circumstances of the business of a particular judge or judges and the status of a

[10] Compare 28 U. S. C. § 332 with 28 U. S. C. § 43 (a) and Fed. Rule App. Proc. 35 (a).

particular case or cases in the district court; and each order, if properly entered, extends only as far as the circumstances that make it "necessary . . . for the effective and expeditious administration of the business of the courts." 28 U. S. C. § 332. As noted above, the Council's orders for the handling of cases in the district court serve as one step in the progress of those cases toward judgment. Those orders can be expected to apply commonly accepted notions of proper judicial administration to the special factual situations of particular cases or particular judges.

As respondent points out, the power entrusted to the Councils by § 332, like those added by later enactments, see *infra,* at 109–110, necessarily involves a large amount of discretion; accordingly, review of the Councils' actions will usually be narrow in scope. But this does not mean that the Councils are "left at large as planning agencies." *United States* v. *First City National Bank,* 386 U. S. 361, 369 (1967). In *First City National Bank,* we were faced with a federal statute directing the courts to determine whether the anticompetitive effect of a proposed bank merger was outweighed by considerations of community convenience and need. We ruled that the courts could accept this as a "judicial task" because, like the "rule of reason," long prevalent in the antitrust field, the effect-on-competition standard was a familiar one within "the area of judicial competence." See also *United Steelworkers* v. *United States,* 361 U. S. 39 (1959). Judicial administration is a matter in which the courts even more clearly should have special competence. Within the framework of the statutes establishing the inferior federal courts and defining their jurisdiction, the Judicial Councils are charged with the duty to take such actions as are necessary for the expedition of the business of the courts in each circuit. Their discretion in this matter, while broad, does not seem to be of a different order from that possessed by district judges with respect

to many matters of trial administration. In both instances, review can correct legal error or abuse of discretion where it occurs; that the scope of review will often be very narrow does not in itself establish that the exercise of such discretion is a nonjudicial act.[11]

Respondent makes a further argument to avert a conclusion that the actions here drawn in question were judicial actions. It points out that Congress since 1939 has given the Judicial Councils many specific powers—powers that respondent considers so clearly nonjudicial as to negate any inference that the Council serves as a "judicial" body within the purview of Article III. Those powers include the power to order a district judge, where circumstances require, to reside in a particular part of the district for which he is appointed, 28 U. S. C. § 134 (c); to make any necessary orders if the district judges in any district are unable to agree upon the division of business among them, 28 U. S. C. § 137; to consent to the pretermission of any regular session of a District Court for insufficient business or other good cause, 28 U. S. C. § 140 (a); to approve as necessary the provision of judicial accommodations for the courts by the General Services Administration, 28 U. S. C. § 142; to consent to the designation and assignment of circuit or district judges to sit on courts other than those for which they are appointed, 28 U. S. C. § 295; to certify to the President

[11] It should be noted that virtually all of the additional powers that have been conferred on the Councils by provisions of the Judicial Code other than § 332, see *infra,* define the Council's tasks in terms commonly used as standards for judicial determination. See 28 U. S. C. § 134 (c) ("[i]f the public interest and the nature of the business of a district court require"), § 137 ("necessary orders"), § 142 ("court quarters and accomodations . . . approved as necessary"), § 372 (b) ("judge . . . unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability"); 11 U. S. C. § 62 (b) ("[r]emoval . . . for incompetency, misconduct, or neglect of duty").

that a circuit or district judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability, thus authorizing the President to appoint an additional judge, 28 U. S. C. § 372 (b); to direct where the records of the courts of appeals and district courts shall be kept, 28 U. S. C. § 457; to approve plans for furnishing representation for defendants under the Criminal Justice Act, 18 U. S. C. § 3006A (a); and to take various actions in regard to referees in bankruptcy, including removal of a referee for cause, 11 U. S. C. §§ 62 (b), 65 (a), (b), 68 (a), (b), (c), 71 (b), (c).

While many of these powers are trivial in comparison with the courts' basic responsibility for final adjudication of lawsuits, I am not persuaded that their possession is inconsistent with a conclusion that the Council, when performing its central responsibilities under 28 U. S. C. § 332, exercises judicial power granted under Article III. Cf. *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 580–582 (1962) (opinion of HARLAN, J.). In the first place, the respondent concedes that at least one of these enumerated powers—the power to remove referees for cause—"can properly be regarded as judicial," and it is not at all clear that any of them is beyond the range of the permissible activities of an Article III court. In *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, 332 (1941), the Court noted the range of relatively minor responsibilities, other than the hearing of appeals, placed by statute in the courts of appeals. These included prescribing the form of writs and other process and the form and style of the courts' seals; making rules and regulations; appointing a clerk and approving the appointment and removal of deputy clerks; and fixing the times when court should be held. Each of these functions was to be performed by the "court." While it is

possible that the performance of some of them might never produce a case or controversy reviewable in this Court, they are reasonably ancillary to the primary, dispute-deciding function of the courts of appeals. Just as the Court in *Textile Mills* did not question the authority of Congress to grant such incidental powers to the courts of appeals, I see little reason to believe that any of the various supervisory tasks entrusted to the Judicial Council is beyond the capacities of a judicial body under Article III.

In the second place, my conclusion about the nature of the Council's primary function under § 332 would stand even if it were determined that one or more of the Council's assorted incidental powers were incapable of being exercised by an Article III court. If I am correct in concluding that Congress' purpose in 1939 in creating the Judicial Councils was to vest in them, as an arm of the Article III judiciary, supervisory powers over the disposition of business in the district courts, that purpose is not undone by a subsequent congressional attempt to give them a minor nonjudicial task; it would be "perverse to make the status of [the Councils] turn upon so minuscule a portion of their purported functions." *Glidden Co.* v. *Zdanok,* 370 U. S., at 583.

### B. STATUTORY JURISDICTION

This Court does not, of course, necessarily possess all of the appellate jurisdiction permitted to it by Article III. That article provides that our appellate jurisdiction is to be exercised "with such Exceptions, and under such Regulations as the Congress shall make," and this language has been held to give Congress the power, within limits, to prescribe the instances in which it may be exercised. *E. g., Ex parte McCardle,* 7 Wall. 506, 512–513 (1869). I turn, therefore, to the Judicial Code

to determine our statutory authority to consider Judge Chandler's petition.

Congress in the Code has not spoken, one way or the other, regarding review of the orders of Judicial Councils. Petitioner asserts that the Court has power to issue mandamus or prohibition to the Councils under the All Writs Act, 28 U. S. C. § 1651 (a), which provides that

> "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This statute has been construed to empower this Court to issue an extraordinary writ to a lower federal court in a case falling within our statutory appellate jurisdiction, where the issuance of the writ will further the exercise of that jurisdiction. See, *e. g., De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212, 217 (1945); *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 201–204 (1945). It is now settled that the case need not be already pending in this Court before an extraordinary writ may be issued under § 1651 (a); rather, the Court may issue the writ when the lower court's action might defeat or frustrate this Court's *eventual* jurisdiction, even where that jurisdiction could be invoked on the merits only after proceedings in an intermediate court. See, *e. g., De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S., at 217; *Ex parte Peru,* 318 U. S. 578 (1943); *Ex parte United States,* 287 U. S. 241, 248–249 (1932); *McClellan* v. *Carland,* 217 U. S. 268 (1910); cf. *FTC* v. *Dean Foods Co.,* 384 U. S. 597 (1966); *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21 (1943). But cf. *In re Glaser,* 198 U. S. 171, 173 (1905); *In re Massachusetts,* 197 U. S. 482, 488 (1905).

Each of the prior cases in which this Court has invoked § 1651 (a) to issue a writ "in aid of [its jurisdiction]" has involved a particular lawsuit over which the Court would have statutory review jurisdiction at a later stage. By contrast, petitioner's reliance on this statute is bottomed on the fact that the action of the Judicial Council "touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction." Petition for Writ of Prohibition and/or Mandamus 13. He argues that the Council's orders, allocating to other judges in his district cases that would otherwise be decided by him, constitute a usurpation of power that cannot adequately be remedied on final review of those cases by certiorari or appeal in this Court. The United States as *amicus curiae* agrees that this claim properly invokes the Court's power to consider whether mandamus or prohibition should be granted.[12] Although this expansive use of § 1651 (a) has no direct precedent in this Court, it seems to me wholly in line with the history of that statute and consistent with the manner in which it has been interpreted both here and in the lower courts.

Chief Justice Stone, writing for the Court in *Ex parte Peru,* 318 U. S., at 583, characterized the "historic use of writs of prohibition and mandamus directed by an appellate to an inferior court" as that of "confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." The bounds of this Court's

[12] Respondent Judicial Council agrees, for "substantially the reasons advanced by the Solicitor General," that § 1651 provides statutory authority for exercise of jurisdiction in this proceeding, if the proceeding is within the permissible appellate jurisdiction of this Court under Article III. Like the *amicus* United States, however, respondent notes that the question is not free from doubt. It is incumbent upon the Court to consider the question even in the absence of disagreement between the parties.

discretionary power to issue such writs were further stated in *Parr* v. *United States,* 351 U. S. 513, 520–521 (1956):

> "The power to issue them is discretionary and it is sparingly exercised. . . . This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper,* 270 U. S. 9, 29–30. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn., supra,* at p. 30." [13]

In *Parr,* the petitioner's claim was simply that a district court had erred in dismissing an indictment at the Government's request after the Government had obtained a new indictment for the same offenses in another district. In contrast, the present case involves a claim that the Council's orders were entered in a matter entirely beyond its jurisdiction. Judge Chandler claims that the order of December 13, 1965, depriving him of both pending and future cases, was tantamount to his removal from office, and that such an act far exceeded the limited jurisdiction over "administrative" matters conferred on the Council by § 332. He further asserts, as noted in Part I, *supra,* that the order of February 4, 1966, exceeded the Council's jurisdiction under either § 332 or § 137. Such grave charges clearly go beyond a mere claim that the Council has "erred in ruling on matters within [its] jurisdiction." Cf. *Will*

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[13] See also *Will* v. *United States,* 389 U. S. 90 (1967); *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 382–383 (1953).

v. *United States,* 389 U. S. 90, 95–96, 98 and n. 6 (1967); *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964).

Further, there seems to be no means by which Judge Chandler's challenge to the orders could be aired adequately on review of the cases to which they pertain. While the losing party in a case assigned to another district judge might conceivably argue on appeal that he is entitled to reversal because his case should have been heard by Judge Chandler, such an argument would encounter formidable obstacles. A reviewing court would have no way of determining whether a particular case filed in the District Court after the February 4 Order would, but for that order, have been assigned to Judge Chandler; nor is it clear that the error, if detectable, would in itself entitle the losing party to invalidate proceedings had before another judge. More basically, Judge Chandler is asserting an injury to himself, apart from any injuries to the parties in those cases; the parties cannot be relied upon to seek vindication of that injury. Cf. *Ex parte Fahey,* 332 U. S. 258, 260 (1947); *Ex parte Harding,* 219 U. S. 363, 372–380 (1911).

It is difficult to see how the very multiplicity of the cases affected by the Council's orders could derogate from this Court's authority under § 1651 (a) to issue an extraordinary writ in aid of its appellate jurisdiction over them. A somewhat analogous multiplicity was found to militate in favor of the issuance of mandamus in *McCullough* v. *Cosgrave,* 309 U. S. 634 (1940), and in *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701 (1927). As later explained by MR. JUSTICE BRENNAN, dissenting in *La Buy* v. *Howes Leather Co.,* 352 U. S. 249, 266 (1957),

> "*Los Angeles Brush Corp.* was a case where a reference [to a master] was made, not because a district judge decided that the particular circumstances of the particular case required a reference, but pur-

> suant to an agreement among all the judges of that District Court always to appoint masters to hear patent cases regardless of the circumstances of particular cases."

Mandamus was therefore issued in *Los Angeles Brush Corp.,* and in *McCullough,* which involved a similar situation in the same District Court, in order to remedy a pervasive disregard of the Rules of Civil Procedure affecting numerous cases.[14]

Similarly, in *La Buy* the Court upheld the authority of the Court of Appeals under § 1651 (a) to issue writs of mandamus compelling a district judge to rescind his referral of two antitrust cases to a master for trial. The Court found that the referral "was a clear abuse of discretion," and further noted "that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making references 'does not commend itself' . . . [and that it was] 'all too common in the Northern District of Illinois.'" 352 U. S., at 257, 258. This factor was primary among the "exceptional circumstances" found to warrant the Court of Appeals' issuance of the writs.

In the reported case most nearly analogous to this one, the Court of Appeals for the Third Circuit issued a writ of mandamus at the behest of the United States to compel a district judge to return to the judicial office from which he had been unlawfully removed. *United States* v. *Malmin,* 272 F. 785 (C. A. 3d Cir. 1921). Judge Malmin, of the District Court of the Virgin Islands, had returned to the United States after the

[14] The Court in *Los Angeles Brush Corp.* relied upon its mandamus power under § 234 of the Judicial Code of 1911, a provision that may no longer be in effect, see n. 15, *infra.* However, since the case was one that would be reviewable on certiorari at a later stage, it seems that § 262 (now carried forward in § 1651) was equally applicable. The *per curiam* opinion in *McCullough* did not disclose the statutory basis for the ruling there.

territorial governor had purported to remove him and appoint another to his seat. Relying on § 262 of the Judicial Code of 1911, a predecessor of the All Writs Act, the court ruled that it had authority to issue the writ "in aid of" its jurisdiction, *id.*, at 791; it observed that the absence of a lawfully appointed judge of the District Court affected the rights of litigants in cases reviewable in the Court of Appeals, and that "the right of the public to a properly constituted trial court from which appeals can validly lie could not be asserted or brought about in proceedings on appeal or by writ of error." In those circumstances, the court deemed it "essential to the appellate jurisdiction of this court that orderly proceedings in the District Court of the Virgin Islands be restored." *Id.*, at 792.

A dissenter in *Malmin* disagreed with the majority's conclusion that the defect could not be rectified on appeal, and urged that mandamus should not issue because it could not bind the succeeding appointee, who was not a party. In the case before us, as noted above, the ordinary appeals are not adequate to protect Judge Chandler's interest; and there is no problem of missing parties, since it is the judge himself who is complaining of illegal interference with the exercise of his office, and that complaint can be remedied fully by the issuance of a writ against respondent Judicial Council.

For these reasons I would conclude that the actions challenged by Judge Chandler sufficiently affect matters within this Court's appellate jurisdiction to bring his application for an extraordinary writ within our authority under § 1651 (a), and that his charges, if sustained, would present an appropriate occasion for the issuance of such a writ.[15]

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[15] In many of the early mandamus cases in this Court, such as *Ex parte Peru, supra,* the Court based its action on both § 234 and § 262 of the Judicial Code of 1911, the predecessors of

## III

In the present posture of this case Judge Chandler, in my opinion, is not entitled to the relief he seeks. The Order of December 13, 1965, which prompted his recourse to this Court, has been superseded by the Order

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§ 1651 (a). The Court usually did not specify whether it relied upon § 234 or § 262, apparently considering that they furnished overlapping authority. Section 234, which derived from § 13 of the Judiciary Act of 1789, conferred upon this Court, and this Court only, the "power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States . . . ." Section 262 provided that "[t]he Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The former provision was construed as conferring upon this Court "a general supervisory power over the inferior courts, so far as this power was exercisable through a writ of mandamus in its historic function," enabling the Court "to exercise the essentially appellate function of reviewing and revising a judicial proceeding in a lower court by appropriate use of the common-law writ of mandamus, whether or not it had been given by Congress some other statutory appellate jurisdiction, or potential appellate jurisdiction, by way of an appeal or writ of error or otherwise." *In re Josephson,* 218 F. 2d 174, 177–178 (C. A. 1st Cir. 1954). See, *e. g., Virginia* v. *Rives,* 100 U. S. 313, 323–324 (1880); *Ex parte Bradley,* 7 Wall. 364, 375–377 (1869); *Ex parte Crane,* 5 Pet. 190 (1831). In contrast, the power granted by § 262 was not an independent appellate power but merely an auxiliary power exercisable when appellate jurisdiction was granted by some other provision of law.

These two provisions were consolidated into § 1651 (a) as part of the 1948 revision of the Judicial Code. The brief Reviser's Note explained that the "revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." The "special provisions" of § 234 relating to the Supreme Court "were omitted as unnecessary in view of the revised section." H. R. Rep. No. 308, 80th Cong., 1st Sess., A144–

of February 4, 1966, which I am satisfied is entirely within the authority of the Council. I am wholly unable to regard the latter order either as a "removal" of Judge Chandler from judicial office, or as anything other than an effort to move along judicial traffic in the District Court. In this state of affairs, I can find no room for the constitutional argument so vigorously made by my Brothers BLACK and DOUGLAS.

A

Petitioner strenuously attacks the substance of the December 13 Order, which he claims effectively re-

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A145 (1947). Because the language of § 1651 (a) more closely resembles that of § 262, it has been speculated that Congress by enacting the revision may have withdrawn from this Court its special appellate power under § 234 to supervise proceedings in the lower federal courts without regard to whether any other statute gives the Court jurisdiction to review those proceedings. See *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 260 (1957) (BRENNAN, J., dissenting); *In re Josephson, supra.*

The United States as *amicus* urges the Court to rule that no such change was effected by the 1948 revision, arguing correctly that § 234 would clearly encompass the type of review Judge Chandler seeks. The United States points out, in support of such a ruling, that the Reviser's Note stated that § 1651 (a) "consolidates" the earlier provisions, "with necessary changes in phraseology"; this gave no indication that a significant change in the law was intended, and one should not lightly be inferred. I note that the Court in *Ex parte Peru,* referring to both § 234 and § 262, stated that "[u]nder the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained." 318 U. S., at 582–583. Its use of the expression "in aid of its appellate jurisdiction" to characterize both statutes suggests that the similar phrase in § 1651 (a) may also encompass the powers exercised by this Court under § 234. However, there is no need to decide this question here in light of the fact that the reviewability in this Court of the many cases whose allocation is determined by the Judicial Council's orders brings Judge Chandler's petition within the Court's powers as they existed under § 262.

moved him from office, as well as the procedures under which the order was issued. His substantive argument is that § 332, on which the Council relied, does not authorize the placing of restrictions upon the functioning of a district judge, even temporarily, and that if it does the statute is unconstitutional because the constitutional provisions [16] vesting in Congress authority to impeach federal officers, including judges, establish the exclusive means of inquiry into the fitness of a federal judge to perform his duties. In response the United States as *amicus* argues that the impeachment provisions should not be read as precluding legislation that would authorize supervision of federal judges by "judicial trial of the fulfillment of the condition of federal judicial tenure under Article III—that the judge maintain his 'good behavior.'" This question has been the subject of scholarly debate, and is presently before the Senate as it considers the proposed Judicial Reform Act. See Hearings on S. 1506–S. 1516 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969). Petitioner's procedural objections to the December 13 Order relate to its issuance *ex parte,* without notice or hearing—circumstances that raise serious questions under the Due Process Clause of the Fifth Amendment.

I believe the respondent and the United States are correct in contending that these issues need not be resolved on this occasion. As already appears, the December 13 Order is no longer before us. Therefore, the only question still requiring decision is the validity of the outstanding February 4 Order under the enabling statutes.

B

The Council rested the February 4 Order on its authority under both § 137 and § 332. Considering first the

[16] See U. S. Const., Art. I, §§ 2, 3; Art. II, § 4.

Council's more general grant of authority, § 332, I think this order was substantively within the powers conferred by that provision. The order was designed to deal with the situation in Judge Chandler's court by requiring him to dispose of his backlog before notifying the Council that he is willing and able to undertake new assignments. See Supplemental Memorandum for Respondent. That the Councils might issue orders of this type was clearly contemplated by the draftsmen of § 332, and such orders seem to have been a customary measure taken by the Councils under the section.

The legislative history of § 332, summarized in Part II above, makes clear that a Judicial Council's mandate to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit" was intended to encompass the making of orders that would direct a district judge to clear up his docket or would channel cases to other judges when a situation existed with respect to one judge that was inimical to the effective administration of justice. Cf. Vinson, The Business of Judicial Administration: Suggestions to the Conference of Chief Justices, 35 A. B. A. J. 893, 895 (1949).

The Judicial Conference of the United States made a study in 1961 of the role of the Judicial Councils, culminating in a report that was transmitted to Congress by Chief Justice Warren. That report, after thorough consideration of the legislative history of the 1939 Act, specifically listed as among the responsibilities of the Councils "having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided." H. R. Doc. No. 201, *supra,* at 10. This power has been exercised on other occasions by other Judicial Councils. See, *e. g.,* Fish, *supra,* 37 U. Chi. L. Rev., at 230; Lumbard, The Place of the Federal Judicial Councils in the Administration

of the Courts, 47 A. B. A. J. 169, 170–171 (1961); Shafroth, Modern Developments in Judicial Administration, 12 Am. U. L. Rev. 150, 160 (1963). The propriety of such action has apparently never before been seriously challenged.

Judge Chandler argues, however, that § 332 limits the Council's authority in making this type of order to situations in which the order is necessitated by the existence of an extraordinary backlog of cases, and that the February 4 Order was prompted, not by such a backlog, but by the Council's desire to punish Judge Chandler for misbehavior. There seem to be two strands to this argument. First, there are suggestions in petitioner's briefs and in those of *amicus curiae* Shipley that the Council's actions have been taken, not for the reasons stated in the various orders and minutes of the Council, but for reasons of personal animosity. There is nothing in the record, which consists of Judge Chandler's petition and the orders and minutes of the Council, to substantiate this charge, and I for one am quite unwilling to attribute such motives to the Council. Second, Judge Chandler seems to assert that the February 4 Order is sustainable only if supported by a showing that his docket bore a numerically heavier load of pending cases than did those of his colleagues on the District Court, and that this justification is lacking here.[17] I believe

[17] Although neither the December 13 Order nor the February 4 Order recited figures concerning the status of the docket in the District Court, the former order did state that it was predicated on a series of meetings over a four-year period in which the Council "has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business."

Approximately a year after the issuance of the February 4 Order, in the course of determining "whether the existing order was still

this argument reflects an overly restrictive view of the Judicial Council's role.

The legislative history of § 332 contains positive refutation of petitioner's argument that the only factor a Council might appropriately consider in making an order such as that of February 4 is the statistical weight of the workloads of the various district judges. It is true, as the legislative history in Part II above confirms, that abatement of delays in disposition of cases was a principal purpose for creation of the Councils; but the Councils were deliberately given broad responsibilities to meet other problems as they arose. Chief Justice Groner contemplated that the Councils would cope not only with delays but also with "any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which [a district judge] may be responsible." Hearings on S. 188,

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suitable or whether the conditions had changed to an extent sufficient to dictate a change in the order," the Council examined statistics furnished by the Administrative Office of the United States Courts, showing that on February 1, 1966, 138 cases had been pending before Judge Chandler, as contrasted to 92, 91, and 99 cases respectively pending before the other active district judges. Further statistics showed that 50 cases were still pending before Judge Chandler on January 31, 1967. On the basis of these figures the Council determined that no action was then appropriate regarding the assignment of cases in the District Court.

On July 12, 1967, the Council again reviewed the condition of the District Court docket and, on discovering that only 12 cases were pending before Judge Chandler, determined that a revision should be made of the disposition of business mandated by the February 4 Order. It requested notification from the district judges of a new order of business suitable to them. However, as appears from the Court's opinion, the district judges advised the Council "that the current order for the division of business in this district is agreeable under the circumstances." On receiving this message the Council determined to leave the February 4 Order in effect. Subsequent statistics, submitted to the Council by the Administrative Office, showed that Judge Chandler had six cases pending on June 30, 1969.

*supra,* at 11. The Senate committee included this part of the testimony in its report recommending passage of the bill. S. Rep. No. 426, 76th Cong., 1st Sess., 3 (1939). The same witness later stated that the Council's responsibilities would embrace correction of "whatever is wrong in the administration of justice, from whatever sources it may arise," as a means of promoting "the strengthening of confidence on the part of the people." Hearings on S. 188, *supra,* at 12–13, 14.[18]

The broad mandate of the Councils was further stressed by the Judicial Conference in its 1961 report. The Conference considered it to be "patent" from the legislative history that § 332

> "imposed upon a judicial council the responsibility of seeing that the work and function of the courts in its circuit were expeditiously and effectively performed; and that this responsibility of observation, supervision, and correction went to the whole of a court's functioning, in both personal and institutional aspect." H. R. Doc. No. 201, *supra,* at 6.

From a study of the applications of the statute by the various Councils, the Conference concluded that

> "most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the

[18] See also Hearings on H. R. 5999, *supra,* at 16 (statement of Chief Justice Groner); *id.,* at 22 (statement of Judge Parker).

> administration of justice by them, from any nature of action by an individual judge or a person attached to the courts." *Id.*, at 7.

The Conference specifically approved this construction in spelling out its conclusions. *Id.*, at 8–9.

It is not necessary to define all of the limits on the powers of the Councils under § 332 in order to determine that the February 4 Order was a proper exercise of those powers. The December 13 Order noted that the Council was familiar with Judge Chandler's conduct of official business from four years of scrutiny, and it further recited that

> "[d]uring that period Judge Chandler has been a party defendant in both civil and criminal litigation. One civil case is still pending. Two proceedings have been brought in the United States Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation. In one instance he was ordered to proceed no further and the other is still pending."

I believe that these circumstances, taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice.

C

Passing over the now-revoked action taken on December 13, I consider the February 4 Order, restricting Judge Chandler for the time being to the cases then pending before him, to be a permissible interim step toward exploration and solution of the problem presented. The Council must be presumed to have known of the substantial number of cases then available to Judge Chandler, see n. 17, *supra,* and it could reasonably have

concluded that a careful way to proceed would be to observe the manner in which Judge Chandler handled those cases before determining what more permanent steps should be taken with respect to the administration of the business of the District Court.

When the Council learned that Judge Chandler had disposed of the bulk of his cases, it invited him and the other district judges to propose a new distribution of business; the district judges together, or Judge Chandler alone exercising his right under § 137 to certify a disagreement to the Council, could make such a proposal at any time. Judge Chandler's claim that his failure to seek a new allocation is the result of unlawful "duress" seems insubstantial in light of the initial validity of the February 4 Order. Even if the December 13 Order did impose a form of duress in January 1966, when the district judges settled upon the present division of cases, that order had been revoked, and there could hardly be said to have been duress, when the district judges declined the Council's July 1967 invitation to propose a new order. Serious questions would be presented if, after exhausting much of his pending business, Judge Chandler had sought additional business and the Council had declined without advancing substantial additional justification for the refusal. However, because of Judge Chandler's inaction, that situation is not presented on this record.

In view of my conclusion that the February 4 Order was a valid exercise of the Council's power under § 332, I need not consider the Council's alternative justification of the order under § 137, or petitioner's arguments concerning the inapplicability of that provision.

D

Finally, the procedures followed by the Council in promulgating its February 4 Order do not appear to have

been offensive to Congress' conception of the manner in which the Councils would act, or inconsistent with the basic demands of due process of law. It seems to have been assumed throughout the consideration of the 1939 Act that, at least on relatively minor matters, the Councils would ordinarily proceed *ex parte*. See, *e. g.*, hearings on H. R. 5999, *supra*, at 14 (statement of Chief Justice Groner). Beginning with the initial suggestion by Chief Justice Hughes, one of the major reasons for placing these responsibilities in a body of circuit judges was that they would have a great deal of firsthand knowledge about the district courts and about the work and conduct of the individual district judges. See H. R. Doc. No. 201, *supra*, at 3 (Chief Justice Hughes); Hearings on S. 188, *supra*, at 16 (statement of A. Vanderbilt). The other major source of the information on which the Councils would act was to be the data gathered by the Administrative Office.

However, the statute, which uses very general language to vest heavy responsibilities in the Councils, certainly allows the Councils the flexibility to vary their procedures, adopting in a particular instance those that are especially suited to the matter at hand or necessitated by the demands of fairness. See Fish, *supra*, at 222. There is much in our tradition of due process of law that runs counter to the taking of serious action on the basis of *ex parte* assertions or suspicions of misbehavior or incapacity. Apparently recognizing this, the Council after its temporary December 13 Order scheduled a hearing on the question of assignment of cases to Judge Chandler, and invited him to appear with counsel. Cf. *Chandler* v. *Judicial Council*, 382 U. S. 1003 (1966). As explained in the opinion of the Court, this hearing was canceled when the Council learned that no judge of the District Court wished to appear. In these circumstances the

Council, it seems to me, was justified in issuing the February 4 Order without further proceedings.

Petitioner challenges this conclusion in several ways. First, he argues that the order directing the hearing, entered January 27, 1966, did not contain adequate notice of the subject matter of the hearing. That order expressly referred to the December 13 Order and to Judge Chandler's attack upon it in this Court, and declared that "this matter" would be set for a hearing at which Judge Chandler might "present such matters to the Council as he may deem fit." [19] In view of the fact that the December 13 Order had listed specific grounds on which the Council's action was based, and Judge Chandler made no request for further specification, I cannot consider his present contention well taken.

Second, petitioner states that his boycott of the hearing was based on his denial that the Council had any jurisdiction to hold it. He apparently concludes from this that the February 4 Order stands as though the Council had never scheduled a hearing at all. However, the Council had already entered the December 13 Order,

[19] The order stated, in pertinent part:

"The Council gave consideration to its December 13, 1965, order in this matter, to the proceedings in the Supreme Court entitled 'Honorable Stephen S. Chandler, etc. v. Judicial Council . . . ,' to the motion for stay filed therein by the petitioner, to the response thereto by the Solicitor General of the United States, and to the order of the Supreme Court entered on January 21, 1966. The Council noted the reference by the Supreme Court to the statement in the response of the Solicitor General that the Council contemplated prompt further proceedings and the order of the Supreme Court that the application for stay be denied 'pending this contemplated prompt action of the Judicial Council.'

"It is ordered that this matter is set for hearing at 9:30 A. M., Thursday, February 10, 1966, in Room 5009 of the United States Courthouse at Oklahoma City, Oklahoma, when and where the Honorable Stephen S. Chandler may appear in person and with counsel and present such matters to the Council as he may deem fit."

which this Court had declined, at least temporarily, to disturb, and the Council's authority to proceed further was surely sufficiently evident that Judge Chandler was not entitled to remain indifferent to its order setting the matter for a hearing. Finally, petitioner asserts that the proposed hearing was deficient because he was merely invited, rather than ordered, to appear. He cites no authority for this proposition, and it appears quite untenable.

Throughout Judge Chandler's briefs, and in the dissents of my Brothers BLACK and DOUGLAS, there are strong assertions of the importance of an independent federal judiciary. I fully agree that this principle holds a profoundly important place in our scheme of government. However, I can discern no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business. The February 4 Order, entered pursuant to this statutory authority, is a supportable exercise of the Council's responsibility to oversee the administration of federal justice.

I would grant Judge Chandler's motion for leave to file his petition for a writ of prohibition or mandamus, but for the reasons stated above I am of the opinion that no such writ should issue.

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

The Congress, which created the lower federal courts, also created a Judicial Council for each circuit composed "of the circuit judges for the circuit, in regular active service." 28 U. S. C. § 332. The Council "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." *Ibid.* And Congress directed that "[t]he dis-

trict judges shall promptly carry into effect all orders of the judicial council." *Ibid.*

Petitioner, Stephen S. Chandler, is a federal district judge of the Tenth Circuit. On December 13, 1965, the Council, composed of five judges of the Court of Appeals, entered an order that "until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever."

Petitioner filed a petition for prohibition and/or mandamus, and sought a stay of the order of the Council. The Court denied relief stating that the order was "entirely interlocutory in character pending prompt further proceedings." 382 U. S. 1003. MR. JUSTICE BLACK and I dissented. On February 4, 1966, the Council entered an order allowing petitioner to continue to sit on cases filed and assigned as of December 28, 1965; but it apportioned all subsequent cases among the remaining judges. The Council stated that its order of February 4, 1966, superseded its order of December 13, 1965. By a subsequent order the Council directed that new judicial business would not, until further order, be assigned to petitioner.

I

This case has been and continues to be the liveliest, most controversial contest involving a federal judge in modern United States history.

The order of February 4, 1966, was made by the Council on the basis of an alleged "disagreement" among the district judges on one side and Judge Chandler on the other over the reassignment of cases previously assigned to Judge Chandler on December 28, 1965. The Council authorized Judge Chandler to sit on cases assigned to him prior to December 28, 1965; and it assigned to the other district judges all cases filed after that date.

Judge Chandler on the eve of that order, January 24, 1966, agreed to acquiesce in the assignment of new cases to the other district judges. But he disagreed with any action concerning "my pending cases." As to them he said: "There is no provision of law that grants a Judicial Council jurisdiction over cases pending before a judge in the various stages of the judicial process after valid assignment to him. I consider it my duty to continue to assert my exclusive jurisdiction over these cases, and shall do so."

Since the order of February 4, 1966, said that all cases "assigned to Judge Chandler as of December 28, 1965, shall remain assigned to him," and since Judge Chandler did not object to the later cases being assigned to others, the then Solicitor General (now MR. JUSTICE MARSHALL) suggested in a memorandum that the case had become moot.

But the Solicitor General in a later memorandum filed here March 17, 1966, agreed "that the case can no longer be deemed moot" because of Judge Chandler's continuing, expressed disagreement with the order of February 4, 1966.

As noted, the original action against Judge Chandler was taken under 28 U. S. C. § 332. The action taken February 4, 1966, was under 28 U. S. C. § 137, which provides in part:

> "If the district judges in any district are unable to agree upon the adoption of rules or orders for

that purpose the judicial council of the circuit shall make the necessary orders."

But there was no disagreement among the district judges and no power of the Council to act under 28 U. S. C. § 137. That was precisely the strategy that Judge Chandler selected so that if the feud against him continued, it would have to be waged under 28 U. S. C. § 332. But the Council did not oblige. It recited in its order of February 4, 1966: "In the circumstances a disagreement exists as to the division of business and the assignment of cases in the Western District of Oklahoma."

If a disagreement existed on February 4, 1966, it existed after Judge Chandler's so-called "acquiescence" which was expressed in the letter of January 24, 1966. The entire ground is thus swept out from under the mootness argument. In spite of Chandler's "acquiescence" the Council considered the case a live controversy and Chandler has contested the February 4, 1966, order ever since it issued. His opposition and the continuing raging controversy led the former Solicitor General to concede that the case had not become moot. Nor does the Council, even at this late date, make any such suggestion. Nor does the present Solicitor General.

The Court holds that because Judge Chandler refused to express to the Council his disagreement with the February 4, 1966, order, he failed to exhaust a possible means for obtaining the relief he now seeks in this Court. Had he disagreed, however, he would have vested the Council with authority to act under § 137, and that was precisely what he wanted to avoid. As MR. JUSTICE HARLAN points out, the whole basis for Judge Chandler's attack is "that it is illegal for the Council to deprive him of new cases, and equally so for the Council to condition his access to new cases upon his making a request to it that is tantamount to a form of a

certification of disagreement under § 137." The Court states that by not certifying disagreement to the Council Judge Chandler is apparently attempting "to have it both ways." It seems clear, however, that the Court's opinion now allows the Council "to have it both ways"—for unless Judge Chandler certifies disagreement with the February 4, 1966, order, he is barred from relief in this Court; and if he seeks relief from the Council by disagreeing with its order, he concedes jurisdiction in the Council for its actions under § 137. Nothing in *Rescue Army* v. *Municipal Court,* 331 U. S. 549, relied on by the Court, compels this result.

For the reasons fully stated by MR. JUSTICE HARLAN, in Part I of his opinion, the case is ripe for decision and we have no excuse for declining to decide it.

II

Our first substantial question is whether this is a "case" or "controversy" within our jurisdiction. As Chief Justice Marshall said in *Marbury* v. *Madison,* 1 Cranch 137, 175:

> "To enable this court, then, to issue a *mandamus,* it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the Court] to exercise appellate jurisdiction.
>
> . . . . . .
>
> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

The question therefore is whether a judicial council is a lower court or inferior tribunal whose decisions are reviewable in the exercise of our appellate jurisdiction. A judicial council is only the court of appeals for a named circuit sitting *en banc.* These councils were created to place "responsibility for judicial administra-

tion where it belongs—with the judiciary." H. R. Rep. No. 702, 76th Cong., 1st Sess., 4. Chief Justice Groner of the Court of Appeals for the District of Columbia, who helped draft the bill that was enacted, explained it as follows to the Senate: [1]

> "To [give the administrative officer any supervision or control over the exercise of purely judicial functions] would be to destroy the very fundamentals of our theory of government. The administrative officer proposed in this bill is purely an administrative officer. . . . It is his duty to observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, *is brought to the attention of the judicial council that it may be corrected, by the courts themselves.* That is, as I respectfully suggest, as it ought to be." (Italics added.)

The Council by 28 U. S. C. § 137 is under a duty to "make the necessary orders" in case the district judges are "unable to agree upon the adoption of rules or orders for that purpose." The Council directs the district judges to carry out certain measures. That is indeed the role of a judicial entity. Only members of the Court of Appeals are members of the Council. Those sitting on the Council do not even change their hats. Expediting the flow of cases to the dockets of district judges is wholly in line with the judicial function. We stated in *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, 332:

> "There are numerous functions of the court, as a 'court of record, with appellate jurisdiction,' other than hearing and deciding appeals. Under the Judicial Code these embrace prescribing the form of

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[1] Hearings on S. 188 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., 12–13 (Apr. 4–5, 1939).

> writs and other process and the form and style of its seal (§ 122); the making of rules and regulations (§ 122); the appointment of a clerk (§ 124) and the approval of the appointment and removal of deputy clerks (§ 125); and the fixing of the 'times' when court shall be held. § 126."

Some functions performed by a Judicial Council may be "administrative." But where, as here, it moves to disqualify a judge from sitting, removing him *pro tanto* from office, it moves against the individual with all of the sting and much of the stigma that impeachment carries. That action gives rise to a "case" or "controversy" triggered by the Council. The Council is therefore under the circumstances an inferior judicial tribunal over which we have appellate jurisdiction where a "case" or "controversy" arises. On that assumption, it is not seriously argued that mandamus is an inappropriate remedy under the All Writs Act.[2]

The order of December 13, 1965, may have been qualified but it has not been erased. Petitioner still is disqualified to sit on incoming cases. He still carries the stigma of the brand put on him by the Council. We should remember that the cessation of illegal conduct does not make a case moot:

> "A controversy may remain to be settled in such circumstances . . . *e. g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632.

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[2] "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

III

An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury. Art. I, § 2 and § 3. Our tradition even bars political impeachments as evidenced by the highly partisan, but unsuccessful, effort to oust Justice Samuel Chase of this Court in 1805.[3] The Impeachment Provision of the Constitution [4] indeed provides for the removal of "Officers of the United States," which includes judges, on "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4.

What the Judicial Council did when it ordered petitioner to "take no action whatsoever in any case or proceeding now or hereafter pending" in his court was to do what only the Court of Impeachment can do. If the business of the federal courts needs administrative oversight, the flow of cases can be regulated. Some judges work more slowly than others; some cases may take months while others take hours or days. Matters of this kind may be regulated by the assignment pro-

[3] See Trial of Samuel Chase, vols. 1 and 2 (1805, taken in shorthand by Samuel H. Smith and Thomas Lloyd).

[4] State procedures vary. Thus New York by its constitution provides for the removal of judges by the judiciary court, made up of judges. See *Friedman* v. *State*, 24 N. Y. 2d 528, 249 N. E. 2d 369.

cedure. But there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

The mood of some federal judges is opposed to this view and they are active in attempting to make all federal judges walk in some uniform step. What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren. The result is that the nonconformist has suffered greatly at the hands of his fellow judges.

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy.

All power is a heady thing as evidenced by the increasing efforts of groups of federal judges to act as referees over other federal judges.

On June 10, 1969, the Judicial Conference adopted resolutions for the governance of many activities of circuit judges and districts judges. Resolution I provided: [5]

> "A judge in regular active service shall not accept compensation of any kind, whether in the form of loans, gifts, gratuities, honoraria or otherwise, for services hereafter performed or to be performed by him except that provided by law for the performance of his judicial duties.
>
> "Provided however, the judicial council of the circuit (or in the case of courts not part of a circuit, the judges of the court in active service) *may upon application of a judge* approve the acceptance of compensation for the performance of services other than his judicial duties *upon a determination that the services are in the public interest or are justified by exceptional circumstances and that the services will not interfere with his judicial duties.* Both the services to be performed and the compensation to be paid shall be made a matter of public record and reported to the Judicial Conference of the United States." (Italics added.)

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[5] Resolution I was suspended on November 1, 1969, by the Judicial Conference pending further study, the only residue presently in force being a requirement that a judge who in any quarterly period "receives compensation for non-judicial services in a total amount exceeding $100" shall report the same to a "receiving officer" named by the Chief Justice and acting for the federal judges. In March 1970, the Judicial Conference approved procedures and forms for judges to report outside income pursuant to the Conference Resolution of November 1, 1969. The approved form requires listing of outside income received by the judge, gifts received by the judge or his immediate family in excess of $100, any knowing participation in cases in which the judge or a member of his immediate family had a financial interest in any of the named parties, and all "fiduciary positions" held by the judge, "such as trustee or executor."

In the Ninth Circuit, of which I am Circuit Justice, this resolution was assumed to bar a federal judge from even being an executor of his own mother's estate, unless of course he got a permit from the other judges. Resolution I apparently required permits for federal judges to teach in a law school—a practice which has paid enormous professional dividends and implicates nothing but the interest and energy of the judge. Justice Joseph Story (who sat here from 1811 to 1845) would, I imagine, have been appalled if he had been told that he could not write any of his many books[6] without getting permission from a group of other federal judges. And I imagine that Justice Cardozo, Judge Jerome Frank, and Judge Learned Hand would have felt the same.[7]

To obtain a permit the other judges must determine if the services are "in the public interest." Pray, how could they determine that unless they saw the lecture, or the lecture notes, or the manuscript? And whose "public interest" would control? Judges who have not been educated to the needs of ecology and of conservation?

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[6] Commentaries on Equity Jurisprudence (2 vols., 1836); Commentaries on Equity Pleadings (1838); Commentaries on the Conflict of Laws (1834); Commentaries on the Constitution of the United States (3 vols., 1833); Commentaries on the Law of Agency (1839); Commentaries on the Law of Bailments (1832); Commentaries on the Law of Bills of Exchange (1843); Commentaries on the Law of Partnership (1841); Commentaries on the Law of Promissory Notes (1845); A Familiar Exposition of the Constitution of the United States (1840); A Selection of Pleadings in Civil Actions (1805).

[7] Justice Cardozo: The Growth of the Law (1931); Law and Literature and Other Essays and Addresses (1931); The Nature of the Judicial Process (1921).

Judge Learned Hand: The Bill of Rights (1958).

Judge Jerome Frank: Courts on Trial—Myth and Reality in American Justice (1949); Not Guilty (1957); If Men Were Angels (1942); Fate and Freedom (1945).

Judges who still have a "plantation" state of mind and relegate many minorities to second-class citizenship? Judges who have a narrow view of freedom of expression or a broad view of due process? Public issues deal with a vast contrariety of views; and judges, like other people, are to be found in all parts of the spectrum. How under the Constitution can one judge's lips be sealed because of the predestined view of other judges? An easy reply is that Resolution I covered only services for "compensation." But books entail royalties; and tax-wise it is not always easy to disassociate an author from royalties. Even though they go ultimately to charity, they pass through his income tax returns.

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of "hazing" having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance that other federal judges have over those aberrations.[8] Some

[8] Cf. S. 1506, 91st Cong., 1st Sess., which would amend 28 U. S. C. c. 17, *first* by creating a Commission on Judicial Disabilities and Tenure, composed of five federal judges in active service; *second* giving it power to "undertake an investigation of the official conduct of any judge of the United States appointed to hold office under article III of the Constitution to determine whether the conduct of such judge is and has been consistent with the good behavior required by that article;" and *third* giving it authority to recommend to the Judicial Conference that he be removed from office under the following standard: "Willful misconduct in office or willful and persistent failure to perform his official duties by a judge of the United States shall constitute conduct inconsistent with the good behavior required by article III of the Constitution and shall be cause for the removal of that judge."

of the idiosyncrasies may be displeasing to those who walk in more measured, conservative steps. But those idiosyncrasies can be of no possible constitutional concern to other federal judges.

It is time we put an end to the monstrous practices that seem about to overtake us, by vacating the orders of the Judicial Council that brand Judge Chandler as unfit to sit in oncoming cases. Only Congress can take action, unless the Constitution is amended to allow judges to censor, police, or impeach their fellow judges.

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

Fully concurring in the dissent of my Brother DOUGLAS in this case, I wish to add a few words to emphasize once again [1] the gravity of the unconstitutional wrong the Court is inflicting upon United States District Judge Stephen Chandler, and, more important, on our system of government and the Constitution itself. The preparation and adoption of that great document was a turning point in the history of this country and of the world. Our Constitution gave new hopes and dreams for freedom and equal justice to citizens of this country and signaled to the suffering and oppressed people everywhere that government could be humane. One of the many factors which gave birth to these new dreams and hopes was our constitutional plan for a more independent judicial system than had ever before existed. Judges in our system were to hold their offices during "good Behaviour," their compensation was not to be "diminished during their Continuance in Office," [2] and they were to be removed only after impeachment and trial by the United States Congress. While judges, like other people, can be tried,

[1] See *Chandler* v. *Judicial Council*, 382 U. S. 1003, 1004 (1966) (dissenting opinion).

[2] Art. III, § 1.

convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.

I am regrettably compelled in this case to say that the Court today, in my judgment, breaks faith with this grand constitutional principle. Judge Chandler, duly appointed, duly confirmed, and never impeached by the Congress, has been barred from doing his work by other judges. The real facts of this case cannot be obscured, nor the effect of the Judicial Council's decisions defended, by any technical, legalistic effort to show that one or the other of the Council's orders issued over the years is "valid." This case must be viewed for what it is—a long history of harassment of Judge Chandler by other judges who somehow feel he is "unfit" to hold office. Their efforts have been going on for at least five years and still Judge Chandler finds no relief. What is involved here is simply a blatant effort on the part of the Council through concerted action to make Judge Chandler a "second-class judge," depriving him of the full power of his office and the right to share equally with all other federal judges in the privileges and responsibilities of the Federal Judiciary. I am unable to find in our Constitution or in any statute any authority whatever for judges to arrogate to themselves and to exercise such powers. Judge Chandler, like every other federal judge including the Justices of this Court, is subject to removal from office only by the constitutionally prescribed mode of impeachment.

The wise authors of our Constitution provided for judicial independence because they were familiar with history; they knew that judges of the past—good, patriotic judges—had occasionally lost not only their offices but had also sometimes lost their freedom and their heads because of the actions and decrees of other judges. They were determined that no such things should happen here. But it appears that the language they used and the protections they thought they had created are not sufficient to protect our judges from the contrived intricacies used by the judges of the Tenth Circuit and this Court to uphold what has happened to Judge Chandler in this case.

I fear that unless the actions taken by the Judicial Council in this case are in some way repudiated, the hope for an independent judiciary will prove to have been no more than an evanescent dream.

# ADICKES *v.* S. H. KRESS & CO.

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

No. 79. Argued November 12, 1969—Decided June 1, 1970

Petitioner is a white school teacher who was refused service in respondent's lunchroom when she was accompanied by six Negro students, and who was arrested for vagrancy by the Hattiesburg, Mississippi, police when she left respondent's premises. She filed a complaint in the Federal District Court to recover damages alleging deprivation of her right under the Equal Protection Clause not to be discriminated against on the basis of race. The complaint had two counts, each based on 42 U. S. C. § 1983: (1) that she had been refused service because she was a "Caucasian in the company of Negroes" (under which she sought to prove that the refusal to serve her was pursuant to a "custom of the community to segregate races in public eating places") and (2) that the refusal of service and the arrest were the product of a conspiracy between respondent and the police (under which she alleged that the policeman who arrested her was in the store at the time of the refusal of service). The District Court ruled that to recover under the first count petitioner would have to prove a specific "custom of refusing service to whites who were in the company of Negroes" that was "enforced by the State" under its criminal trespass statute. The court directed a verdict for respondent on this count because petitioner failed to prove other instances of whites having been refused service while in company of Negroes in Hattiesburg. The Court of Appeals affirmed, holding that § 1983 requires the discriminatory custom be proved to exist in the locale where the discrimination took place and in the State generally, and that petitioner's proof was deficient on both points. The second count was dismissed before trial by the District Court on a motion for summary judgment since petitioner "failed to allege any facts from which a conspiracy might be inferred." The Court of Appeals affirmed this determination. *Held:*

1. The District Court on the basis of this record erred in granting summary judgment on the conspiracy count. Pp. 149–161.

(a) The involvement of a policeman, a state official, whether or not his actions were lawful or authorized, in the alleged conspiracy would plainly provide the state action needed to show a direct violation of petitioner's Fourteenth Amendment rights entitling her to relief under § 1983, and private persons involved in such a conspiracy are acting "under color" of law and can be liable under § 1983. Pp. 150–152.

(b) Respondent did not carry out its burden, as the party moving for summary judgment, of showing the absence of a genuine issue as to any material fact, as it did not foreclose the possibility that there was a policeman in the store while the petitioner was awaiting service (from which the jury could infer an understanding between the officer and an employee of respondent that petitioner not be served), and its failure to meet that burden requires reversal. Pp. 153–159.

(c) Because respondent failed to meet its initial burden as the party moving for summary judgment, petitioner was not required to come forward with suitable opposing affidavits under Fed. Rule Civ. Proc. 56 (e). Pp. 159–161.

2. Petitioner will have established a claim under § 1983 for violation of her equal protection rights if she proves that she was refused service by respondent because of a state-enforced custom requiring racial segregation in Hattiesburg restaurants. Pp. 161–174.

(a) Based upon the language of the statute, legislative history, and judicial decisions, the words "under color of a . . . custom or usage, of [a] State," in § 1983, mean that the "custom or usage" must have the force of law by virtue of the persistent practices of state officials. Pp. 162–169.

(b) Petitioner would have shown an abridgment of her constitutional right of equal protection if she proved that respondent refused her service because of a state-enforced custom of racial segregation in public restaurants. Pp. 169–171.

(c) The District Court erred in its implicit assumption that a custom can have the force of law only if it is enforced by a state statute. Pp. 171–172.

(d) The District Court's ruling that proving a "custom" in this case required demonstrating a specific practice of not serving white persons in the company of Negroes in public restaurants was too narrow, as the relevant inquiry is whether there was a longstanding and still prevailing state-enforced custom of segregating the races in public eating places. P. 173.

(e) The courts below erred in suggesting that the custom must exist throughout the State, as a custom with the force of law in a political subdivision can offend the Fourteenth Amendment even though it lacks state-wide application. P. 173.

409 F. 2d 121, reversed and remanded.

*Eleanor Jackson Piel* argued the cause for petitioner. With her on the briefs was *Melvin L. Wulf.*

*Sanford M. Litvack* argued the cause for respondent. With him on the briefs were *James R. Withrow, Jr.,* and *Alfred H. Hoddinott, Jr.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner, Sandra Adickes, a white school teacher from New York, brought this suit in the United States District Court for the Southern District of New York against respondent S. H. Kress & Co. ("Kress") to recover damages under 42 U. S. C. § 1983 [1] for an alleged violation of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. The suit arises out of Kress' refusal to serve lunch to Miss Adickes at its restaurant facilities in its Hattiesburg, Mississippi, store on August 14, 1964, and Miss Adickes' subsequent arrest upon her departure from the store by the Hattiesburg police on a charge of vagrancy. At the time of both the refusal to serve and the arrest, Miss Adickes was with six young people, all Negroes, who were her students in a Mississippi "Freedom School" where she was

[1] Rev. Stat. § 1979, 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

teaching that summer. Unlike Miss Adickes, the students were offered service, and were not arrested.

Petitioner's complaint had two counts,[2] each bottomed on § 1983, and each alleging that Kress had deprived her of the right under the Equal Protection Clause of the Fourteenth Amendment not to be discriminated against on the basis of race. The first count charged that Miss Adickes had been refused service by Kress because she was a "Caucasian in the company of Negroes." Petitioner sought, *inter alia,* to prove that the refusal to serve her was pursuant to a "custom of the community to segregate the races in public eating places." However, in a pretrial decision, 252 F. Supp. 140 (1966), the District Court ruled that to recover under this count, Miss Adickes would have to prove that at the time she was refused service, there was a specific "custom . . . of refusing service to whites in the company of Negroes" and that this custom was "enforced by the State" under Mississippi's criminal trespass statute.[3] Because petitioner was unable to prove at the trial that there were other instances in Hattiesburg of a white person having been refused service while in the company of Negroes,

[2] The District Court denied petitioner's request to amend her complaint to include a third count seeking liquidated damages under §§ 1 and 2 of the Civil Rights Act of 1875, 18 Stat. 335. Although in her certiorari petition, petitioner challenged this ruling, and asked this Court to revive this statute by overruling the holding in the *Civil Rights Cases,* 109 U. S. 3 (1883), examination of the record shows that petitioner never raised any issue concerning the 1875 statute before the Court of Appeals. Accordingly, the Second Circuit did not rule on these contentions. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Lawn* v. *United States,* 355 U. S. 339, 362–363, n. 16 (1958); *Husty* v. *United States,* 282 U. S. 694, 701–702 (1931); *Duignan* v. *United States,* 274 U. S. 195, 200 (1927). We decline to do so here.

[3] The statute, Miss. Code Ann. § 2046.5 (1956), *inter alia,* gives the owners, managers, or employees of business establishments the right to choose customers by refusing service.

the District Court directed a verdict in favor of respondent. A divided panel of the Court of Appeals affirmed on this ground, also holding that § 1983 "requires that the discriminatory custom or usage be proved to exist in the locale where the discrimination took place, and in the State generally," and that petitioner's "proof on both points was deficient," 409 F. 2d 121, 124 (1968).

The second count of her complaint, alleging that both the refusal of service and her subsequent arrest were the product of a conspiracy between Kress and the Hattiesburg police, was dismissed before trial on a motion for summary judgment. The District Court ruled that petitioner had "failed to allege any facts from which a conspiracy might be inferred." 252 F. Supp., at 144. This determination was unanimously affirmed by the Court of Appeals, 409 F. 2d, at 126–127.

Miss Adickes, in seeking review here, claims that the District Court erred both in directing a verdict on the substantive count, and in granting summary judgment on the conspiracy count. Last Term we granted certiorari, 394 U. S. 1011 (1969), and we now reverse and remand for further proceedings on each of the two counts.

As explained in Part I, because the respondent failed to show the absence of any disputed material fact, we think the District Court erred in granting summary judgment. With respect to the substantive count, for reasons explained in Part II, we think petitioner will have made out a claim under § 1983 for violation of her equal protection rights if she proves that she was refused service by Kress because of a state-enforced custom requiring racial segregation in Hattiesburg restaurants. We think the courts below erred (1) in assuming that the only proof relevant to showing that a custom was state-enforced related to the Mississippi criminal trespass statute; (2) in defining the relevant

state-enforced custom as requiring proof of a practice both in Hattiesburg and throughout Mississippi, of refusing to serve white persons in the company of Negroes rather than simply proof of state-enforced segregation of the races in Hattiesburg restaurants.

## I

Briefly stated, the conspiracy count of petitioner's complaint made the following allegations: While serving as a volunteer teacher at a "Freedom School" for Negro children in Hattiesburg, Mississippi, petitioner went with six of her students to the Hattiesburg Public Library at about noon on August 14, 1964. The librarian refused to allow the Negro students to use the library, and asked them to leave. Because they did not leave, the librarian called the Hattiesburg chief of police who told petitioner and her students that the library was closed, and ordered them to leave. From the library, petitioner and the students proceeded to respondent's store where they wished to eat lunch. According to the complaint, after the group sat down to eat, a policeman came into the store "and observed [Miss Adickes] in the company of the Negro students." A waitress then came to the booth where petitioner was sitting, took the orders of the Negro students, but refused to serve petitioner because she was a white person "in the company of Negroes." The complaint goes on to allege that after this refusal of service, petitioner and her students left the Kress store. When the group reached the sidewalk outside the store, "the Officer of the Law who had previously entered [the] store" arrested petitioner on a groundless charge of vagrancy and took her into custody.

On the basis of these underlying facts petitioner alleged that Kress and the Hattiesburg police had conspired (1) "to deprive [her] of her right to enjoy equal treatment and service in a place of public accommoda-

tion"; and (2) to cause her arrest "on the false charge of vagrancy."

### A. Conspiracies Between Public Officials and Private Persons—Governing Principles

The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show that the defendant acted "under color of law." [4]

As noted earlier we read both counts of petitioner's complaint to allege discrimination based on race in violation of petitioner's equal protection rights.[5] Few prin-

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[4] See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167, 184, 187 (1961); *United States* v. *Price*, 383 U. S. 787, 793, 794 (1966).

[5] The first count of petitioner's complaint alleges that Kress' refusal to serve petitioner "deprived [her] of the privilege of equal enjoyment of a place of public accommodation by reason of her association with Negroes and [she] was *thereby discriminated against because of race in violation of the Constitution* of the United States and of Title 42 United States Code, Section 1983." (App. 4.) (Emphasis added.) The conspiracy count alleges, *inter alia*, that Kress and the Hattiesburg police "conspired together to deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation."

The language of the complaint might, if read generously, support the contention that petitioner was alleging a violation of Title II, the Public Accommodations provisions, of the 1964 Civil Rights Act, 78 Stat. 243, 42 U. S. C. § 2000a. It is clear, and respondent seemingly concedes, that its refusal to serve petitioner was a violation of § 201 of the 1964 Act, 42 U. S. C. § 2000a. It is very doubtful, however, that Kress' violation of Miss Adickes' rights under the Public Accommodations Title could properly serve as a basis for recovery under § 1983. Congress deliberately provided no damages

ciples of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race

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remedy in the Public Accommodations Act itself, and § 207 (b) provides that the injunction remedy of § 206 was the "exclusive means of enforcing the rights based on this title." Moreover, the legislative history makes quite plain that Congress did not intend that violations of the Public Accommodations Title be enforced through the damages provisions of § 1983. See 110 Cong. Rec. 9767 (remark of floor manager that the language of 207 (b) "is necessary because otherwise it . . . would result . . . in civil liability for damages under 42 U. S. C. § 1983"); see also 110 Cong. Rec. 7384, 7405.

In *United States* v. *Johnson,* 390 U. S. 563 (1968), the Court held that violations of § 203 (b) of the Public Accommodations Title could serve as the basis for criminal prosecution under 18 U. S. C. § 241 (another civil rights statute) against "outsiders," having no relation to owners and proprietors of places of public accommodations, notwithstanding the "exclusive" remedy provision of § 207 (b). It is doubtful whether the *Johnson* reasoning would allow recovery under § 1983 for Kress' alleged violation of § 201, and indeed the petitioner does not otherwise contend. The Court, in *Johnson,* in holding that the § 207 (b) limitation did not apply to violations of § 203, stated: "[T]he exclusive-remedy provision of § 207 (b) was inserted *only to make clear that the substantive rights to public accommodation defined in § 201 and § 202 are to be enforced exclusively by injunction.*" 390 U. S., at 567.

In any event, we think it clear that there can be recovery under § 1983 for conduct that violates the Fourteenth Amendment, even though the same conduct might also violate the Public Accommodations Title which itself neither provides a damages remedy nor can be the basis of a § 1983 action. Section 207 (b) of the Public Accommodations Title expressly provides that nothing in that title "shall preclude any individual . . . from asserting any right based on any other Federal or State law not inconsistent with this title . . . or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right." Therefore, quite apart from whether § 207 precludes enforcement of one's rights under the Public Accommodations Title through a damages action under 42 U. S. C. § 1983, we think it evident that enforcement of one's constitutional rights under § 1983 is not "inconsistent" with the Public Accommodations Act.

or the race of his companions, or in any way act to compel or encourage racial segregation.[6] Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; *Monroe* v. *Pape,* 365 U. S. 167 (1961); see *United States* v. *Classic,* 313 U. S. 299, 326 (1941); *Screws* v. *United States,* 325 U. S. 91, 107–111 (1945); *Williams* v. *United States,* 341 U. S. 97, 99–100 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," *United States* v. *Price,* 383 U. S. 787, 794 (1966).[7]

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[6] *E. g., Brown* v. *Board of Education,* 347 U. S. 483 (1954); cf. *Barrows* v. *Jackson,* 346 U. S. 249 (1953).

[7] Although *Price* concerned a criminal prosecution involving 18 U. S. C. § 242, we have previously held that "under color of law" means the same thing for § 1983. *Monroe* v. *Pape, supra,* at 185 (majority opinion), 212 (opinion of Frankfurter, J.); *United States* v. *Price, supra,* at 794 n. 7.

### B. Summary Judgment

We now proceed to consider whether the District Court erred in granting summary judgment on the conspiracy count. In granting respondent's motion, the District Court simply stated that there was "no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy," 252 F. Supp., at 144, aff'd, 409 F. 2d, at 126–127. Our own scrutiny of the factual allegations of petitioner's complaint, as well as the material found in the affidavits and depositions presented by Kress to the District Court, however, convinces us that summary judgment was improper here, for we think respondent failed to carry its burden of showing the absence of any genuine issue of fact. Before explaining why this is so, it is useful to state the factual arguments, made by the parties concerning summary judgment, and the reasoning of the courts below.

In moving for summary judgment, Kress argued that "uncontested facts" established that no conspiracy existed between any Kress employee and the police. To support this assertion, Kress pointed first to the statements in the deposition of the store manager (Mr. Powell) that (a) he had not communicated with the police,[8] and that (b) he had, by a prearranged tacit

[8] In his deposition, Powell admitted knowing Hugh Herring, chief of police of Hattiesburg, and said that he had seen and talked to him on two occasions in 1964 prior to the incident with Miss Adickes. (App. 123–126.) When asked how often the arresting officer, Ralph Hillman, came into the store, Powell stated that he didn't know precisely but "Maybe every day." However, Powell said that on August 14 he didn't recall seeing any policemen either inside or outside the store (App. 136), and he denied (1) that he had called the police, (2) that he had agreed with any public official to deny Miss Adickes the use of the library, (3) that he had agreed with any public official to refuse Miss Adickes service in the Kress store on the day in ques-

signal,[9] ordered the food counter supervisor to see that Miss Adickes was refused service only because he was fearful of a riot in the store by customers angered at seeing a "mixed group" of whites and blacks eating together.[10] Kress also relied on affidavits from the Hatties-

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tion, or (4) that he had asked any public official to have Miss Adickes arrested. App. 154–155.

[9] The signal, according to Powell, was a nod of his head. Powell claimed that at a meeting about a month earlier with Miss Baggett, the food counter supervisor, he "told her not to serve the white person in the group if I . . . shook my head no. But, if I didn't give her any sign, to go ahead and serve anybody." App. 135.

Powell stated that he had prearranged this tacit signal with Miss Baggett because "there was quite a lot of violence . . . in Hattiesburg" directed towards whites "with colored people, in what you call a mixed group." App. 131.

[10] Powell described the circumstances of his refusal as follows:

"On this particular day, just shortly after 12 o'clock, I estimate there was 75 to 100 people in the store, and the lunch counter was pretty—was pretty well to capacity there, full, and I was going up towards the front of the store in one of the aisles, and looking towards the front of the store, and there was a group of colored girls, and a white woman who came into the north door, which was next to the lunch counter.

"And the one thing that really stopped me and called my attention to this group, was the fact that they were dressed alike. They all had on, what looked like a light blue denim skirt. And the best I can remember is that they were—they were almost identical, all of them. And they came into the door, and people coming in stopped to look, and they went on to the booths. And there happened to be two empty there. And one group of them and the white woman sat down in one, and the rest of them sat in the second group.

"And, almost immediately there—I mean this, it didn't take just a few seconds from the time they came into the door to sit down, but, already the people began to mill around the store and started coming over towards the lunch counter. And, by that time I was up close to the candy counter, and I had a wide open view there. And the people had real sour looks on their faces, nobody was joking, or being corny, or carrying on. They looked like a frightened mob. They really did. I have seen mobs before. I was

burg chief of police,[11] and the two arresting officers,[12] to the effect that store manager Powell had not requested that petitioner be arrested. Finally, Kress pointed to the statements in petitioner's own deposition that she had no knowledge of any communication between any Kress employee and any member of the Hattiesburg police, and was relying on circumstantial evidence to support her

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in Korea during the riots in 1954 and 1955. And I know what they are. And this actually got me.

"I looked out towards the front, and we have what they call see-through windows. There is no backs to them. You can look out of the store right into the street. And the north window, it looks right into the lunch counter. 25 or 30 people were standing there looking in, and across the street even, in a jewelry store, people were standing there, and it looked really bad to me. It looked like one person could have yelled 'Let's get them,' which has happened before, and cause this group to turn into a mob. And, so, quickly I just made up my mind to avoid the riot, and protect the people that were in the store, and my employees, as far as the people in the mob who were going to get hurt themselves. I just knew that something was going to break loose there." App. 133–134.

[11] The affidavit of the chief of police, who it appears was not present at the arrest, states in relevant part:

"Mr. Powell had made no request of me to arrest Miss Sandra Adickes or any other person, in fact, I did not know Mr. Powell personally until the day of this statement. [But cf. Powell's statement at his deposition, n. 8, *supra*.] Mr. Powell and I had not discussed the arrest of this person until the day of this statement and we had never previously discussed her in any way." (App. 107.)

[12] The affidavits of Sergeant Boone and Officer Hillman each state, in identical language:

"I was contacted on this date by Mr. John H. Williams, Jr., a representative of Genesco, owners of S. H. Kress and Company, who requested that I make a statement concerning alleged conspiracy in connection with the aforesaid arrest.

"This arrest was made on the public streets of Hattiesburg, Mississippi, and was an officers discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest." (App. 110, 112.)

contention that there was an arrangement between Kress and the police.

Petitioner, in opposing summary judgment, pointed out that respondent had failed in its moving papers to dispute the allegation in petitioner's complaint, a statement at her deposition,[13] and an unsworn statement by a Kress employee,[14] all to the effect that there was a policeman in the store at the time of the refusal to serve her, and that this was the policeman who subsequently

[13] When asked whether she saw any policeman in the store up to the time of the refusal of service, Miss Adickes answered: "My back was to the door, but one of my students saw a policeman come in." (App. 75.) She went on to identify the student as "Carolyn." At the trial, Carolyn Moncure, one of the students who was with petitioner, testified that "about five minutes" after the group had sat down and while they were still waiting for service, she saw a policeman come in the store. She stated: "[H]e came in the store, my face was facing the front of the store, and he came in the store and he passed, and he stopped right at the end of our booth, and he stood up and he looked around and he smiled, and he went to the back of the store, he came right back and he left out." (App. 302.) This testimony was corroborated by that of Dianne Moncure, Carolyn's sister, who was also part of the group. She testified that while the group was waiting for service, a policeman entered the store, stood "for awhile" looking at the group, and then "walked to the back of the store." (App. 291.)

[14] During discovery, respondent gave to petitioner an unsworn statement by Miss Irene Sullivan, a check-out girl. In this statement Miss Sullivan said that she had seen Patrolman Hillman come into the store "[s]hortly after 12:00 noon," while petitioner's group was in the store. She said that he had traded a "hello greeting" with her, and then walked past her check-out counter toward the back of the store "out of [her] line of vision." She went on: "A few minutes later Patrolman Hillman left our store by the northerly front door just slightly ahead of a group composed of several Negroes accompanied by a white woman. As Hillman stepped onto the sidewalk outside our store the police car pulled across the street and into an alley that is alongside our store. The police car stopped and Patrolman Hillman escorted the white woman away from the Negroes and into the police car." (App. 178.)

arrested her. Petitioner argued that although she had no knowledge of an agreement between Kress and the police, the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the non-circumstantial evidence of the conspiracy could only come from adverse witnesses. Further, she submitted an affidavit specifically disputing the manager's assertion that the situation in the store at the time of the refusal was "explosive," thus creating an issue of fact as to what his motives might have been in ordering the refusal of service.

We think that on the basis of this record, it was error to grant summary judgment. As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party.[15] Respondent here did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served.

It is true that Mr. Powell, the store manager, claimed in his deposition that he had not seen or communicated with a policeman prior to his tacit signal to Miss Baggett, the supervisor of the food counter. But respondent did not submit any affidavits from Miss Baggett,[16] or from

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[15] See, *e. g., United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962); 6 J. Moore, Federal Practice ¶ 56.15[3] (2d ed. 1966).

[16] In a supplemental brief filed in this Court respondent lodged a copy of an unsworn statement by Miss Baggett denying any contact with the police on the day in question. Apart from the fact that the statement is unsworn, see Fed. Rule Civ. Proc. 56 (e), the statement itself is not in the record of the proceedings below and therefore could not have been considered by the trial court. Mani-

Miss Freeman,[17] the waitress who actually refused petitioner service, either of whom might well have seen and communicated with a policeman in the store. Further, we find it particularly noteworthy that the two officers involved in the arrest each failed in his affidavit to foreclose the possibility (1) that he was in the store while petitioner was there; and (2) that, upon seeing petitioner with Negroes, he communicated his disapproval to a Kress employee, thereby influencing the decision not to serve petitioner.

Given these unexplained gaps in the materials submitted by respondent, we conclude that respondent failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case—that there was no policeman in the store. If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a "meeting of the minds" and thus reached an understanding that petitioner should be refused service. Because "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light

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festly, it cannot be properly considered by us in the disposition of the case.

During discovery, petitioner attempted to depose Miss Baggett. However, Kress successfully resisted this by convincing the District Court that Miss Baggett was not a "managing agent," and "was without power to make managerial decisions."

[17] The record does contain an unsworn statement by Miss Freeman in which she states that she "did not contact the police or ask anyone else to contact the police *to make the arrest which subsequently occurred.*" (App. 177.) (Emphasis added.) This statement, being unsworn, does not meet the requirements of Fed. Rule Civ. Proc. 56 (e), and was not relied on by respondent in moving for summary judgment. Moreover, it does not foreclose the possibility that Miss Freeman was influenced in her refusal to serve Miss Adickes by some contact with a policeman present in the store.

most favorable to the party opposing the motion," *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962), we think respondent's failure to show there was no policeman in the store requires reversal.

Pointing to Rule 56 (e), as amended in 1963,[18] respondent argues that it was incumbent on petitioner to come forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on that fact to avoid summary judgment. Respondent notes in this regard that none of the materials upon which petitioner relied met the requirements of Rule 56 (e).[19]

This argument does not withstand scrutiny, however, for both the commentary on and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party under Rule 56 (c) to show initially the absence of a genuine issue concerning any material fact.[20] The Advisory Commit-

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[18] The amendment added the following to Rule 56 (e):

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[19] Petitioner's statement at her deposition, see n. 13, *supra,* was, of course, hearsay; and the statement of Miss Sullivan, see n. 14, *supra,* was unsworn. And, the rule specifies that reliance on allegations in the complaint is not sufficient. See Fed. Rule Civ. Proc. 56 (e).

[20] The purpose of the 1963 amendment was to overturn a line of cases, primarily in the Third Circuit, that had held that a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply by relying on a contrary allegation in a well-pleaded complaint. *E. g., Frederick Hart & Co.* v. *Recordgraph Corp.*, 169 F. 2d 580 (1948); *United States ex rel. Kolton* v. *Halpern,* 260 F. 2d 590 (1958). See Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56.

tee note on the amendment states that the changes were not designed to "affect the ordinary standards applicable to the summary judgment." And, in a comment directed specifically to a contention like respondent's, the Committee stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*" [21] Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was not required to come forward with suitable opposing affidavits.[22]

If respondent had met its initial burden by, for example, submitting affidavits from the policemen denying their presence in the store at the time in question, Rule 56 (e) would then have required petitioner to have done more than simply rely on the contrary allegation in her complaint. To have avoided conceding this fact for purposes of summary judgment, petitioner would have had to come forward with either (1) the affidavit of someone who saw the policeman in the store or (2) an affidavit under Rule 56 (f) explaining why at that time it was impractical to do so. Even though not essential here to defeat

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[21] *Ibid.* (emphasis added).

[22] In *First National Bank* v. *Cities Service,* 391 U. S. 253 (1968), the petitioner claimed that the lower courts had misapplied Rule 56 (e) to shift the burden imposed by Rule 56 (c). In rejecting this contention, we said: "Essentially all that the lower courts held in this case was that Rule 56 (e) placed upon [petitioner] the burden of producing evidence of the conspiracy he alleged only *after respondent . . . conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them.*" Id., at 289 (Emphasis added.) In this case, on the other hand, we hold that respondent failed to show conclusively that a fact alleged by petitioner was "not susceptible" of an interpretation that might give rise to an inference of conspiracy.

respondent's motion, the submission of such an affidavit would have been the preferable course for petitioner's counsel to have followed. As one commentator has said:

> "It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56 (f) affidavit. And the peril rightly continues [after the amendment to Rule 56 (e)]. Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required." 6 J. Moore, Federal Practice ¶ 56.22 [2], pp. 2824–2825 (2d ed. 1966).

## II

There remains to be discussed the substantive count of petitioner's complaint, and the showing necessary for petitioner to prove that respondent refused her service "under color of any . . . custom, or usage, of [the] State" in violation of her rights under the Equal Protection Clause of the Fourteenth Amendment.[23]

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[23] Petitioner also appears to argue that, quite apart from custom, she was refused service under color of the state trespass statute, *supra*, n. 2. It should be noted, however, that this trespass statute by its terms does not compel segregation of the races. Although such a trespass statute might well have invalid applications if used to compel segregation of the races through state trespass convictions, see *Robinson* v. *Florida*, 378 U. S. 153 (1964), the statute here was not so used in this case. Miss Adickes, although refused service, was not asked to leave the store, and was not arrested for a trespass arising from a refusal to leave pursuant to this statute. The majority below, because it thought the code provision merely restated the common law "allowing [restaurateurs] to serve whomever they wished," 409 F. 2d, at 126, concluded that a private discrimination on the basis of race pursuant to this pro-

### A. Custom or Usage

We are first confronted with the issue of whether a "custom" for purposes of § 1983 must have the force of law, or whether, as argued in dissent, no state involvement is required. Although this Court has never explicitly decided this question, we do not interpret the statute against an amorphous backdrop.

What is now 42 U. S. C. § 1983 came into existence as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The Chairman of the House Select Committee which drafted this legislation described [24] § 1 as modeled after § 2 of the Civil Rights Act of 1866—a criminal provision that also contained language that forbade certain acts by any person "under color of any law, statute, ordinance, regulation, or custom," 14 Stat. 27. In the *Civil Rights Cases,* 109 U. S. 3, 16 (1883), the Court said of this 1866 statute: "This law is clearly corrective in its

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vision would not fulfill the "state action" requirement necessary to show a violation of the Fourteenth Amendment. Judge Waterman, in dissent, argued that the statute changed the common law, and operated *to encourage* racial discrimination.

Because a factual predicate for statutory relief under § 1983 has not yet been established below, we think it inappropriate in the present posture of this case to decide the constitutional issue of whether or not proof that a private person knowingly discriminated on the basis of race pursuant to a state trespass statute like the one involved here would make out a violation of the Fourteenth Amendment. Whatever else may also be necessary to show that a person has acted "under color of [a] statute" for purposes of § 1983, see n. 44, *infra,* we think it essential that he act with the knowledge of and pursuant to that statute. The courts below have made no factual determinations concerning whether or not the Kress refusal to serve Miss Adickes was the result of action by a Kress employee who had knowledge of the trespass statute, and who was acting pursuant to it.

[24] Cong. Globe, 42d Cong., 1st Sess., App. 68 (statement by Rep. Shellabarger).

character, intended to counteract and furnish redress against State laws and proceedings, and *customs having the force of law,* which sanction the wrongful acts specified." (Emphasis added.) Moreover, after an exhaustive examination of the legislative history of the 1866 Act, both the majority and dissenting opinions [25] in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968), concluded that § 2 of the 1866 Civil Rights Act was intended to be limited to "deprivations perpetrated 'under color of *law.*'" [26] (Emphasis added.)

Quite apart from this Court's construction of the identical "under color of" provision of § 2 of the 1866 Act, the legislative history of § 1 of the 1871 Act, the lineal ancestor of § 1983, also indicates that the provision in question here was intended to encompass only conduct supported by state action. That such a limitation was intended for § 1 can be seen from an examination of the statements and actions of both the supporters and opponents of the Ku Klux Klan Act.

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[25] 392 U. S., at 424–426 (majority opinion); *id.,* at 454–473 (HARLAN, J., dissenting).

[26] *Id.,* at 426. In arguing that § 1 of the 1866 Act (the predecessor of what is now 42 U. S. C. § 1982) was meant to cover private as well as governmental interference with certain rights, the Court in *Jones* said:

"Indeed, if § 1 had been intended to grant nothing more than an immunity from *governmental* interference, then much of § 2 would have made no sense at all. For that section, which provided fines and prison terms for certain individuals who deprived others of rights 'secured or protected' by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed. . . . Hence the structure of the 1866 Act, as well as its language, points to the conclusion . . . [that] only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." *Id.,* 424–426. The Court in *Jones* cited the legislative history of § 2 to support its conclusion that the section "was carefully drafted to exempt private violations" and punish only "*governmental* interference." *Id.,* at 424–425 and n. 33.

In first reporting the Committee's recommendations to the House, Representative Shellabarger, the Chairman of the House Select Committee which drafted the Ku Klux Klan Act, said that § 1 was "*in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws* which abridge these rights." [27] (Emphasis added.) Senator Edmunds, Chairman of the Senate Committee on the Judiciary, and also a supporter of the bill, said of this provision: "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are *assailed by any State law or under color of any State law,* and it is merely carrying out the principles of the civil rights bill, which have since become a part of the Constitution." [28] (Emphasis added.) Thus, in each House, the leader of those favoring the bill expressly stated his understanding that § 1 was limited to deprivations of rights done under color of law.

That Congress intended to limit the scope of § 1 to actions taken under color of law is further seen by contrasting its legislative history with that of other sections of the same Act. On the one hand, there was comparatively little debate over § 1 of the Ku Klux Klan Act, and it was eventually enacted in form identical to that in which it was introduced in the House.[29] Its history thus stands in sharp contrast to that of other sections

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[27] Cong. Globe, 42d Cong., 1st Sess., App. 68.

[28] *Id.*, at 568 (emphasis added), quoted in *Monroe* v. *Pape, supra,* at 171; see also Cong. Globe, *supra,* at App. 79 (Rep. A. Perry) (§ 1 understood to remedy injuries done "under color of State authority").

[29] Compare *id.*, at App. 68 with 17 Stat. 13. See *id.*, at 568; App. 153–154 (Rep. Garfield).

of the Act.[30] For example, § 2 of the 1871 Act,[31] a provision aimed at private conspiracies with no "under color of law" requirement, created a great storm of controversy, in part because it was thought to encompass private conduct. Senator Thurman, for example, one of the leaders of the opposition to the Act, although objecting to § 1 on other grounds, admitted its constitutionality [32] and characterized it as "refer[ring] to a deprivation under color of law, either statute law *or 'custom or usage' which has become common law.*" [33] (Emphasis added.) This same Senator insisted vociferously on the absence of congressional power under § 5 of the Four-

[30] Throughout the debates, for example, "moderates" who expressed no opposition to § 1, objected to other proposals that they saw as allowing the Federal Government to take over the State's traditional role of punishing unlawful conduct of private parties. See, *e. g., id.,* at 578–579 (Sen. Trumbull, the author of the 1866 Act); 514 (Rep. Poland); App. 153 (Rep. Garfield).

[31] Section 2 of the Ku Klux Klan Act is, as amended, 42 U. S. C. § 1985 (3). In *Collins* v. *Hardyman,* 341 U. S. 651 (1951), in order to avoid deciding whether there was congressional power to allow a civil remedy for purely private conspiracies, the Court in effect interpreted § 1985 (3) to require action under color of law even though this element is not found in the express terms of the statute. In a dissent joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, Mr. Justice Burton said of § 1985 (3): "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. . . . When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms," citing and quoting what is now § 1983. *Id.,* at 663–664. Without intimating any view concerning the correctness of the Court's interpretation of § 1985 (3) in *Collins,* we agree with the dissenters in that case that Congress in enacting what is now § 1983 "said . . . in unmistakable terms" that action under color of law is necessary.

[32] Cong. Globe, *supra,* at App. 216.

[33] *Id.,* at App. 217; see also *id.,* at App. 268 (Rep. Sloss).

teenth Amendment to penalize a conspiracy of private individuals to violate state law.[34] The comparative lack of controversy concerning § 1, in the context of the heated debate over the other provisions, suggests that the opponents of the Act, with minor exceptions, like its proponents understood § 1 to be limited to conduct under color of law.

In addition to the legislative history, there exists an unbroken line of decisions, extending back many years, in which this Court has declared that action "under color of *law*" is a predicate for a cause of action under § 1983,[35] or its criminal counterpart, 18 U. S. C. § 242.[36] Moreover, with the possible exception of an exceedingly opaque district court opinion,[37] every lower court opinion of which we are aware that has considered the issue, has concluded that a "custom or usage" for purposes of § 1983 requires state involvement and is not simply a practice that reflects longstanding social habits, gen-

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[34] *Id.*, at App. 218.

[35] *E. g., Pierson* v. *Ray*, 386 U. S. 547, 554 (1967); *Monroe* v. *Pape*, *supra*; *Smith* v. *Allwright*, 321 U. S. 649 (1944).

[36] *United States* v. *Price*, 383 U. S. 787, 794 n. 7 (1966); *Williams* v. *United States*, *supra*; *Screws* v. *United States*, *supra*, at 109; *United States* v. *Classic*, *supra*, at 326–329. Section 242 of 18 U. S. C. is the direct descendant of § 2 of the 1866 Civil Rights Act. See n. 26, *supra*.

[37] In *Gannon* v. *Action*, 303 F. Supp. 1240 (D. C. E. D. Mo. 1969), the opinion on the one hand said that "Section 1983 . . . requires that the action for which redress is sought be under 'color' of state law." It then went on to decide that the defendants under color of a "custom of [*sic*] usage of the State of Missouri . . . [of] undisturbed worship by its citizens according to the dictates of their consciences" entered a St. Louis cathedral, disrupted a service and thus "deprived plaintiffs of their constitutional rights of freedom of assembly, speech, and worship, and to use and enjoy their property, all in violation of section 1983," *id.*, at 1245. See 23 Vand. L. Rev. 413, 419–420 (1970).

erally observed by the people in a locality.[38] Finally, the language of the statute itself points in the same direction for it expressly requires that the "custom or usage" be that "of any *State*," not simply of the people living in a state. In sum, against this background, we think it clear that a "custom, or usage, of [a] State" for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials.

Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South. As Representative Garfield said: "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." [39] Although not authorized by written law, such

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[38] *Williams* v. *Howard Johnson's, Inc.*, 323 F. 2d 102 (C. A. 4th Cir. 1963); *Williams* v. *Hot Shoppes, Inc.*, 110 U. S. App. D. C. 358, 363, 293 F. 2d 835, 840 (1961) ("As to the argument based upon the 'custom or usage' language of the statute, we join with the unanimous decision of the Fourth Circuit in support of the proposition that—'The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment,'" quoting from *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 848 (C. A. 4th Cir. 1959)), and 110 U. S. App. D. C., at 367–368, 293 F. 2d, at 844–845 (Bazelon, J., dissenting); see *Slack* v. *Atlantic White Tower System*, 181 F. Supp. 124, 127–128, 130 (D. C. Md.), aff'd, 284 F. 2d 746 (C. A. 4th Cir. 1960).

It should also be noted that the dissenting opinion below thought a "custom or usage" had to have the force of law. 409 F. 2d, at 128.

[39] Cong. Globe, 42d Cong., 1st Sess., App. 153. MR. JUSTICE BRENNAN, *post*, at 219, 230, infers from this statement that Rep. Garfield thought § 1983 was meant to provide a remedy in circumstances where the State had failed to take affirmative action to prevent widespread private discrimination. Such a reading of the statement is too broad, however. All Rep. Garfield said was that a

practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.

This interpretation of custom recognizes that settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements. If authority be needed for this truism, it can be found in *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362 (1940), where the Court held that although a statutory provision suggested a different note, the "law" in Tennessee as established by longstanding practice of state officials was that railroads and public utilities were taxed at full cash value. What Justice Frankfurter wrote there seems equally apt here:

> "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." *Id.,* at 369.

And in circumstances more closely analogous to the case at hand, the statements of the chief of police and mayor of New Orleans, as interpreted by the Court

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State, through the practices of its officials, could deny a person equal protection of the laws by the "systematic maladministration" of, or "a neglect or refusal to enforce" written laws that were "just and equal on their face." Official inaction in the sense of neglecting to enforce laws already on the books is quite different from the inaction implicit in the failure to enact corrective legislation.

in *Lombard* v. *Louisiana,* 373 U. S. 267 (1963), could well have been taken by restaurant proprietors as articulating a custom having the force of law. Cf. *Garner* v. *Louisiana,* 368 U. S. 157, 176–185 (DOUGLAS, J., concurring) (1961); *Wright* v. *Georgia,* 373 U. S. 284 (1963); *Baldwin* v. *Morgan,* 287 F. 2d 750, 754 (C. A. 5th Cir. 1961).

B. STATE ACTION—14TH AMENDMENT VIOLATION

For petitioner to recover under the substantive count of her complaint, she must show a deprivation of a right guaranteed to her by the Equal Protection Clause of the Fourteenth Amendment. Since the "action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States," *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948), we must decide, for purposes of this case, the following "state action" issue: Is there sufficient state action to prove a violation of petitioner's Fourteenth Amendment rights if she shows that Kress refused her service because of a state-enforced custom compelling segregation of the races in Hattiesburg restaurants?

In analyzing this problem, it is useful to state two polar propositions, each of which is easily identified and resolved. On the one hand, the Fourteenth Amendment plainly prohibits a State itself from discriminating because of race. On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in *Shelley* v. *Kraemer, supra,* § 1 of "[t]hat Amendment erects no shield against merely private conduct, however discriminatory or wrongful." 334 U. S., at 13.

At what point between these two extremes a State's involvement in the refusal becomes sufficient to make the private refusal to serve a violation of the Fourteenth Amendment, is far from clear under our case law. If a State had a law requiring a private person to refuse service because of race, it is clear beyond dispute that the law would violate the Fourteenth Amendment and could be declared invalid and enjoined from enforcement. Nor can a State enforce such a law requiring discrimination through either convictions of proprietors who refuse to discriminate, or trespass prosecutions of patrons who, after being denied service pursuant to such a law, refuse to honor a request to leave the premises.[40]

The question most relevant for this case, however, is a slightly different one. It is whether the decision of an owner of a restaurant to discriminate on the basis of race under the compulsion of state law offends the Fourteenth Amendment. Although this Court has not explicitly decided the Fourteenth Amendment state action issue implicit in this question, underlying the Court's decisions in the sit-in cases is the notion that a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in *Peterson* v. *City of Greenville,* 373 U. S. 244, 248 (1963): "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it." Moreover, there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth

[40] *E. g., Peterson* v. *City of Greenville,* 373 U. S. 244 (1963); *Robinson* v. *Florida,* 378 U. S. 153 (1964); see *Lombard* v. *Louisiana,* 373 U. S. 267 (1963); *Shuttlesworth* v. *Birmingham,* 373 U. S. 262 (1963).

Amendment. In *Baldwin* v. *Morgan, supra,* the Fifth Circuit held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." The Court then went on to say: "As we have pointed out above the State may not use race or color as the basis for distinction. *It may not do so by direct action or through the medium of others who are under State compulsion to do so.*" *Id.,* at 755–756 (emphasis added). We think the same principle governs here.

For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants.

### C. Three Additional Points

For purposes of remand, we consider it appropriate to make three additional points.

First, the District Court's pretrial opinion seems to suggest that the exclusive means available to petitioner for demonstrating that state enforcement of the custom relevant here would be by showing that the State used its criminal trespass statute for this purpose. We disagree with the District Court's implicit assumption that a custom can have the force of law only if it is enforced

by a state statute.[41] Any such limitation is too restrictive, for a state official might act to give a custom the force of law in a variety of ways, at least two examples of which are suggested by the record here. For one thing, petitioner may be able to show that the police subjected her to false arrest for vagrancy for the purpose of harassing and punishing her for attempting to eat with black people.[42] Alternatively, it might be shown on remand that the Hattiesburg police would intentionally tolerate violence or threats of violence directed toward those who violated the practice of segregating the races at restaurants.[43]

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[41] Because it thought petitioner had failed to prove the existence of a custom, the majority of the Second Circuit explicitly refused to decide whether petitioner had to prove "the custom or usage was enforced by a state statute," 409 F. 2d, at 125.

[42] Together with some other civil rights workers also being prosecuted on vagrancy charges, Miss Adickes, in a separate action, removed the state vagrancy prosecution against her to a federal court on the ground that the arrest and prosecution were in retaliation for her attempt to exercise her rights under the Public Accommodations Title of the 1964 Civil Rights Act. The District Court remanded the charge to the state courts, but the Fifth Circuit reversed, finding that "[t]he utter baselessness of any conceivable contention that the vagrancy statutes prohibited any conduct in which these persons were engaged, merely buttresses the undisputed evidence before the trial court when the order of remand was entered that these protected acts [*i. e.*, "attempts to enjoy equal public accommodations in the Hattiesburg City Library, and a restaurant in the nationally known Kress store"] constituted the conduct for which they were then and there being arrested." *Achtenberg* v. *Mississippi,* 393 F. 2d 468, 474 (C. A. 5th Cir. 1968). Although one judge dissented on the ground that Miss Adickes' case was not properly removable under *Georgia* v. *Rachel,* 384 U. S. 780 (1966), he too thought that the "vagrancy charges against Miss Adickes were shown to be baseless and an unsophisticated subterfuge," *id.,* at 475.

[43] See n. 10, *supra.*

Second, we think the District Court was wrong in ruling that the only proof relevant to showing a custom in this case was that demonstrating a specific practice of not serving white persons who were in the company of black persons in public restaurants. As Judge Waterman pointed out in his dissent below, petitioner could not possibly prove a "long and unvarying" habit of serving only the black persons in a "mixed" party of whites and blacks for the simple reason that "it was only after the Civil Rights Act of 1964 became law that Afro-Americans had an opportunity to be served in Mississippi 'white' restaurants" at all, 409 F. 2d, at 128. Like Judge Waterman, we think the District Court viewed the matter too narrowly, for under petitioner's complaint the relevant inquiry is whether at the time of the episode in question there was a longstanding and still prevailing state-enforced custom of segregating the races in public eating places. Such a custom, of course, would perforce encompass the particular kind of refusal to serve challenged in this case.

Third, both the District Court and the majority opinion in the Court of Appeals suggested that petitioner would have to show that the relevant custom existed throughout the State, and that proof that it had the force of law in Hattiesburg—a political subdivision of the State—was insufficient. This too we think was error. In the same way that a law whose source is a town ordinance can offend the Fourteenth Amendment even though it has less than state-wide application, so too can a custom with the force of law in a political subdivision of a State offend the Fourteenth Amendment even though it lacks state-wide application.

In summary, if petitioner can show (1) the existence of a state-enforced custom of segregating the races in public eating places in Hattiesburg at the time of the inci-

dent in question; and (2) that Kress' refusal to serve her was motivated by that state-enforced custom, she will have made out a claim under § 1983.[44]

For the foregoing reasons we think petitioner is entitled to a new trial on the substantive count of her complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

*It is so ordered.*

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

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[44] Any notion that a *private* person is necessarily immune from liability under § 1983 because of the *"under color of"* requirement of the statute was put to rest by our holding in *United States* v. *Price, supra,* see n. 7, *supra.* There, in the context of a conspiracy, the Court said: "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State . . . ," *id.,* at 794. Because the core of congressional concern in enacting § 1983 was to provide a remedy for violations of the Equal Protection Clause arising from racial discrimination, we think that a private person who discriminates on the basis of race with the knowledge of and pursuant to a state-enforced custom requiring such discrimination, is a "participant in joint activity with the State," and is acting "under color of" that custom for purposes of § 1983.

We intimate no views concerning the relief that might be appropriate if a violation is shown. See *Williams* v. *Hot Shoppes, Inc.,* 110 U. S. App. D. C. 358, 370–371, 293 F. 2d 835, 847–848 (1961) (Bazelon, J., dissenting). The parties have not briefed these remedial issues, and if a violation is proved they are best explored in the first instance below in light of the new record that will be developed on remand. Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand. Cf. *Pierson* v. *Ray,* 386 U. S. 547 (1967).

MR. JUSTICE BLACK, concurring in the judgment.

The petitioner, Sandra Adickes, brought suit against the respondent, S. H. Kress & Co., to recover damages for alleged violations of 42 U. S. C. § 1983. In one count of her complaint she alleged that a police officer of the City of Hattiesburg, Mississippi, had conspired with employees of Kress to deprive her of rights secured by the Constitution and that this joint action of a state official and private individuals was sufficient to constitute a violation of § 1983. She further alleged in another count that Kress' refusal to serve her while she was in the company of Negroes was action "under color of" a custom of refusing to serve Negroes and whites together in Mississippi, and that this action was a violation of § 1983. The trial judge granted a motion for summary judgment in favor of Kress on the conspiracy allegation and, after full presentation of evidence by the petitioner, granted a motion for a directed verdict in favor of the respondent on the custom allegation. Both decisions rested on conclusions that there were no issues of fact supported by sufficient evidence to require a jury trial. I think the trial court and the Court of Appeals which affirmed were wrong in allowing summary judgment on the conspiracy allegation. And—assuming for present purposes that the trial court's statutory interpretation concerning "custom or usage" was correct—it was also error to direct a verdict on that count. In my judgment, on this record, petitioner should have been permitted to have the jury consider both her claims.

Summary judgments may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." Fed. Rule Civ. Proc. 56 (c). Petitioner in this case alleged that she went into Kress in the company of Negroes

and that the waitress refused to serve her, stating "[w]e have to serve the colored, but we are not going to serve the whites that come in with them." Petitioner then alleged that she left the store with her friends and as soon as she stepped outside a policeman arrested her and charged her with vagrancy. On the basis of these facts she argued that there was a conspiracy between the store and the officer to deprive her of federally protected rights. The store filed affidavits denying any such conspiracy and the trial court granted the motion for summary judgment, concluding that petitioner had not alleged any basic facts sufficient to support a finding of conspiracy.

The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. In this case petitioner may have had to prove her case by impeaching the store's witnesses and appealing to the jury to disbelieve all that they said was true in the affidavits. The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment. "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller* v. *Columbia Broadcasting,* 368 U. S. 464, 473 (1962).

Second, it was error for the trial judge to direct a verdict in favor of the respondent on the "custom"

count. The trial judge surveyed the evidence and concluded that it was insufficient to prove the existence of a custom of not serving white people in the company of Negroes. He thereupon took the case away from the jury, directing a verdict for the respondent. The Court of Appeals affirmed this conclusion. In my opinion this was clear error.

Petitioner testified at trial as follows:

> "Q. Did you have occasion to know of specific instances where white persons in the company of Negroes were discriminated against? A. Yes.
>
> "Q. How many such instances can you recall? A. I can think of about three at the moment.
>
> "Q. Will you describe the three instances to us? A. I know that people were turned away from a white church, an integrated group was turned away from a white church in Hattiesburg. I was not present but this was explained to me. I saw a rabbi being beaten because he was in the company of Negroes.
>
> "Q. This was a white rabbi? A. Yes. And people were turned away from a drug store in Hattiesburg, an integrated group. I don't remember the name of the drug store.
>
> "Q. On the basis of what you studied and on the basis of what you observed, and on the basis of your conversations with other persons there, did you come to a conclusion with regard to the custom and usage with regard to the white community towards serving persons, white persons, in the company of Negroes? A. Yes.
>
> "Q. What was that conclusion? A. The conclusion was that white persons—it was a custom and usage not to serve white persons in the company of Negroes."

This evidence, although weakened by the cross-examination, was sufficient, I think, to require the court to let the case go to the jury and secure petitioner's constitutionally guaranteed right to a trial by that jury. See *Galloway* v. *United States,* 319 U. S. 372, 396 (1943) (BLACK, J., dissenting).

I do not find it necessary at this time to pass on the validity of the statutory provision concerning "custom or usage" or on the trial court's views, concurred in by the Court of Appeals, on the proper interpretation of that term. Assuming that the trial court's interpretation was correct and that the provision as so interpreted is valid, there was enough evidence in this record to warrant submitting the entire question of custom or usage to the jury in accordance with instructions framed to reflect those views.

For the foregoing reasons I concur in the judgment reversing the Court of Appeals and remanding for a new trial on both counts.

MR. JUSTICE DOUGLAS, dissenting in part.

I

The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State," 42 U. S. C. § 1983, are seriously emasculated by today's ruling. Custom, it is said, must have "the force of law"; and "law," as I read the opinion, is used in the Hamiltonian sense.[1]

[1] The Federalist, No. 15:

"It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms."

The Court requires state involvement in the enforcement of a "custom" before that "custom" can be actionable under 42 U. S. C. § 1983. That means, according to the Court, that "custom" for the purposes of § 1983 "must have the force of law by virtue of the persistent practices of state officials." That construction of § 1983 is, to borrow a phrase from the first Mr. Justice Harlan, "too narrow and artificial." *Civil Rights Cases,* 109 U. S. 3, 26 (dissenting opinion).

Section 1983 by its terms protects all "rights" that are "secured by the Constitution and laws" of the United States. There is no more basic "right" than the exemption from discrimination on account of race—an exemption that stems not only from the Equal Protection Clause of the Fourteenth Amendment but also from the Thirteenth Amendment and from a myriad of "laws" enacted by Congress. And so far as § 1983 is concerned it is sufficient that the deprivation of that right be "under color" of "any . . . custom . . . of any State." The "custom" to be actionable must obviously reflect more than the prejudices of a few; it must reflect the dominant communal sentiment.

II

The "custom . . . of any State" can of course include the predominant attitude backed by some direct or indirect sanctions inscribed in law books. Thus in *Garner* v. *Louisiana,* 368 U. S. 157, another restaurant case involving racial discrimination, there was no state law or municipal ordinance that in terms required segregation of the races in restaurants. But segregation was basic to the structure of Louisiana as a community as revealed by a mosaic of laws. *Id.,* at 179–181 (concurring opinion).

The same is true of Mississippi in the present case. In 1964, at the time of the discrimination perpetrated in this case, there were numerous Mississippi laws that were designed to continue a regime of segregation of

the races. The state legislature had passed a resolution condemning this Court's *Brown* v. *Board of Education* decisions, 347 U. S. 483, 349 U. S. 294, as "unconstitutional" infringements on States' rights. Miss. Laws 1956, c. 466, Senate Concurrent Resolution No. 125. Part of the Mississippi program to perpetuate the segregated way of life was the State Sovereignty Commission, Miss. Code Ann. § 9028–31 *et seq.* (1956), of which the Governor was chairman and which was charged with the duty "to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi . . . from encroachment thereon by the Federal Government . . . ." *Id.*, § 9028–35. Miss. Code Ann. § 4065.3 (1956) required "the entire executive branch of the government of the State of Mississippi . . . to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government . . . ." Every word and deed of a state officer, agent, or employee that was connected with maintaining segregated schools in Mississippi was deemed to be "the sovereign act . . . of the sovereign State of Mississippi." *Id.*, § 4065.4 (Supp. 1968). It was unlawful for a white student to attend any school of high school or lower level that was also attended by Negro students. *Id.*, § 6220.5. Separate junior college districts were established for blacks and whites. *Id.*, § 6475–14 (1952). The Ellisville State School for the feeble-minded was required to provide for separate maintenance of blacks and whites. *Id.*, § 6766. The State Insane Hospital was required to keep the two races separate, *id.*, § 6883, as was the South Mississippi Charity Hospital. *Id.*, § 6927. Separate entrances were required to be maintained at state hos-

pitals for black and white patients. *Id.*, § 6973. It was the responsibility of those in authority to furnish a sufficient number of Negro nurses to attend Negro patients, but the Negro nurses were to be under the supervision of white supervisors. *Id.*, § 6974. It was unlawful for Negro and white convicts to be confined or worked together. *Id.*, § 7913 (1956). County sheriffs were required to maintain segregated rooms in the jails. *Id.*, § 4259. It was unlawful for taxicab drivers to carry black and white passengers together. *Id.*, § 3499. Railroad depots in cities of 3,000 or more inhabitants were required to have separate "closets" for blacks and whites. *Id.*, § 7848. And it was a crime to overthrow the segregation laws of the State. *Id.*, § 2056 (7).

The situation was thus similar to that which existed in *Garner*. Although there was no law that in terms required segregation of the races in restaurants, it was plain that the discrimination was perpetrated pursuant to a deeply entrenched custom in Louisiana that was "at least as powerful as any law." *Garner* v. *Louisiana*, *supra*, at 181 (concurring opinion); cf. *Robinson* v. *Florida*, 378 U. S. 153, 156.

III

The "custom . . . of any State," however, can be much more pervasive. It includes the unwritten commitment, stronger than ordinances, statutes, and regulations, by which men live and arrange their lives. Bronislaw Malinowski, the famed anthropologist, in speaking of the "cake of custom" of a Melanesian community "safeguarding life, property and personality" said: [2]

> "There is no religious sanction to these rules, no fear, superstitious or rational, enforces them, no

[2] B. Malinowski, Crime and Custom in Savage Society 66–67 (1932).

> tribal punishment visits their breach, nor even the stigma of public opinion or moral blame. The forces which make these rules binding we shall lay bare and find them not simple but clearly definable, not to be described by one word or one concept, but very real none the less. The binding forces of Melanesian civil law are to be found in the concatenation of the obligations, in the fact that they are arranged into chains of mutual services, a give and take extending over long periods of time and covering wide aspects of interest and activity. To this there is added the conspicuous and ceremonial manner in which most of the legal obligations have to be discharged. This binds people by an appeal to their vanity and self-regard, to their love of self-enhancement by display. Thus the binding force of these rules is due to the natural mental trend of self-interest, ambition and vanity, set into play by a special social mechanism into which the obligatory actions are framed."

This concept of "custom" is, I think, universal and as relevant here as elsewhere. It makes apparent that our problem under 42 U. S. C. § 1983 does not make our sole aim the search for "state action" in the Hamiltonian sense of "law."

That restricted kind of a search certainly is not compelled by grammar. "Of" is a word of many meanings, one of which indicates "the thing or person whence anything originates, comes, is acquired or sought." 7 Oxford English Dictionary (definition III). The words "under color of any . . . custom . . . of any State" do no more than describe the geographical area or political entity in which the "custom" originates and where it is found.

The philosophy of the Black Codes reached much further than the sanctions actually prescribed in them. Federal judges, who entered the early school desegrega-

tion decrees, often felt the ostracism of the community, though the local "law" never even purported to place penalties on judges for doing such acts. Forty years ago in Washington, D. C., a black who was found after the sun set in the northwest section of the District on or above Chevy Chase Circle was arrested, though his only "crime" was waiting for a bus to take him home after caddying at a plush golf course in the environs. There was no "law" sanctioning such an arrest. It was done "under color" of a "custom" of the Nation's Capital.

Harry Golden [3] recently wrote:

> "Southerners drew a line and prohibited Negroes crossing it. They doomed themselves to a lifetime of guarding that line, fearing it would be breached. Because the white Southerner must forever watch that line, the Negro intrudes upon the white at every level of life."

Is not the maintenance of that line by habit a "custom?"

Title 42 U. S. C. § 1983 was derived from § 1 of the "Ku Klux Klan Act" of 1871, 17 Stat. 13. The "under color of" provisions of § 1 of the 1871 Act, in turn, were derived from § 2 of the Civil Rights Act of 1866, 14 Stat. 27. The meaning of "under color of . . . custom" in the context of the 1866 Act is therefore relevant to the meaning of that phrase as it is used in § 1983, for, as the Court states, the "under color of" provisions mean the same thing for § 1983 as they do for 18 U. S. C. § 242, the direct descendant of § 2 of the 1866 Act.[4] *Ante,* at 152 n. 7.

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[3] Book Guide, Boston Sunday Herald Traveler, February 22, 1970, p. 2.

[4] Section 2 of the 1866 Act, which we discussed in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 424–426, made it a criminal offense for any person "under color of any law, statute, ordinance, regulation, or custom" to subject any inhabitant of "any State or Territory to the

A "custom" of the community or State was one of the targets of the Civil Rights Act of 1866. Section 1, which we upheld in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, provided a civil remedy for specified private acts of racial discrimination. Section 2 of that Act provided criminal sanctions for acts done "under color of any" custom of a State. A Congress that in 1866 was not bent only on "the nullification of racist laws," *id.*, at 429, was not restricting itself strictly to state action; it was out to ban racial discrimination partly as respects private actions, partly under state law in the Hamiltonian sense, and partly under the color of "custom."

Of course, § 2 of the 1866 Act did not cover purely private actions as did § 1 of the Act, and that was the point of our discussion of § 2 in *Jones* v. *Alfred H. Mayer Co.* But the Court does not come to grips with the fact that actions taken "under color of any . . . custom" were covered by § 2 of the 1866 Act quite apart from

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deprivation of any right secured or protected by this act." The direct descendant of § 2 is 18 U. S. C. § 242, which, in an earlier form, was before the Court in *United States* v. *Classic*, 313 U. S. 299, and *Screws* v. *United States*, 325 U. S. 91. Section 242 provides:

"Whoever, *under color of any* law, statute, ordinance, regulation, or *custom*, wilifully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both." (Emphasis added.)

Section 1983 of 42 U. S. C. provides a civil remedy. It reads:

"Every person who, *under color of any* statute, ordinance, regulation, *custom*, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

actions taken under "color of any statute, ordinance, [or] regulation"—in other words, quite apart from actions taken under "color of law" in the traditional sense. Instead, the Court seems to divide all actions into two groups—those constituting "state action" and those constituting purely "private action"—with coverage of § 2 limited to the former. While § 2 did not reach "private violations," it did reach discrimination based on "color of custom," which is far beyond the realm of a mere private predilection or prejudice. And, despite the Court's suggestion to the contrary, the use of the term "under color of law" by the Court in *Jones* v. *Alfred H. Mayer Co.* was merely a shorthand reference for all the "under color of" provisions in § 2 and had no relevance to the specific problem of defining the meaning of "under color of . . . custom." [5]

Section 2, like § 1, involved in *Jones* v. *Alfred H. Mayer Co.*, was bottomed on the Thirteenth Amendment, for it was enacted before the Fourteenth Amendment was adopted. As we stated in *Jones* v. *Alfred H. Mayer Co.*:

> "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the

[5] The meaning of "under color of . . . custom" was not before the Court in *Jones* v. *Alfred H. Mayer Co.*, and language from the Court's opinion in that case, taken out of context, can be highly misleading. For example, the language quoted in n. 26 of the Court's opinion in this case distinguished "private violations" covered by § 1 of the 1866 Act from "deprivations perpetrated 'under color of law' " covered by § 2 of the Act. The Court here interprets that use of the phrase "under color of law" to exclude actions taken "under color of . . . custom" *sans* state action. A more realistic interpretation of the quoted language, however, is that "under color of law" was merely being used by the Court as a shorthand phrase for "under color of any statute, ordinance, regulation, custom, or usage, of any State," and that the Court, without in any way addressing the question of the meaning of "custom," was merely using the phrase to distinguish purely private violations.

authority to translate that determination into effective legislation." *Id.*, at 440.

While the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment are each protective of the individual as against "state" action, the guarantees of the Thirteenth Amendment and various laws of the United States are not so restricted. And § 1983 protects not only Fourteenth Amendment rights, but "*any* rights . . . secured by the Constitution and laws." With regard to § 1983's scope of protection for violations of these rights, Congress in § 1983 aimed partly at "state" action and it was with that aspect of it that we were concerned in *Monroe* v. *Pape*, 365 U. S. 167.

If the wrong done to the individual was under "color" of "custom" alone, the ingredients of the cause of action were satisfied.[6] The adoption of the Fourteenth Amend-

[6] The trial court restricted the evidence on custom to that which related to the specific practice of not serving white persons who were in the company of black persons in public restaurants. Such evidence was necessarily limited, as the Court points out, by the fact that it was only after the Civil Rights Act of 1964 went into effect that blacks could be served in " 'white' restaurants" in Mississippi at all. Although I agree with my Brother BLACK that the evidence introduced under this narrow definition of custom, as outlined in his opinion, was sufficient to require a jury trial on that question, I also agree with the Court's conclusion that the definition employed by the trial court was far too restrictive. Petitioner argued that the relevant custom was the custom against integration of the races, and that the refusal to serve a white person in the company of blacks was merely a specific manifestation of that custom. I think that petitioner's definition of custom is the correct one. There is abundant evidence in the record of a custom of racial segregation in Mississippi, and in Hattiesburg in particular. In fact the trial judge conceded, "I certainly don't dispute that it could be shown that there was a custom and usage of discrimination in the past. . . . It is certainly a way of life so far as the people in Mississippi were concerned."

ment expanded the substantive rights covered by § 1 of the 1871 Act *vis-à-vis* those covered by § 2 of the 1866 Act. But that expanded coverage did not make "state action" a necessary ingredient in all of the remedial provisions of § 1 of the 1871 Act. Neither all of § 1 of the 1871 Act nor all of its successor, § 1983, was intended to be conditioned by the need for "state" complicity.

Moreover, a majority of the Court held in *United States* v. *Guest,* 383 U. S. 745, 761, 774, 782 and n. 6, that § 5 of the Fourteenth Amendment enables Congress to punish interferences with constitutional rights "whether or not state officers or others acting under the color of state law are implicated." *Id.,* at 782. There the statute involved (18 U. S. C. § 241) proscribed all conspiracies to impair any right "secured" by the Constitution. A majority agreed that in order for a conspiracy to qualify it need not involve any "state" action. By the same reasoning the "custom . . . of any State" as used in § 1983 need not involve official state development, maintenance, or participation. The reach of § 1983 is constitutional rights, including those under the Fourteenth Amendment; and Congress rightfully was concerned with their full protection, whoever might be the instigator or offender.

To repeat, § 1983 was "one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." *Monroe* v. *Pape, supra,* at 171. Yet powers exercised by Congress may stem from more than one constitutional source. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548–549; *Edye* v. *Robertson,* 112 U. S. 580, 595–596; *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 683. Moreover, § 1983 protects "any rights" that are "secured" by "the Constitution and laws"

of the United States, which makes unmistakably clear that § 1983 does not cover, reach, protect, or secure only Fourteenth Amendment rights. The Thirteenth Amendment and its enabling legislation cover a wide range of "rights" designed to rid us of all the badges of slavery. And, as I have said, the phrase "under color of any . . . custom" derives from § 2 of the 1866 Act which rested on the Thirteenth Amendment whose enforcement does not turn on "state action." [7] The failure of the Court to come to face with those realities leads to the regressive decision announced today.

It is time we stopped being niggardly in construing civil rights legislation. It is time we kept up with Congress and construed its laws in the full amplitude needed to rid their enforcement of the lingering tolerance for racial discrimination that we sanction today.

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

Petitioner contends that in 1964 respondent, while acting "under color of . . . statute" or "under color of . . . custom, or usage" of the State of Mississippi, subjected her to the deprivation of her right under the Equal Protection Clause of the Fourteenth Amendment not to be denied service in respondent's restaurant due to racial discrimination in which the State of Mississippi was involved, and that therefore respondent is liable to her in damages under 42 U. S. C. § 1983. To recover under § 1983 petitioner must prove two separate and independent elements: first, that respondent subjected her to the

[7] This case concerns only the meaning of "custom . . . of any State" as those words are used in § 1983. It does not involve the question whether under certain circumstances "custom" can constitute state action for purposes of the Fourteenth Amendment. See *Garner* v. *Louisiana, supra,* at 178–179 (concurring opinion).

deprivation of a right "secured by the Constitution and laws"; and, second, that while doing so respondent acted under color of a statute, ordinance, regulation, custom, or usage of the State of Mississippi.

Whether a person suing under § 1983 must show state action in the first element—the deprivation of a right "secured by the Constitution and laws"—depends on the nature of the particular right asserted. For example, a person may be deprived of a right secured by the Constitution and 42 U. S. C. § 1982 by a private person acting completely independently of state government. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). On the other hand, the constitutional right to equal protection of the laws, unelaborated by any statute, can be violated only by action involving a State. The discussion in *United States* v. *Reese*, 92 U. S. 214, 249–252 (1876) (Hunt, J., dissenting), of various constitutional uses of the word "State" suggests that as an original matter "State" in the Equal Protection Clause might have been interpreted in any of several ways. Moreover, some have thought that historical evidence points to an interpretation covering some categories of state inaction in the face of wholly private conduct, see, *e. g.*, *Bell* v. *Maryland*, 378 U. S. 226, 286–316 (1964) (Goldberg, J., concurring); R. Harris, The Quest for Equality 24–56 (1960); J. tenBroek, Equal Under Law 201–239 (1965). However, our cases have held that the Equal Protection Clause applies only to action by state government or officials and those significantly involved with them. *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 721–722 (1961). Whether and when a person suing under § 1983 must show state action in the second element—action under color of a statute, ordinance, regulation, custom, or

usage of a State—depends on an analysis of the text, legislative history, and policy of § 1983. See Part II, *infra*. These two inquiries are wholly different, though in particular cases a showing of state action under one element may suffice under the other.

In the present case petitioner alleged as the first element under § 1983 a deprivation of her right to equal protection. Therefore, under our cases, she must show state action. She asserts that there was state action in two different respects. First, she contends that there was a conspiracy between respondent and local police to discriminate against her in restaurant service because she, a white person, sought service while accompanied by Negro friends. The Court treats this aspect of her claim in Part I of its opinion, which I join.[1] Petitioner contends, alternatively, that respondent's discrimination was authorized and encouraged by Mississippi statutes. To that contention I now turn.

## I

The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial

[1] I do not agree with the statement on page 150 of the Court's opinion that the "second element [of § 1983] requires that the plaintiff show that the defendant acted 'under color of law.'" See Part II, *infra*.

discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. See, *e. g., Burton* v. *Wilmington Parking Authority, supra; Evans* v. *Newton,* 382 U. S. 296 (1966); *Hunter* v. *Erickson,* 393 U. S. 385 (1969). These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination.

Among the state-action cases that most nearly resemble the present one are the sit-in cases decided in 1963 and 1964. In *Peterson* v. *City of Greenville,* 373 U. S. 244 (1963), the petitioners were convicted of trespass for refusing to leave a lunch counter at a Kress store in South Carolina. A Greenville ordinance at that time imposed on the proprietors of restaurants the duty to segregate the races in their establishments, and there was evidence that the Kress manager was aware of the ordinance. We held that the existence of the ordinance, together with a showing that the Kress manager excluded the petitioners solely because they were Negroes, was sufficient to constitute discriminatory state action in violation of the Fourteenth Amendment:

> "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice. . . .
>
> "Consequently these convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance." 373 U. S., at 248.

Although the case involved trespass convictions, the Court did not rely on the State's enforcement of its neutral trespass laws in analyzing the elements of state action present. Nor did it cite *Shelley* v. *Kraemer*, *supra*, the logical starting point for an analysis in terms of judicial enforcement. The denial of equal protection occurred when the petitioners were denied service in the restaurant. That denial of equal protection tainted the subsequent convictions. And as we noted in *Reitman* v. *Mulkey*, 387 U. S. 369, 380 (1967), no "proof [was] required that the restaurant owner had actually been influenced by the state statute . . . ." Thus *Peterson* establishes the proposition that where a State commands a class of persons to discriminate on the basis of race, discrimination by a private person within that class is state action, regardless of whether he was motivated by the command. The Court's intimation in the present case that private discrimination might be state action only where the private person acted under compulsion imposed by the State echoes MR. JUSTICE HARLAN's argument in *Peterson* that private discrimination is state action only where the State motivates the private person to discriminate. See 373 U. S., at 251–253. That argument was squarely rejected by the Court in *Peterson*, and I see no reason to resurrect it now.

The rationale of *Peterson* was extended in *Lombard* v. *Louisiana*, 373 U. S. 267 (1963). There the petitioners were convicted of trespass for refusing to leave a restaurant after being denied service. Prior to the arrests the mayor and superintendent of police of New Orleans had publicly stated that sit-in demonstrations were undesirable and that relevant trespass laws would be fully enforced. Although these statements, unlike the ordinance in *Peterson*, were not discriminatory on their face, the Court interpreted them

as evidencing state support for the system of racial segregation prevalent in the private institutions against which the petitioners' sit-in was directed. Moreover, the statements, unlike the ordinance in *Peterson,* did not command restaurateurs to discriminate. A restaurateur in New Orleans, unlike one in Greenville, could integrate his services without violating any law. Although there was evidence that the restaurateur's actions were influenced by the official statements, the Court did not rely on this factor. The Court held on the basis of the statements alone that the degree of state involvement in the private discriminatory denial of service to the petitioners was sufficient to make that denial state action violative of the Fourteenth Amendment. As in *Peterson,* the Court's analysis of state action did not turn on the actual enforcement of the State's criminal law. *Lombard,* therefore, advances at least two propositions. First, an authoritative expression of state policy that is nondiscriminatory on its face may be found to be discriminatory when considered against the factual background of its promulgation. Cf. *Guinn* v. *United States,* 238 U. S. 347, 364–365 (1915); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). Second, where a state policy enforces privately chosen racial discrimination in places of public accommodation, it renders such private discrimination unconstitutional state action, regardless of whether the private discriminator was motivated or influenced by it.

The principles of *Peterson* and *Lombard* were extended further in *Robinson* v. *Florida,* 378 U. S. 153 (1964). That case also involved trespass convictions arising out of a sit-in at a segregated restaurant. At the time, a Florida regulation required restaurants to maintain separate lavatory and toilet facilities for each race as well as each sex. However, the regulation did not require segregation of a restaurant itself; nor did the

convictions of the demonstrators result from anything they did with respect to the facilities that were the subject of the regulation. Nevertheless, this Court reversed the convictions on the ground that by virtue of the regulation the State had become sufficiently involved in the privately chosen segregation of the restaurant to make that segregation state action. The Court commented:

> "While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together." 378 U. S., at 156.

*Robinson* involved neither a state command of restaurant segregation, as in *Peterson,* nor a state policy of enforcing restaurant segregation, as in *Lombard.* It involved state imposition of burdens amounting to discouragement of private integration. It is true that the burden in that case happened to take the form of a requirement of segregated lavatory facilities; but any other burden—for example, a tax on integrated restaurants—would have sufficed to render the privately chosen restaurant segregation unconstitutional state action. Again, the Court's finding of state action did not depend on the use of the State's trespass law. *Robinson* thus stands for the proposition that state discouragement of a particular kind of privately chosen integration renders that kind of privately chosen segregation unconstitutional state action.

The step from *Peterson, Lombard,* and *Robinson* to the present case is a small one. Indeed, it may be no step at all, since those cases together hold that a state

policy of discouraging privately chosen integration or encouraging privately chosen segregation, even though the policy is expressed in a form nondiscriminatory on its face, is unconstitutional and taints the privately chosen segregation it seeks to bring about. These precedents suggest that the question of state action in this case is whether, as petitioner contends, Mississippi statutes do in fact manifest a state policy of encouraging and supporting restaurant segregation so that respondent's alleged privately chosen segregation is unconstitutional state action.

To establish the existence in 1964 of a state statutory policy to maintain segregation in restaurant facilities, petitioner relies principally on Miss. Code Ann. § 2046.5 (1956), which, on its face, "authorizes" and "empowers" owners of hotels, restaurants, and other places of public accommodation and amusement to refuse to serve whomsoever they choose.[2] The decision whether to serve a par-

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[2] Section 2046.5 reads as follows:

"1. Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve . . . .

"2. Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that 'the management reserves the right to refuse to sell to, wait upon or serve any person,' however, the display

ticular individual is left to the unfettered discretion of the restaurant management, which may refuse service for any reason or for no reason. Thus, while there is no explicit command in § 2046.5 that segregated eating facilities be maintained, a refusal to serve on the basis of race alone falls clearly within the broad terms of the statute. The restaurateur is informed, in essence, that he may discriminate for racial or any other reasons and that he may call upon the police power of the State to make that private decision effective through the trespass sanctions expressly incorporated in § 2046.5. It is clear that, to the extent that the statute authorizes and empowers restaurateurs to discriminate on the basis of race, it cannot pass muster under the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority, supra,* at 726–727 (STEWART, J., concurring).

*Burton* involved a statute that permitted a restaurateur to refuse service to "persons whose reception or entertainment by him would be offensive to the major part of his customers . . . ." MR. JUSTICE STEWART took the position that the state courts had "construed this legislative enactment as authorizing discriminatory classification based exclusively on color." 365 U. S., at 726–727. Justices Frankfurter, HARLAN, and Whittaker, the only other Justices who dealt at length with the statute,[3]

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of such a sign shall not be a prerequisite to exercising the authority conferred by this act.

"3. Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment. . . ."

[3] The Court found state action on a different ground.

agreed that it would violate the Fourteenth Amendment if so construed. However, they thought the construction adopted by the state courts insufficiently clear to make possible a final determination of the issue.

The language of § 2046.5 is considerably broader than that involved in *Burton*. Although § 2046.5 apparently has not been authoritatively interpreted by the state courts, its plain language clearly authorizes a restaurateur to refuse service for *any* reason, which obviously includes a refusal based upon race. Were there any conceivable doubt that § 2046.5 was intended to authorize, *inter alia*, "discriminatory classification based exclusively on color," it is completely dispelled by a consideration of the historical context in which § 2046.5 was enacted.

A legislative or constitutional provision need not be considered in isolation, but may be examined "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman* v. *Mulkey, supra*, at 373; cf. *Lombard* v. *Louisiana, supra*. Through the 1950's and 1960's Mississippi had a "steel-hard, inflexible, undeviating official policy of segregation." *United States* v. *City of Jackson*, 318 F. 2d 1, 5 (C. A. 5th Cir. 1963) (Wisdom, J.). See generally J. Silver, Mississippi: The Closed Society (1964). Section 2046.5 itself was originally enacted in 1956 in the wake of our decisions in *Brown* v. *Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955). It was passed contemporaneously with numerous statutes and resolutions condemning *Brown*,[4] requiring racial segregation in various transportation facilities,[5] and committing the state government to continued adherence to the principles of racial

[4] Miss. Laws 1956, c. 466, Senate Concurrent Resolution No. 125.

[5] *E. g.*, Miss. Laws 1956, cc. 258–260 [now Miss. Code Ann. §§ 7787.5, 2351.5, 2351.7].

segregation.[6] Together with these other statutes and resolutions, § 2046.5 is indexed in the 1956 Mississippi Session Laws under "Segregation" and "Races."[7] Prior

[6] *E. g.*, Miss. Laws 1956, c. 254 [now Miss. Code Ann. § 4065.3]. See Inaugural Address of former Governor James P. Coleman, Miss. House Journal 59, 65–68 (1956). See also Miss. Code Ann. § 4065.4 (enacted 1962).

[7] The 1956 session of the Mississippi Legislature produced many statutes and resolutions, including § 2046.5, dealing with the separation of the races. Under the heading "Segregation" in the index to the General Laws volume for that session, there is a cross-reference to "Races." In addition to § 2046.5, Miss. Laws 1956, c. 257, the following chapters of the General Laws of Mississippi, all enacted during February, March, and April, 1956, are cited under that heading:

(1) Chapter 241 (maximum ten-year penalty for incestuous or interracial marriage);

(2) Chapter 253 [now Miss. Code Ann. §§ 2049–01 to 2049–08] (act "to prohibit the fomenting and agitation of litigation");

(3) Chapter 254 [now Miss. Code Ann. § 4065.3] ("entire executive branch" of state government "to prohibit by any lawful . . . means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly");

(4) Chapter 255 [now Miss. Code Ann. § 8666] (standards for admitting foreign lawyers to practice in Mississippi);

(5) Chapter 256 [now Miss. Code Ann. § 2090.5] (act "to prohibit any person from creating a disturbance or breach of the peace in any public place of business");

(6) Chapter 258 [now Miss. Code Ann. § 7787.5] (act "to require railroad companies, bus companies and other common carriers of passengers owning, operating or leasing depots, bus stations or terminals to provide separate accomodations [*sic*] for the races traveling in intrastate travel");

(7) Chapter 259 [now Miss. Code Ann. § 2351.5] (act "to require railroad companies, bus companies or other common carriers for hire maintaining and operating waiting rooms for passengers to provide separate toilet facilities for the races traveling in intrastate travel");

(8) Chapter 260 [now Miss. Code Ann. § 2351.7] (act "to require all persons traveling in intrastate travel to use and occupy the waiting rooms marked and provided for such persons; to prohibit persons

to 1956, the State had declared unlawful any conspiracy "[t]o overthrow or violate the segregation laws of this state . . . ."[8] Subsequent to the passage of § 2046.5, breach of the peace, vagrancy, and trespass statutes similar to § 2046.5[9] were enacted or employed to give local officials additional weapons to combat attempts to desegregate places of public accommodation. See, *e. g.*, *Dilworth* v. *Riner*, 343 F. 2d 226 (C. A. 5th Cir. 1965).[10]

Illustrative of the practical effect of these various provisions is the incident that gave rise to this liti-

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traveling in intrastate travel from entering and using the waiting rooms not marked and provided for such persons");

(9) Chapter 261 (act "to prohibit the use of profane, vulgar, indecent, offensive, slanderous language over a telephone");

(10) Chapter 273 (separate schools to be maintained for white and black children) [see Miss. Code Ann. § 6220.5 (unlawful for whites to attend integrated schools)];

(11) Chapter 288 (repeal of compulsory education laws);

(12) Chapter 365 [now Miss. Code Ann. §§ 9028–31 to 9028–48] (creation of state sovereignty commission);

(13) Chapter 466 (Senate Concurrent Resolution No. 125 "condemning and protesting" *Brown* v. *Board of Education*).

In addition to the foregoing enactments of 1956, numerous other statutes, in force in 1956 and not thereafter repealed, manifest Mississippi's segregation policies. See, *e. g.*, Miss. Code Ann. § 2339 (punishment for those guilty of "printing, publishing or circulating . . . matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes"). Other provisions purport to require segregation in taxicabs (except for servants) (Miss. Code Ann. § 3499); in the State Insane Hospital (Miss. Code Ann. §§ 6882, 6883); and in schools (Miss. Const., Art. 8, § 207).

[8] Miss. Laws 1954, c. 20, Miss. Code Ann. § 2056. The explicit reference to segregation was omitted from the 1968 re-enactment of the conspiracy statute. Miss. Code Ann. § 2056 (Supp. 1968).

[9] *E. g.*, Miss. Code Ann. §§ 2087.5, 2087.7, 2089.5 (enacted 1960); § 2087.9 (enacted 1964).

[10] See generally *Bailey* v. *Patterson*, 323 F. 2d 201 (C. A. 5th Cir. 1963).

gation. Petitioner was arrested for vagrancy shortly after she had unsuccessfully sought service at respondent's store. In ordering dismissal of the charges after removal of the prosecutions to the federal courts, the Court of Appeals for the Fifth Circuit noted "[t]he utter baselessness of any conceivable contention that the vagrancy statutes prohibited any conduct in which these persons were engaged" and concluded that the arrests had been made solely because petitioner had attempted to receive service at a city library and at respondent's store in the company of Negro friends. *Achtenberg* v. *Mississippi,* 393 F. 2d 468, 474–475 (C. A. 5th Cir. 1968).[11]

In sum, it may be said of the various statutes and resolutions that constituted Mississippi's response to *Brown* that "they are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co.* v. *United States,* 196 U. S. 375, 396 (1905) (Holmes, J.). Section 2046.5 was an integral part of this scheme to foster and encourage the practice of segregation in places of public accommodation and elsewhere, which it furthered by authorizing discrimination and by affording those who elected to discriminate on the basis of race a remedy under state law. Indeed, it is difficult to conceive of any purpose for the enactment of § 2046.5 other than to make clear the authorization of private discrimination where such express authorization did not exist previously. Cf. *Mulkey* v. *Reitman,* 64 Cal.

[11] Cf. *United States* v. *City of Jackson,* 318 F. 2d 1, 6–7 (C. A. 5th Cir. 1963), involving segregation in railroad and bus terminals, where the Court of Appeals noted that "one of the sophisticated methods for circumventing the law is for local police to eschew 'segregation' laws, using in their place conventional breach of peace or trespass laws as instruments for enforcing segregation, euphemistically termed 'separation.'" See also *Lewis* v. *Greyhound Corp.,* 199 F. Supp. 210 (D. C. M. D. Ala. 1961); *Bailey* v. *Patterson,* 199 F. Supp. 595, 609–622 (D. C. S. D. Miss. 1961) (Rives, J., dissenting), vacated and remanded, 369 U. S. 31 (1962).

2d 529, 544, 413 P. 2d 825, 835–836 (1966), aff'd, 387 U. S. 369 (1967).

Judge Waterman, dissenting in the Court of Appeals, states that under the common law an innkeeper, and by analogy a restaurateur, did not have the right to serve only whomever he wished and to discriminate on the basis of race in selecting his customers. 409 F. 2d 121, 131–133. See *Bell* v. *Maryland,* 378 U. S. 226, 296–300 (1964) (Goldberg, J., concurring). Since the common law is presumed to apply in Mississippi, *Western Union Telegraph Co.* v. *Goodman,* 166 Miss. 782, 146 So. 128 (1933), Judge Waterman concludes that the State has "drastically changed the common law" by enacting § 2046.5.[12] 409 F. 2d, at 132. Further support for this view can be found in the preamble to § 2046.5 which states that that provision "*confer*[*s*] upon any person . . . the further right to refuse to sell or render a service to any person . . . ." Miss. Laws 1956, c. 257. (Emphasis added.) This formulation suggests that the legislature intended to alter the existing state law.

It is not completely clear, however, that the common law in regard to innkeepers and restaurateurs, as understood by Judge Waterman, was ever widely enforced in Mississippi in racial matters. In Reconstruction times

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[12] See *Donnell* v. *State,* 48 Miss. 661, 680–681 (1873):

"Among those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a *quasi* public relation to the community. The wayfarer and the traveler had a right to demand food and lodging from the inn-keeper; the common carrier was bound to accept all passengers and goods offered for transportation, according to his means. Soo, [*sic*] too, all who applied for admission to the public shows and amusements, were entitled to admission, and in each instance, for a refusal, an action on the case lay, unless sufficient reason were shown. The [state civil rights] statute deals with subjects which have always been under legal control."

the State enacted a civil rights law that forbade discrimination in places of public accommodation and amusement. See Miss. Laws 1873, c. LXIII. It was upheld and applied in *Donnell* v. *State,* 48 Miss. 661 (1873). That law, however, quickly fell into desuetude.[13] Thus some question exists as to whether Mississippi "changed" the law as it existed in that State in 1956. At least it can be said, however, that Mississippi, by enacting § 2046.5, clarified the state law, and in doing so elected to place the full authority of the State behind private acts of discrimination. Since § 2046.5 authorizes discrimination on the basis of race, it is invalid as applied to authorize such discrimination in particular cases.

The remaining question concerning this aspect of the present case is what nexus between § 2046.5 and respondent's alleged discrimination petitioner must show to establish that that discrimination is state action violative of the Fourteenth Amendment. Our prior decisions leave no doubt that the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement in those pertinent private acts of discrimination that subsequently occur. See, *e. g., Peterson* v. *City of Greenville, supra; Lombard* v. *Louisiana, supra; Robinson* v. *Florida,*

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[13] The state civil rights law of 1873 took the form of an amendment to Miss. Rev. Code §§ 2731, 2732 (1871), which forbade, *inter alia,* segregation of the races on railroads, stage coaches, and steamboats. None of the provisions of the amended statutes, though apparently never explicitly repealed, appear in the 1880 Mississippi Code or in subsequent codifications of state law. In 1888 the Mississippi Legislature enacted a criminal statute that provided that "all railroads . . . shall provide equal but separate accommodations for the white and colored races" and that all prior statutes in conflict therewith were repealed *pro tanto.* Miss. Laws 1888, c. 27.

*supra.*[14] This is so, as we noted in *Reitman* v. *Mulkey, supra,* at 380, whether or not the private discriminator was actually influenced in the commission of his act by the policy of the State. Thus, when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action. In sum, if an individual discriminates on the basis of race and does so in conformity with the State's policy to authorize or encourage such discrimination, neither the State nor the private party will be heard to say that their mutual involvement is outside the prohibitions of the Fourteenth Amendment. Therefore, in light of the statutory scheme including § 2046.5, which authorized and encouraged restaurant segregation, petitioner will fully satisfy the state-action requirement of the Fourteenth Amendment if she establishes that she was refused service on the basis of race.

I turn now to the other elements of petitioner's case under § 1983.

## II

Title 42 U. S. C. § 1983 derives from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." [15] The 1871 Act, popularly known as the "Ku

[14] Also see *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.,* 235 U. S. 151 (1914); *Evans* v. *Abney,* 396 U. S. 435, 457–458 (1970) (BRENNAN, J., dissenting); *Evans* v. *Newton,* 382 U. S. 296, 302–312 (1966) (opinion of WHITE, J.); *Burton* v. *Wilmington Parking Authority, supra,* at 726–727 (STEWART, J., concurring). See also *Mulkey* v. *Reitman, supra.*

[15] As originally enacted, § 1 of the 1871 Act provided:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities

Klux Klan Act," was, as its legislative history makes absolutely clear, a response to the outrages committed by the Klan in many parts of the South. The conditions that gave rise to the Act were discussed extensively in *Monroe* v. *Pape,* 365 U. S. 167, 172–183 (1961). In the context of that case we pointed out that although the 1871 Act was engendered by the activities of the Klan, the language and purposes of § 1983 are not restricted to that evil. See 365 U. S., at 183. See also

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secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

Section 1983 presently provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The language was changed without comment into its present form when § 1 was codified in 1874 as Revised Statutes § 1979. See *id.;* 1 Revision of U. S. Statutes, Draft 947 (1872). The jurisdictional provisions of the 1871 Act now appear in 28 U. S. C. § 1343. For purposes of this opinion I assume that the linguistic differences between the original § 1 and present § 1983 are immaterial. See *Monroe* v. *Pape,* 365 U. S. 167, 212–213, n. 18 (1961) (opinion of Frankfurter, J.); cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 422–423, n. 29 (1968).

*United States* v. *Mosley,* 238 U. S. 383, 388 (1915), where Mr. Justice Holmes, speaking for the Court, commented on § 6 of the Enforcement Act of 1870, 16 Stat. 141, as amended, now 18 U. S. C. § 241, in words applicable to § 1983:

> "Just as the Fourteenth Amendment . . . was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, [the statute] had a general scope and used general words that have become the most important now that the Ku Klux have passed away. . . . [W]e cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords."

Stirred to action by the wholesale breakdown of protection of civil rights in the South, Congress carried to completion the creation of a comprehensive scheme of remedies—civil, criminal, and military [16]—for the protection of constitutional rights from all major interference.

In the 1871 Act, Congress undertook to provide broad federal civil remedies against interference with the exercise and actual enjoyment of constitutional rights, particularly the right to equal protection. Section 1 (now § 1983) provided a civil remedy for deprivation of any constitutional right by a person acting "under color of any law, statute, ordinance, regulation, custom, or usage of any State . . . ." Section 2 (now surviving

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[16] The military remedy, designed to become available when the other remedies were inadequate, was created by § 3 of the 1871 Act, now 10 U. S. C. § 333. See generally Comment, Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy, 1966 Duke L. J. 415.

in part as § 1985 (3)) provided a civil and a criminal remedy against conspiratorial interference with any person's enjoyment of equal protection. Section 6 (now § 1986) cast the net of civil liability even more widely by providing a remedy against any person who, having the ability by reasonable diligence to prevent a violation of § 2, fails to do so. These remedies were bolstered by other criminal provisions of § 2 and by previously enacted criminal laws. Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, re-enacted as § 17 of the Enforcement Act of 1870, 16 Stat. 144, as amended, now 18 U. S. C. § 242, provided a criminal remedy against what amounts to a violation of § 1983. Section 6 of the Enforcement Act of 1870, 16 Stat. 141, as amended, now 18 U. S. C. § 241, provided a criminal remedy against conspiracies to interfere with the exercise or enjoyment of a federal right.[17]

The history of this scheme of remedies for the protection of civil rights was, until very recently, one of virtual nullification by this Court. Key provisions were declared unconstitutional or given an unduly narrow construction wholly out of keeping with their purposes.[18] In *United States* v. *Harris,* 106 U. S. 629 (1883), the Court invalidated the criminal provision of § 2 of the

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[17] Numerous other criminal and civil remedies had been created by prior civil rights acts, principally to protect voting rights. See § 6 of the 1866 Act, 14 Stat. 28; §§ 2, 3, 4, 5, 7, 11, 15, 19, 20, and 22 of the 1870 Act, 16 Stat. 140 *et seq.;* §§ 1, 10, and 11 of the Act of Feb. 28, 1871, 16 Stat. 433, 436, 437. All of these statutes have been repealed, see 28 Stat. 36 (1894); 35 Stat. 1088, 1153 (1909), some after having been declared unconstitutional. See, *e. g., United States* v. *Reese,* 92 U. S. 214 (1876) (§§ 3, 4 of 1870 Act held unconstitutional); *James* v. *Bowman,* 190 U. S. 127 (1903) (§ 5 of 1870 Act held unconstitutional).

[18] See generally Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952).

Ku Klux Klan Act, the criminal analogue to § 1985 (3), on the ground that Congress was not authorized by § 5 of the Fourteenth Amendment to prohibit interference by private persons with the exercise of Fourteenth Amendment rights, except perhaps in extreme and remote circumstances. Essential to the holding was a recognition that the language of § 2 plainly reaches conspiracies not involving state officials. See also *Baldwin* v. *Franks,* 120 U. S. 678 (1887). The statute (Rev. Stat. § 5519) was repealed in 1909. 35 Stat. 1154. In *Collins* v. *Hardyman,* 341 U. S. 651 (1951), the Court, under the influence of *Harris,* construed § 1985 (3). Pointing out that the language of § 1985 (3) is exactly the same (except for the remedy provided) as the language of the statute condemned in *Harris,* the Court thought it necessary to read in a limitation of the section to conspiracies involving state action, in order to sustain its constitutionality. This limiting construction necessarily carried over to § 1986, whose scope is keyed to that of § 1985.

Section 241 of 18 U. S. C. fared little better. That statute, as indicated, deals generally with conspiracies to interfere with the exercise of federal rights. It was established soon after its enactment that § 241 reaches conspiracies among private persons to interfere with "rights which arise from the relationship of the individual and the Federal Government." *United States* v. *Williams,* 341 U. S. 70, 77 (1951) (opinion of Frankfurter, J.). See, *e. g., Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Waddell,* 112 U. S. 76 (1884); *Logan* v. *United States,* 144 U. S. 263 (1892); *In re Quarles,* 158 U. S. 532 (1895). However, the concept of "arising from" was given a very narrow construction in *United States* v. *Cruikshank,* 92 U. S. 542 (1876). Moreover, in *United States* v. *Williams, supra,* the Court divided 4 to 4 on the question whether § 241 reaches private conspiracies to

interfere with the exercise of Fourteenth Amendment rights, which arise from the relation of an individual and a State. The four members of the Court who thought § 241 does not protect the exercise of Fourteenth Amendment rights placed considerable reliance on the argument that § 241 would be unconstitutional if construed otherwise. See 341 U. S., at 77–78. See also *Hodges* v. *United States,* 203 U. S. 1 (1906).

Although the other principal criminal statute protecting civil rights, 18 U. S. C. § 242, the criminal analogue to § 1983, was construed to protect Fourteenth Amendment rights, it was nonetheless held constitutional. However, under this statute a violation can be found only if the defendant acted "willfully," that is, with "a specific intent to deprive a person of a federal right made definite by decision or other rule of law." See *Screws* v. *United States,* 325 U. S. 91, 103 (1945). Moreover, this Court has never had occasion to consider whether § 242 reaches wholly nonofficial conduct.

Thus, until very recently, the construction of the surviving remedial civil rights statutes was narrowed or placed in doubt by a restrictive view of the power of Congress under § 5 of the Fourteenth Amendment. But that view of congressional power has now been completely rejected by this Court.

In *United States* v. *Guest,* 383 U. S. 745 (1966), and *United States* v. *Price,* 383 U. S. 787 (1966), the Court expressly held that § 241 does protect Fourteenth Amendment rights, thereby squarely resolving the issue that divided the court in *Williams.* Because the conspiracy in *Guest* was alleged to have been carried out by private persons acting in conjunction with state officials,[19] the Court found it unnecessary to consider whether § 241

[19] *Guest* was an appeal from the dismissal of an indictment for failure to state an offense under the laws of the United States.

would be constitutional if construed to reach wholly private conspiracies to interfere with the exercise of Fourteenth Amendment rights. However, to put the point beyond doubt, six members of the Court in *Guest* expressly stated their view that Congress has power under § 5 of the Fourteenth Amendment to protect Fourteenth Amendment rights against interference by private persons, without regard to state involvement in the private interference. See *United States* v. *Guest, supra,* at 761–762 (opinion of Clark, J., joined by BLACK and Fortas, JJ.), 774–786 (opinion of BRENNAN, J., joined by Warren, C. J., and DOUGLAS, J.). This general view of congressional power under § 5 was expressly adopted by the Court in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), where we said:

> "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18. . . . Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 650–651.

See also *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966).[20]

Thus the holding of *Harris* and the *Civil Rights Cases,* 109 U. S. 3 (1883), that Congress cannot under § 5 protect the exercise of Fourteenth Amendment rights from private interference has been overruled. See *United States* v. *Guest, supra,* at 782–783 (opinion of BREN-

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[20] See generally Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966).

NAN, J.). Consequently, the interpretation of the civil rights statutes need no longer be warped by unwarranted concern that Congress lacks power under § 5 to reach conduct by persons other than public officials. There is no doubt that § 1983 protects Fourteenth Amendment rights. See *Monroe* v. *Pape, supra,* at 170–171; *id.,* at 205–206 (opinion of Frankfurter, J.). Accordingly, the only substantial question in this branch of the present case is whether § 1983 was intended by Congress to reach nonofficial conduct of the kind at issue here.

Petitioner contends that respondent's discrimination against her was within the scope of § 1983 on either of two grounds. First, she claims that respondent acted under color of Mississippi statutory law, and in particular Mississippi Code § 2046.5. Second, she claims that respondent acted under color of a custom or usage of Mississippi, which prescribed segregation of the races in dining facilities.

Petitioner's claim that respondent acted under color of Mississippi statutory law is similar to her claim that respondent's action constituted state action. Indeed, the two claims would be proved by the same factual showing if respondent were a state official who acted by virtue of his official capacity or a private party acting in conjunction with such state official, for when a state official acts by virtue of his official capacity it is precisely the use or misuse of state authority that makes the action state action. However, when a private party acts alone,[21] more must be shown, in my view, to establish that he acts "under color of" a state statute or other authority than is needed to show that his action constitutes state action.

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[21] For purposes of this part of the opinion I put aside petitioner's allegation of a conspiracy.

As I pointed out in Part I, *supra,* under the constitutional principle that no State shall have any significant involvement whatever in racial discrimination, and under our prior cases, the mere existence of a state policy authorizing, encouraging, or otherwise supporting racial discrimination in a particular kind of service is sufficient to render private discrimination in that service state action. However, the statutory term "under color of any statute" has a narrower meaning than the constitutional concept of "state action." The "under color" language of § 1983 serves generally to limit the kinds of constitutional violation for which the section provides a remedy. To understand how that language applies to private persons, it is helpful to consider its application to state officials. In other legal usage, the word "color," as in "color of authority," "color of law," "color of office," "color of title," and "colorable," suggests a kind of holding out and means "appearance, semblance, or *simulacrum,*" but not necessarily the reality. See H. Black, Law Dictionary 331–332 (rev. 4th ed. 1968). However, as the word appears in § 1983, it covers both actions actually authorized by a State, see *Myers* v. *Anderson,* 238 U. S. 368 (1915); *Nixon* v. *Herndon,* 273 U. S. 536 (1927); *Lane* v. *Wilson,* 307 U. S. 268 (1939), and misuse of state authority in ways not intended by the State, see, *e. g., Monroe* v. *Pape, supra; Screws* v. *United States, supra,* at 111. In some of these latter situations there is a holding out in that the official uses his actual authority to give the appearance that he has authority to take the particular action he is taking. In other cases the abuse of power is so palpable that the victim or any observer may well be aware that the official is exceeding his authority, so that any holding out of authority would be wholly transparent. In these cases the misuse of authority alone is enough to warrant recovery. See, *e. g., Monroe* v. *Pape, supra;*

*United States* v. *Classic,* 313 U. S. 299, 326 (1941); *Catlette* v. *United States,* 132 F. 2d 902 (C. A. 4th Cir. 1943). Thus, a public official acting by virtue of his official capacity always acts under color of a state statute or other law, whether or not he overtly relies on that authority to support his action, and whether or not that action violates state law. A private person acts "under color of" a state statute or other law when he, like the official, in some way acts consciously pursuant to some law that gives him aid, comfort, or incentive, cf. *Griffin* v. *Maryland,* 378 U. S. 130 (1964); *Flemming* v. *South Carolina Elec. & Gas Co.,* 224 F. 2d 752 (C. A. 4th Cir. 1955), appeal dismissed, 351 U. S. 901 (1956); or when he acts in conjunction with a state official, as in *United States* v. *Price, supra.* In the present case Mississippi statutory law did authorize and encourage respondent to discriminate against petitioner on the basis of race. Therefore petitioner can establish that respondent acted "under color of" Mississippi statutory law by showing that respondent was aware of that body of law as prescribing, encouraging, authorizing, legitimating, effectuating, or otherwise supporting its refusal to serve petitioner. The vice of action under color of statute exists wherever the private discriminator consciously draws from a state statute any kind of support for his discrimination. Therefore, it is irrelevant that petitioner was not arrested under the trespass provision of § 2046.5.

Petitioner's second contention, that respondent discriminated againt her "under color of [a] custom, or usage" of Mississippi, presents more difficulty. I have found few prior cases construing the phrase "under color of custom, or usage" in the context of § 1983; [22] and it

[22] Mr. Justice Frankfurter made a passing reference to "custom" in his separate opinion in *Monroe* v. *Pape, supra,* at 246; see *infra,* at 216, n. 25. In the lower courts the phrase "custom or usage" has not received thorough consideration and has been given different inter-

has not been litigated under 18 U. S. C. § 242, though in that context it was briefly discussed in the opinions in *Jones* v. *Alfred H. Mayer Co., supra.* It is true that on occasion this Court has summed up the statutory language "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" as meaning "under color of law," and as incorporating a requirement of state action akin to that of the Equal Protection Clause. See, *e. g., United States* v. *Price, supra,* at 794 n. 7. But the loose and vague phrase "under color of law" has always been used by the Court in the context of cases in which reliance was put on something other than "custom or usage." The Court

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pretations. Compare *Williams* v. *Hot Shoppes, Inc.,* 110 U. S. App. D. C. 358, 363–364, 293 F. 2d 835, 840–841 (1961) with *Gannon* v. *Action,* 303 F. Supp. 1240 (D. C. E. D. Mo. 1969). In the *Hot Shoppes* case, the court construed "custom or usage" to include a state-action requirement; but it did so solely on the basis of doubts about congressional power to reach private interference with Fourteenth Amendment rights. Those doubts have now been completely removed by decisions of this Court. See *supra,* at 208–210. In two other cases, *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845 (C. A. 4th Cir. 1959), and *Williams* v. *Howard Johnson's, Inc.,* 323 F. 2d 102 (C. A. 4th Cir. 1963), on subsequent appeal *sub nom. Williams* v. *Lewis,* 342 F. 2d 727 (C. A. 4th Cir. 1965) (*en banc*), the Court of Appeals for the Fourth Circuit held that private custom and usage did not amount to state action. In each case the court dealt with custom and usage under the first element of § 1983—deprivation of a constitutional right—and not under the second element—action under color of statute, ordinance, regulation, custom, or usage. Those two decisions were constructions of the Equal Protection Clause, not of § 1983. The same is true of *Slack* v. *Atlantic White Tower System,* 181 F. Supp. 124 (D. C. Md.), aff'd, 284 F. 2d 746 (C. A. 4th Cir. 1960), cited by the Court. Moreover, in that case the court had no occasion to consider the elements of a § 1983 custom, because it took judicial notice of reports showing that in the defendant's area there was in fact no custom of restaurant segregation in any sense. See 181 F. Supp., at 126.

has never held, or even intimated, that "custom or usage" means "law." Indeed, MR. JUSTICE HARLAN, dissenting in *Jones* v. *Alfred H. Mayer Co., supra,* used a different formula in summarizing the "under color of" language in § 242; he said it referred to "action taken pursuant to *state or community authority.*" 392 U. S., at 454. Moreover, he referred to "discriminations which were legitimated by a *state or community sanction* sufficiently powerful to deserve the name 'custom.'" *Id.,* at 457. (Emphasis added.) See also *Monroe* v. *Pape, supra,* at 193 (HARLAN, J., concurring) ("abuses so recurrent as to amount to 'custom, or usage'"). Thus, "under color of law" has not been the only formula used by members of this Court to summarize the parallel language in §§ 242 and 1983.[23] It is also true that the phrase "under color

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[23] As presently codified, § 242 begins:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ."

This language differs from the comparable language of § 1983, n. 15, *supra,* in several respects. For example: "law" precedes "statute" in § 242, but not in § 1983; "or usage" follows "custom" in § 1983, but not in § 242; the entire enumeration "statute . . . usage" is qualified by "of any State or Territory" in § 1983, but not in § 242; § 1983 refers to rights that are "secured," whereas § 242 refers to rights "secured or protected"; § 1983 covers rights secured "by the Constitution *and* laws" (emphasis added), whereas § 242 covers rights secured or protected "by the Constitution *or* laws of the United States" (emphasis added); § 242 reaches only acts done "willfully," but § 1983 is not so limited. As originally enacted, § 1983 was modeled on the precursor of § 242, with differences of coverage not material here. See Cong. Globe, 42d Cong., 1st Sess., App. 68 (remarks of Rep. Shellabarger). Apart from the inclusion of the word "willfully" in § 242, see *Monroe* v. *Pape, supra,* at 187, the linguistic differences mentioned here have not been thought to be substantive. See, *e. g., id.,* at 185; *id.,* at 212–213, n. 18 (opinion of Frankfurter, J.); *United States* v. *Price, supra,* at 794 n. 7.

of law" occurs in the debates on the 1871 Act, see n. 25, *infra.* But since in the original version of § 1983, as introduced and enacted, the word "law" was the first word in the enumeration following "color of," [24] the use of "under color of law" as a handy formula in debate is readily explained. More importantly, the phrase has never been taken to be a considered, comprehensive, and authoritative summation of the provisions of § 1983. As this Court said over a century ago and has since repeated, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Boisdoré's Heirs,* 8 How. 113, 122 (1849) (Taney, C. J.); *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 285 (1956); *Richards* v. *United States,* 369 U. S. 1, 11 (1962); *Dandridge* v. *Williams,* 397 U. S. 471, 517 (1970) (MARSHALL, J., dissenting).

The legislative history of § 1983 provides no direct guidance for the interpretation of the phrase "custom or usage." Much of the lengthy debate concerned the truth of the allegations of KKK outrages and the constitutionality and wisdom of other sections of the Act. Little attention was given to the precise wording of § 1983, and there was no sustained discussion of the meaning of "custom or usage." [25] Consequently, in my

[24] See n. 15, *supra.*

[25] The legislative history concerning the precise congressional understanding of "custom or usage" is inconclusive. At least four possible interpretations were suggested. Representative Blair, an opponent of the bill, argued that § 1983 operated only against state legislation and as such would be a nullity. See Cong. Globe, 42d Cong., 1st Sess., App. 209; see also *id.,* at App. 268 (remarks of Rep. Sloss, an opponent). Our cases squarely reject any such limited construction of § 1983. See, *e. g., Monroe* v. *Pape, supra.* A second view was that § 1983 reached deprivations of constitutional rights under "color of law." See, *e. g., id.,* at App. 68 (remarks of Rep. Shellabarger); *id.,* at 568 (remarks of Sen. Edmunds); but see *id.,* at 697–698 (remarks of Sen. Edmunds). Since Representa-

view, we are called on to analyze the purposes Congress sought to achieve by enacting § 1983 in the context of the Civil Rights Act of 1871. Only by relating the

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tive Shellabarger and Senator Edmunds were the managers of the bill, their commentary would ordinarily be entitled to great weight; but at no point did either explain what he meant by "color of law." Representative Kerr, an opponent, employed the formula "color of state laws," but predicted that § 1983 would give rise to a flood of litigation involving all types of injury to person or property. See *id.*, at App. 50. A third view was reflected in the comment of Senator Thurman, an opponent, who said in passing that § 1983 "refers to a deprivation under color of law, either statute law or 'custom or usage' which has become common law." *Id.*, at App. 217. There is little or no further support in the debate for this reading of the statute, though it apparently was adopted without discussion by Mr. Justice Frankfurter, see *Monroe* v. *Pape, supra,* at 246 (opinion of Frankfurter, J.). The precise meaning of Senator Thurman's formula is unclear. He may have been referring to customs that had been expressly recognized and approved by state courts, or he may have had in mind the ancient principle that a general custom as such "is really a part of the common law itself." *Louisville & Nashville R. Co.* v. *Reverman,* 243 Ky. 702, 707, 49 S. W. 2d 558, 560 (1932). See 1 W. Blackstone, Commentaries **68–74. Moreover, Senator Thurman joined several others in taking a fourth position: that § 1983 reaches private persons. See *id.*, at App. 216–217 (remarks of Sen. Thurman); *id.*, at App. 215 (remarks of Sen. Johnston, an opponent); *id.*, at 429 (remarks of Rep. McHenry, an opponent); *id.*, at 395 (remarks of Rep. Rice, an opponent); cf. *id.*, at 804 (remarks of Rep. Poland, a supporter and conferee). Other speeches during the debate and consideration of the purposes of the statute make it clear that Congress did not intend to reach every private interference with a constitutional right. See *infra,* at 219–220. Finally, two members of the House expressed a view compatible with any of the preceding positions: they thought the principal effect of § 1983 was to remove the possible defense that the defendant acted under state authority. See *id.*, at 416 (remarks of Rep. Biggs, an opponent); *id.*, at App. 310 (remarks of Rep. Maynard, a supporter).

Section 1983 was patterned after § 2 of the Civil Rights Act of 1866, 14 Stat. 27. See Cong. Globe, 42d Cong., 1st Sess., App. 68 (remarks of Rep. Shellabarger). The legislative history of the latter

phrase "custom or usage" to congressional purposes can we properly interpret and apply the statutory language today.

In seeking to determine the purposes of § 1983, it is important to recall that it originated as part of a statute directed against the depredations of a private army. Cong. Globe, 42d Cong., 1st Sess., 339 (remarks of Rep. Kelley, a supporter of the bill). The Klan was recognized by Congress to be a widespread conspiracy "operating wholly outside the law," *Jones* v. *Alfred H. Mayer Co., supra,* at 436, and employing a variety of methods to coerce Negroes and others to forgo exercise of civil rights theoretically protected by the Constitution and federal statutes. In some areas of the South the Klan was strong enough to paralyze the operations of state government. As Representative Coburn, a supporter of the bill, noted:

> "Such, then, is the character of these outrages—numerous, repeated, continued from month to month and year to year, extending over many States; all similar in their character, aimed at a similar class of citizens; all palliated or excused or

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section is no more enlightening on the precise meaning of "under color of any law, statute, ordinance, regulation, or custom" than are the comments on the similar language in § 1983. See Cong. Globe, 39th Cong., 1st Sess., 1680 (veto message of President Johnson); *id.*, at 1120 (remarks of Rep. Loan, a supporter, and Rep. J. Wilson, a manager); *id.*, at 1778 (remarks of Sen. Johnson, an opponent); *id.*, at 1785 (remarks of Sen. Stewart, a supporter); *id.*, at 475, 500, 1758 (remarks of Sen. Trumbull, a manager).

Similar language appeared in § 8 of the Freedmen's Bureau bill, which was also debated at the first session of the 39th Congress. In addition, the word "custom" appeared in § 7 of the bill. See *id.*, at 209. However, the precise language of both sections received virtually no attention during debate. There was, though, some indication that custom was recognized as different from law. See *id.*, at 318 (remarks of Sen. Hendricks, an opponent). See also n. 29, *infra.*

justified or absolutely denied by the same class of men. Not like the local outbreaks sometimes appearing in particular districts, where a mob or a band of regulators may for a time commit crimes and defy the law, but having every mark and attribute of a systematic, persistent, well-defined organization, with a fixed purpose, with a regular plan of action.

"The development of this condition of affairs was not the work of a day or even of a year. It could not be, in the nature of things; it must be slow; one fact to be piled on another, week after week, year after year. . . .

"Such occurrences show that there is a pre-concerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception." Cong. Globe, 42d Cong., 1st Sess., 458–459.

See also *id.*, at App. 172 (remarks of Sen. Pool, a supporter); *id.*, at 653 (remarks of Sen. Osborn, a supporter); *id.*, at 155–160 (remarks of Sen. Sherman, a supporter). Thus the mischief that the legislation of 1871 was intended to remedy derived, not from state action, but from concerted "private" action that the States were unwilling or unable to cope with.

Senator Schurz, a moderate opponent who on behalf of the President had personally investigated the disorders in the South, summed up the condition to be dealt with:

"The real evil in the southern States you will find in the baffled pro-slavery tendency prevailing there;

> in a diseased public sentiment which partly vents itself in violent acts, partly winks at them, and partly permits itself to be overawed by them. That public sentiment is not only terrorizing timid people, but it is corrupting the jury-box, it is overawing the witness-stand, and it is thus obstructing the functions of justice." *Id.*, at 687.

Representative [later President] Garfield, a moderate supporter, focused more specifically on one of the principal evils § 1983 was designed to remedy:

> "[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." *Id.*, at App. 153.

Accordingly, in his view, § 1983 was intended to provide a remedy in federal court for, *inter alia,* certain denials of equal protection that occurred even in States with just and equal laws when some private persons acted against others and the State failed to provide protection. Thus, both the House and the Senate were quite aware that the task before them was to devise a scheme of remedies against privately instigated interference with the exercise of constitutional rights, through terror, force of numbers, concerted action, and other means.

The debates in both Houses also make it clear that many of those who gave the most careful attention to the conditions that called for the bill, to the provisions of the bill itself, and to the problems of constitutionality and policy it presented, did not think that in § 1983 the Federal Government undertook to provide a federal remedy for every isolated act by private persons that

amounted to interference with the exercise of a constitutional right. See, *e. g.*, *id.*, at 578–579 (remarks of Sen. Trumbull, an opponent); *id.*, at 514 (remarks of Rep. Poland, a supporter and conferee); *id.*, at App. 153 (remarks of Rep. Garfield); *id.*, at App. 79 (remarks of Rep. A. Perry, a supporter).[26] Where, for example, the injury to federal rights was the result of a genuinely individual act of private prejudice, then it could not be said that the state and local authorities were failing to give equal protection by countenancing major interference with the exercise of federal rights. Indeed, in most instances it could rightly be said that the acts of discrimination were isolated precisely because the State was affirmatively fulfilling its obligation to afford equal protection. In such circumstances no useful purpose would be served by providing a federal remedy for the isolated wrong, and the resulting federal intrusion into state affairs would be unjustified.

Near the conclusion of the debate, Rep. Garfield observed:

> "I believe, Mr. Speaker, that we have at last secured a bill, trenchant in its provisions, that reaches down into the very heart of the Ku Klux organization, and yet is so guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws." *Id.*, at 808.

This statute, "trenchant" but measured, provided a scheme of three civil remedies, currently codified in §§ 1983, 1985, and 1986. In view of the purposes these remedies were designed to achieve, § 1983 would be read too narrowly if it were restricted to acts of state officials and those acting in concert with them. Congress did not say, "Every state official and others acting

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[26] See generally R. Harris, The Quest for Equality 44–50 (1960).

in concert with him . . ."; Congress said, "[*A*]*ny* [now *Every*] *person* who, under color . . ." (emphasis added). Similarly, it would be read too broadly if interpreted to reach acts of purely individual discrimination. As I read § 1983 together with the other sections, against the background of the congressional debates, I understand them to protect the exercise of constitutional rights by reaching three kinds of interference that are sufficiently "major" in their effects to have warranted congressional action.

The first category is that involving action under color of authority derived from state government and this category of invasions is clearly within § 1983. Where state officials or private persons acting consciously with state support participate in the interference with the exercise of federal rights, the interference assumes a far graver cast than it otherwise would have, and the authority of the State is brought into conflict with the authority of the Constitution. See, *e. g., Monroe* v. *Pape, supra,* at 238 (opinion of Frankfurter, J.).

The second category is that involving conspiracy, which is within the ambit of § 1985. It is well recognized in the criminal law that conspiratorial agreements for concerted action present aggravated dangers to society, see *United States* v. *Rabinowich,* 238 U. S. 78, 88 (1915); *Pinkerton* v. *United States,* 328 U. S. 640, 644 (1946); *Krulewitch* v. *United States,* 336 U. S. 440, 448–449 (1949) (Jackson, J., concurring); Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 923–924 (1959), and for this general reason, as exemplified in the activities of the Ku Klux Klan, Congress provided for a civil remedy against conspiratorial interference with the right to equal protection.[27]

[27] I consider the narrow construction given to § 1985 in *Collins* v. *Hardyman,* 341 U. S. 651 (1951), as no longer binding. See *supra,* at 206–210.

The third category is that where, in the absence of the overt elements of a conspiracy, constitutional rights are violated by widespread habitual practices or conventions regarded as prescribing norms for conduct, and supported by common consent, or official or unofficial community sanctions—in short, customs and usages. Where violation of constitutional rights is customary, the violation is, by definition, widespread and enduring, and therefore worthy of congressional response. As I read § 1983, that response was made in the provision of a remedy against

> "[e]very person who, under color of any . . . custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." [28]

The excerpts from the congressional debate that I have quoted make clear that Congress wanted a civil remedy, not only against conspiratorial violence, but also against the perhaps more subtle but potentially more virulent customary infringements of constitutional rights. The Ku Klux Klan was an extreme reflection of broadly held attitudes toward Negroes and longstanding practices of denying them rights that the Constitution secured for all people. The fundamental evil was a "diseased public sentiment" reflected in multifarious efforts to confine Negroes in their former status of inferiority. Accordingly, a statute designed to reach "down into the very heart of the Ku Klux organization" had to deal with the widespread manifestations of that diseased pub-

[28] Section 1986 fits into this legislative scheme by providing a remedy against individuals who share responsibility for conspiratorial wrongs under § 1985 by failing to make reasonable use of their power to prevent the perpetration of such wrongs.

lic sentiment. Respect for constitutional rights was to be "embodied not only in the laws, but intrenched in the daily habits of the American people . . . ." Cong. Globe, 42d Cong., 1st Sess., 339 (remarks of Rep. Kelley). Congress could not legislate popular sentiments, but in providing generally in the Ku Klux Klan Act for the protection of constitutional rights against major types of interference it could, and I think it did in § 1983, provide a remedy against violations that in particular States were so common as to be customary.

As this Court recently said in construing another of the early civil rights statutes, "We think that history leaves no doubt that, if we are to give [the statute] the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States* v. *Price, supra,* at 801. The language of § 1983 imposes no obstacle to an interpretation carrying out the congressional purposes I have identified. I think it clearly possible for a private person or entity like respondent to "subject" a person or "[cause him] to be subjected . . . to the deprivation" of a constitutional right, as those quoted words are used in § 1983. In *Monroe* v. *Pape, supra,* we held that a cause of action was stated under § 1983 by an allegation that police officers invaded petitioners' home in violation of the Fourth and Fourteenth Amendments. Certainly if "deprivation" in § 1983 means something like "extinguishment," then no cause of action could have been stated, for no policeman, nor even any state government as a whole, can extinguish a constitutional right, at least not while this Court sits. Cf. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223 (Holmes, J., dissenting).[29] A con-

[29] I think this is also an adequate answer to the argument made in the *Civil Rights Cases, supra,* at 17, that a private party differs from a State in that the former cannot, whereas the latter can, deprive a person of a constitutional right in the sense of extinguishing that right. Neither a private person nor a State can extinguish

stitutional right can be extinguished only by amendment of the Constitution itself. If "deprivation" meant "extinguishment," § 1983—and also 18 U. S. C. § 242—would be a nullity. Thus all the cases finding violations of these sections must be taken to have held that "deprivation" as used in these statutes means, not "extinguishment," but rather something like "violation," "denial," or "infringement." Cf. *Jones* v. *Alfred H. Mayer Co., supra,* at 420–421; Cong. Globe, 39th Cong., 1st Sess., 605 (remarks of Sen. Trumbull, manager of 1866 Civil Rights bill, on § 242). As the present case illustrates, it is possible for private action in some circumstances to constitute state action violating a constitutional right, and such action amounts to "deprivation" within the meaning of § 1983.

In discussing petitioner's contention that respondent acted under color of state law I have already indicated my understanding of the words "under color of." See *supra,* at 211–212. I would apply that understanding here as well. I read "custom, or usage" in § 1983 to mean what it has usually meant at common law—a widespread and longstanding practice, commonly regarded as prescribing norms for conduct, and backed by sanctions.

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or impair a constitutional right, although a State can certainly violate, infringe, or fail to protect a constitutional right. A private person can violate or infringe a constitutional right when, due to some factual circumstances, his action constitutes state action, or when his wholly private conduct violates some constitutional prohibition of such conduct, *e. g.,* § 1 of the Thirteenth Amendment. Cf. *Civil Rights Cases, supra,* at 20; *Clyatt* v. *United States,* 197 U. S. 207, 216 (1905); *Bailey* v. *Alabama,* 219 U. S. 219, 241 (1911). A private person can also, of course, by wholly private conduct interfere with the exercise or enjoyment of constitutional rights that run only against the States. *United States* v. *Guest, supra,* at 774–784 (opinion of BRENNAN, J.). Thus interference can occur even where there has been no violation of the constitutional right by a party having a duty correlative to it.

See, *e. g., Strother* v. *Lucas,* 12 Pet. 410, 437, 445–446 (1838); *United States* v. *Arredondo,* 6 Pet. 691, 713–714 (1832). The sanctions need not be imposed by the State. A custom can *have* the effect or force of law even where it is not *backed by* the force of the State. See, *e. g., Adams* v. *Otterback,* 15 How. 539, 545 (1854); *Merchants' Bank* v. *State Bank,* 10 Wall. 604, 651 (1871); cf. *Jones* v. *Alfred H. Mayer Co., supra,* at 423.[30] The power of custom to generate and impose rules of conduct, even without the support of the State, has long been recognized. See, *e. g., Mercer County* v. *Hacket,* 1 Wall. 83, 95 (1864); 1 W. Blackstone, Commentaries *64; B. Cardozo, The Nature of the Judicial Process 58–64 (1921).[31]

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[30] In *Jones* v. *Alfred H. Mayer Co., supra,* at 423 n. 30, the Court noted that the same session of Congress that passed the Civil Rights Act of 1866 also passed a Freedmen's Bureau bill, § 7 of which extended military jurisdiction over parts of the South where "in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice, any of the civil rights . . . belonging to white persons . . . are refused or denied to [N]egroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude . . . ." See Cong. Globe, 39th Cong., 1st Sess., 209, 318. The Court pointed out that although the bill was vetoed by President Johnson, it "was nonetheless significant for its recognition that the 'right to purchase [property]' was a right that could be 'refused or denied' by 'custom or prejudice' as well as by 'State or local law.'" The Court also observed: "Of course an 'abrogation of civil rights made "in consequence of . . . custom, or prejudice" might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance.'"

[31] I agree with the Court, for the reasons stated in its opinion, that the relevant custom in this case would be one of segregating the races in dining facilities, rather than one of refusing to serve white persons in the company of Negroes. Of course, I do not agree that the custom must be shown to have been "state enforced."

Of course, a custom or usage is within § 1983 only if it is a custom of a "State or Territory." It was recognized during the debate on the Ku Klux Klan Act that the word "State" does not refer only to state government. In *Texas* v. *White,* 7 Wall. 700, 720–721 (1869),[32] decided just two years before the debate, this Court said of the word "State" as used in the Constitution:

> "It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
>
> "It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.
>
> "This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. . . .
>
> "In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a

[32] *Texas* v. *White* was overruled on an unrelated issue in *Morgan* v. *United States,* 113 U. S. 476, 496 (1885). Thereafter, it was quoted approvingly on the meaning of "State" in *McPherson* v. *Blacker,* 146 U. S. 1, 25 (1892).

> government sanctioned and limited by a written constitution, and established by the consent of the governed."

This language was quoted in the debate. See Cong. Globe, 42d Cong., 1st Sess., App. 80 (remarks of Rep. A. Perry). When the word "State" in § 1983 is so understood, then it is not at all strained or tortured—indeed, it is perfectly natural—to read "custom" as meaning simply "custom" in the enumeration "statute, ordinance, regulation, custom, or usage, of any State." Moreover, I agree with the Court that just as an ordinance can be state action, so, too, can a custom of a subdivision of a State be a custom "of [a] State" for purposes of § 1983; and in my view a custom of the people living in a subdivision is a custom of the subdivision. Thus a person acts under color of a custom or usage of a State when there is among the people of a State or subdivision of a State a widespread and longstanding practice regarded as prescribing norms for conduct and supported by community sentiment or sanctions, and a person acts in accordance with this custom either from a belief that the norms it prescribes authorize or require his conduct or from a belief that the community at large regards it as authorizing or requiring his conduct.[33]

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[33] It is only superficially odd that a violation of a constitutional right may be actionable under § 1983 if the violation occurs in one State where there is a custom, but not in another State where there is not. In both cases it would be just to impose liability on the violator. However, Congress was interested in providing a remedy only against what I have called "major" violations, and it is for that reason that liability may vary from one State to another. Similarly, privately chosen discrimination will constitute state action in some States, but not in others, depending on the public policies of the different States. That result, too, is dictated by sound considerations of principle and policy, though reflected in the Constitution rather than in a statute.

The Court eschews any attempt to interpret § 1983 against the background of a rational scheme of congressional purposes. Instead it relies basically on three sets of materials to support its restrictive interpretation of the statute. First are cases; some make casual use of the vague phrase "under color of law" as a summation of the "under color" language of § 1983, and the rest interpret the significance of custom either under an erroneous theory of constitutional law or outside the specific context of § 1983 altogether. I have already shown why these cases are hardly relevant, much less controlling, here. See *supra,* at 213–214 and n. 22. The Court's second set of authorities consists of three quotations from the legislative history purporting to explain the scope of § 1983. I have already shown that such quotations cannot be set up as a reliable guide to interpretation. See n. 25, *supra.* Given the demonstrable lack of consensus among the debaters on this precise issue, it is highly misleading to select two or three statements arguably favorable to one view and pronounce them authoritative. Moreover, as I have already indicated, see n. 25, *supra,* the remarks of Representative Shellabarger and Senator Edmunds consist merely of a handy formula for a debate not directed to matters of draftsmanship, and are themselves subject to varying interpretation.

Finally, the Court dwells on the relative lack of controversy over § 1983 in contrast to the heated debate over § 2 of the 1871 Act. However, despite Senator Edmunds' complacent prediction, § 1983 was opposed, and opposed vigorously. Senator Johnston commented, "The Senator from Vermont [Senator Edmunds] said that there would be no objection to the first section of the bill. That section, in my view, has only the slight objection of being unconstitutional." Cong. Globe, 42d Cong., 1st Sess., App. 215. Repre-

sentative McHenry called § 1983 an "outrage," a "flagrant infraction" of the Constitution. *Id.*, at 429. Representative Edward Rice characterized it as bringing "lambs to the slaughter"; it was, he said, "a provision for dragging persons from their homes, from their neighbors, and from the vicinage of the witnesses for the redress of private grievances to the Federal courts." *Id.*, at 395. See also *id.*, at App. 216–217 (remarks of Sen. Thurman).

Moreover, the Court does not adequately characterize the controversy over § 2 of the Act. As originally proposed, § 2 would have made a federal crime of any conspiracy in a State to commit an act that if committed on a federal enclave would constitute "murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny." See *id.*, at App. 68–69 (remarks of Rep. Shellabarger). Extreme opponents of the bill attacked this section, as they attacked other sections. Moderate opponents objected not because the section reached private conduct but because it ousted the States from a broad range of their criminal jurisdiction even where they were successfully meeting their constitutional obligation to provide equal protection. See, *e. g.*, *id.*, at 366 (remarks of Rep. Arthur, an opponent). Representative Garfield, for example, criticized the original § 2, see *id.*, at App. 153, but praised and voted for the final bill, including § 2, which he understood to reach private conduct, see *id.*, at 807, 808.

On its intrinsic merits, the Court's conclusion that custom "for purposes of § 1983 must have the force of law" would be wholly acceptable if the phrase "force of law" meant, as at common law, merely that custom must have the effect of law—that it be generally regarded as having normative force, whether or not en-

forced or otherwise supported by government. It is clear, however, that this is not the Court's meaning. The Court takes the position that custom can acquire the force of law only "by virtue of the persistent practices of state officials." Little in the debate supports this narrow reading of the statute. The statement by Representative Garfield on which the Court relies, *ante,* at 167, refers not merely to "permanent and well-settled" official practices, but more broadly to "systematic maladministration of [the laws], or a neglect or refusal to enforce" them. In short, under Representative Garfield's theory of the Equal Protection Clause, private customary violations of constitutional rights on the basis of race were denials of equal protection because of the failure of the State to prevent or remedy them. Mere state inaction converted customary private discrimination into a denial of equal protection, which Congress under §§ 1 and 5 had power to remedy. See also Cong. Globe, 42d Cong., 1st Sess., 333–334 (remarks of Rep. Hoar, a moderate supporter); *id.,* at 375 (remarks of Rep. Lowe, a supporter). Our cases have never explicitly held that state inaction alone in the face of purely private discrimination constitutes a denial of equal protection. But cf. *Burton* v. *Wilmington Parking Authority, supra,* at 725; *Catlette* v. *United States,* 132 F. 2d 902, 907 (C. A. 4th Cir. 1943); *Lynch* v. *United States,* 189 F. 2d 476 (C. A. 5th Cir. 1951); Henkin, *Shelley* v. *Kraemer:* Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962); see also *supra,* at 189. Nevertheless, the constitutional theory of the men who enacted § 1983 remains relevant for our interpretation of its meaning. Representative Garfield's theory of § 1 of the Fourteenth Amendment and of congressional power under §§ 1 and 5 had strong support in the debate. See Harris, *supra,* n. 26. Recognition of that theory—and *a fortiori* of the other principal theory among the bill's supporters, the

radical view that the Fourteenth Amendment empowers Congress to assert plenary jurisdiction over state affairs, see *ibid.*—only provides further confirmation for the conclusion that "custom" in § 1983 means custom of the people of a State, not custom of state officials.

III

Since this case is being remanded, I think it proper to express my views on the kinds of relief to which petitioner may be entitled if she should prevail on the merits.

Section 1983 in effect authorizes the federal courts to protect rights "secured by the Constitution and laws" by invoking any of the remedies known to the arsenal of the law. Standards governing the granting of relief under § 1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law. See *Tenney* v. *Brandhove,* 341 U. S. 367 (1951); *Monroe* v. *Pape, supra; Pierson* v. *Ray,* 386 U. S. 547 (1967); *Basista* v. *Weir,* 340 F. 2d 74, 85–87 (C. A. 3d Cir. 1965); cf. *Sullivan* v. *Little Hunting Park,* 396 U. S. 229, 238–240 (1969); *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433–434 (1964). Of course, where justice requires it, federal district courts are duty-bound to enrich the jurisprudence of § 1983 by looking to the remedies provided by the States wherein they sit. 42 U. S. C. § 1988. But resort to state law as such should be had only in cases where for some reason federal remedial law is not and cannot be made adequate to carry out the purposes of the statute.

Section 1983 does not in general impose strict liability on all who come within its prohibitions; certain broad immunities are recognized. See *Tenney* v. *Brandhove, supra; Monroe* v. *Pape, supra,* at 187–192; *Pierson* v. *Ray, supra,* at 553–555. In some types of cases where the wrong under § 1983 is closely analogous to a wrong

recognized in the law of torts, it is appropriate for the federal court to apply the relevant tort doctrines as to the bearing of particular mental elements on the existence and amount of liability. See, *e. g., Pierson* v. *Ray, supra; Whirl* v. *Kern,* 407 F. 2d 781 (C. A. 5th Cir. 1969). In other types of cases, however, the common law of torts may be divided on important questions of defenses and relief, or it may be inadequate to carry out the purposes of the statute. Thus the common law is not an infallible guide for the development of § 1983. In particular, denial of equal protection on the basis of race was the central evil that § 1983 was designed to stamp out. Where that is the basis for recovery, relief should not depend on the vagaries of the general common law but should be governed by uniform and effective federal standards.

The appropriateness of any particular remedy in a given case depends on the circumstances of that case, and especially on the degree of culpability of the defendant. In my view, where a plaintiff shows a voluntary denial of equal protection on the ground of race amounting to a violation of § 1983 he is entitled to recover compensation for actual damages, if any, simply on the basis of the proved violation. The question of compensatory damages is one of allocation of actual loss, and, as between the innocent plaintiff and the defendant who deliberately discriminates on the basis of race, I think it just and faithful to the statutory purposes to impose the loss on the discriminator, even if he was unaware that his discrimination constituted state action denying equal protection. Proof of an evil motive or of a specific intent to deprive a person of a constitutional right is generally not required under § 1983. *Monroe* v. *Pape, supra,* at 183–187; *Whirl* v. *Kern, supra.* And, indeed, in *Nixon* v. *Herndon,* 273 U. S. 536 (1927), and *Lane* v. *Wilson,* 307 U. S. 268 (1939), this Court upheld complaints seek-

ing $5,000 recoveries from state election officials who merely carried out their official duty to prevent the plaintiffs from voting under discriminatory state statutes which made them ineligible to vote. Of course, there may be cases where it would be proper to give declaratory or injunctive relief without damages. See *Williams* v. *Hot Shoppes, Inc.*, 110 U. S. App. D. C. 358, 370, 293 F. 2d 835, 847 (1961) (Bazelon, J., dissenting).

To recover punitive damages, I believe a plaintiff must show more than a bare violation of § 1983. On the other hand, he need not show that the defendant specifically intended to deprive him of a recognized federal right, as is required by the word "willfully" in 18 U. S. C. § 242, see *Screws* v. *United States, supra.* Nor need he show actual damages. *Basista* v. *Weir, supra,* at 87–88; *Tracy* v. *Robbins,* 40 F. R. D. 108, 113 (D. C. S. C. 1966). It is sufficient for the plaintiff to show either that the defendant acted "under color of [a] statute, ordinance, regulation, custom, or usage of any State or Territory," with actual knowledge that he was violating a right "secured by the Constitution and laws," *or* that the defendant acted with reckless disregard of whether he was thus violating such a right. Cf. C. McCormick, Handbook on the Law of Damages § 79 (1935). However, in my view, a proprietor of a place of public accommodation who discriminates on the basis of race after our decision in *Peterson* v. *City of Greenville, supra,* and the enactment of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a to 2000h–6, does so with reckless disregard as a matter of law, and therefore may be found liable for punitive damages.[34] Of course, it is proper for the factfinder to consider the degree of recklessness or actual knowledge and other circumstances in assessing the amount of punitive damages to award in a particular case.

[34] Moreover, there was evidence below that respondent's attention was expressly called to the Civil Rights Act.

It may be argued that it is inequitable to impose punitive damages on a defendant, a restaurateur for example, who knowingly or recklessly violates a constitutional right and § 1983 out of fear that he will lose some of his customers if he does not. That argument is plainly unacceptable. The protection of constitutional rights may not be watered down because some members of the public actively oppose the exercise of constitutional rights by others. *Cooper* v. *Aaron,* 358 U. S. 1 (1958). To give any weight at all to that argument would be to encourage popular opposition to compliance with the Constitution. Moreover, the argument is particularly devoid of merit in the context of § 1983, which was enacted by a Congress determined to stamp out widespread violations of constitutional rights at virtually any cost, and which imposed liability even on persons who simply failed to prevent certain violations. See Cong. Globe, 41st Cong., 1st Sess., 804 (remarks of Rep. Poland). If § 1983 is given an interpretation befitting its purposes, the threat of withdrawal of patronage will be largely empty since no other place of public accommodation in the community will be in a better position to discriminate. The prospect of substantial punitive damages may be the most effective means to persuade all proprietors of places of public accommodation to respect constitutional rights.

Syllabus

# BOYS MARKETS, INC. *v.* RETAIL CLERKS UNION, LOCAL 770

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

No. 768. Argued April 21–22, 1970—Decided June 1, 1970

Petitioner company and respondent union were parties to a collective-bargaining agreement containing a provision that all controversies concerning its interpretation or application should be resolved by arbitration and that there should be no work stoppage, lockout, picketing, or boycotts during the life of the contract. A dispute arose and, when petitioner did not accede to respondent's demand, a strike was called and the union began to picket petitioner's establishment. Petitioner's effort to invoke the contract's arbitration procedures being unsuccessful, it sought injunctive relief in the state court, which issued a temporary restraining order. The union removed the case to the Federal District Court, which ordered arbitration and enjoined the strike and the picketing. The Court of Appeals reversed, considering itself bound by *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962), which held that § 4 of the Norris-LaGuardia Act bars a federal district court from enjoining a strike in breach of a no-strike clause in a collective-bargaining agreement, even though that agreement contains binding arbitration provisions enforceable under § 301 (a) of the Labor Management Relations Act. *Held:* In the circumstances of this case—where the grievance was subject to arbitration under the collective-bargaining agreement, petitioner was ready for arbitration when the strike was enjoined, and the District Court concluded that respondent's violations of the no-strike clause were causing petitioner irreparable injury—the Norris-LaGuardia Act does not bar the granting of injunctive relief. *Sinclair Refining Co.* v. *Atkinson, supra,* overruled. Pp. 240–255.

(a) The doctrine of *stare decisis,* "a principle of policy and not a mechanical formula," does not bar re-examination of *Sinclair.* Pp. 240–241.

(b) The mere silence of Congress after *Sinclair* was decided does not foreclose reconsideration of that decision. Pp. 241–242.

(c) Arbitration is an important instrument of federal policy for resolving labor disputes, and a refusal to arbitrate is not an

abuse against which the Norris-LaGuardia Act was aimed. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957). Pp. 242–243.

(d) This Court's holding in *Avco Corp.* v. *Aero Lodge 735,* 390 U. S. 557 (1968), that § 301 (a) suits initially brought in state courts are removable to federal courts (a decision which in conjunction with *Sinclair* had the effect of ousting state courts of jurisdiction in such cases where injunctive relief is sought for breach of a no-strike obligation), contravenes the congressional purpose embodied in § 301 (a) to *supplement,* and not encroach upon, the pre-existing jurisdiction of state courts. *Avco* has created an anomalous situation urgently necessitating reconsideration of *Sinclair.* Pp. 244–245.

(e) Congress did not intend that the removal procedure be used to foreclose completely injunctive and other remedies otherwise available in the state courts. P. 246.

(f) Extending *Sinclair* to the States would be an unacceptable resolution of the dilemma created by *Sinclair* and *Avco* because it would substantially lessen the employers' incentive to agree to submit grievances to arbitration in exchange for the unions' undertakings to refrain from striking and would totally eliminate, contrary to congressional intent, the injunction as the most effective device to enforce no-strike obligations. Pp. 247–249.

(g) The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301 (a) of the Labor Management Relations Act and the purposes of arbitration, equitable remedies to enforce which are essential to further congressional policy for peacefully resolving labor disputes. Pp. 249–253.

(h) The narrow holding in this case comports with the principles of the dissent in *Sinclair, supra,* at 228, which the Court adopts as guidelines for the district courts in determining whether to grant injunctive relief. Pp. 253–254.

416 F. 2d 368, reversed and remanded.

*Joseph M. McLaughlin* argued the cause and filed briefs for petitioner.

*Kenneth M. Schwartz* argued the cause for respondent. With him on the brief were *Laurence D. Steinsapir* and *Robert M. Dohrmann.*

Briefs of *amici curiae* were filed by *William H. Willcox* and *Lawrence M. Cohen* for the Chamber of Commerce of the United States; by *George R. Fearon* for Associated Industries of New York State, Inc.; by *John E. Branch* and *James Pulm Swann, Jr.*, for General Electric Co.; by *Carl M. Gould* and *Stanley E. Tobin* for the Plumbing-Heating & Piping Employers Council of Southern California, Inc.; by *Harold I. Elbert* for Peabody Coal Co.; and by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In this case we re-examine the holding of *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962), that the anti-injunction provisions of the Norris-LaGuardia Act[1] preclude a federal district court from enjoining a strike in breach of a no-strike obligation under a collective-

[1] "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

. . . . . .

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

. . . . . .

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . ." § 4, 47 Stat. 70, 29 U. S. C. § 104.

bargaining agreement, even though that agreement contains provisions, enforceable under § 301 (a) of the Labor Management Relations Act, 1947,[2] for binding arbitration of the grievance dispute concerning which the strike was called. The Court of Appeals for the Ninth Circuit, considering itself bound by *Sinclair,* reversed the grant by the District Court for the Central District of California of petitioner's prayer for injunctive relief. 416 F. 2d 368 (1969). We granted certiorari. 396 U. S. 1000 (1970). Having concluded that *Sinclair* was erroneously decided and that subsequent events have undermined its continuing validity, we overrule that decision and reverse the judgment of the Court of Appeals.

## I

In February 1969, at the time of the incidents that produced this litigation, petitioner and respondent were parties to a collective-bargaining agreement which provided, *inter alia,* that all controversies concerning its interpretation or application should be resolved by adjustment and arbitration procedures set forth therein [3] and that, during the life of the contract, there should

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[2] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156, 29 U. S. C. § 185 (a).

[3] "ARTICLE XIV

"ADJUSTMENT AND ARBITRATION

"A. CONTROVERSY, DISPUTE OR DISAGREEMENT.

"Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement . . . [with certain exceptions not relevant

be "no cessation or stoppage of work, lock-out, picketing or boycotts . . . ." [4] The dispute arose when petitioner's frozen foods supervisor and certain members of his crew who were not members of the bargaining unit began to rearrange merchandise in the frozen food cases of one of petitioner's supermarkets. A union representative insisted that the food cases be stripped of all merchandise and be restocked by union personnel. When petitioner did not accede to the union's demand, a strike was called and the union began to picket petitioner's establishment. Thereupon petitioner demanded that the union cease the work stoppage and picketing and sought to invoke the grievance and arbitration procedures specified in the contract.

The following day, since the strike had not been terminated, petitioner filed a complaint in California

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to the instant case] shall be settled and resolved by the procedures and in the manner hereinafter set forth.

"B. ADJUSTMENT PROCEDURE.

. . . . . .

"C. ARBITRATION.

"1. Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. . . .

. . . . . .

"4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law. . . ."

[4] "D. POWERS, LIMITATIONS AND RESERVATIONS.

. . . . . .

"2. *Work Stoppages.* Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board."

Superior Court seeking a temporary restraining order, a preliminary and permanent injunction, and specific performance of the contractual arbitration provision. The state court issued a temporary restraining order forbidding continuation of the strike and also an order to show cause why a preliminary injunction should not be granted. Shortly thereafter, the union removed the case to the Federal District Court and there made a motion to quash the state court's temporary restraining order. In opposition, petitioner moved for an order compelling arbitration and enjoining continuation of the strike. Concluding that the dispute was subject to arbitration under the collective-bargaining agreement and that the strike was in violation of the contract, the District Court ordered the parties to arbitrate the underlying dispute and simultaneously enjoined the strike, all picketing in the vicinity of petitioner's supermarket, and any attempts by the union to induce the employees to strike or to refuse to perform their services.

## II

At the outset, we are met with respondent's contention that *Sinclair* ought not to be disturbed because the decision turned on a question of statutory construction which Congress can alter at any time. Since Congress has not modified our conclusions in *Sinclair,* even though it has been urged to do so,[5] respondent argues that principles of *stare decisis* should govern the present case.

We do not agree that the doctrine of *stare decisis* bars a re-examination of *Sinclair* in the circumstances of this case. We fully recognize that important policy considerations militate in favor of continuity and predictability in the law. Nevertheless, as Mr. Justice Frankfurter

[5] See, *e. g.,* Report of Special *Atkinson-Sinclair* Committee, A. B. A. Labor Relations Law Section—Proceedings 226 (1963) [hereinafter cited as A. B. A. *Sinclair* Report].

wrote for the Court, "[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940). See *Swift & Co.* v. *Wickham,* 382 U. S. 111, 116 (1965). It is precisely because *Sinclair* stands as a significant departure from our otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration [6] and our efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act [7] that we believe *Sinclair* should be reconsidered. Furthermore, in light of developments subsequent to *Sinclair,* in particular our decision in *Avco Corp.* v. *Aero Lodge 735,* 390 U. S. 557 (1968), it has become clear that the *Sinclair* decision does not further but rather frustrates realization of an important goal of our national labor policy.

Nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to *Sinclair* on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States,* 328 U. S. 61, 69

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[6] See, *e. g., United Steelworkers of America* v. *American Mfg. Co.,* 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.,* 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960); *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957).

[7] See, *e. g., Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R. Co.,* 353 U. S. 30 (1957); *Textile Workers Union* v. *Lincoln Mills, supra;* cf. *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232 (1949). See also *United States* v. *Hutcheson,* 312 U. S. 219 (1941).

(1946). Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of *Sinclair,* the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision. *Helvering* v. *Hallock, supra,* at 119–120.

III

From the time *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957), was decided, we have frequently found it necessary to consider various substantive and procedural aspects of federal labor contract law and questions concerning its application in both state and federal courts. *Lincoln Mills* held generally that "the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws," 353 U. S., at 456, and more specifically that a union can obtain specific performance of an employer's promise to arbitrate grievances. We rejected the contention that the anti-injunction proscriptions of the Norris-LaGuardia Act prohibited this type of relief, noting that a refusal to arbitrate was not "part and parcel of the abuses against which the Act was aimed," *id.,* at 458, and that the Act itself manifests a policy determination that arbitration should be encouraged. See 29 U. S. C. § 108.[8] Subsequently in the *Steelworkers*

[8] Section 108 provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

See generally *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & W. R. Co.,* 321 U. S. 50 (1944).

*Trilogy*[9] we emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and cautioned the lower courts against usurping the functions of the arbitrator.

Serious questions remained, however, concerning the role that state courts were to play in suits involving collective-bargaining agreements. Confronted with some of these problems in *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), we held that Congress clearly intended *not* to disturb the pre-existing jurisdiction of the state courts over suits for violations of collective-bargaining agreements. We noted that the

> "clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." *Id.*, at 511.

Shortly after the decision in *Dowd Box*, we sustained, in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), an award of damages by a state court to an employer for a breach by the union of a no-strike provision in its contract. While emphasizing that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules," *id.*, at 104, we did not consider the applicability of the Norris-LaGuardia Act to state court proceedings because the employer's prayer for relief sought only

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[9] *United Steelworkers of America* v. *American Mfg. Co., supra; United Steelworkers of America* v. *Warrior & Gulf Nav. Co., supra; United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra.*

damages and not specific performance of a no-strike obligation.

Subsequent to the decision in *Sinclair,* we held in *Avco Corp.* v. *Aero Lodge 735, supra,* that § 301 (a) suits initially brought in state courts may be removed to the designated federal forum under the federal question removal jurisdiction delineated in 28 U. S. C. § 1441. In so holding, however, the Court expressly left open the questions whether state courts are bound by the anti-injunction proscriptions of the Norris-LaGuardia Act and whether federal courts, after removal of a § 301 (a) action, are required to dissolve any injunctive relief previously granted by the state courts. See generally *General Electric Co.* v. *Local Union 191,* 413 F. 2d 964 (C. A. 5th Cir. 1969) (dissolution of state injunction required). Three Justices who concurred expressed the view that *Sinclair* should be reconsidered "upon an appropriate future occasion." 390 U. S., at 562 (STEWART, J., concurring).[10]

The decision in *Avco,* viewed in the context of *Lincoln Mills* and its progeny, has produced an anomalous situation which, in our view, makes urgent the reconsideration of *Sinclair.* The principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in § 301 (a) suits where injunc-

[10] Shortly after *Sinclair* was decided, an erosive process began to weaken its underpinnings. Various authorities suggested methods of mitigating the absolute rigor of the *Sinclair* rule. For example, the Court of Appeals for the Fifth Circuit held that *Sinclair* does not prevent a federal district court from enforcing an arbitrator's order directing a union to terminate work stoppages in violation of a no-strike clause. *New Orleans Steamship Assn.* v. *General Longshore Workers,* 389 F. 2d 369, cert. denied, 393 U. S. 828 (1968); see *Pacific Maritime Assn.* v. *International Longshoremen,* 304 F. Supp. 1315 (D. C. N. D. Cal. 1969). See generally Keene, The Supreme Court, Section 301 and No-Strike Clauses: From *Lincoln Mills* to *Avco* and Beyond, 15 Vill. L. Rev. 32 (1969).

tive relief is sought for breach of a no-strike obligation. Union defendants can, as a matter of course, obtain removal to a federal court,[11] and there is obviously a compelling incentive for them to do so in order to gain the advantage of the strictures upon injunctive relief which *Sinclair* imposes on federal courts. The sanctioning of this practice, however, is wholly inconsistent with our conclusion in *Dowd Box* that the congressional purpose embodied in § 301 (a) was to *supplement,* and not to encroach upon, the pre-existing jurisdiction of the state courts.[12] It is ironic indeed that the very provision that Congress clearly intended to provide additional remedies for breach of collective-bargaining agreements has been employed to displace previously existing state remedies. We are not at liberty thus to depart from the clearly expressed congressional policy to the contrary.

On the other hand, to the extent that widely disparate remedies theoretically remain available in state, as opposed to federal, courts, the federal policy of labor law

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[11] Section 301 (a) suits require neither the existence of diversity of citizenship nor a minimum jurisdictional amount in controversy. All § 301 (a) suits may be removed pursuant to 28 U. S. C. § 1441.

[12] The view that state court jurisdiction would not be disturbed by § 301 (a) was perhaps most clearly articulated by Senator Ferguson, a spokesman for that provision, in a Senate debate in 1946:

"Mr. FERGUSON. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts, and the mere fact that the Senator and I disagree does not change the effect of the amendment.

"Mr. MURRAY. But it authorizes the employers to bring suit in the Federal courts, if they so desire.

"Mr. FERGUSON. That is correct. That is all it does. It takes away no jurisdiction of the State courts." 92 Cong. Rec. 5708.

uniformity elaborated in *Lucas Flour Co.*, is seriously offended. This policy, of course, could hardly require, as a practical matter, that labor law be administered identically in all courts, for undoubtedly a certain diversity exists among the state and federal systems in matters of procedural and remedial detail, a fact that Congress evidently took into account in deciding not to disturb the traditional jurisdiction of the States. The injunction, however, is so important a remedial device, particularly in the arbitration context, that its availability or nonavailability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements.

Furthermore, the existing scheme, with the injunction remedy technically available in the state courts but rendered inefficacious by the removal device, assigns to removal proceedings a totally unintended function. While the underlying purposes of Congress in providing for federal question removal jurisdiction remain somewhat obscure,[13] there has never been a serious contention that Congress intended that the removal mechanism be utilized to foreclose completely remedies otherwise available in the state courts. Although federal question removal jurisdiction may well have been intended to provide a forum for the protection of federal rights where such protection was deemed necessary or to encourage the development of expertise by the federal courts in the

[13] The legislative history of the federal question removal provision is meager, but it has been suggested that its purpose was the same as original federal question jurisdiction, enacted at the same time in the Judiciary Act of 1875, 18 Stat. 470, namely, to protect federal rights, see H. Hart & H. Wechsler, The Federal Courts and the Federal System 727–733 (1953), and to provide a forum that could more accurately interpret federal law, see Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 159 (1953). 113 U. Pa. L. Rev. 1096, 1098 and n. 17 (1965).

interpretation of federal law, there is no indication that Congress intended by the removal mechanism to effect a wholesale dislocation in the allocation of judicial business between the state and federal courts. Cf. *City of Greenwood* v. *Peacock,* 384 U. S. 808 (1966).

It is undoubtedly true that each of the foregoing objections to *Sinclair-Avco* could be remedied either by overruling *Sinclair* or by extending that decision to the States. While some commentators have suggested that the solution to the present unsatisfactory situation does lie in the extension of the *Sinclair* prohibition to state court proceedings,[14] we agree with Chief Justice Traynor of the California Supreme Court that "whether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris-LaGuardia Act or section 301." *McCarroll* v. *Los Angeles County Dist. Council of Carpenters,* 49 Cal. 2d 45, 63, 315 P. 2d 322, 332 (1957), cert. denied, 355 U. S. 932 (1958). See, *e. g., American Dredging Co.* v. *Marine Local 25,* 338 F. 2d 837 (C. A. 3d Cir. 1964), cert. denied, 380 U. S. 935 (1965); *Shaw Electric Co.* v. *I. B. E. W.,* 418 Pa. 1, 208 A. 2d 769 (1965).

An additional reason for not resolving the existing dilemma by extending *Sinclair* to the States is the devastating implications for the enforceability of arbitration agreements and their accompanying no-strike obligations if equitable remedies were not available.[15] As we have

[14] See, *e. g.,* Bartosic, Injunctions and Section 301: The Patchwork of *Avco* and *Philadelphia Marine* on the Fabric of National Labor Policy, 69 Col. L. Rev. 980 (1969); Dunau, Three Problems in Labor Arbitration, 55 Va. L. Rev. 427 (1969).

[15] It is true that about one-half of the States have enacted so-called "little Norris-LaGuardia Acts" that place various restrictions upon the granting of injunctions by state courts in labor disputes. However, because many States do not bar injunctive relief for violations of collective-bargaining agreements, in only about 14 jurisdictions

previously indicated, a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. See *Textile Workers Union* v. *Lincoln Mills, supra,* at 455.[16] Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.[17]

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is there a significant Norris-LaGuardia-type prohibition against equitable remedies for breach of no-strike obligations. See Bartosic, *supra,* n. 14, at 1001–1006; Keene, *supra,* n. 10, at 49 and nn. 79, 80.

[16] We held in *Teamsters Local 174* v. *Lucas Flour Co., supra,* that, even in the absence of an express no-strike clause in the collective-bargaining contract, an agreement that certain disputes "will be exclusively covered by compulsory terminal arbitration" (369 U. S., at 106) gives rise to an implied promise by the union not to strike during the term of the contract in response to these arbitrable disputes. *Id.,* at 104–106. In the present case, there was an express no-strike clause in the union-management contract. See n. 4, *supra.*

[17] As the neutral members of the A. B. A. committee on the problems raised by *Sinclair* noted in their report:

"Under existing laws, employers may maintain an action for damages resulting from a strike in breach of contract and may discipline the employees involved. In many cases, however, neither of these alternatives will be feasible. Discharge of the strikers is often inexpedient because of a lack of qualified replacements or because of the adverse effect on relationships within the plant. The damage remedy may also be unsatisfactory because the employer's losses

Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate. Thus, because *Sinclair,* in the aftermath of *Avco,* casts serious doubt upon the effective enforcement of a vital element of stable labor-management relations—arbitration agreements with their attendant no-strike obligations—we conclude that *Sinclair* does not make a viable contribution to federal labor policy.

## IV

We have also determined that the dissenting opinion in *Sinclair* states the correct principles concerning the accommodation necessary between the seemingly absolute terms of the Norris-LaGuardia Act and the policy considerations underlying § 301 (a).[18] 370 U. S., at 215.

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are often hard to calculate and because the employer may hesitate to exacerbate relations with the union by bringing a damage action. Hence, injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy." A. B. A. *Sinclair* Report 242.

[18] Scholarly criticism of *Sinclair* has been sharp, and it appears to be almost universally recognized that *Sinclair,* particularly after *Avco,* has produced an untenable situation. The commentators are divided, however, with respect to proposed solutions, some favoring reconsideration of *Sinclair,* others suggesting extension of *Sinclair* to the States, and still others recommending that any action in this area be left to Congress. See generally Aaron, Strikes in Breach of

Although we need not repeat all that was there said, a few points should be emphasized at this time.

The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301 (a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions. See *Richards* v. *United States,* 369 U. S. 1, 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 285 (1956); *United States* v. *Hutcheson,* 312 U. S. 219, 235 (1941).

The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today. In the early part of this century, the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups.[19] The result was a large number of sweeping decrees, often issued *ex parte,* drawn on an *ad hoc* basis without regard to any systematic elaboration of national labor policy. See *Drivers' Union* v. *Lake Valley Co.,* 311 U. S. 91, 102 (1940).

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Collective Agreements: Some Unanswered Questions, 63 Col. L. Rev. 1027 (1963); Aaron, The Labor Injunction Reappraised, 10 U. C. L. A. L. Rev. 292 (1963); Bartosic, *supra,* n. 14; Dunau, *supra,* n. 14; Keene, *supra,* n. 10; Kiernan, Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts, 32 Albany L. Rev. 303 (1968); Wellington, The No-Strike Clause and the Labor Injunction: Time for a Re-examination, 30 U. Pitt. L. Rev. 293 (1968); Wellington & Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L. J. 1547 (1963).

[19] See generally F. Frankfurter & N. Greene, The Labor Injunction (1930).

In 1932 Congress attempted to bring some order out of the industrial chaos that had developed and to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management. See declaration of public policy, Norris-LaGuardia Act, § 2, 47 Stat. 70. Congress, therefore, determined initially to limit severely the power of the federal courts to issue injunctions "in any case involving or growing out of any labor dispute . . . ." § 4, 47 Stat. 70. Even as initially enacted, however, the prohibition against federal injunctions was by no means absolute. See Norris-LaGuardia Act, §§ 7, 8, 9, 47 Stat. 71, 72. Shortly thereafter Congress passed the Wagner Act,[20] designed to curb various management activities that tended to discourage employee participation in collective action.

As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.

A leading example of this accommodation process is *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30 (1957). There we were confronted with a peaceful strike which violated the statutory duty to arbitrate imposed by the Railway Labor Act. The Court concluded that a strike in violation of a statutory arbitration duty was not the type of situa-

[20] National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*

tion to which the Norris-LaGuardia Act was responsive, that an important federal policy was involved in the peaceful settlement of disputes through the statutorily mandated arbitration procedure, that this important policy was imperiled if equitable remedies were not available to implement it, and hence that Norris-LaGuardia's policy of nonintervention by the federal courts should yield to the overriding interest in the successful implementation of the arbitration process.

The principles elaborated in *Chicago River* are equally applicable to the present case. To be sure, *Chicago River* involved arbitration procedures established by statute. However, we have frequently noted, in such cases as *Lincoln Mills,* the *Steelworkers Trilogy,* and *Lucas Flour,* the importance that Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end. Indeed, it has been stated that *Lincoln Mills,* in its exposition of § 301 (a), "went a long way towards making arbitration the central institution in the administration of collective bargaining contracts." [21]

The *Sinclair* decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking. On the other hand, the central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under

[21] Wellington & Albert, *supra,* n. 18, at 1557.

a specifically enforceable agreement to submit disputes to arbitration.[22] We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.

## V

Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appro-

[22] As well stated by the neutral members of the A. B. A. *Sinclair* committee:

"Any proposal which would subject unions to injunctive relief must take account of the Norris-LaGuardia Act and the opposition expressed in that Act to the issuing of injunctions in labor disputes. Nevertheless, the reasons behind the Norris-LaGuardia Act seem scarcely applicable to the situation . . . [in which a strike in violation of a collective-bargaining agreement is enjoined]. The Act was passed primarily because of widespread dissatisfaction with the tendency of judges to enjoin concerted activities in accordance with 'doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy.' [Citation omitted.] Where an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose." A. B. A. *Sinclair* Report 242.

priate as a matter of course in every case of a strike over an arbitrable grievance. The dissenting opinion in *Sinclair* suggested the following principles for the guidance of the district courts in determining whether to grant injunctive relief—principles that we now adopt:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U. S., at 228. (Emphasis in original.)

In the present case there is no dispute that the grievance in question was subject to adjustment and arbitration under the collective-bargaining agreement and that the petitioner was ready to proceed with arbitration at the time an injunction against the strike was sought and obtained. The District Court also concluded that, by reason of respondent's violations of its no-strike obligation, petitioner "has suffered irreparable injury and will continue to suffer irreparable injury." Since we now

overrule *Sinclair,* the holding of the Court of Appeals in reliance on *Sinclair* must be reversed. Accordingly, we reverse the judgment of the Court of Appeals and remand the case with directions to enter a judgment affirming the order of the District Court.

*It is so ordered.*

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

MR. JUSTICE STEWART, concurring.

When *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, was decided in 1962, I subscribed to the opinion of the Court. Before six years had passed I had reached the conclusion that the *Sinclair* holding should be reconsidered, and said so in *Avco Corp.* v. *Aero Lodge 735,* 390 U. S. 557, 562 (concurring opinion). Today I join the Court in concluding "that *Sinclair* was erroneously decided and that subsequent events have undermined its continuing validity . . . ."

In these circumstances the temptation is strong to embark upon a lengthy personal *apologia.* But since MR. JUSTICE BRENNAN has so clearly stated my present views in his opinion for the Court today, I simply join in that opinion and in the Court's judgment. An aphorism of Mr. Justice Frankfurter provides me refuge: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee* v. *Union Planters Bank,* 335 U. S. 595, 600 (dissenting opinion).

MR. JUSTICE BLACK, dissenting.

Congress in 1932 enacted the Norris-LaGuardia Act, § 4 of which, 29 U. S. C. § 104, with exceptions not here relevant, specifically prohibited federal courts in the broadest and most comprehensive language from

issuing any injunctions, temporary or permanent, against participation in a labor dispute. Subsequently, in 1947, Congress gave jurisdiction to the federal courts in "[s]uits for violation of contracts between an employer and a labor organization." Although this subsection, § 301 (a) of the Taft-Hartley Act, 29 U. S. C. § 185 (a), explicitly waives the diversity and amount-in-controversy requirements for federal jurisdiction, it says nothing at all about granting injunctions. Eight years ago this Court considered the relation of these two statutes: after full briefing and argument, relying on the language and history of the Acts, the Court decided that Congress did not wish this later statute to impair in any way Norris-LaGuardia's explicit prohibition against injunctions in labor disputes. *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962).

Although Congress has been urged to overrule our holding in *Sinclair,* it has steadfastly refused to do so. Nothing in the language or history of the two Acts has changed. Nothing at all has changed, in fact, except the membership of the Court and the personal views of one Justice. I remain of the opinion that *Sinclair* was correctly decided, and, moreover, that the prohibition of the Norris-LaGuardia Act is close to the heart of the entire federal system of labor regulation. In my view *Sinclair* should control the disposition of this case.

Even if the majority were correct, however, in saying that *Sinclair* misinterpreted the Taft-Hartley and Norris-LaGuardia Acts, I should be compelled to dissent. I believe that both the making and the changing of laws which affect the substantial rights of the people are primarily for Congress, not this Court. Most especially is this so when the laws involved are the focus of strongly held views of powerful but antagonistic political and economic interests. The Court's function in the application and interpretation of such laws must be carefully limited to avoid encroaching on the power of

Congress to determine policies and make laws to carry them out.

When the Court implies that the doctrine called *stare decisis* rests solely on "important policy considerations . . . in favor of continuity and predictability in the law," it does not tell the whole story. Such considerations are present and, in a field as delicate as labor relations, extremely important. Justice Brandeis said, dissenting in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932):

> "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."

In the ordinary case, considerations of certainty and the equal treatment of similarly situated litigants will provide a strong incentive to adhere to precedent.

When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws. Of course, when this Court first interprets a statute, then the statute becomes what this Court has said it is. See *Gulf, C. & S. F. R. Co.* v. *Moser,* 275 U. S. 133, 136 (1927). Such an initial interpretation is proper, and unavoidable, in any system in which courts have the task of applying general statutes in a multitude of situations. B. Cardozo, The Nature of the Judicial Process 112–115 (1921). The Court undertakes the task of interpretation, however, not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it. When the law has been settled by an earlier case then any subsequent "reinterpretation" of the statute is gratuitous and neither more nor less than

an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.

Altering the important provisions of a statute is a legislative function. And the Constitution states simply and unequivocally: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U. S. Const. Art. I. It is the Congress, not this Court, that responds to the pressures of political groups, pressures entirely proper in a free society. It is Congress, not this Court, that has the capacity to investigate the divergent considerations involved in the management of a complex national labor policy. And it is Congress, not this Court, that is elected by the people. This Court should, therefore, interject itself as little as possible into the law-making and law-changing process. Having given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.

The legislative effect of the Court's reversal is especially clear here. In *Sinclair* the Court invited Congress to act if it should be displeased with the judicial interpretation of the statute. We said, 370 U. S., at 214–215:

> "Strong arguments are made to us that it is highly desirable that the Norris-LaGuardia Act be changed in the public interest. If that is so, Congress itself might see fit to change that law and repeal the anti-injunction provisions of the Act insofar as suits for violation of collective agreements are concerned, as the House bill under consideration originally provided. It might, on the other hand, decide that if injunctions are necessary, the whole idea of enforcement of these agreements by private suits should

> be discarded in favor of enforcement through the administrative machinery of the Labor Board, as Senator Taft provided in his Senate bill. Or it might decide that neither of these methods is entirely satisfactory and turn instead to a completely new approach. The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters."

Commentators on our holding found this invitation to legislative action clear, and judicial self-restraint proper. See Dunau, Three Problems in Labor Arbitration, 55 Va. L. Rev. 427, 464–465 (1969); Wellington & Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L. J. 1547, 1565–1566 (1963). Bills were introduced in Congress seeking to effect a legislative change. S. 2132, 89th Cong., 1st Sess. (1965); H. R. 9059, 89th Cong., 1st Sess. (1965). Congress, however, did not act, thus indicating at least a willingness to leave the law as *Sinclair* had construed it. It seems to me highly inappropriate for this Court now, eight years later, in effect to enact the amendment that Congress has refused to adopt. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953); see also *United States* v. *International Boxing Club of New York, Inc.*, 348 U. S. 236, 242–244 (1955).

I do not believe that the principle of *stare decisis* forecloses all reconsiderations of earlier decisions. In the area of constitutional law, for example, where the only alternative to action by this Court is the laborious process of constitutional amendment and where the ultimate responsibility rests with this Court, I believe reconsideration is always proper. See *James* v. *United States*, 366 U. S. 213, 233–234 (1961) (separate opin-

ion of BLACK, J.).* Even on statutory questions the appearance of new facts or changes in circumstances might warrant re-examination of past decisions in exceptional cases under exceptional circumstances. In the present situation there are no such circumstances. Congress has taken no action inconsistent with our decision in *Sinclair*. *Girouard* v. *United States*, 328 U. S. 61, 70 (1946). And, although bills have been introduced, cf. *Helvering* v. *Hallock*, 309 U. S. 106, 119–120 (1940), Congress has declined the invitation to act.

The only "subsequent event" to which the Court can point is our decision in *Avco Corp.* v. *Aero Lodge 735*, 390 U. S. 557 (1968). The Court must recognize that the holding of *Avco* is in no way inconsistent with *Sinclair*. As we said in *Avco, supra*, at 561: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." The Court contends, however, that the result of the two cases taken together is the "anomalous situation" that no-strike clauses become unenforceable in state courts, and this is inconsistent with "an important goal of our national labor policy."

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*Other members of the Court have drawn the distinction between constitutional and statutory matters, and indicated that the correction of this Court's errors in statutory interpretation is best left to Congress. For example, MR. JUSTICE DOUGLAS noted in dissent in *Swift & Co.* v. *Wickham*, 382 U. S. 111, 133–134 (1965):

"An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress, or has interpreted a statute in such a manner as to thwart the legislative purpose, Congress may change it. The lessons of experience are not learned by judges alone."

See also *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392, 406 (1965) (DOUGLAS, J., dissenting). Apparently, however, some members of the Court are willing to give greater weight to *stare decisis* in constitutional than in statutory matters. See, *e. g.*, *Orozco* v. *Texas*, 394 U. S. 324, 327–328 (1969) (HARLAN, J., concurring).

*Avco* does make any effort to enforce a no-strike clause in a state court removable to a federal court, but it does not follow that the no-strike clause is unenforceable. Damages may be awarded; the union may be forced to arbitrate. And the employer may engage in self-help. The Court would have it that these techniques are less effective than an injunction. That is doubtless true. But the harshness and effectiveness of injunctive relief—and opposition to "government by injunction"—were the precise reasons for the congressional prohibition in the Norris-LaGuardia Act. The effect of the *Avco* decision is, indeed, to highlight the limited remedial powers of federal courts. But if the Congress is unhappy with these powers as this Court defined them, then the Congress may act; this Court should not. The members of the majority have simply decided that they are more sensitive to the "realization of an important goal of our national labor policy" than the Congress or their predecessors on this Court.

The correct interpretation of the Taft-Hartley Act, and even the goals of "our national labor policy," are less important than the proper division of functions between the branches of our Federal Government. The Court would do well to remember the words of John Adams, written in the Declaration of Rights in the Constitution of the Commonwealth of Massachusetts:

> "The judicial [department] shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

I dissent.

MR. JUSTICE WHITE dissents for the reasons stated in the majority opinion in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962).

# MAXWELL *v.* BISHOP, PENITENTIARY SUPERINTENDENT

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

No. 13. Argued March 4, 1969—Reargued May 4, 1970—Decided June 1, 1970

Petitioner challenged his jury conviction for rape and the sentence of death imposed pursuant to Arkansas law on the grounds that (1) the jury had determined the issues of guilt and sentencing in a single proceeding, thus precluding him from presenting evidence on the penalty issue without subjecting himself to self-incrimination on the guilt issue, and (2) the jury had been given no standards to guide it in sentencing. The District Court denied a writ of habeas corpus and the Court of Appeals affirmed. Several prospective jurors had been removed for cause from the panel "because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," which this Court held impermissible in *Witherspoon* v. Illinois, 391 U. S. 510, decided after petitioner's trial. *Held:* Although the *Witherspoon* issue was not raised below, the case is remanded to the District Court for consideration of that issue. *Boulden* v. *Holman,* 394 U. S. 478.

398 F. 2d 138, vacated and remanded.

*Anthony G. Amsterdam* argued the cause for petitioner on the original argument and on the reargument. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Norman C. Amaker, Michael Meltsner, Elizabeth DuBois,* and *George Howard, Jr.*

*Don Langston,* Deputy Attorney General of Arkansas, argued the cause for respondent on the original argument and on the reargument. With him on the brief was *Joe Purcell,* Attorney General.

*Albert W. Harris, Jr.,* Assistant Attorney General, argued the cause for the State of California as *amicus curiae* on the original argument and on the reargument. With him on the brief were *Thomas C. Lynch,* Attorney

General, and *Robert R. Granucci* and *George R. Nock,* Deputy Attorneys General. Briefs of *amici curiae* were filed by *Elmer Gertz* and *Willard J. Lassers* for the American Civil Liberties Union, Illinois Division, et al.; by *Sol Rubin* and *Samuel B. Waterman* for the National Council on Crime and Delinquency; by *Leo Pfeffer, Marvin Braiterman, Morris Dershowitz, Will Maslow, Joseph B. Robison,* and *George Soll* for the Synagogue Council of America et al.; by *Messrs. Gertz* and *Lassers* and *Alex Elson* for the American Friends Service Committee et al.; by *Warren E. Magee* and *Judah Best* for the American Psychiatric Association; by *Berl I. Bernhard, William T. Coleman, Jr., Samuel Dash, John W. Douglas, Steven Duke, William T. Gossett, Rita Hauser, Burke Marshall, Steven R. Rivkin, Whitney North Seymour,* and *Cyrus R. Vance, pro sese,* for Berl I. Bernhard et al.; by *Messrs. Amsterdam, Greenberg,* and *Meltsner, Melvyn Zarr,* and *Charles S. Ralston* for Robert Page Anderson et al., and by *Hilbert P. Zarky* and *Richard M. Mosk* for Clinton Duffy.

PER CURIAM.

In 1962 the petitioner was found guilty of rape by an Arkansas jury without a verdict of life imprisonment, and the trial court imposed a sentence of death.[1] The Arkansas Supreme Court affirmed the judgment of conviction. 236 Ark. 694, 370 S. W. 2d 113. The petitioner then sought a writ of habeas corpus in the United

[1] At the time of the petitioner's trial Arkansas law provided only two alternative sentences upon conviction for rape:

"*Penalty for rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]." Ark. Stat. Ann. § 41–3403 (1964 Repl. Vol.).

"*Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor." Ark. Stat. Ann. § 43–2153 (1964 Repl. Vol.).

States District Court for the Eastern District of Arkansas, claiming, among other things, that his conviction and punishment were unconstitutional in that (1) the jury had determined the two issues of guilt or innocence and of a life or death sentence in a single proceeding, thereby precluding him from presenting evidence pertinent to the question of penalty without subjecting himself to self-incrimination on the issue of guilt; and (2) the jury had been given no standards or directions of any kind to guide it in deciding whether to impose a sentence of life imprisonment or death. The District Court denied the writ, 257 F. Supp. 710, and the Court of Appeals for the Eighth Circuit affirmed, 398 F. 2d 138. We granted certiorari limited to the two questions noted above. 393 U. S. 997.

The petitioner's trial took place long before this Court's decision in *Witherspoon* v. *Illinois,* 391 U. S. 510. The trial transcript makes evident that several prospective jurors were removed from the panel upon grounds held impermissible in the *Witherspoon* case. One prospective juror, for example, was successfully challenged for cause solely on the basis of the following exchange:

> "Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that *might* prevent you from returning such a verdict?
>
> "A. I *think* I do." (Emphasis supplied.)

Another venireman was removed from the jury panel on the basis of the following question and answer:

> "Q. Do you entertain any conscientious scruples about imposing the death penalty?
>
> "A. Yes, I am afraid I do."

Still another member of the panel was dismissed after the following colloquy:

> "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you *or make you have any feelings about* returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
>
> "A. No, I don't believe in capital punishment." (Emphasis supplied.) [2]

As was made clear in *Witherspoon,* "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. We reaffirmed that doctrine in *Boulden* v. *Holman,* 394 U. S. 478. As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable "to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U. S., at 484. "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Witherspoon* v. *Illinois, supra,* at 516 n. 9.

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has

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[2] The record shows possible violations of the *Witherspoon* rule in the removal from the venire of at least four other prospective jurors.

> begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.*, at 522 n. 21.

It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon* v. *Illinois*. As in *Boulden* v. *Holman*, however, we do not finally decide that question here. The situation in this case closely resembles that presented in *Boulden*, in that the petitioner's trial took place before the *Witherspoon* decision, and the *Witherspoon* issue was not raised in the District Court, in the Court of Appeals, or in the petition for certiorari filed in this Court. The reasons that persuaded us to remand the *Boulden* case to the District Court apply with equal force here: "A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us. Further, it is not clear whether the petitioner has exhausted his state remedies with respect to this issue. Finally, in the event it turns out, as now appears, that relief from this death sentence must be ordered, a local federal court will be far better equipped than are we to frame an appropriate decree with due regard to available [Arkansas] procedures." 394 U. S., at 484.[3]

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[3] During oral argument of this case reference was made to the following Arkansas statute:

"*Reduction of verdict.*—The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in the opinion of the court, the conviction is proper, and the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted, so that the punish-

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court, where the issue that has belatedly been brought to our attention may be fully considered. In the action we take today, we express no view whatever with respect to the two questions originally specified in our grant of certiorari.[4]

*It is so ordered.*

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

MR. JUSTICE BLACK, dissenting.

Since I am still of the view that *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968), was erroneously decided, I dissent from the opinion of the Court in this case.

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ment be not, in any case, reduced below the limit prescribed by law in such cases." Ark. Stat. Ann. § 43-2310 (1964 Repl. Vol.).

No effort was made by the petitioner to seek relief in the state courts under this statute. There is nothing in the record or otherwise reported to us to indicate that this remedy is not now available.

[4] We have today granted certiorari in No. 486, Misc., *McGautha* v. *California,* and No. 709, Misc., *Crampton* v. *Ohio,* in which these two questions will be considered at an early date in the 1970 Term.

## UNITED STATES *v.* ARMOUR & CO. ET AL.

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

No. 103. Argued March 5, 1970—Decided June 1, 1970

Vacated and remanded.

*James van R. Springer* argued the cause for the United States. On the brief were *Solicitor General Griswold, Deputy Assistant Attorney General Comegys, Lawrence G. Wallace, Howard E. Shapiro,* and *Seymour H. Dussman.*

*Herbert A. Bergson* argued the cause for appellee General Host Corp. With him on the brief were *Howard Adler, Jr., James H. Kelley, Carol Garfiel Freeman,* and *Edwin E. McAmis.*

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Illinois with instructions to dismiss the case as moot.

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

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

MR. JUSTICE DOUGLAS, dissenting.

I dissent from dismissal of the case as moot.

In an historic consent decree the giant meatpackers were separated in a complete and continuing way from the general food business, the District Court retaining in the customary way the power to grant additional

relief, at the foot of the decree. Some years later motions to vacate the decree were made, and a judgment overruling them was affirmed by this Court. *Swift & Co.* v. *United States,* 276 U. S. 311. Later Armour and other meatpacker defendants, claiming that conditions in the food business had changed, sought modifications of the decree to relieve them from the structural bars against engaging in various aspects of the general food and retail meat business. That effort was also unsuccessful. *United States* v. *Swift & Co.,* 286 U. S. 106. Later, another attempt was made to obtain similar relief and it too failed. *United States* v. *Swift & Co.,* 189 F. Supp. 885, aff'd, 367 U. S. 909.

Armour is now the second largest meatpacker in the Nation. General Host is engaged in the food products business; it operates some 380 grocery stores, and some lodges, restaurants, and coffee shops. It is, in other words, engaged in lines of business from which Armour, as a party to the decree, would be barred, whether it did so directly or through stock ownership.

Against the resistance of Armour, General Host, which held about 16½% of Armour's outstanding stock, undertook to acquire at least 51% of it. The United States asked the District Court having jurisdiction over the meatpackers consent decree to make General Host a party under § 5 of the Sherman Act, 26 Stat. 210, as amended, 15 U. S. C. § 5. The refusal of the District Court to do so was, I think, error. After the District Court's ruling, General Host acquired 57% of Armour's stock. As a result, a species of the monopoly at which the consent decree was aimed was achieved.

General Host, it appears, has now transferred, pursuant to authority of the Interstate Commerce Commission, its Armour stock to Greyhound Corporation. It is alleged that Greyhound, like General Host, is engaged in food business prohibited to Armour under the

decree. The United States contends that Greyhound's control of Armour is as inconsistent with the decree as General Host's control. Greyhound, the United States states, owns other food interests that Armour could not own by virtue of the decree.

Neither General Host nor Greyhound could, of course, be held in contempt under the decree as it is written, for they were not parties. But they presumably knew of the decree and seemingly fashioned a procedure to circumvent it. The District Court had ample power under § 5 of the Sherman Act, to restrain General Host from frustrating the decree, for § 5 provides:

> "Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

General Host and Greyhound would have, of course, the opportunity to litigate the question whether their acts do interfere with the decree before any citation for contempt.

Moreover, Rule 25 (c) of the Federal Rules of Civil Procedure provides:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Unless the District Court proceeds against General Host and Greyhound to supplement the decree, there

may be no remedy. Without the hearing I urge, they cannot be punished for contempt. Armour, though a party to the decree, was the victim of its violation, not a participant.

Under the decree Armour could not acquire either General Host or Greyhound. Yet the combination of meatpackers with food products arguably is realized whether Armour acquired them, or they, Armour. The misconception of the thrust of the decree by the District Court is evident in its statement that "General Host is not a large meat packer extending its monopolistic grasp toward the rest of the food industry and through the use of its already established distributing facilities, superior financial resources and other means making a dominant position felt, resulting in a restraint of trade by squeezing out present or potential competitors. Rather, General Host, a wholly separate corporate entity, has acquired some shares of Armour stock and evinced an interest in acquiring additional shares." The evil is in an interference with the decree through the combination of Armour's meatpacking power with the food lines of General Host—the precise type of evil at which the decree was aimed. And that evil is apparently present in Greyhound's acquisition.

Mr. Justice Cardozo speaking for the Court in the second *Swift* case said:

> "Whether the defendants would resume [their predatory practices] if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals. Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . , but

> size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The original decree at all events was framed upon that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether. It did not say that the privilege to deal in groceries should be withdrawn for a limited time, or until the combination in respect of meats had been effectually broken up. It said that the privilege should be renounced forever, and this whether the units within the combination were acting collectively or singly. The combination was to be disintegrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. . . . Groceries and other enumerated articles they were not to sell at all, either by wholesale or by retail. Even the things that they were free to sell, meats and meat products, they were not to sell by retail." *United States* v. *Swift & Co.*, 286 U. S. 106, 116–117.

Mr. Justice Cardozo added that with the addition of groceries to meats, "[t]he opportunity will be theirs to renew the war of extermination that they waged in years gone by." *Id.*, at 118.

The same sentiment had previously been stated in the Senate by Senator (now MR. JUSTICE) BLACK in opposing the move of the meatpacking industry to relax the

decree. His fear was opening the doors to control of groceries and other food by the meatpackers: [1]

> "If this court decree should be canceled and set aside by governmental consent, a giant food trust would not only be permitted but encouraged to rear its stupendous and ominous form over North, South, East, and West alike. Such governmental action will tacitly invite a monopoly of such size and power that with one stroke of a pen in some large financial center of the Nation this trust could lift the price of bread and meat from Maine to California."

Later he spoke of a financial prospectus based upon an expected modification of the decree: [2]

> " 'With the expected modification of the consent decree, the big meat packers will enter the retail field anew, with nation-wide chains of grocery and other food shops, which will overshadow all the existing enterprises of that type in the United States.'
>
> . . . . .
>
> " 'As the nucleus of such chains of meat and grocery stores as they now contemplate the packers may take over most of the huge retail food store chains already existing, such as the big grocery chains, which now operate meat departments in 20,000 to 30,000 such shops in various parts of the country.
>
> " 'It will pay every investor to scrutinize closely the increasing profit potentialities of the packing organizations.' "

The spectre of meatpacking and food products merging is as ominous today as it was then. It should not

[1] 72 Cong. Rec. 1239.

[2] 72 Cong. Rec. 9336.

matter how the predatory scheme is effectuated, whether one acquires the other or vice versa. On the facts here tendered, a case has been made out for making General Host and Greyhound parties and having a hearing to determine whether they or either of them has interfered with the decree. The question is not whether, as a *de novo* matter, the combination of either with Armour constitutes a violation of the Act. The issue whether General Host or Greyhound has interfered with the decree is a narrower one. If they and Armour had designed this scheme to avoid the decree, interference would be rather obvious. Why does it matter that General Host or Greyhound, acting without the connivance of Armour, achieves the same result unilaterally? A federal court has inherent power to prevent obstruction of its authority by acts of "force, guile, or otherwise," whether or not the person charged was or was not a party defendant. See *Mississippi Valley Barge Line Co.* v. *United States,* 273 F. Supp. 1, aff'd *sub nom. Osbourne* v. *Mississippi Valley Barge Line Co.,* 389 U. S. 579. For it is an historic equity principle that even a nonparty is bound "not to interfere with, and not to obstruct, the course of justice," or treat a court order as "unworthy of notice." See *Seaward* v. *Paterson,* [1897] 1 Ch. 545, 554. Cf. Rule 65 (d), Federal Rules of Civil Procedure.

I would not dismiss the case as moot. Rather, I would remand it to the District Court for a full hearing on the issue of interference.

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

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

No. 896. Argued April 27–28, 1970—
Decided June 1, 1970

Appellees brought this suit challenging on equal protection and statutory grounds the disparity between payments under the state welfare law made to recipients in New York City and those made to recipients in certain suburban counties. The District Court issued a preliminary injunction, having found the disparity violative of equal protection. *Held:* In the light of the subsequently decided case of *Rosado* v. *Wyman,* 397 U. S. 397, the District Court should have the opportunity to pass on the propriety of granting interim relief on the basis of appellees' statutory claims or, if the question is reached, continuing the present injunction in light of the Court's decision in *Dandridge* v. *Williams,* 397 U. S. 471.

303 F. Supp. 339, vacated and remanded.

*Philip Weinberg* argued the cause for appellants. With him on the briefs were *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler,* Assistant Attorney General.

*Edward V. Sparer* argued the cause for appellees. With him on the brief were *Carl Rachlin* and *Norman Lichtenstein.*

*Peter L. Strauss* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Griswold* and *Assistant Attor-*

*ney General Ruckelshaus. Morris H. Schneider* filed a brief for the Center on Social Welfare Policy and Law et al. as *amici curiae* urging affirmance.

PER CURIAM.

Appellees commenced this action in the federal District Court for the Southern District of New York challenging on equal protection and statutory grounds § 131–a of the New York Social Services Law which provides for payments to welfare recipients in Nassau, Suffolk, and certain other New York State counties in lesser amounts than provided for residents of New York City should the Welfare Administrator determine that adequate cause exists for the differential. A three-judge court was convened and it found that appellees' likelihood of success on their constitutional claim warranted the issuance of a preliminary injunction against what it found to be the payment of welfare in violation of the Equal Protection Clause of the Fourteenth Amendment. The court found it unnecessary to consider appellees' statutory claims. We noted probable jurisdiction. 397 U. S. 903.

Subsequent to the decision of the District Court this Court rendered its decision in *Rosado* v. *Wyman,* 397 U. S. 397, wherein we held that a federal court called upon to pass upon the constitutional validity of a State's welfare program should, before reaching the constitutional issues, consider first any pendent statutory claims that are presented, notwithstanding the pendency of negotiations between the State and the Department of Health, Education, and Welfare.

In light of the foregoing, the judgment of the District Court is vacated and the case is remanded to that court for an opportunity to pass on the propriety of granting interim relief in accordance with conventional equitable principles on the basis of appellees' statutory claims, or,

if the question is reached, continuing the present injunction in light of this Court's decision in *Dandridge* v. *Williams,* 397 U. S. 471.

*It is so ordered.*

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

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

When this action was commenced by appellees, the Secretary of Health, Education, and Welfare was in the process of determining if the New York welfare provisions under attack in this case are consistent with the federal standard requiring uniform statewide application of state welfare plans. See Social Security Act § 402, as amended, 81 Stat. 877 *et seq.,* 42 U. S. C. § 602 (1964 ed., Supp. IV); 45 CFR § 233.20. Although the federal agency has not yet made a final decision, it appears from the brief submitted by the United States as *amicus curiae* that HEW has made a preliminary determination that the New York provisions do not conform to the Social Security Act's requirements. Accordingly, the statutory claim which this Court today remands to the District Court for its consideration involves a live controversy between New York and the Federal Government, and, as I said in my dissenting opinion in *Rosado* v. *Wyman,* 397 U. S. 397, 430 (1970), it is my belief that such controversies should be resolved in proceedings between the two governments involved, as provided in the Social Security Act. See, *e. g.,* 42 U. S. C. §§ 602, 1316 (1964 ed., Supp. IV). For this reason, I would vacate the judgment of the District Court and remand with directions that the complaint be dismissed.

## BLOSS ET AL. *v.* DYKEMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 1347. Decided June 1, 1970

Certiorari granted; judgment of the Michigan Court of Appeals, 17 Mich. App. 318, 169 N. W. 2d 367, reversed.

PER CURIAM.

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

THE CHIEF JUSTICE and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

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

MR. JUSTICE HARLAN, dissenting.

I would affirm the judgment of the Michigan Court of Appeals upon principles heretofore often expressed by me. See my opinions in *Roth* v. *United States,* 354 U. S. 476, 496 (1957); *Jacobellis* v. *Ohio,* 378 U. S. 184, 203 (1964); *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455 (1966). From the standpoint of what I regard as the permissible exercise of state power in this field, the materials in this case fall far short of the "borderline" movie involved in *Cain* v. *Kentucky* (reversed summarily), 397 U. S. 319 (1970), see my dissent in that case, and I am at a loss to understand how these materials can be deemed to qualify for *Redrup* treatment when only a short time ago the Court declined to accord that treatment to the materials involved in *Spicer* v. *New York,* cert. denied, 397 U. S. 1042.

## FOLLETTE, WARDEN *v.* COMACHO

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

No. 1394. Decided June 1, 1970

Certiorari granted; 421 F. 2d 822, vacated and remanded.

PER CURIAM.

The motion of the respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *McMann* v. *Richardson,* 397 U. S. 759.

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

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## HIGGINS *v.* UNITED STATES

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

No. 1183, Misc. Decided June 1, 1970

Certiorari granted; 416 F. 2d 406, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Gutknecht* v. *United States,* 396 U. S. 295.

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

## LEITCHFIELD MANUFACTURING CO., INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 1426. Decided June 1, 1970

Vacated and remanded.

PER CURIAM.

The judgment of the District Court is vacated and the case is remanded to that court for redetermination upon the basis of the record of the Interstate Commerce Commission proceedings.

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

MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN would affirm.

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

Syllabus

# ATLANTIC COAST LINE RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.

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

No. 477. Argued March 2–3, 1970—Decided June 8, 1970

As part of its dispute with the Florida East Coast railroad (FEC) respondent Brotherhood of Locomotive Engineers (BLE) in 1967 began picketing a switching yard owned and operated by Atlantic Coast Line railroad (ACL). ACL's request for an injunction to halt the picketing was denied by the Federal District Court, which held that the BLE was "free to engage in self-help," and that the Norris-LaGuardia Act and § 20 of the Clayton Act were applicable. ACL then obtained an injunction from a Florida court. After the decision in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969), holding that unions had a federally protected right to picket the terminal without interference by state court injunctions, respondent union moved in state court to dissolve the injunction, but the state judge held that *Jacksonville Terminal* was not controlling and denied the motion. The union then returned to the District Court and requested an injunction against the enforcement of the state injunction, which the District Court granted. The Court of Appeals affirmed. The union contends that the federal injunction was proper under 28 U. S. C. § 2283 either "to protect or effectuate" the District Court's 1967 denial of an injunction, or as "necessary in aid of" that court's jurisdiction. *Held:* The federal injunction was not justified under the exceptions in § 2283 and thus was improperly issued in this case. Pp. 285–297.

(a) A federal injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283. *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 515–516. Pp. 286–287.

(b) The District Court's determination in 1967 that the union had a right to "engage in self-help" under federal law, was not a decision that federal law precluded an injunction based on state law. Pp. 289–291.

(c) In 1969 the union in effect was attempting to get the District Court to decide that the state court erred in distinguishing *Jacksonville Terminal,* but such attempt to seek federal appellate review of a state decision cannot be justified as necessary "to protect or effectuate" the 1967 order. Pp. 291–293.

(d) Since the state and federal courts had concurrent jurisdiction in this case neither court could prevent a party from simultaneously pursuing claims in both courts, and an injunction was not "necessary in aid of" the District Court's jurisdiction because the state court may have acted improperly in light of *Jacksonville Terminal,* as the state court's assumption of jurisdiction over the state law claims did not hinder the federal court's jurisdiction. Pp. 294–296.

(e) While the union cannot obtain direct review of the state court decision in the lower federal courts, it can, if adversely affected by the decision or if faced with immediate irreparable injury, seek relief in the Florida appellate courts, and possibly in this Court. P. 296.

Reversed and remanded.

*Dennis G. Lyons* and *Frank X. Friedmann, Jr.,* argued the cause for petitioner. With him on the briefs were *David M. Foster, John W. Weldon,* and *John S. Cox.*

*Allan Milledge* argued the cause for respondents. With him on the brief was *Richard L. Horn.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Congress in 1793, shortly after the American Colonies became one united Nation, provided that in federal courts "a writ of injunction [shall not] be granted to stay proceedings in any court of a state." Act of March 2, 1793, § 5, 1 Stat. 335. Although certain exceptions to this general prohibition have been added, that statute, directing that state courts shall remain free from interference by federal courts, has remained in effect until this time. Today that amended statute provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court ex-

> cept as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

Despite the existence of this longstanding prohibition, in this case a federal court did enjoin the petitioner, Atlantic Coast Line Railroad Co. (ACL),[1] from invoking an injunction issued by a Florida state court which prohibited certain picketing by respondent Brotherhood of Locomotive Engineers (BLE). The case arose in the following way.

In 1967 BLE began picketing the Moncrief Yard, a switching yard located near Jacksonville, Florida, and wholly owned and operated by ACL.[2] As soon as this picketing began ACL went into federal court seeking an injunction. When the federal judge denied the request, ACL immediately went into state court and there succeeded in obtaining an injunction. No further legal action was taken in this dispute until two years later in 1969, after this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394

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[1] After this suit was instituted ACL merged with the Seaboard Air Line Railroad Co. to form the present Seaboard Coast Line Railroad Co. We will continue, as have the parties, to refer to the petitioner as ACL.

[2] There is no present labor dispute between the ACL and the BLE or any other ACL employees. ACL became involved in this case as a result of a labor dispute between the Florida East Coast Railway Co. (FEC) and its employees. FEC cars are hauled into and out of Moncrief Yard and switched around to make up trains in that yard. The BLE picketed the yard, encouraging ACL employees not to handle any FEC cars.

The initial development of the controversy is chronicled in *Railway Clerks* v. *Florida E. C. R. Co.,* 384 U. S. 238 (1966). See also, *Railroad Trainmen* v. *Atlantic C. L. R. Co.,* 362 F. 2d 649 (C. A. 5th Cir.), aff'd by an equally divided court, 385 U. S. 20 (1966); *Florida E. C. R. Co.* v. *Railroad Trainmen,* 336 F. 2d 172 (C. A. 5th Cir. 1964).

U. S. 369 (1969). In that case the Court considered the validity of a state injunction against picketing by the BLE and other unions at the Jacksonville Terminal, located immediately next to Moncrief Yard. The Court reviewed the factual situation surrounding the Jacksonville Terminal picketing and concluded that the unions had a federally protected right to picket under the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, and that that right could not be interfered with by state court injunctions. Immediately after a petition for rehearing was denied in that case, 394 U. S. 1024 (1969), the respondent BLE filed a motion in state court to dissolve the Moncrief Yard injunction, arguing that under the *Jacksonville Terminal* decision the injunction was improper. The state judge refused to dissolve the injunction, holding that this Court's *Jacksonville Terminal* decision was not controlling. The union did not elect to appeal that decision directly, but instead went back into the federal court and requested an injunction against the enforcement of the state court injunction. The District Judge granted the injunction and upon application a stay of that injunction, pending the filing and disposition of a petition for certiorari, was granted. 396 U. S. 1201 (1969). The Court of Appeals summarily affirmed on the parties' stipulation, and we granted a petition for certiorari to consider the validity of the federal court's injunction against the state court. 396 U. S. 901 (1969).

In this Court the union contends that the federal injunction was proper either "to protect or effectuate" the District Court's denial of an injunction in 1967, or as "necessary in aid of" the District Court's jurisdiction. Although the questions are by no means simple and clear, and the decision is difficult, we conclude that the injunction against the state court was not justified under either

of these two exceptions to the anti-injunction statute. We therefore hold that the federal injunction in this case was improper.

I

Before analyzing the specific legal arguments advanced in this case, we think it would be helpful to discuss the background and policy that led Congress to pass the anti-injunction statute in 1793. While all the reasons that led Congress to adopt this restriction on federal courts are not wholly clear,[3] it is certainly likely that one reason stemmed from the essentially federal nature of our national government. When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by "the supreme Law of the Land" as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies. Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights. Others felt that a complete system of federal courts to take care of federal legal problems should be provided for in the Constitution itself. This dispute resulted in compromise. One "supreme Court" was created by the Constitution, and Congress was given the power to create other federal courts. In the first Congress this power was exercised and a system of federal trial and appellate courts with limited jurisdiction was created by the Judiciary Act of 1789, 1 Stat. 73.

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[3] See the historical discussion of the origin of the 1793 statute in *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118, 129–132 (1941).

While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 9 (1940), it was necessary to work out lines of demarcation between the two systems. Some of these limits were spelled out in the 1789 Act. Others have been added by later statutes as well as judicial decisions. The 1793 anti-injunction Act was at least in part a response to these pressures.

On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three excep-

tions. We cannot accept any such contention. In 1955 when this Court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers* v. *Richman Bros.,* 348 U. S. 511, 515–516 (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

II

In this case the Florida Circuit Court enjoined the union's intended picketing, and the United States District Court enjoined the railroad "from giving effect to or availing [itself] of the benefits of" that state court order. App. 196. Both sides agree that although this federal injunction is in terms directed only at the railroad it is an injunction "to stay proceedings in a State court." It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding. *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 9 (1940); *Hill* v. *Martin,* 296 U. S. 393, 403 (1935). Thus if the injunction against the Florida court

proceedings is to be upheld, it must be "expressly authorized by Act of Congress," "necessary in aid of [the District Court's] jurisdiction," or "to protect or effectuate [that court's] judgments."

Neither party argues that there is any express congressional authorization for injunctions in this situation and we agree with that conclusion. The respondent union does contend that the injunction was proper either as a means to protect or effectuate the District Court's 1967 order, or in aid of that court's jurisdiction. We do not think that either alleged basis can be supported.

A

The argument based on protecting the 1967 order is not clearly expressed, but in essence it appears to run as follows: In 1967 the railroad sought a temporary restraining order which the union opposed. In the course of deciding that request, the United States District Court determined that the union had a federally protected right to picket Moncrief Yard and that this right could not be interfered with by state courts. When the Florida Circuit Court enjoined the picketing, the United States District Court could, in order to protect and effectuate its prior determination, enjoin enforcement of the state court injunction. Although the record on this point is not unambiguously clear, we conclude that no such interpretation of the 1967 order can be supported.

When the railroad initiated the federal suit it filed a complaint with three counts, each based entirely on alleged violations of federal law. The first two counts alleged violations of the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, and the third alleged a violation of that Act and the Interstate Commerce Act as well. Each of the counts concluded with a prayer for an injunction against the picketing. Although the union had not been formally served with the complaint and had not filed an answer,

it appeared at a hearing on a motion for a temporary restraining order and argued against the issuance of such an order. The union argued that it was a party to a labor dispute with the FEC, that it had exhausted the administrative remedies required by the Railway Labor Act, and that it was thus free to engage in "self-help," or concerted economic activity. Then the union argued that such activity could not be enjoined by the federal court. In an attempt to clarify the basis of this argument the District Judge asked: "You are basing your case solely on the Norris-LaGuardia Act?" The union's lawyer replied: "Right. I think at this point of the argument, since Norris-LaGuardia is clearly in point here." App. 63. At no point during the entire argument did either side refer to state law, the effects of that law on the picketing, or the possible preclusion of state remedies as a result of overriding federal law. The next day the District Court entered an order denying the requested restraining order. In relevant part that order included these conclusions of law:

> "3. The parties to the BLE–FEC 'major dispute,' having exhausted the procedures of the Railway Labor Act, 45 U. S. C. § 151, et seq., are now free to engage in self-help. . . .
>
> "4. The conduct of the FEC pickets and that of the responding ACL employees are a part of the FEC–BLE major dispute. . . .
>
> . . . . .
>
> "7. The Norris-LaGuardia Act, 29 U. S. C. § 101, and the Clayton Act, 29 U. S. C. § 52, are applicable to the conduct of the defendants here involved." App. 67.

In this Court the union asserts that the determination that it was "free to engage in self-help" was a determination that it had a federally protected right to picket

and that state law could not be invoked to negate that right. The railroad, on the other hand, argues that the order merely determined that the *federal* court could not enjoin the picketing, in large part because of the general prohibition in the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*, against issuance by federal courts of injunctions in labor disputes. Based solely on the state of the record when the order was entered, we are inclined to believe that the District Court did not determine whether federal law precluded an injunction based on state law. Not only was that point never argued to the court, but there is no language in the order that necessarily implies any decision on that question. In short we feel that the District Court in 1967 determined that federal law could not be invoked to enjoin the picketing at Moncrief Yard, and that the union did have a right "to engage in self-help" as far as the federal courts were concerned. But that decision is entirely different from a decision that the Railway Labor Act precludes state regulation of the picketing as well, and this latter decision is an essential prerequisite for upholding the 1969 injunction as necessary "to protect or effectuate" the 1967 order. Finally we think it highly unlikely that the brief statements in the order conceal a determination of a disputed legal point that later was to divide this Court in a 4-to-3 vote in *Jacksonville Terminal, supra,* in opinions totaling 28 pages. While judicial writing may sometimes be thought cryptic and tightly packed, the union's contention here stretches the content of the words well beyond the limits of reasonableness.

Any lingering doubts we might have as to the proper interpretation of the 1967 order are settled by references to the positions adopted by the parties later in the litigation. In response to the railroad's request for a temporary restraining order from the state court, the union

referred to the prior federal litigation, noted that it was part of a "major dispute," that it was covered by § 20 of the Clayton Act, 38 Stat. 738, 29 U. S. C. § 52 and that "[l]abor activity which is within the Clayton Act is 'immunized trade union activities.' *United States* v. *Hutcheson,* 312 U. S. 219, at pages 235–236."[4] 2 Record 105. At no point did the union appear to argue that the federal court had already determined that the railroad was precluded from obtaining an injunction under Florida law.

Similarly the union's arguments in 1969 indicate that the 1967 federal order did not determine whether federal law precluded resort to the state courts. When the union tried to dissolve the state court injunction, the argument was based entirely on the controlling effect of the *Jacksonville Terminal* decision on the picketing at Moncrief Yard. The union argued that this Court's "decision is squarely controlling upon [the Moncrief Yard] case which is identical in all material respects." 2 Record 123; see also *id.,* at 149–176. Although the union again mentioned that the federal District Judge had determined in 1967 that it was free to engage in self-help, it never argued that the 1967 order had in effect held with respect to Moncrief Yard what this Court later held was the law with respect to the Jacksonville Terminal situation. The railroad argued that *Jacksonville Terminal* was not controlling, and the Florida judge agreed.[5]

Our reading of this record is not altered by the District Court's 1969 opinion issued when the injunction

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[4] The *Hutcheson* case held that protected union activity would not be deemed violative of federal antitrust law.

[5] For purposes of this case only, we will assume, without deciding, that the Florida Circuit Court's decision was wrong in light of our decision in *Jacksonville Terminal.*

was granted two years after the 1967 order was entered. In that opinion the court said:

> "In its Order of April 26, 1967, this Court found that Plaintiff's Moncrief Yard, the area in question, 'is an integral and necessary part of [Florida East Coast Railway Company's] operations.' . . . The Court concluded furthermore that Defendants herein 'are now free to engage in self-help.' . . . The injunction of the state court, if allowed to continue in force, would effectively nullify this Court's findings and delineation of rights of the parties. The categorization of Defendants' activities as 'secondary' does not alter this state of affairs. See *Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.*, — U. S. —, 22 L. Ed. 2d 344 (1969). The prohibition of 28 U. S. C. § 2283, therefore, does not deprive this Court of jurisdiction to enter the injunction in this instance." App. 195–196.

We think the proper interpretation of that somewhat ambiguous passage can be reached only when it is considered in light of the arguments presented to the District Court by the union. In arguing that an injunction was necessary to protect the 1967 order, the union's lawyer said: "Now, the basic finding [of that order] is that we are free to engage in such self-help as is permitted under the Railway Labor Act. Now, Your Honor, at that point, did not get to the question of how broad is this right, because the Norris-LaGuardia Act prevented Your Honor from issuing an injunction. Now, how broad, then, is that right? We know, from the [*Jacksonville Terminal*] decision . . . ." 1 Record 249. The lawyer then proceeded to argue that the *Jacksonville Terminal* case had clearly revealed that the

right of self-help is beyond state court proscription in these circumstances. At no point during this hearing did the union try to argue, as it now appears to do, that the 1967 order itself had anticipated the *Jacksonville Terminal* decision. Rather the union appears to have argued that the decision of this Court in *Jacksonville Terminal* operated to define the scope of the right to self-help which the District Court had found the union entitled to exercise, and that the state court injunction interfered with that right as so defined. Considered in this light we cannot agree with the dissenting view in this case that the District Court in 1967 "by necessary implication" decided that the union had a federally protected right to picket that "could not be subverted by resort to state proceedings." *Post,* at 299. On the contrary, we read the quoted passage in the 1969 opinion as an indication that the District Court accepted the union's argument and concluded that the *Jacksonville Terminal* decision had amplified its 1967 order, and it was this amplification, rather than the original order itself, that required protection. Such a modification of an earlier order through an opinion in another case is not a "judgment" that can properly be protected by an injunction against state court proceedings.

This record, we think, conclusively shows that neither the parties themselves nor the District Court construed the 1967 order as the union now contends it should be construed. Rather we are convinced that the union in effect tried to get the Federal District Court to decide that the state court judge was wrong in distinguishing the *Jacksonville Terminal* decision. Such an attempt to seek appellate review of a state decision in the Federal District Court cannot be justified as necessary "to protect or effectuate" the 1967 order. The record simply will not support the union's contention on this point.

B

This brings us to the second prong of the union's argument in which it is suggested that even if the 1967 order did not determine the union's right to picket free from state interference, once the decision in *Jacksonville Terminal* was announced, the District Court was then free to enjoin the state court on the theory that such action was "necessary in aid of [the District Court's] jurisdiction." Again the argument is somewhat unclear, but it appears to go in this way: The District Court had acquired jurisdiction over the labor controversy in 1967 when the railroad filed its complaint, and it determined at that time that it did have jurisdiction. The dispute involved the legality of picketing by the union and the *Jacksonville Terminal* decision clearly indicated that such activity was not only legal, but was protected from state court interference. The state court had interfered with that right, and thus a federal injunction was "necessary in aid of its jurisdiction." For several reasons we cannot accept the contention.[6]

First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the

[6] The union also argues that the 1969 injunction was an aid to the federal court's jurisdiction in other pending cases arising out of this same labor dispute. This argument was not raised in the District Court and we need not consider it. In any event the reasons for rejecting the argument with respect to the 1967 order apply equally well to arguments relating to any other orders, cases, or judgments the union has advanced.

same reason that the state court is. Cf. *Amalgamated Clothing Workers* v. *Richman Bros., supra,* at 519–520. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be *"necessary in aid of"* that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case. Third, no such situation is presented here. Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. *Jacksonville Terminal, supra,* at 375–377, 390. While the railroad could probably have based its federal case on the pendent state law claims as well, *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966), it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts. Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. Cf. *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964). In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts. *Kline* v.

*Burke Constr. Co.*, 260 U. S. 226 (1922); cf. *Donovan* v. *Dallas*, 377 U. S. 408 (1964). Therefore the state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction *necessary* to aid that jurisdiction. Nor was an injunction necessary because the state court may have taken action which the federal court was certain was improper under the *Jacksonville Terminal* decision. Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well. Cf. *Natural Gas Co.* v. *Public Serv. Comm'n*, 294 U. S. 698 (1935); *United States* v. *Moscow Fire Ins. Co.*, 308 U. S. 542 (1939); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court § 441 (R. Wolfson & P. Kurland ed. 1951). Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

## III

This case is by no means an easy one. The arguments in support of the union's contentions are not insubstantial. But whatever doubts we may have are strongly affected by the general prohibition of § 2283.

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

The injunction issued by the District Court must be vacated. Since that court has not yet proceeded to a final judgment in the case, the cause is remanded to it for further proceedings in conformity with this opinion.

*It is so ordered.*

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

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion on the understanding that its holding implies no retreat from *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969). Whether or not that case controls the underlying controversy here is a question that will arise only on review of any final judgment entered in the state court proceedings respecting that controversy.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, dissenting.

My disagreement with the Court in this case is a relatively narrow one. I do not disagree with much that is said concerning the history and policies underlying 28 U. S. C. § 2283. Nor do I dispute the Court's holding on the basis of *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511 (1955), that federal courts do not have authority to enjoin state proceedings merely because it is asserted that the state court is improperly asserting jurisdiction in an area pre-empted by federal

law or federal procedures. Nevertheless, in my view the District Court had discretion to enjoin the state proceedings in the present case because it acted pursuant to an explicit exception to the prohibition of § 2283, that is, "to protect or effectuate [the District Court's] judgments."

The pertinent portions of the District Court's 1967 order, denying ACL's application for injunctive relief and defining BLE's federally protected right to picket at the Moncrief Yard, are as follows:

> "3. The parties to the BLE–FEC 'major dispute,' having exhausted the procedures of the Railway Labor Act, 45 U. S. C. § 151, et seq., are now free to engage in self-help. *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. R.*, 372 U. S. 284 (1963).
>
> "4. The conduct of the FEC pickets and that of the responding ACL employees are a part of the FEC–BLE major dispute. *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry.*, 346 F. 2d 673 (5th Cir. 1965).
>
> . . . . .
>
> "6. The 'economic self-interest' of the picketing union in putting a stop to the interchange services daily performed within the premises of plaintiff's yard facilities, and in the normal, day-to-day operation of FEC trains operating with strike replacement crews within these facilities is present here. The 'economic self-interest' of the responding employees in refusing to handle this interchange and in making common cause with the striking FEC engineers is similarly present. *Brotherhood of R. R. Trainmen* v. *Atlantic Coast Line R. R.*, 362 F. 2d 649 (5th Cir.), *aff'd*, 385 U. S. 20 (1966).
>
> "7. The Norris-LaGuardia Act, 29 U. S. C. § 101, and the Clayton Act, 29 U. S. C. § 52, are appli-

cable to the conduct of the defendants here involved. See *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry.*, 346 F. 2d 673 (5th Cir. 1965); *Brotherhood of R. R. Trainmen* v. *Atlantic Coast Line Railroad*, 362 F. 2d 649 (5th Cir.), *aff'd*, 385 U. S. 20 (1966)." App. 67–68.

The thrust of the District Judge's order is that the procedures prescribed by the Railway Labor Act had been exhausted in relation to the BLE–FEC dispute, that BLE was therefore free to engage in self-help tactics, and that it was properly exercising this federal right when it engaged in the picketing that ACL sought to enjoin. This interpretation of the order is supported by the fact that the District Judge relied upon *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284 (1963), in which this Court held that the parties had exhausted all available procedures under the Railway Labor Act and thus were free to resort to self-help. Furthermore, the District Court invoked § 20 of the Clayton Act, 29 U. S. C. § 52, which provides that certain union activities, including striking and peaceful picketing, shall not "be considered or held to be violations of any law of the United States." Thus, contrary to petitioner's contention, the District Court obviously decided considerably more than the threshold question of whether the Norris-LaGuardia Act withdrew jurisdiction to grant federal injunctive relief in the circumstances of this case.

In my view, what the District Court decided in 1967 was that BLE had a federally protected right to picket at the Moncrief Yard and, by necessary implication, that this right could not be subverted by resort to state proceedings. I find it difficult indeed to ascribe to the District Judge the views that the Court now says he held, namely, that ACL, merely by marching across the street to the state court, could render wholly nugatory the

District Judge's declaration that BLE had a federally protected right to strike at the Moncrief Yard.

Moreover, it is readily apparent from the District Court's 1969 order enjoining the state proceedings that the District Judge viewed his 1967 order as delineating the rights of the respective parties, and, more particularly, as establishing BLE's right to conduct the picketing in question under paramount federal law. This interpretation should be accepted as controlling, for certainly the District Judge is in the best position to render an authoritative interpretation of his own order. In the 1969 injunction order, after distinguishing *Richman Bros.* and concluding that the District Court could grant injunctive relief "in aid of its jurisdiction," the court alternatively held that it had power to stay the state court proceedings so as to effectuate its 1967 order:

> "In its Order of April 26, 1967, this Court found that Plaintiff's Moncrief Yard, the area in question, 'is an integral and necessary part of [Florida East Coast Railway Company's] operations.' . . . The Court concluded furthermore that Defendants herein 'are now free to engage in self-help.' . . . The injunction of the state court, if allowed to continue in force, would effectively nullify this Court's findings and delineation of rights of the parties. The categorization of Defendants' activities as 'secondary' does not alter this state of affairs. See *Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.*, — U. S. —, 22 L. Ed. 2d 344 (1969). The prohibition of 28 U. S. C. § 2283, therefore, does not deprive this Court of jurisdiction to enter the injunction in this instance. *Capital Service, Inc.* v. *NLRB,* 347 U. S. 501 (1954); [*United Indus. Workers of the Seafarers Int'l Union*] v. *Board of Trustees of Galveston Wharves,* 400 F. 2d 320 (5th Cir. 1968)." App. 195–196.

The District Judge's reliance upon *Capital Service, Inc.* v. *NLRB,* 347 U. S. 501 (1954),[1] and *United Indus. Workers of the Seafarers Int'l Union* v. *Board of Trustees of Galveston Wharves,* 400 F. 2d 320 (C. A. 5th Cir. 1968), a fact ignored by the Court, is particularly significant, for both of these cases sustained injunctive relief against state court proceedings that threatened to impair the ability of the federal courts to make their judgments effective. Moreover, no matter how the arguments of counsel before the District Court are understood, it is apparent that the District Judge did not bottom the 1969 injunction upon our intervening decision in *Jacksonville Terminal* but merely cited that case to support the court's 1967 conclusion that the picketing in question constituted federally protected activity whether or not it had "secondary" aspects.

The Court seeks to bolster its own reading of the District Court's 1967 and 1969 orders by finding them "somewhat ambiguous" and then by referring to the arguments of counsel before that court and the state court both in 1967 and 1969. In the first place, it should be noted that the argument of counsel is not always a sure guide to the interpretation of a subsequent judicial decree or opinion, because it not infrequently happens, in this Court as well as others, that a decision is based on premises not elaborated by counsel. Indeed, occasionally a decision is grounded on a theory not even suggested by counsel's argument.

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[1] In *Capital Service* the NLRB sought an injunction against certain picketing under § 10 (l) of the National Labor Relations Act, 29 U. S. C. § 160 (*l*). Previously a state court had restrained the very conduct that the District Court was asked to enjoin. This Court decided that the District Court had authority to enjoin the state proceedings so that it would have "unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act." 347 U. S., at 505–506.

In any event, I believe that the Court has misinterpreted the argument of counsel in the lower courts. While I do not find the various proceedings below entirely free of confusion with respect to BLE's legal theory, there appear to be at least two strands to its argument. To be sure, BLE did contend, particularly in the state proceedings, that our decision in *Jacksonville Terminal* was controlling on the merits.[2] As I read the record, however, BLE also argued that the state injunction should either be dissolved or enjoined so that it would not interfere with the federal court's 1967 decree. Thus, in moving for a preliminary injunction against the state court proceedings, BLE relied both upon *Jacksonville Terminal* and upon the power of the District Court to issue the injunction "to protect and effectuate the judgment of this Court dated April 26, 1967." 1 Record 30–31.

Furthermore, both in support of the motion for a preliminary injunction and during oral argument in the District Court, BLE relied extensively upon *Capital Service, Inc.* v. *NLRB, supra,* and *United Indus. Workers of the Seafarers Int'l Union* v. *Board of Trustees of Galveston Wharves, supra.* See 1 Record 33–34, 243–245, 247, 253–257, 279–281. A consideration of the factual context of the latter case is instructive in understanding BLE's position below. In *Galveston Wharves*

[2] It is hardly surprising that BLE emphasized the *Jacksonville Terminal* decision in the state proceedings to dissolve the state injunction, and this reliance is hardly inconsistent with the position that the federal court in 1967 had authoritatively delineated BLE's federally protected right to strike at the Moncrief Yard. BLE may well have thought that its contention that *Jacksonville Terminal* was controlling on the issue of pre-emption would carry more weight with the state court than the alternative position that the protected character of the BLE picketing had been previously determined by the Federal District Court.

the union fully complied with the pertinent provisions of the Railway Labor Act, but, because the employer had refused to bargain concerning a "major" dispute, the union was free to strike. Meanwhile the employer obtained from a state court an injunction against any picketing on or near its premises. The Federal District Court ordered the parties to bargain and enjoined the employer from giving effect to, or seeking enforcement of, the state court injunction. The Court of Appeals for the Fifth Circuit affirmed the granting of injunctive relief on the ground that this action was within the § 2283 exception relating to the effectuation of federal court judgments. The Court of Appeals held that the union had a right to strike under the Railway Labor Act and that that right could not be frustrated or interfered with by state court injunctions. Similarly, BLE argued below that resort to state equitable proceedings should not be permitted to undermine the District Court's prior determination that BLE had a right to picket at the Moncrief Yard. As its injunction order indicates, the District Court was persuaded by BLE's argument. After the federal injunction was issued, in proceedings brought by ACL to stay the effectiveness of the order, BLE adhered to its position that the state injunction, if not enjoined, would nullify the District Court's 1967 order delineating the rights of the parties. 1 Record 499, 505, 508–509. Again BLE relied upon the intervening decision in *Jacksonville Terminal,* but it did so primarily in support of the contention that the 1967 order was proper insofar as it prohibited state court interference with the picketing at the Moncrief Yard. 1 Record 509–510. In essence, BLE argued that the 1967 order had correctly anticipated *Jacksonville Terminal.* See *ibid.*

In the state courts BLE adopted a position entirely consistent with the foregoing. For example, in opposing

ACL's application for a temporary injunction against the picketing, BLE contended that the District Court had previously held that under controlling federal law BLE's right to picket had been established, that this declaration of rights was *res judicata* in the state proceedings, and consequently that state proscription of the picketing was improper. 2 Record 104–105.

In sum, to the extent that the argument of counsel is an interpretive guide to what the District Court actually decided in its 1967 and 1969 orders, the Court's conclusion that the record "conclusively shows that neither the parties themselves nor the District Court construed the 1967 order" to preclude resort to state remedies to prohibit the Moncrief Yard picketing (*ante,* at 293) is wholly erroneous. And, quite apart from counsel's argument, it is apparent that the District Judge viewed his own 1967 order as delineating a federally protected right for the BLE picketing in question. Whether the District Court's anticipation of *Jacksonville Terminal* was correct in the circumstances of the present case is not now before us. But if the 1967 order is so understood, it is undeniably clear that the subsequent injunction against the state proceedings was both necessary and appropriate to preserve the integrity of the 1967 order.

In justifying its niggardly construction of the District Court's orders, the Court takes the position that any doubts concerning the propriety of an injunction against state proceedings should be resolved against the granting of injunctive relief. Unquestionably § 2283 manifests a general design on the part of Congress that federal courts not precipitately interfere with the orderly determination of controversies in state proceedings. However, this policy of nonintervention is by no means absolute, as the explicit exceptions in § 2283 make entirely clear. Thus, § 2283 itself evinces a congressional intent that

resort to state proceedings not be permitted to undermine a prior judgment of a federal court. But that is exactly what has occurred in the present case. Indeed, the federal determination that BLE may picket at the Moncrief Yard has been rendered wholly ineffective by the state injunction. The crippling restrictions that the Court today places upon the power of the District Court to effectuate and protect its orders are totally inconsistent with both the plain language of § 2283 and the policies underlying that statutory provision.

Accordingly, I would affirm the judgment of the Court of Appeals sustaining the District Court's grant of injunctive relief against petitioner's giving effect to, or availing itself of, the benefit of the state court injunction.

# HELLENIC LINES LTD. ET AL. *v.* RHODITIS

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

No. 661. Argued April 21, 1970—
Decided June 8, 1970

Respondent, a Greek seaman employed under a Greek contract, sought recovery under the Jones Act for injuries sustained on a ship of Greek registry while in American territorial waters. The vessel is operated by petitioner Greek corporation, which has its largest office in New York and another office in New Orleans, and more than 95% of whose stock is owned by a United States domiciliary, who is a Greek citizen. The income of the ship, which operates between the United States and the Middle East, is from cargo either originating or terminating in the United States. The District Court rendered judgment for respondent. The Court of Appeals affirmed. *Held:* In the totality of the circumstances of this case, which is factually distinguishable from *Lauritzen* v. *Larsen,* 345 U. S. 571, the Jones Act is applicable, the alien owner's substantial and continuing contacts with this country outweighing other factors against the Act's applicability here. Pp. 307–310.

412 F. 2d 919, affirmed.

*James M. Estabrook* argued the cause for petitioners. On the briefs was *George F. Wood.*

*Joseph B. Stahl* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *Mr. Estabrook* and *David P. H. Watson* for the Royal Greek Government, and by *John R. Sheneman* and *Edwin K. Reid* for the Greek Chamber of Shipping et al.

Briefs of *amici curiae* urging affirmance were filed by *Arthur J. Mandell* for the American Trial Lawyers Association, and by *Abraham E. Freedman* for the National Maritime Union of America.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit under the Jones Act [1] by a seaman who was injured aboard the ship *Hellenic Hero* in the Port of New Orleans. The District Court, sitting without a jury, rendered judgment for the seaman, 273 F. Supp. 248. The Court of Appeals affirmed, 412 F. 2d 919. The case is here on petition for a writ of certiorari which we granted, 396 U. S. 1000, in light of the conflict between the decision below and *Tsakonites* v. *Transpacific Carriers Corp.*, 368 F. 2d 426, in the Second Circuit.

Petitioner [2] Hellenic Lines Ltd. is a Greek corporation that has its largest office in New York and another office in New Orleans. More than 95% of its stock [3] is owned by a United States domiciliary who is a Greek citizen—Pericles G. Callimanopoulos (whom we call Pericles). He lives in Connecticut and manages the corporation out of New York. He has lived in this coun-

[1] The Act provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 41 Stat. 1007, 46 U. S. C. § 688.

[2] The other petitioner, Universal Cargo Carriers Inc., is a Panamanian corporation which owns the *Hellenic Hero;* but *Hellenic Hero* is managed by petitioner Hellenic Lines Ltd., a Greek corporation.

[3] Pericles owns in excess of 95% of the stock of both petitioners.

try since 1945. The ship *Hellenic Hero* is engaged in regularly scheduled runs between various ports of the United States and the Middle East, Pakistan, and India. The District Court found that its entire income is from cargo either originating or terminating in the United States.

Respondent, the seaman, signed on in Greece, and he is a Greek citizen. His contract of employment provides that Greek law and a Greek collective-bargaining agreement apply between the employer and the seaman and that all claims arising out of the employment contract are to be adjudicated by a Greek court. And it seems to be conceded that respondent could obtain relief through Greek courts, if he desired.

The Jones Act speaks only of "the defendant employer" without any qualifications. In *Lauritzen* v. *Larsen*, 345 U. S. 571, however, we listed seven factors to be considered in determining whether a particular shipowner should be held to be an "employer" for Jones Act purposes:

> (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.

Of these seven factors it is urged that four are in favor of the shipowner and against jurisdiction: the ship's flag is Greek; the injured seaman is Greek; the employment contract is Greek; and there is a foreign forum available to the injured seaman.

The *Lauritzen* test, however, is not a mechanical one. 345 U. S., at 582. We indicated that the flag that a ship flies may, at times, alone be sufficient. *Id.*, at 585–586.

The significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction.[4] Moreover, the list of seven factors in *Lauritzen* was not intended as exhaustive. As held in *Pavlou* v. *Ocean Traders Marine Corp.*, 211 F. Supp. 320, 325, and approved by the Court of Appeals in the present case, 412 F. 2d, at 923 n. 7, the shipowner's *base of operations* is another factor of importance in determining whether the Jones Act is applicable; and there well may be others.

In *Lauritzen* the injured seaman had been hired in and was returned to the United States, and the shipowner was served here. Those were the only contacts of that shipping operation with this country.

The present case is quite different.

Pericles became a lawful permanent resident alien in 1952. We extend to such an alien the same constitutional protections of due process that we accord citizens.[5]

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[4] Judge Medina, speaking for the Court of Appeals for the Second Circuit, correctly stated the problem in the following words:

"[T]he decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial. Thus each factor is to be 'weighed' and 'evaluated' only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of whether all the factors present add up to the necessary substantiality. Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act." *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437, 441.

[5] "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our

*Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 596. The injury occurred here. The forum is a United States court. Pericles' base of operations is New York. The *Hellenic Hero* was not a casual visitor; rather, it and many of its sister ships were earning income from cargo originating or terminating here. We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act "employer." The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country. If, as stated in *Bartholomew* v. *Universe Tankships Inc.,* 263 F. 2d 437, the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States. By that test the Court of Appeals was clearly right in holding that petitioner Hellenic Lines was an "employer" under the Jones Act.

*Affirmed.*

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borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority." *Bridges* v. *Wixon,* 326 U. S. 135, 161 (concurring opinion).

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

I dissent from today's decision holding that a Greek seaman who signs articles in Greece for employment on a Greek-owned, Greek-flag vessel may recover under the Jones Act for shipboard injuries sustained while the vessel was in American territorial waters. This result is supported neither by precedent, nor realistic policy, and in my opinion is far removed from any intention that can reasonably be ascribed to Congress.

A

Section 688 of Title 46, U. S. C., 41 Stat. 1007, the Jones Act, provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The language of § 688 is, as Mr. Justice Jackson noted in *Lauritzen* v. *Larsen,* 345 U. S. 571 (1953), all-embracing. By its terms it is not limited to American

seamen nor to vessels bearing the American flag. Yet despite the sweeping language it can hardly be doubted that congressional concern stopped short of the lengths to which the literal terms of the statute carry the Jones Act. This was emphasized in *Lauritzen* which pointed out that Congress wrote against a backdrop of "usage as old as the Nation," that "such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." 345 U. S., at 577. This principle the Court reiterated in *Romero* v. *International Terminal Co.,* 358 U. S. 354 (1959), where we reaffirmed the presumption that domestic legislation has been enacted with "respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." 358 U. S., at 383.

This Court only recently applied this principle in *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963), where we were called upon to determine whether labor relations dealing with an alien crew on a foreign-flag vessel, beneficially owned by an American corporation, affected "commerce" within the meaning of the National Labor Relations Act. In holding that the Act was not "intended to have any application to foreign registered vessels employing alien seamen," the Court declined to rely on the beneficial ownership of the vessel and other "substantial United States contacts," including regular visits to the United States and the "integrated maritime operation" of the United Fruit Company, the beneficial owner of the vessel, to override the well-settled principle that the law of the country whose flag a ship flies governs shipboard transactions, absent some "clear expression" from Congress to the contrary. See *Wildenhus's Case,* 120 U. S. 1 (1887); *United States* v. *Flores,* 289 U. S. 137, 155–159 (1933); *Cunard Steamship Co.* v. *Mellon,*

262 U. S. 100, 124 (1923); cf. *Murray* v. *The Charming Betsy,* 2 Cranch 64, 118 (1804).[1]

The *McCulloch* case followed a course marked early in our jurisprudence, and, in fact, built upon *Lauritzen* which had announced that the law of the flag, "the most venerable and universal rule of maritime law," would in Jones Act cases "overbear most other connecting events in determining applicable law . . . unless some heavy counterweight appears." 345 U. S., at 584, 585–586.

Such a counterweight would exist only in circumstances where the application of the American rule of law would further the purpose of Congress. While some legislation in its purpose obviously requires extension beyond our borders to achieve national policy, this is not so, in my opinion, with an Act concerned with prescribing particular remedies, rather than one regulating commerce or creating a standard for conduct.

The only justification that I can see for extending extraterritorially a remedial-type provision like § 688

[1] The principle of deference to the law of the flag had its origins in the fiction that the vessel was an extension of the sovereign territory of the country whose ensign it flew. As Mr. Justice Jackson noted in *Lauritzen,* the principle draws strength from the practical necessity of providing predictable rules for shipboard conduct, rules that would, under conventional territorial principles, be changing as the vessel traveled over the high seas and through different territorial waters. "It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect. [Citations omitted.] But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. . . ." *United States* v. *Flores,* 289 U. S., at 155–156. See Restatement, Conflict of Laws §§ 405, 406 (1934).

is that the injured seaman is an individual whose well-being is a concern of this country. It was for this reason that *Lauritzen* recognized the residence of the plaintiff as a factor that should properly be considered in deciding who is a "seaman" as Congress employed that term in § 688. See D. Cavers, The Choice-of-Law Process 96–97 (1965). In so doing it reflected earlier decisions where recovery was had by resident alien seamen who were serving aboard foreign-flag vessels. See, *e. g., Gambera* v. *Bergoty,* 132 F. 2d 414 (C. A. 2d Cir. 1942); cf. *Uravic* v. *F. Jarka Co.,* 282 U. S. 234 (1931).

In the early decisions involving citizen and resident alien seamen serving on foreign vessels, some additional factor, such as the vessel's presence in American waters or beneficial American ownership, was considered to be an element justifying recovery. See *Uravic* v. *F. Jarka Co., supra; Gerradin* v. *United Fruit Co.,* 60 F. 2d 927 (C. A. 2d Cir. 1932); compare *Gambera* v. *Bergoty, supra,* with *O'Neill* v. *Cunard White Star,* 160 F. 2d 446 (C. A. 2d Cir. 1947). *Lauritzen* in enumerating these factors ("contacts") as independent considerations, was attempting to focus analysis on those factors that are the necessary ingredients for a statutory cause of action: first, as a matter of statutory construction, is plaintiff within that class of seamen that Congress intended to cover by the statute? and, second, is there a sufficient nexus between the defendant and this country so as to justify the assertion of legislative jurisdiction?[2] In other words the Court must define "seaman" and "employer" as those words are used in

[2] There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction. See, *e. g., Home Ins. Co.* v. *Dick,* 281 U. S. 397 (1930); *Watson* v. *Employers Liability Assurance Corp.,* 348 U. S. 66 (1954).

§ 688. In this regard the *situs* of the accident or the vessel's contacts with this country by virtue of its beneficial ownership or the frequency of calls at our ports simply serves as an adequate nexus between this country and defendant to assert jurisdiction in a case where congressional policy is otherwise furthered. But no matter how qualitatively substantial or numerous these kinds of contacts may be, they have no bearing in themselves on whether Jones Act recovery is appropriate in a given instance. For transactions occurring aboard foreign-flag vessels that question should be answered by reference to the plaintiff's relationship to this country. See Note, Admiralty and the Choice of Law: *Lauritzen* v. *Larsen* Applied, 47 Va. L. Rev. 1400 (1961).

Viewed in this perspective, today's decision and decisions of several lower courts that have taken the phenomenon of "convenient" foreign registry as a wedge for displacing the law of the flag, see, *e. g., Southern Cross Steamship Co.* v. *Firipis,* 285 F. 2d 651 (C. A. 4th Cir. 1960); *Pavlou* v. *Ocean Traders Marine Corp.,* 211 F. Supp. 320 (D. C. S. D. N. Y. 1962); *Voyiatzis* v. *National Shipping & Trading Corp.,* 199 F. Supp. 920 (D. C. S. D. N. Y. 1961), have, I believe, misconstrued these basic premises on which *Lauritzen* was founded. This is underscored by the fact that the *Lauritzen* allusion to the practice of American owners of finding a "convenient" flag "to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries," 345 U. S., at 587, was prefaced by citation and discussion of *Skiriotes* v. *Florida,* 313 U. S. 69 (1941), and *Steele* v. *Bulova Watch Co.,* 344 U. S. 280 (1952), both of which dealt with the question of when legislative jurisdiction existed to apply domestic law to American nationals abroad. In both cases the application of domestic law

presupposed or construed legislative purpose to be furthered by reaching across the border.[3]

The *Lauritzen* statement, lifted out of context, has acquired a dynamism and become the justification for recovery by foreign seamen simply on the ground that convenient "registry" somehow circumvents an obligation that Congress desired to impose on all owners within its jurisdiction.[4]

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[3] In *Skiriotes* the precise question was whether a State could prohibit by statute the use of diving equipment for the purpose of gathering deep sea sponges in waters within its territorial limits. This Court sustained the State's legislative jurisdiction to regulate the conduct of its own citizens. Thus the Court said: "Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the . . . divers' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved. No right of a citizen of another State is here asserted. The question is solely between appellant and his own State. . . . If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest . . . ." 313 U. S., at 76–77.

*Steele* involved the question of whether a district court "has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States." 344 U. S., at 281. There was no question that plaintiff had suffered the injury and American commerce had been adversely affected in the way that the Lanham Act sought to prevent. The court concluded that in such circumstances liability could not be avoided simply by performing the forbidden acts in a foreign territory. Cf. *Continental Ore Co.* v. *Union Carbide*, 370 U. S. 690, 704 (1962); *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927).

[4] The Second Circuit quite properly relied on the beneficial ownership of the ship to permit recovery in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (C. A. 2d Cir. 1959), where the

This underlies today's decision which relies on the fact that Hellenic Lines is an American-based operation and its vessels would be accorded a competitive advantage over American-flag vessels were we to permit petitioners to avoid responsibility under the Jones Act. Liability is only one factor that contributes to the higher cost of operating an American-flag vessel. Indeed, recognizing the insurance factor, it is doubtful that this factor is a significant contribution to the competitive advantage of foreign-flag ships, especially given the higher crew wages (see 46 U. S. C. § 1132 requiring American crews) and construction costs for American-flag ships, which must be built in American yards if they are to participate in the congressional programs specifically designed to offset the higher costs that the Court today takes as justification for displacing settled international principles of choice of law. See, *e. g.*, 46 U. S. C. § 883 (coastwise trade); 46 U. S. C. § 1180 (subsidy). See generally S. Lawrence, United States Merchant Shipping Policies and Politics 61–67 (1966).

Even were Jones Act liability a significant uncompensated cost in the operation of an American ship, I could not regard this as a reason for extending Jones Act recovery to foreign seamen when the underlying concern of the legislation before us is the adjustment of the risk of loss between individuals and not the regulation of commerce or competition.

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injured plaintiff was an American domiciliary. *Bartholomew*, unfortunately, apprehended what I conceive to be unintended reverberations in Justice Jackson's *Lauritzen* language which it all but echoed: "looking through the facade of foreign registration and incorporation to the American ownership . . . is essential unless the purposes of the Jones Act are to be frustrated by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag." 263 F. 2d 437, 442.

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Today's decision suggests that courts have become mesmerized by contacts, and notwithstanding the purported eschewal of a mechanical application of the *Lauritzen* test, they have lost sight of the primary purpose of *Lauritzen* which, as I conceive it, was to reconcile the all-embracing language of the Jones Act with those principles of comity embodied in international and maritime law that are designed to "foster amicable and workable commercial relations." 345 U. S., at 582. *Lauritzen*, properly understood, should, I submit, be taken to focus the judicial inquiry on the purpose of Congress and the presence or absence of an adequate basis for the assertion of American jurisdiction, when that purpose may be furthered by application of the statute in the circumstances presented.

Where, as in the case before us, the injured plaintiff has no American ties, the inquiry should be directed toward determining what jurisdiction is primarily concerned with plaintiff's welfare and whether that jurisdiction's rule may, consistent with those notions of due process that determine the presence of legislative jurisdiction, govern recovery. In the case before us, there is no reason to disregard either the law of the flag or plaintiff's contractual undertaking to accept Greek law as controlling, thereby in effect assuming that he signed articles under conditions that would justify disregarding the contractual choice of law. Rhoditis is a Greek national who resides in Greece. Under these circumstances Greek law provides the appropriate rule.

I would reverse the judgment of the Court of Appeals, and hold that the Jones Act affords no redress to this seaman.

# MOON *v.* MARYLAND

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 267. Argued April 22, 1970—Decided June 8, 1970

After petitioner's first conviction was set aside on appeal, he was retried for the same offense, convicted, and given a more severe sentence than before. Following the grant of a petition for a writ of certiorari to consider the question of the retroactivity of *North Carolina* v. *Pearce,* 395 U. S. 711, facts emerged from which it appears that there is no claim that the due process standards of that case have been violated here. The writ is therefore dismissed as improvidently granted.

250 Md. 468, 243 A. 2d 564, certiorari dismissed as improvidently granted.

*Robert Anthony Jacques* argued the cause and filed a brief for petitioner.

*Edward F. Borgerding,* Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief was *Francis B. Burch,* Attorney General.

PER CURIAM.

"When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" This was the question the Court dealt with last Term in *North Carolina* v. *Pearce,* 395 U. S. 711. We held in that case that there exists no absolute constitutional bar to the imposition of a harsher sentence upon retrial, but that due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.,* at 725. "In order to assure the

absence of such a motivation," we held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.*, at 726. The *Pearce* case was decided on June 23, 1969.

In the present case the petitioner was found guilty of armed robbery by a Maryland jury and sentenced by the trial judge to 12 years' imprisonment. The conviction was set aside on appeal by the Maryland Court of Appeals. At a second trial for the same offense in 1966 the petitioner was again convicted, and this time the trial judge imposed a sentence of 20 years' imprisonment, less full credit for time served under the original sentence. This second conviction was affirmed on appeal. 250 Md. 468, 243 A. 2d 564. We granted certiorari, 395 U. S. 975, requesting counsel to brief and argue the question of the retroactivity of *North Carolina* v. *Pearce, supra.*

The facts that have emerged since the grant of certiorari impel us to dismiss the writ as improvidently granted. As an appendix to its brief, the respondent has filed an affidavit of the judge who presided at the second trial, setting out in detail the reasons he imposed the 20-year prison sentence. Those reasons clearly include "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." But the dispositive development is that counsel for the petitioner has now made clear that there is no claim in this case that the due process standard of *Pearce* was violated. As counsel forthrightly stated in the course of oral argu-

ment, "I have never contended that Judge Pugh was vindictive."

Accordingly, the writ is dismissed as improvidently granted.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN would reverse the judgment below based on his separate opinions in *Desist* v. *United States,* 394 U. S. 244, 256, and in *North Carolina* v. *Pearce,* 395 U. S. 711, 744.

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

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was first convicted of armed robbery in 1964 and received a 12-year sentence. On appeal the judgment was reversed. He was tried again in 1966 for armed robbery, again convicted, and this time received a sentence of 20 years. Under Md. Ann. Code, Art. 27, § 488 (1967 Repl. Vol.), the maximum punishment possible was 20 years. As I stated in my separate opinion in *North Carolina* v. *Pearce,* 395 U. S. 711, 726, 727: "He [the defendant] risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again." That is the respect I think is due the constitutional guarantee against double jeopardy.

I would reverse the judgment below.

# DEPARTMENT OF SOCIAL SERVICES OF IOWA ET AL. *v.* DIMERY ET AL.

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

No. 1491. Decided June 8, 1970

Vacated and remanded.

PER CURIAM.

The motion of the appellees 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 *Reetz* v. *Bozanich,* 397 U. S. 82.

MR. JUSTICE DOUGLAS dissents from the remand of this case.

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

# PRICE *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 269. Argued April 27, 1970—Decided June 15, 1970

Petitioner was tried for murder, found guilty of the lesser included offense of voluntary manslaughter, and sentenced to 10 to 15 years' imprisonment. Following reversal of that conviction on appeal, he was retried for murder, despite his double jeopardy claim, again found guilty of voluntary manslaughter, and sentenced to 10 years' imprisonment. The Georgia Court of Appeals affirmed the second conviction, rejecting, on the authority of *Brantley* v. *State*, 132 Ga. 573, 64 S. E. 676, aff'd, 217 U. S. 284, petitioner's contention that his retrial for murder constituted double jeopardy. The Georgia Supreme Court denied certiorari. *Held:*

1. Though under the continuing jeopardy principle (see *Green* v. *United States*, 355 U. S. 184, 189), petitioner could be retried for voluntary manslaughter, the lesser included offense, he could not, under the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Fourteenth Amendment, be retried and subjected to the hazard of conviction for murder, of which he had been impliedly acquitted when the jury returned a verdict on the lesser included offense but refused to return a guilty verdict on that greater offense. *Brantley*, *supra*, is deemed overruled by this Court's subsequent decisions. Pp. 326–330.

2. In view of the hazard of conviction of murder in the second trial and the possible effect upon the jury of the murder charge, the second jeopardy was not harmless error. Pp. 331–332.

3. The issue whether petitioner can be retried for voluntary manslaughter under Georgia law is to be resolved on remand. P. 332.

118 Ga. App. 207, 163 S. E. 2d 243, reversed and remanded.

*Allyn M. Wallace* argued the cause and filed a brief for petitioner.

*Mathew Robins*, Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief

were *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Marion O. Gordon,* Assistant Attorney General.

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

We granted the writ to consider the power of a State to retry an accused for murder after an earlier guilty verdict on the lesser included offense of voluntary manslaughter had been set aside because of a trial error.

Petitioner was charged with the killing of Johnnie Mae Dupree in an indictment for the offense of murder filed in the Superior Court of Effingham County, Georgia. He entered a plea of not guilty and was tried on October 17, 1962. The jury returned a verdict of guilty to the lesser included crime of voluntary manslaughter and fixed the sentence at 10 to 15 years in the state penitentiary. The jury's verdict made no reference to the charge of murder.

The Court of Appeals of Georgia reversed the conviction because of an erroneous jury instruction and ordered a new trial. *Price* v. *State,* 108 Ga. App. 581, 133 S. E. 2d 916 (1963).

On October 20, 1967, petitioner was again placed on trial for murder under the original indictment. Before the commencement of the second trial petitioner entered a plea of *autrefois acquit,* claiming that to place him again on trial for the offense of murder would expose him to double jeopardy in view of the verdict of voluntary manslaughter at the initial trial. The trial judge rejected the plea and, at the close of the trial, included instructions on the offense of murder in his charge to the jury so that the jury could have rendered a verdict of guilty on that offense. That jury, like the first, found petitioner guilty of voluntary manslaughter, and then fixed the penalty at 10 years' imprisonment.

Petitioner sought direct review of his second conviction in the Supreme Court of Georgia,[1] but that court transferred the case to the Court of Appeals of Georgia, declaring that "[o]nly questions as to the application of plain and unambiguous provisions of the Constitution of the United States being involved, . . . the case is one for the consideration of the Court of Appeals . . . ." *Price* v. *State,* 224 Ga. 306, 307, 161 S. E. 2d 825, 826 (1968).

The Georgia Court of Appeals then heard the appeal and affirmed the second conviction, rejecting petitioner's argument, among others, that his retrial for murder constituted double jeopardy. *Price* v. *State,* 118 Ga. App. 207, 163 S. E. 2d 243 (1968). The Court of Appeals held that in *Brantley* v. *State,* 132 Ga. 573, 64 S. E. 676 (1909), aff'd, 217 U. S. 284 (1910), the Georgia Supreme Court had decided this question adversely to petitioner. The Court of Appeals then quoted from the *Brantley* case's syllabus:

> "When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquittal of the crime of murder, or former jeopardy in regard thereto." 118 Ga. App., at 208, 163 S. E. 2d, at 244.

Petitioner sought a rehearing, contending, as he contends here, that *Brantley* was no longer controlling. He relied on *Green* v. *United States,* 355 U. S. 184 (1957), and

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[1] Georgia's Constitution provides for direct review in the Georgia Supreme Court of, among others, "all cases that involve the construction of the Constitution of the State of Georgia or of the United States . . . ." Ga. Const., Art. VI, § 2, ¶ 4.

*United States ex rel. Hetenyi* v. *Wilkins,* 348 F. 2d 844 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 913 (1966). His contention was rejected. In deciding that *Brantley* was still a binding precedent as to it, the Georgia Court of Appeals noted that the Georgia Supreme Court had transferred the case to it as involving the application of only "plain and unambiguous" constitutional provisions. The petitioner's motion was then denied. Thereafter the Georgia Supreme Court denied certiorari, and petitioner sought review in this Court. We granted the writ, 395 U. S. 975 (1969), and now reverse.

(1)

In *United States* v. *Ball,* 163 U. S. 662, 669 (1896), this Court observed: "The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . . ." (Emphasis added.) The "twice put in jeopardy" language of the Constitution thus relates to a potential, *i. e.,* the risk that an accused for a second time will be convicted of the "same offense" for which he was initially tried.

The circumstances that give rise to such a forbidden potential have been the subject of much discussion in this Court. In the *Ball* case, for example, the Court expressly rejected the view that the double jeopardy provision prevented a second trial when a conviction had been set aside. In so doing, it effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course. See *Green* v. *United States,* 355 U. S. 184, 189 (1957).

The continuing jeopardy principle necessarily is applicable to this case. Petitioner sought and obtained the

reversal of his initial conviction for voluntary manslaughter by taking an appeal. Accordingly, no aspect of the bar on double jeopardy prevented his retrial for that crime. However, the first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense. Such a result flows inescapably from the Constitution's emphasis on a risk of conviction and the Constitution's explication in prior decisions of this Court.

An early case to deal with restrictions on retrials was *Kepner* v. *United States,* 195 U. S. 100 (1904), where the Court held that the Fifth Amendment's double jeopardy prohibition barred the Government from appealing an acquittal in a criminal prosecution,[2] over a dissent by Mr. Justice Holmes that argued that there was only one continuing jeopardy until the proceedings against the accused had been finally resolved. He held to the view that even if an accused was retried after the Government had obtained reversal of an acquittal, the second trial was part of the original proceeding.

Similar double jeopardy issues did not fully claim the Court's attention until the Court heard argument in *Green* v. *United States,* 355 U. S. 184 (1957).[3] There

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[2] *Kepner* rested upon a portion of the *Ball* case that dealt with a criminal action that had been finally resolved. In *Ball* the Court had held that the Government could not re-indict an accused for an offense where a judgment of acquittal had been entered by a trial court with jurisdiction over the accused and the cause. 163 U. S., at 669–670. The Court relied partially on *United States* v. *Sanges,* 144 U. S. 310 (1892), where the Court had interpreted the Judiciary Act of 1891 to hold that the United States could not obtain review by a writ of error in a criminal case.

[3] Shortly after *Kepner* the Court was faced with a factual situation somewhat akin to that presented by the instant case. In *Trono* v. *United States,* 199 U. S. 521 (1905), the defendants had been charged in a Philippine court with murder, and had been found guilty of the lesser offense of assault. On their appeal of

the petitioner had been tried and convicted of first-degree murder after an earlier guilty verdict on the lesser included offense of second-degree murder had been set aside on appeal. A majority of the Court rejected the argument that by appealing the conviction of second-degree murder the petitioner had "waived" his plea of former jeopardy with regard to the charge of first-degree murder.

The Court in the *Green* case reversed the first-degree murder conviction obtained at the retrial, holding that the petitioner's jeopardy for first-degree murder came to an end when the jury was discharged at the end of his first trial. This conclusion rested on two premises. First, the Court considered the first jury's verdict of guilty on the second-degree murder charge to be an "implicit acquittal" on the charge of first-degree murder.

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the conviction the Philippine Supreme Court set aside the trial court's judgment, found them guilty of murder, and increased their sentences. This Court affirmed. Four Justices took the position that by appealing the assault conviction, the defendants had waived any double jeopardy claim respecting the murder charge. Mr. Justice Holmes concurred in the result without stating his rationale. *Kepner* had been decided in the previous year, however, and his concurrence could have indicated that, for him, a waiver theory was too narrow—instead he considered that even an appeal by the Government was a continuing jeopardy, not a second jeopardy. Of the four dissenters, two, Justices McKenna and White, would have found a violation of the Constitution's double jeopardy provision.

Acceptance of either *Trono*'s waiver theory or Mr. Justice Holmes' broad continuing jeopardy approach would indicate that Price could not complain of his retrial for the greater offense. But *Trono* has not survived unscathed to the present day. The "waiver theory" of four of the majority Justices in *Trono* was distinguished in *Green* as resting on "a statutory provision against double jeopardy pertaining to the Philippine Islands—a territory just recently conquered with long-established legal procedures that were alien to the common law." 355 U. S., at 197.

Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury "was given a full opportunity to return a verdict" on that charge and instead reached a verdict on the lesser charge. 355 U. S., at 191. Under either of these premises, the holding in the *Kepner* case—that there could be no appeal from an acquittal because such a verdict ended an accused's jeopardy—was applicable.

The rationale of the *Green* holding applies here. The concept of continuing jeopardy implicit in the *Ball* case [4] would allow petitioner's retrial for voluntary manslaughter after his first conviction for that offense had been reversed. But, as the *Kepner* and *Green* cases illustrate, this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity [5] to return a verdict on the greater charge. There is no relevant factual distinction between this case and *Green* v. *United States.* Although the petitioner was not convicted of the greater charge on retrial, whereas Green was, the risk of conviction on the greater charge was the same in both cases, and the Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment.

The Georgia courts nonetheless rejected *Green* as a persuasive authority in favor of reliance on *Brantley* v. *State,* 132 Ga. 573, 64 S. E. 676 (1909), aff'd, 217 U. S. 284 (1910). The *Brantley* case presented a situation where a defendant's appeal from a conviction for a

[4] After *Kepner* and *Green,* the continuing jeopardy principle appears to rest on an amalgam of interests—*e. g.,* fairness to society, lack of finality, and limited waiver, among others.

[5] See *People* v. *Jackson,* 20 N. Y. 2d 440, 231 N. E. 2d 722 (1967).

lesser included offense ultimately led to retrial and conviction on the greater offense. After the second conviction had been affirmed on appeal, the defendant sued out a writ of error to the Supreme Court of Georgia from this Court, contending "that the exemption from second jeopardy is one of the privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids a state to abridge",[6] that he had "been tried and acquitted by a jury of his country of the crime of murder",[7] and that "[h]e should never [*sic*] have been tried a second time only for the offense on which he obtained a new trial . . . ." [8] This Court tersely rejected these contentions as:

> "absolutely without merit. It was not a case of twice in jeopardy under any view of the Constitution of the United States." 217 U. S., at 285.

The *Brantley* case was decided by this Court at a time when, although the Court was actively developing an explication of federal double jeopardy doctrines based on the Fifth Amendment, it took a very restricted approach in reviewing similar state court decisions. While the *Brantley* holding may have had some vitality at the time the Georgia courts rendered their decisions in this case, it is no longer a viable authority and must now be deemed to have been overruled by subsequent decisions of this Court.[9]

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[6] Brief for Plaintiff in Error, No. 692, O. T. 1909, p. 2.

[7] *Id.*, 5.

[8] *Ibid.*

[9] In *Palko* v. *Connecticut,* 302 U. S. 319 (1937), this Court refused to overturn a first-degree murder conviction obtained after the State had successfully appealed from a conviction of second-degree murder which was the product of a trial on first-degree murder charges. The Court ruled that federal double jeopardy standards were not applicable to the States.

*Palko* was overruled in *Benton* v. *Maryland,* 395 U. S. 784 (1969), where this Court determined that the double jeopardy

(2)

One further consideration remains. Because the petitioner was convicted of the same crime at both the first and second trials, and because he suffered no greater punishment on the subsequent conviction, Georgia submits that the second jeopardy was harmless error when judged by the criteria of *Chapman* v. *California,* 386 U. S. 18 (1967), and *Harrington* v. *California,* 395 U. S. 250 (1969).

We must reject this contention. The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.[10] Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex rel. Hetenyi* v.

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prohibition of the Fifth Amendment should be applied to the States through the Fourteenth Amendment. *Brantley* and *Palko* were of the same genre, and *Brantley* necessarily shared *Palko*'s fate in *Benton.*

The last of the decisions of the Georgia courts affirming the petitioner's conviction was rendered on September 24, 1968, well before *Benton* was decided. But *Benton* has fully retroactive application, see *Waller* v. *Florida,* 397 U. S. 387, 391 n. 2 (1970), and the Georgia courts' reliance on the themes of *Brantley,* though understandable, now has no place.

[10] There is a significant difference to an accused whether he is being tried for murder or manslaughter. He has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well.

*Wilkins,* 348 F. 2d 844 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 913 (1966).

(3)

We asked the parties to submit post-argument memoranda directed to the question of whether petitioner can now be re-indicted or retried for voluntary manslaughter under Georgia law. These memoranda have been filed and indicate that the answer to our question appears to depend upon the construction of several Georgia statutes and on the power of Georgia courts to fashion remedial orders. Accordingly, although we reverse petitioner's conviction, we also remand the case to enable the Georgia courts to resolve the issues pertaining to petitioner's retrial, if any such retrial is to be had.

*Reversed and remanded.*

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

# WELSH *v.* UNITED STATES

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

No. 76. Argued January 20, 1970—Decided June 15, 1970

Petitioner was convicted of refusing to submit to induction into the Armed Forces despite his claim for conscientious objector status under § 6 (j) of the Universal Military Training and Service Act. That provision exempts from military service persons who by reason of "religious training and belief" are conscientiously opposed to war in any form, that term being defined in the Act as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" but not including "essentially political, sociological, or philosophical views or a merely personal code." In his exemption application petitioner stated that he could not affirm or deny belief in a "Supreme Being" and struck the words "my religious training and" from the form. He affirmed that he held deep conscientious scruples against participating in wars where people were killed. The Court of Appeals, while noting that petitioner's "beliefs are held with the strength of more traditional religious convictions," concluded that those beliefs were not sufficiently "religious" to meet the terms of § 6 (j), and affirmed the conviction. Petitioner contends that the Act violates the First Amendment prohibition of establishment of religion and that his conviction should be set aside on the basis of *United States* v. *Seeger,* 380 U. S. 163, which held that the test of religious belief under § 6 (j) is whether it is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption. *Held:* The judgment is reversed. Pp. 335–367.

404 F. 2d 1078, reversed.

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL, concluded that:

This case is controlled by *United States* v. *Seeger, supra,* to which it is factually similar. Under *Seeger,* § 6 (j) is not limited to those whose opposition to war is prompted by orthodox or parochial religious beliefs. A registrant's conscientious objection to all war is "religious" within the meaning of § 6 (j) if this

opposition stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and these beliefs are held with the strength of traditional religious convictions. In view of the broad scope of the word "religious," a registrant's characterization of his beliefs as "nonreligious" is not a reliable guide to those administering the exemption. Pp. 335–344.

MR. JUSTICE HARLAN concluded that:

1. The language of § 6 (j) cannot be construed (as it was in *United States* v. *Seeger, supra,* and as it is in the prevailing opinion) to exempt from military service all individuals who in good faith oppose all war, it being clear from both the legislative history and textual analysis of that provision that Congress used the words "by reason of religious training and belief" to limit religion to its theistic sense and to confine it to formal, organized worship or shared beliefs by a recognizable and cohesive group. Pp. 348–354.

2. The question of the constitutionality of § 6 (j) cannot be avoided by a construction of that provision that is contrary to its intended meaning. Pp. 354–356.

3. Section 6 (j) contravenes the Establishment Clause of the First Amendment by exempting those whose conscientious objection claims are founded on a theistic belief while not exempting those whose claims are based on a secular belief. To comport with that clause an exemption must be "neutral" and include those whose belief emanates from a purely moral, ethical, or philosophical source. Pp. 356–361.

4. In view of the broad discretion conferred by the Act's severability clause and the longstanding policy of exempting religious conscientious objectors, the Court, rather than nullifying the exemption entirely, should extend its coverage to those like petitioner who have been unconstitutionally excluded from its coverage. Pp. 361–367.

*J. B. Tietz* argued the cause and filed briefs for petitioner.

*Solicitor General Griswold* argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson, Francis X. Beytagh, Jr.,* and *Beatrice Rosenberg.*

MR. JUSTICE BLACK announced the judgment of the Court and delivered an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces in violation of 50 U. S. C. App. § 462 (a), and was on June 1, 1966, sentenced to imprisonment for three years. One of petitioner's defenses to the prosecution was that § 6 (j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form."[1] After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals, Judge Hamley dissenting, affirmed the conviction. 404 F. 2d 1078 (1968). We granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in *United States* v. *Seeger,* 380 U. S. 163 (1965). 396 U. S. 816 (1969). For the reasons to be stated, and without passing upon the constitutional arguments that have been raised, we vote to reverse this conviction because of its fundamental inconsistency with *United States* v. *Seeger, supra.*

The controlling facts in this case are strikingly similar to those in *Seeger.* Both Seeger and Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for

[1] 62 Stat. 612. See also 50 U. S. C. App. § 456 (j). The pertinent provision as it read during the period relevant to this case is set out *infra,* at 336.

any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft boards for conscientious objector exemptions from military service under § 6 (j) of the Universal Military Training and Service Act. That section then provided, in part: [2]

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In filling out their exemption applications both Seeger and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated "I am, by reason of my religious training and belief, conscien-

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[2] 62 Stat. 612. An amendment to the Act in 1967, subsequent to the Court's decision in the *Seeger* case, deleted the reference to a "Supreme Being" but continued to provide that "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a merely personal moral code." 81 Stat. 104, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. IV).

tiously opposed to participation in war in any form." Seeger could sign only after striking the words "training and" and putting quotation marks around the word "religious." Welsh could sign only after striking the words "my religious training and." On those same applications, neither could definitely affirm or deny that he believed in a "Supreme Being," both stating that they preferred to leave the question open.[3] But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, small voice of conscience"; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, "[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions." 404 F. 2d, at 1081. But in both cases the Selective Service System concluded that the beliefs of these men were in some sense insufficiently "religious" to qualify them for conscientious objector exemptions under the terms of § 6 (j). Seeger's conscientious objector claim was denied "solely because it was not based upon a 'belief in a relation to a Supreme Being' as required by § 6 (j) of the Act," *United States* v. *Seeger,* 380 U. S. 163, 167 (1965), while Welsh was

[3] In his original application in April 1964, Welsh stated that he did not believe in a Supreme Being, but in a letter to his local board in June 1965, he requested that his original answer be stricken and the question left open. App. 29.

denied the exemption because his Appeal Board and the Department of Justice hearing officer "could find no religious basis for the registrant's beliefs, opinions and convictions." App. 52. Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

In *Seeger* the Court was confronted, first, with the problem that § 6 (j) defined "religious training and belief" in terms of a "belief in a relation to a Supreme Being . . . ," a definition that arguably gave a preference to those who believed in a conventional God as opposed to those who did not. Noting the "vast panoply of beliefs" prevalent in our country, the Court construed the congressional intent as being in "keeping with its long-established policy of not picking and choosing among religious beliefs," *id.,* at 175, and accordingly interpreted "the meaning of religious training and belief so as to embrace *all* religions . . . ." *Id.,* at 165. (Emphasis added.) But, having decided that all religious conscientious objectors were entitled to the exemption, we faced the more serious problem of determining which beliefs were "religious" within the meaning of the statute. This question was particularly difficult in the case of Seeger himself. Seeger stated that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." 380 U. S., at 166. In a letter to his draft board, he wrote:

> "My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from the more important moral standpoint, it is unethical." 326 F. 2d 846, 848 (1964).

On the basis of these and similar assertions, the Government argued that Seeger's conscientious objection to war was not "religious" but stemmed from "essentially political, sociological, or philosophical views or a merely personal moral code."

In resolving the question whether Seeger and the other registrants in that case qualified for the exemption, the Court stated that "[the] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, *in his own scheme of things,* religious." 380 U. S., at 185. (Emphasis added.) The reference to the registrant's "own scheme of things" was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. The Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of § 6 (j) was as follows:

> "The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." 380 U. S., at 176.

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that § 6 (j) "does not distinguish between externally and internally derived beliefs," *id.,* at 186, and also held that "intensely personal" convictions which some might find "incomprehensible" or "incorrect" come within the meaning of "religious belief" in the Act. *Id.,* at 184–185. What is necessary under *Seeger* for a registrant's consci-

entious objection to all war to be "religious" within the meaning of § 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

Applying this standard to Seeger himself, the Court noted the "compulsion to 'goodness'" that shaped his total opposition to war, the undisputed sincerity with which he held his views, and the fact that Seeger had "decried the tremendous 'spiritual' price man must pay for his willingness to destroy human life." 380 U. S., at 186–187. The Court concluded:

> "We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers." 380 U. S., at 187.

Accordingly, the Court found that Seeger should be granted conscientious objector status.

In the case before us the Government seeks to distinguish our holding in *Seeger* on basically two grounds,

both of which were relied upon by the Court of Appeals in affirming Welsh's conviction. First, it is stressed that Welsh was far more insistent and explicit than Seeger in denying that his views were religious. For example, in filling out their conscientious objector applications, Seeger put quotation marks around the word "religious," but Welsh struck the word "religious" entirely and later characterized his beliefs as having been formed "by reading in the fields of history and sociology." App. 22. The Court of Appeals found that Welsh had "denied that his objection to war was premised on religious belief" and concluded that "[t]he Appeal Board was entitled to take him at his word." 404 F. 2d, at 1082. We think this attempt to distinguish *Seeger* fails for the reason that it places undue emphasis on the registrant's interpretation of his own beliefs. The Court's statement in *Seeger* that a registrant's characterization of his own belief as "religious" should carry great weight, 380 U. S., at 184, does not imply that his declaration that his views are nonreligious should be treated similarly. When a registrant states that his objections to war are "religious," that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in § 6 (j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were "certainly religious in the ethical sense of the word." He explained:

> "I believe I mentioned taking of life as not being, for me, a religious wrong. Again, I assumed Mr. [Brady (the Department of Justice hearing

officer)] was using the word 'religious' in the conventional sense, and, in order to be perfectly honest did not characterize my belief as 'religious.'" App. 44.

The Government also seeks to distinguish *Seeger* on the ground that Welsh's views, unlike Seeger's, were "essentially political, sociological, or philosophical views or a merely personal moral code." As previously noted, the Government made the same argument about Seeger, and not without reason, for Seeger's views had a substantial political dimension. *Supra,* at 338–339. In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

> "I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.*" App. 30.

We certainly do not think that § 6 (j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon

considerations of policy, pragmatism, or expediency. In applying § 6 (j)'s exclusion of those whose views are "essentially political, sociological, or philosophical" or of those who have a "merely personal moral code," it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by "religious training and belief." Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical." Nor can they be a "merely personal moral code." See *United States* v. *Seeger,* 380 U. S., at 186.

Welsh stated that he "believe[d] the taking of life—anyone's life—to be morally wrong." App. 44. In his original conscientious objector application he wrote the following:

> "I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant." App. 10.

Welsh elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them "with the strength of more traditional religious convictions," 404 F. 2d, at 1081, we think Welsh was clearly entitled to a conscientious objector exemption. Section

6 (j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.

The judgment is

*Reversed.*

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

MR. JUSTICE HARLAN, concurring in the result.

Candor requires me to say that I joined the Court's opinion in *United States* v. *Seeger,* 380 U. S. 163 (1965), only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge.[1]

In *Seeger* the Court construed § 6 (j) of the Universal Military Training and Service Act so as to sustain a conscientious objector claim not founded on a theistic belief. The Court, in treating with the provision of the statute that limited conscientious objector claims to those stemming from belief in "a Supreme Being," there said: "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views," and held that the test of belief " 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the or-

[1] For a discussion of those principles that determine the appropriate scope for the doctrine of *stare decisis,* see *Moragne* v. *States Marine Lines,* also decided today, *post,* p. 375; *Boys Markets* v. *Retail Clerks Union, ante,* p. 235; *Helvering* v. *Hallock,* 309 U. S. 106 (1940).

thodox belief in God of one who clearly qualifies for the exemption." 380 U. S., at 165–166. Today the prevailing opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption. The prevailing opinion now says: "If an individual deeply and sincerely holds beliefs that are *purely ethical* or *moral* in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time" (emphasis added), he qualifies for a § 6 (j) exemption.

In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in *Seeger,* and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether § 6 (j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by MR. JUSTICE BLACK, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified.

## I

Section 6 (j) provided during the period relevant to this case:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant

> training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." Universal Military Training and Service Act of 1948, § 6 (j), 62 Stat. 612, 50 U. S. C. App. § 456 (j).

The issue is then whether Welsh's opposition to war is founded on "religious training and belief" and hence "belief in a relation to a Supreme Being" as *Congress* used those words. It is of course true that certain words are more plastic in meaning than others. "Supreme Being" is a concept of theology and philosophy, not a technical term, and consequently may be, in some circumstances, capable of bearing a contemporary construction as notions of theology and philosophy evolve. Cf. *United States* v. *Storrs,* 272 U. S. 652 (1926). This language appears, however, in a congressional enactment; it is not a phrase of the Constitution, like "religion" or "speech," which this Court is freer to construe in light of evolving needs and circumstances. Cf. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952), and my concurring opinion in *Estes* v. *Texas,* 381 U. S. 532, 595–596 (1965), and my opinion concurring in the judgment in *Garner* v. *Louisiana,* 368 U. S. 157, 185 (1961). Nor is it so broad a statutory directive, like that of the Sherman Act, that we may assume that we are free to adopt and shape policies limited only by the most general statement of purpose. Cf., *e. g., Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). It is Congress' will that must here be divined. In that endeavor

it is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also uncontemplated by the legislature in order to achieve the legislative policy, *Holy Trinity Church* v. *United States,* 143 U. S. 457 (1892); it is a wholly different matter to define words so as to change policy. The limits of this Court's mandate to stretch concededly elastic congressional language are fixed in all cases by the context of its usage and legislative history, if available, that are the best guides to congressional *purpose* and the lengths to which Congress enacted a policy. *Rosado* v. *Wyman,* 397 U. S. 397 (1970).[2] The prevailing opinion today snubs both guidelines for it is apparent from a textual analysis of § 6 (j) and the legislative history that the words of this section, as used and understood by Congress, fall short of enacting the broad policy of exempting from military service all individuals who in good faith oppose all war.

[2] The difference is between the substitution of judicial judgment for a principle that is set forth by the Constitution and legislature and the application of the legislative principle to a new "form" that is no different in substance from the circumstances that existed when the principle was set forth. Cf. *Katz* v. *United States,* 389 U. S. 347 (1967). As the Court said in *Weems* v. *United States,* "Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the *form* that evil had theretofore taken. . . . [A] *principle* to be vital must be capable of wider application than the mischief which gave it birth." 217 U. S. 349, 373 (1910) (emphasis added).

While it is by no means always simple to discern the difference between the residual principle in legislation that should be given effect in circumstances not covered by the express statutory terms and the limitation on that principle inherent in the same words, the Court in *Seeger* and the prevailing opinion today read out language that, in my view, plainly limits the principle rather than illustrates the policy and circumstances that were in mind when § 6 (j) was enacted.

A

The natural reading of § 6 (j), which quite evidently draws a distinction between theistic and nontheistic religions, is the only one that is consistent with the legislative history. Section 5 (g) of the 1940 Draft Act exempted individuals whose opposition to war could be traced to "religious training and belief," 54 Stat. 889, without any allusion to a Supreme Being. In *United States* v. *Kauten,* 133 F. 2d 703 (C. A. 2d Cir. 1943), the Second Circuit, speaking through Judge Augustus Hand, broadly construed "religious training and belief" to include a "belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." 133 F. 2d, at 708. The view was further elaborated in subsequent decisions of the Second Circuit, see *United States ex rel. Phillips* v. *Downer,* 135 F. 2d 521 (C. A. 2d Cir. 1943); *United States ex rel. Reel* v. *Badt,* 141 F. 2d 845 (C. A. 2d Cir. 1944). This expansive interpretation of § 5 (g) was rejected by a divided Ninth Circuit in *Berman* v. *United States,* 156 F. 2d 377, 380–381 (1946):

> "It is our opinion that the expression 'by reason of religious training and belief' . . . was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.
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> "[I]n United States v. Macintosh, 283 U. S. 605 . . . Mr. [Chief] Justice Hughes in his dissent . . . said: 'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.' "

The unmistakable and inescapable thrust of the *Berman* opinion, that religion is to be conceived in theistic terms, is rendered no less straightforward by the court's elaboration on the difference between beliefs held as a matter of moral or philosophical conviction and those inspired by religious upbringing and adherence to faith.

> "There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute. It is said in State v. Amana Society, 132 Iowa 304, 109 N. W. 894, 898 . . . : 'Surely a scheme of life designed to obviate such results (man's inhumanity to man), and by removing temptations, and all the inducements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion *when its devotee regards it as an essential tenet of their* [sic] *religious faith.*'" (Emphasis of Court of Appeals.) *Ibid.*

In the wake of this intercircuit dialogue, crystallized by the dissent in *Berman* which espoused the Second Circuit interpretation in *Kauten, supra,* Congress enacted § 6 (j) in 1948. That Congress intended to anoint the Ninth Circuit's interpretation of § 5 (g) would seem beyond question in view of the similarity of the statutory language to that used by Chief Justice Hughes in his dissenting opinion in *Macintosh* and quoted in *Berman* and the Senate report. The first half of the new language was almost word for word that of Chief Justice Hughes in

*Macintosh,* and quoted by the *Berman* majority;[3] and the Senate Committee report adverted to *Berman,* thus foreclosing any possible speculation as to whether Congress was aware of the possible alternatives. The report stated:

> "This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States* v. *Berman* [*sic*], 156 F. (2d) 377, certiorari denied, 329 U. S. 795.)" S. Rep. No. 1268, 80th Cong., 2d Sess., 14.[4]

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[3] The substitution in § 6 (j) of "Supreme Being" instead of "God" as used in *Macintosh* does not, in my view, carry the burden, placed on it in the *Seeger* opinion, of demonstrating that Congress "deliberately broadened" Chief Justice Hughes' definition. "God" and "Supreme Being" are generally taken as synonymous terms meaning Deity. It is common practice to use various synonyms for the Deity. The Declaration of Independence refers to "Nature's God," "Creator," "Supreme Judge of the world," and "divine Providence." References to the Deity in preambles to the state constitutions include, for example, and use interchangeably "God," "Almighty God," "Supreme Being." A. Stokes & L. Pfeffer, Church and State in the United States 561 (1964). In *Davis* v. *Beason,* 133 U. S. 333, 342 (1890), the Court spoke of man's relations to his "Creator" and to his "Maker"; in *Zorach* v. *Clauson,* 343 U. S. 306, 313 (1952), and *Engel* v. *Vitale,* 370 U. S. 421, 424 (1962), to the "Almighty."

[4] The *Seeger* opinion relies on the absence of any allusion to the judicial conflict to parry the thrust of the legislative history and assigns significance to the Committee citation of *Berman* as manifestation of its intention to reenact § 5 (g) of the 1940 Act, and also as authority for the exclusion of those whose beliefs are grounded in secular ethics. The citation to *Berman* would not be conclusive of congressional purpose if Congress had simply reenacted the 1940

B

Against this legislative history it is a remarkable feat of judicial surgery to remove, as did *Seeger,* the theistic requirement of § 6 (j). The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from "essentially political, sociological, or philosophical views or a merely personal moral code."

In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress. Resort to Webster's [5] reveals that the meanings of "religion" are: "1. The service and adoration of God or a god as expressed in forms of worship, in obedience to divine commands . . . ; 2. The state of life of a religious . . . ; 3. One of the *systems* of faith and worship; a form of theism; a religious faith . . . ; 4. The profession or practice of religious beliefs; religious observances *collectively; pl.* rites; 5. Devotion or fidelity; . . . conscien-

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Act adding only the express exclusion in the last clause. But the reasoning in *Seeger* totally ignores the fact that Congress without other apparent reason added the "Supreme Being" language of the *Berman* majority in the face of the *Berman* dissent which espoused Judge Hand's view in *Kauten.* The argument in *Seeger* is not, moreover, strengthened by the fact that Congress in drafting the 1948 Selective Service laws placed great weight on the views of the Selective Service System which, the Court suggested, did not view *Berman* and *Kauten* as being in conflict. 380 U. S., at 179. The Selective Service System Monograph No. 11, Conscientious Objection (1950) was not before Congress when § 6 (j) was enacted and the fact that the Service relied on both *Kauten* and *Berman* for the proposition that conscientious objection must emanate from a religious and not a secular source, does not mean that it considered the Supreme Being discussion in *Berman* as surplusage.

[5] New International Dictionary, Unabridged (2d ed. 1934).

tiousness; 6. An apprehension, awareness, or conviction of the existence of a supreme being, or more widely, of supernatural powers or influences controlling one's own, humanity's, or nature's destiny; also, such an apprehension, etc., accompanied by or arousing reverence, love, gratitude, the will to obey and serve, and the like . . . ." (Emphasis added.)

Of the five pertinent definitions four include the notion of either a Supreme Being or a cohesive, organized group pursuing a common spiritual purpose together. While, as the Court's opinion in *Seeger* points out, these definitions do not exhaust the almost infinite and sophisticated possibilities for defining "religion," there is strong evidence that Congress restricted, in this instance, the word to its conventional sense. That it is difficult to plot the semantic penumbra of the word "religion" does not render this term so plastic in meaning that the Court is entitled, as matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements. It must be recognized that the permissible shadow of connotation is limited by the context in which words are used. In § 6 (j) Congress has included not only a reference to a Supreme Being but has also explicitly contrasted "religious" beliefs with those that are "essentially political, sociological, or philosophical" and a "personal moral code." This exception certainly is, at the very least, the statutory boundary, the "asymptote," of the word "religion." [6]

[6] The prevailing opinion's purported recognition of this distinction slides over the "personal moral code" exception, in § 6 (j). Thus that opinion in concluding that § 6 (j) does not exclude "those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy" but excludes individuals, whose beliefs are not deeply held, and those whose objection to war does not rest upon "moral, ethical, or religious principle," but instead rests solely upon considerations of

For me this dichotomy reveals that Congress was not embracing that definition of religion that alone speaks in terms of "devotion or fidelity" to individual principles acquired on an individualized basis but was adopting, at least, those meanings that associate religion with formal, organized worship or shared beliefs by a recognizable and cohesive group. Indeed, this requirement was explicit in the predecessor to the 1940 statute. The Draft Act of 1917 conditioned conscientious objector status on membership in or affiliation with a "well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles forb[ade] its members to participate in war in any form . . . ." § 4, 40 Stat 78. That § 5 (g) of the 1940 Act eliminated the affiliation and membership requirement does not, in my view, mean as the Court, in effect, concluded in *Seeger* that Congress was embracing a secular definition of religion.[7]

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"policy, pragmatism, or expediency," *ante,* at 342–343, blends morals and religion, two concepts that Congress chose to keep separate.

[7] The apparent purpose of the 1940 change in language was to eliminate membership as a decisive criterion in recognition of the fact that mere formal affiliation is no measure of the intensity of beliefs, and that many nominal adherents do not share or pursue the ethics of their church. That the focus was made the conscientiousness of the individual's own belief does not mean that Congress was indifferent to its source. Were this the case there would have been no occasion to allude to "religious training" in the 1940 enactment, and to contrast it with secular ethics in the 1948 statute. Yet the prevailing opinion today holds that "beliefs that are purely ethical," no matter how acquired, qualify the holder for § 6 (j) status if they are held with the requisite intensity.

However, even the prevailing opinion's ambulatory concept of "religion" does not suffice to embrace Welsh, since petitioner insisted that his beliefs had been formed "by reading in the fields of history and sociology" and "denied that his objection to war was premised on religious belief." 404 F. 2d, at 1082. That opinion not only establishes a definition of religion that amounts to "Newspeak" but it refuses to listen to petitioner who is speaking the same language.

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views.

II

When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost.

I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues, a principle to which I fully adhere. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are unconstitutional, but it is not permissible, in my judgment, to take a lateral step that robs legislation of all meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution.

Cf. *Yates* v. *United States,* 354 U. S. 298 (1957). As the Court stated in *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515 (1964):

> "It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. *Scales* v. *United States* [367 U. S. 203, 211]. To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."

The issue comes sharply into focus in Mr. Justice Cardozo's statement for the Court in *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (1933):

> " 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' . . . But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered."

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with

Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional. Compare, *e. g., Yu Cong Eng* v. *Trinidad,* 271 U. S. 500 (1926); *United States* v. *Reese,* 92 U. S. 214 (1876), with *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Nat. Life Ins. Co.* v. *United States,* 277 U. S. 508 (1928). I therefore turn to the constitutional question.

III

The constitutional question that must be faced in this case is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors. Such a course would be wholly "neutral" and, in my view, would not offend the Free Exercise Clause, for reasons set forth in my dissenting opinion in *Sherbert* v. *Verner,* 374 U. S. 398, 418 (1963). See *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29 (1905) (dictum); cf. *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Davis* v. *Beason,* 133 U. S. 333 (1890); *Hamilton* v. *Board of Regents,* 293 U. S. 245, 264–265 (1934); *Reynolds* v. *United States,* 98 U. S. 145 (1879); Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1 (1961). However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. See my separate opinion in *Walz* v. *Tax Comm'n,* 397 U. S. 664, 694 (1970); *Epperson* v. *Arkansas,* 393 U. S. 97 (1968); *School District of Abington Township* v. *Schempp,* 374 U. S. 203, 305 (1963) (Goldberg, J., concurring);

*Engel* v. *Vitale,* 370 U. S. 421 (1962); *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). The implementation of the neutrality principle of these cases requires, in my view, as I stated in *Walz* v. *Tax Comm'n, supra,* "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 scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included]." 397 U. S., at 696.

The "radius" of this legislation is the conscientiousness with which an individual opposes war in general, yet the statute, as I think it must be construed, excludes from its "scope" individuals motivated by teachings of nontheistic religions,[8] and individuals guided by an inner ethical voice that bespeaks secular and not "religious" reflection. It not only accords a preference to the "religious" but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification

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[8] This Court has taken notice of the fact that recognized "religions" exist that "do not teach what would generally be considered a belief in the existence of God," *Torcaso* v. *Watkins,* 367 U. S. 488, 495 n. 11, *e. g.,* "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Ibid.* See also *Washington Ethical Society* v. *District of Columbia,* 101 U. S. App. D. C. 371, 249 F. 2d 127 (1957); 2 Encyclopaedia of the Social Sciences 293; J. Archer, Faiths Men Live By 120–138, 254–313 (2d ed. revised by Purinton 1958); Stokes & Pfeffer, *supra,* n. 3, at 560.

that this Court has condemned. See my separate opinion in *Walz* v. *Tax Comm'n, supra; School District of Abington Township* v. *Schempp* (Goldberg, J., concurring), *supra; Engel* v. *Vitale, supra; Torcaso* v. *Watkins, supra.*

If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source.[9] The common denominator must be the intensity of moral conviction with which a belief is held.[10] Common experience teaches that among

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[9] In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the Court held unconstitutional over my dissent a state statute that conditioned eligibility for unemployment benefits on being "able to work and . . . available for work" and further provided that a claimant was ineligible "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." This, the Court held, was a violation of the Free Exercise Clause as applied to Seventh Day Adventists whose religious background forced them as a matter of conscience to decline Saturday employment. My own conclusion, to which I still adhere, is that the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group. I suggested, however, that a State could constitutionally create exceptions to its program to accommodate religious scruples. That suggestion must, however, be qualified by the observation that any such exception in order to satisfy the Establishment Clause of the First Amendment, would have to be sufficiently broad to be religiously neutral. See my separate opinion in *Walz* v. *Tax Comm'n, supra.* This would require creating an exception for anyone who, as a matter of conscience, could not comply with the statute. Whether, under a statute like that involved in *Sherbert,* it would be possible to demonstrate a basis in conscience for not working Saturday is quite another matter.

[10] Without deciding what constitutes a definition of "religion" for First Amendment purposes it suffices to note that it means, in my view, at least the two conceivable readings of § 6 (j) set forth in Part II, but something less than mere adherence to ethical or

"religious" individuals some are weak and others strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations.

The Government enlists the *Selective Draft Law Cases,* 245 U. S. 366 (1918), as precedent for upholding the constitutionality of the religious conscientious objector provision. That case involved the power of Congress to raise armies by conscription and only incidentally the conscientious objector exemption. The language emphasized by the Government to the effect that the exemption for religious objectors and ministers constituted neither an establishment nor interference with free exercise of religion can only be considered an afterthought since the case did not involve any individuals who claimed to be nonreligious conscientious objectors.[11] This conclusory assertion, unreasoned and unaccompanied by citation, surely cannot foreclose consideration of the question in a case that squarely presents the issue.

Other authorities assembled by the Government, far from advancing its case, demonstrate the unconstitutionality of the distinction drawn in § 6 (j) between religious and nonreligious beliefs. *Everson* v. *Board of Education,* 330 U. S. 1 (1947), the *Sunday Closing Law Cases,* 366 U. S. 420, 582, 599, and 617 (1961), and *Board*

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moral beliefs in general or a certain belief such as conscientious objection. Thus the prevailing opinion's expansive reading of "religion" in § 6 (j) does not, in my view, create an Establishment Clause problem in that it exempts all sincere objectors but does not exempt others, *e. g.,* those who object to war on pragmatic grounds and contend that pragmatism is their creed.

[11] Thus, Mr. Chief Justice White said:

"And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more." 245 U. S., at 389–390.

*of Education* v. *Allen*, 392 U. S. 236 (1968), all sustained legislation on the premise that it was neutral in its application and thus did not constitute an establishment, notwithstanding the fact that it may have assisted religious groups by giving them the same benefits accorded to nonreligious groups.[12] To the extent that *Zorach* v. *Clauson*, 343 U. S. 306 (1952), and *Sherbert* v. *Verner*, *supra*, stand for the proposition that the Government may (*Zorach*), or must (*Sherbert*), shape its secular programs to accommodate the beliefs and tenets of religious

[12] My Brother WHITE in dissent misinterprets, in my view, the thrust of Mr. Justice Frankfurter's language in the *Sunday Closing Law Cases*. See *post*, at 369. Section 6 (j) speaks directly to belief divorced entirely from conduct. It evinces a judgment that individuals who hold the beliefs set forth by the statute should not be required to bear arms, and the statutory belief that qualifies is only a religious belief. Under these circumstances I fail to see how this legislation has "any substantial legislative purpose" apart from honoring the conscience of individuals who oppose war on only religious grounds. I cannot, moreover, accept the view, implicit in the dissent, that Congress has any ultimate responsibility for construing the Constitution. It, like all other branches of government, is constricted by the Constitution and must conform its action to it. It is this Court, however, and not the Congress that is ultimately charged with the difficult responsibility of construing the First Amendment. The Court has held that universal conscription creates no free exercise problem, see cases cited, *supra*, at 356, and Congress can constitutionally draft individuals notwithstanding their religious beliefs. Congress, whether in response to political considerations or simply out of sensitivity for men of religious conscience, can of course decline to exercise its power to conscript to the fullest extent, but it cannot do so without equal regard for men of nonreligious conscience. It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own. Any view of the Free Exercise Clause that does not insist on this neutrality would engulf the Establishment Clause and render it vestigial.

groups, I think these cases unsound.[13] See generally Kurland, *supra.* To conform with the requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral. See my separate opinion in *Walz* v. *Tax Comm'n, supra.*

IV

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239 (1931).[14]

[13] That the "released-time" program in *Zorach* did not utilize classroom facilities for religious instruction, unlike *McCollum* v. *Board of Education,* 333 U. S. 203 (1948), is a distinction for me without Establishment Clause substance. At the very least the Constitution requires that the State not excuse students early for the purpose of receiving religious instruction when it does not offer to nonreligious students the opportunity to use school hours for spiritual or ethical instruction of a nonreligious nature. Moreover, whether a released-time program cast in terms of improving "conscience" to the exclusion of artistic or cultural pursuits, would be "neutral" and consistent with the requirement of "voluntarism," is by no means an easy question. Such a limited program is quite unlike the broad approach of the tax exemption statute, sustained in *Walz* v. *Tax Comm'n, supra,* which included literary societies, playgrounds, and associations "for the moral or mental improvement of men."

[14] See *Skinner* v. *Oklahoma,* where MR. JUSTICE DOUGLAS, in an opinion holding infirm under the Equal Protection Clause a state statute that required sterilization of habitual thieves who perpetrated larcenies but not those who engaged in embezzlement, noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment.

The appropriate disposition of this case, which is a prosecution for refusing to submit to induction and not an action for a declaratory judgment on the constitutionality of § 6 (j), is determined by the fact that at the time of Welsh's induction notice and prosecution the Selective Service was, as required by statute, exempting individuals whose beliefs were identical in all respects to those held by petitioner except that they derived from a religious source. Since this created a religious benefit not accorded to petitioner, it is clear to me that this conviction must be reversed under the Establishment Clause of the First Amendment unless Welsh is to go remediless. Cf. *Iowa-Des Moines National Bank* v. *Bennett, supra; Smith* v. *Cahoon,* 283 U. S. 553 (1931).[15]

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[15] In *Iowa-Des Moines National Bank* v. *Bennett,* Mr. Justice Brandeis speaking for the Court in a decision holding that the State had denied petitioners equal protection of the laws by taxing them more heavily than their competitors, observed that: "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." 284 U. S., at 247. Based on the impracticality of requiring the aggrieved taxpayer at that stage to "assume the burden of seeking an increase of the taxes which . . . others should have paid," the Court held that petitioner was entitled to recover the overpayment.

The Establishment Clause case that comes most readily to mind as involving "underinclusion" is *Epperson* v. *Arkansas,* 393 U. S. 97 (1968). There the State prohibited the teaching of evolutionist theory but "did not seek to excise from the curricula of its schools and universities all discussion of the origin of man." 393 U. S., at 109. The Court held the Arkansas statute, which was framed as a prohibition, unconstitutional. Since the statute authorized no positive action, there was no occasion to consider the remedial problem. Cf. *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). Most of the other cases arising under the Establishment Clause have involved instances where the challenged legislation conferred a benefit on religious as well as secular institutions. See, *e. g., Walz* v. *Tax Comm'n, supra; Everson* v. *Board of Education, supra; Board of Education* v. *Allen, supra.* These cases, had they been decided differently, would still

This result, while tantamount to extending the statute, is not only the one mandated by the Constitution in this case but also the approach I would take had this question been presented in an action for a declaratory judg-

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not have presented the remedial problem that arises in the instant case, for they were cases of alleged "overinclusion." The school prayer cases, *School District of Abington Township* v. *Schempp, supra;* and *Engel* v. *Vitale, supra;* and the released-time cases, *Zorach* v. *Clauson, supra; McCollum* v. *Board of Education, supra,* also failed to raise the remedial issue. In the school prayer situation the requested relief was an injunction against the saying of prayers. Moreover it is doubtful that there is any analogous secular ritual that could be performed so as to satisfy the neutrality requirement of the First Amendment and even then the practice of saying prayers in schools would still offend the principle of voluntarism that must be satisfied in First Amendment cases. See my separate opinion in *Walz* v. *Tax Comm'n, supra.* The same considerations prevented the issue from arising in the one released-time program case that held the practice unconstitutional.

In *McCollum,* where the Court held unconstitutional a program that permitted "religious teachers, employed by private religious groups . . . to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law," 333 U. S., at 205, the relief requested was an order to mandamus the authorities to discontinue the program. No question arose as to whether the program might have been saved by extending a similar privilege to other students who wished extracurricular instruction in, for example, atheistic or secular ethics and morals. Cf. my separate opinion in *Walz* v. *Tax Comm'n, supra.* Moreover as in the prayer cases, since the defect in the Illinois program was not the mere absence of neutrality but also the encroachment on "voluntarism," see *ibid.,* it is doubtful whether there existed any remedial alternative to voiding the entire program. A further complication would have arisen in these cases by virtue of the more limited discretion this Court enjoys to extend a policy for the States even as a constitutional remedy. Cf. *Skinner* v. *Oklahoma, supra; Morey* v. *Doud,* 354 U. S. 457 (1957); *Dorchy* v. *Kansas,* 264 U. S. 286 (1924).

ment or "an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope." *Smith* v. *Cahoon,* 283 U. S., at 565.[16] While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Indicative of the breadth of the judicial mandate in this regard is the broad severability clause, 65 Stat. 88, which provides that "[i]f any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby." While the absence of such a provision would not foreclose the exercise of discretion in determining whether a legislative policy should be repaired or abandoned, cf. *United States* v. *Jackson,* 390 U. S. 570, 585 n. 27 (1968), its existence "discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained . . . ." *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 235 (1932). See also *Skinner*

[16] As long as the Selective Service continues to grant exemptions to religious conscientious objectors, individuals like petitioner are not required to submit to induction. This is tantamount to extending the present statute to cover those in petitioner's position. Alternatively the defect of underinclusion that renders this statute unconstitutional could be cured in a civil action by eliminating the exemption accorded to objectors whose beliefs are founded in religion. The choice between these two courses is not one for local draft boards nor is it one that should await civil litigation where the question could more appropriately be considered. Consequently I deem it proper to confront the issue here, even though, as a technical matter, no judgment could issue in this case ordering the Selective Service to refrain entirely from granting exemptions.

v. *Oklahoma, supra; Nat. Life Ins. Co.* v. *United States,* 277 U. S. 508 (1928).[17]

In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation. Cf. *Nat. Life Ins. Co.* v. *United States, supra* (Brandeis, J., dissenting); *Dorchy* v. *Kansas,* 264 U. S. 286 (1924).

The policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and "open" society, the important value of reconciling in-

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[17] In *Skinner* the Court impliedly recognized the mandate of flexibility to repair a defective statute—even by extension—conferred by a broad severability clause. As already noted, the Court there declined to exercise discretion, however, since absent a clear indication of legislative preference it was for the state courts to determine the proper course.

While Mr. Justice Brandeis in a dissenting opinion in *Nat. Life Ins. Co., supra,* at 522, 534–535, expressed the view that a severability clause in terms like that before us now is not intended to authorize amendment by expanding the scope of legislation, his remarks must be taken in the context of a dissent to a course he deemed contrary to that Congress would have chosen. Thus, after quoting *Hill* v. *Wallace,* 259 U. S. 44, 71 (1922), to the effect that a severability clause "furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part [b]ut . . . does not give . . . power to amend the act," Justice Brandeis observed, that: "Even if such a clause could ever permit a court to enlarge the scope of a deduction allowed by a taxing statute, . . . the asserted unconstitutionality can be cured as readily by [excision] as by [enlargement]" and that the former would most likely have been the congressional preference in that particular case. Cf. *Iowa-Des Moines National Bank* v. *Bennett, supra.*

dividuality of belief with practical exigencies whenever possible. See *Girouard* v. *United States,* 328 U. S. 61 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton* v. *Board of Regents,* 293 U. S., at 267; *Macintosh* v. *United States,* 42 F. 2d 845, 847 (1930). That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.[18] Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patch-

[18] I reach these conclusions notwithstanding the admonition in *United States* v. *Reese* that it "is no part of [this Court's] duty" "[t]o limit [a] statute in [such a way as] to make a new law, [rather than] enforce an old one." 92 U. S. 214, 221 (1876). See also *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500 (1926); *Marchetti* v. *United States,* 390 U. S. 39, 60 (1968). Neither of these cases involved statutes evincing a congressional intent to confer a benefit on a particular group, thus requiring the frustration of third-party beneficiary legislation when the acts were held invalid. Moreover, the saving construction in *Marchetti* would have thwarted, not complemented, the primary purpose of the statute by introducing practical difficulties into that enforcement of state gambling laws that the statute was designed to further.

work of judicial making that cures the defect of underinclusion in § 6 (j) and can be administered by local boards in the usual course of business.[19] Like the prevailing opinion, I also conclude that petitioner's beliefs are held with the required intensity and consequently vote to reverse the judgment of conviction.

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

Whether or not *United States* v. *Seeger,* 380 U. S. 163 (1965), accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of § 6 (j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology. Our obli-

[19] During World War I when the exemption was granted to members or affiliates of "well-recognized religious sect[s]" the Selective Service System found it impracticable to compile a list of "recognized" sects and left the matter to the discretion of the local boards. Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918, p. 56. As a result, some boards treated religious and nonreligious objectors in the same manner. Report of the Provost Marshal General to the Secretary of War on the First Draft Under the Selective-Service Act, 1917, p. 59. Finally, by presidential regulation dated March 20, 1918, it was ordered that conscientious objector status be open to all conscientious objectors without regard to any religious qualification. The experience during World War II, when draft boards were operating under the broad definition of religion in *United States* v. *Kauten,* 133 F. 2d 703 (C. A. 2d Cir. 1943), also demonstrates the administrative viability of today's test. Not only would the test announced today seem manageable but it would appear easier than the arcane inquiry required to determine whether beliefs are religious or secular in nature.

gation in statutory construction cases is to enforce the will of Congress, not our own; and as MR. JUSTICE HARLAN has demonstrated, construing § 6 (j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me that conclusion should end this case. Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not § 6 (j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction. If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.

If the Constitution expressly provided that aliens should not be exempt from the draft, but Congress purported to exempt them and no others, Welsh, a citizen, could hardly qualify for exemption by demonstrating that exempting aliens is unconstitutional. By the same token, if the Constitution prohibits Congress from exempting religious believers, but Congress exempts them anyway, why should the invalidity of the exemption create a draft immunity for Welsh? Surely not just because he would otherwise go without a remedy along with all those others not qualifying for exemption under the statute. And not as a reward for seeking a declaration of the invalidity of § 6 (j); for as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if § 6 (j) would present no First Amendment problems if it had included Welsh and others like him. "[O]ne to whom application of a statute is constitutional will not be heard to attack the

statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines,* 362 U. S. 17, 21 (1960). Nothing in the First Amendment prohibits drafting Welsh and other nonreligious objectors to war. Saving § 6 (j) by extending it to include Welsh cannot be done in the name of a presumed congressional will but only by the Court's taking upon itself the power to make draft-exemption policy.

If I am wrong in thinking that Welsh cannot benefit from invalidation of § 6 (j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, § 6 (j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion. As Mr. Justice Frankfurter, joined by MR. JUSTICE HARLAN, said in a separate opinion in the *Sunday Closing Law Cases,* 366 U. S. 420, 468 (1961), an establishment contention "can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear. See *Selective Draft Law Cases,* 245 U. S. 366."

Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because

in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. True, this Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers. *Hamilton* v. *Board of Regents,* 293 U. S. 245, 263–264 (1934); *United States* v. *Macintosh,* 283 U. S. 605, 623–624 (1931). But this Court is not alone in being obliged to construe the Constitution in the course of its work; nor does it even approach having a monopoly on the wisdom and insight appropriate to the task. Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States* v. *Macintosh, supra,* at 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are " 'indicative of the actual operation of the principles of the Constitution.' " However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds.

If there were no statutory exemption for religious objectors to war and failure to provide it was held by this Court to impair the free exercise of religion contrary to the First Amendment, an exemption reflecting this constitutional command would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), or the exemption from the flat tax on book sellers held required for evangelists, *Follett* v. *McCormick,* 321 U. S. 573 (1944). Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well; nor would it be any less an establish-

ment if camouflaged by granting additional exemptions for nonreligious, but "moral" objectors to war.

On the assumption, however, that the Free Exercise Clause of the First Amendment does not by its own force require exempting devout objectors from military service, it does not follow that § 6 (j) is a law respecting an establishment of religion within the meaning of the First Amendment. It is very likely that § 6 (j) is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause. That judgment is entitled to respect. Congress has the power "To raise and support Armies" and "To make all Laws which shall be necessary and proper for carrying into Execution" that power. Art. I, § 8. The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore—surely "necessary and proper"—in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause. If this was the course Congress took, then just as in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), where we accepted the judgment of Congress as to what legislation was appropriate to enforce the Equal Protection Clause of the Fourteenth Amendment, here we should respect congressional judgment accommodating the Free Exercise Clause and the power to raise armies. This involves no surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution. But it was enough in *Katzenbach* "to perceive a basis upon which the Congress might resolve the conflict as it did," 384 U. S., at 653, and plainly in the case before us there is an arguable basis for § 6 (j) in the Free Exercise Clause since, without the exemption, the law would compel some members of the public to engage in combat

operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment. *United States* v. *Sisson,* 297 F. Supp. 902 (1969). There being substantial roots in the Free Exercise Clause for § 6 (j) I would not frustrate congressional will by construing the Establishment Clause to condition the exemption for religionists upon extending the exemption also to those who object to war on nonreligious grounds.

We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality" and not "inhibition" of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech. "[I]t safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940). Although socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct that cannot be forbidden to religious practitioners but that may be forbidden to others. See *United States* v. *Ballard,* 322 U. S. 78 (1944); *Follett* v.

*McCormick,* 321 U. S. 573 (1944). We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.

In *Braunfeld* v. *Brown,* 366 U. S. 599 (1961), and *Gallagher* v. *Crown Kosher Market,* 366 U. S. 617 (1961), a majority of the Court rejected claims that Sunday closing laws placed unacceptable burdens on Sabbatarians' religious observances. It was not suggested, however, that the Sunday closing laws in 21 States exempting Sabbatarians and others violated the Establishment Clause because no provision was made for others who claimed nonreligious reasons for not working on some particular day of the week. Nor was it intimated in *Zorach* v. *Clauson,* 343 U. S. 306 (1952), that the no-establishment holding might be infirm because only those pursuing religious studies for designated periods were released from the public school routine; neither was it hinted that a public school's refusal to institute a released-time program would violate the Free Exercise Clause. The Court in *Sherbert* v. *Verner, supra,* construed the Free Exercise Clause to require special treatment for Sabbatarians under the State's unemployment compensation law. But the State could deal specially with Sabbatarians whether the Free Exercise Clause required it or not, for as MR. JUSTICE HARLAN then said—and I agreed with him—the Establishment Clause would not forbid an exemption for Sabbatarians who otherwise could not qualify for unemployment benefits.

The Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion that

otherwise might be consistent with the Free Exercise Clause. But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.

I would affirm the judgment below.

# MORAGNE *v.* STATES MARINE LINES, INC., ET AL.

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

No. 175. Argued March 4, 1970—Decided June 15, 1970

Petitioner is not foreclosed from bringing this action under federal maritime law, based on unseaworthiness, for the wrongful death within state territorial waters of her husband, a longshoreman, as a wrongful-death action under such law is maintainable for breach of maritime duties. *The Harrisburg,* 119 U. S. 199, overruled. Pp. 379–409.

409 F. 2d 32, reversed and remanded.

*Charles J. Hardee, Jr.,* argued the cause and filed briefs for petitioner.

*Dewey R. Villareal, Jr.,* argued the cause for respondent States Marine Lines, Inc. With him on the brief were *John W. Boult* and *William A. Gillen. David C. G. Kerr* argued the cause for respondent Gulf Florida Terminal Co. On the brief were *George W. Ericksen* and *James B. McDonough, Jr.*

*Louis F. Claiborne* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Joseph J. Connolly,* and *Alan S. Rosenthal.*

Briefs of *amici curiae* were filed by *David B. Kaplan* for the American Trial Lawyers Association, and by *Nathan Baker, pro se.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

We brought this case here to consider whether *The Harrisburg,* 119 U. S. 199, in which this Court held in 1886 that maritime law does not afford a cause of action

for wrongful death, should any longer be regarded as acceptable law.

The complaint sets forth that Edward Moragne, a longshoreman, was killed while working aboard the vessel *Palmetto State* in navigable waters within the State of Florida. Petitioner, as his widow and representative of his estate, brought this suit in a state court against respondent States Marine Lines, Inc., the owner of the vessel, to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. The claims were predicated upon both negligence and the unseaworthiness of the vessel.

States Marine removed the case to the Federal District Court for the Middle District of Florida on the basis of diversity of citizenship, see 28 U. S. C. §§ 1332, 1441, and there filed a third-party complaint against respondent Gulf Florida Terminal Company, the decedent's employer, asserting that Gulf had contracted to perform stevedoring services on the vessel in a workmanlike manner and that any negligence or unseaworthiness causing the accident resulted from Gulf's operations.

Both States Marine and Gulf sought dismissal of the portion of petitioner's complaint that requested damages for wrongful death on the basis of unseaworthiness. They contended that maritime law provided no recovery for wrongful death within a State's territorial waters, and that the statutory right of action for death under Florida law, Fla. Stat. § 768.01 (1965), did not encompass unseaworthiness as a basis of liability. The District Court dismissed the challenged portion of the complaint on this ground, citing this Court's decision in *The Tungus* v. *Skovgaard,* 358 U. S. 588 (1959), and cases construing the state statute, but made the certification necessary under 28 U. S. C. § 1292 (b) to allow petitioner an interlocutory appeal to the Court of Appeals for the Fifth Circuit.

The Court of Appeals took advantage of a procedure furnished by state law, Fla. Stat. § 25.031 (1965), to certify to the Florida Supreme Court the question whether the state wrongful-death statute allowed recovery for unseaworthiness as that concept is understood in maritime law. After reviewing the history of the Florida Act, the state court answered this question in the negative. 211 So. 2d 161 (1968). On return of the case to the Court of Appeals, that court affirmed the District Court's order, rejecting petitioner's argument that she was entitled to reversal under federal maritime law without regard to the scope of the state statute. 409 F. 2d 32 (1969). The court stated that its disposition was compelled by our decision in *The Tungus*. We granted certiorari, 396 U. S. 900 (1969), and invited the United States to participate as *amicus curiae, id.,* at 952, to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters.

In *The Tungus* this Court divided on the consequences that should flow from the rule of maritime law that "in the absence of a statute there is no action for wrongful death," first announced in *The Harrisburg*. All members of the Court agreed that where a death on state territorial waters is left remediless by the general maritime law and by federal statutes, a remedy may be provided under any applicable state law giving a right of action for death by wrongful act. However, four Justices dissented from the Court's further holding that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." 358 U. S., at 592. The dissenters would have held that federal maritime law could utilize the state law to "supply a remedy" for breaches of federally imposed duties, without regard

to any substantive limitations contained in the state law. *Id.*, at 597, 599.

The extent of the role to be played by state law under *The Tungus* has been the subject of substantial debate and uncertainty in this Court, see *Hess* v. *United States,* 361 U. S. 314 (1960); *Goett* v. *Union Carbide Corp.,* 361 U. S. 340 (1960), with opinions on both sides of the question acknowledging the shortcomings in the present law. See 361 U. S., at 314–315, 338–339. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in *The Tungus,* but in *The Harrisburg,* and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed. We therefore reverse the judgment of the Court of Appeals.[1]

[1] Respondents argue that petitioner is foreclosed from seeking a remedy for wrongful death under general maritime law by her failure to invoke that law at the proper time in the courts below. In the state trial court, which was bound to apply federal maritime law in a case within federal admiralty jurisdiction, *e. g., Hess* v. *United States,* 361 U. S., at 318; *McAllister* v. *Magnolia Petroleum Co.,* 357 U. S. 221 (1958), petitioner supported her unseaworthiness claim solely by arguing that the Florida death statute encompassed recovery for unseaworthiness. Under federal law as declared by *The Tungus,* this was the only theory on which she could proceed, short of a challenge—which she did not make—to the validity of *The Tungus* itself. After the District Court on removal rejected her claim, petitioner presented to the Court of Appeals only the question of the interpretation of the state statute, until that question was definitively settled against her by the State Supreme Court on referral.

At that point, petitioner moved the Court of Appeals to uphold her claim as a matter of federal law, despite the state court's ruling. In her brief in support of this motion, petitioner urged that the rule of *The Tungus* was unsound; that the Florida Supreme Court's decision in this case was the first since *The Tungus* in which a state court had read its wrongful-death act to exclude unseaworthiness; and that the lack of uniformity thus produced dictated a re-examina-

## I

The Court's opinion in *The Harrisburg* acknowledged that the result reached had little justification except in primitive English legal history—a history far removed from the American law of remedies for maritime deaths.

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tion of *The Tungus* and adoption of the views of the dissenters in that case. The Court of Appeals heard oral argument on the motion and granted petitioner leave to file a further brief after argument. Respondents opposed the motion and moved to affirm on the basis of *The Tungus,* respondent Gulf arguing that: "Appellant [petitioner] has no Federal or maritime action for wrongful death," and that: "[T]he issues discussed in Appellant's Brief have been thoroughly argued in Briefs heretofore filed." Neither respondent opposed consideration of the motion on the ground that the issue had not been properly raised.

The Court of Appeals affirmed, stating: "No useful purpose will be served by additional review of pertinent authority upon the issue of law presented in this appeal. It is sufficient to say that in The Tungus v. Skovgaard, . . . the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action for unseaworthiness is a question to be decided by the courts of that state."

While this language is not in itself wholly clear, we think it evident in the circumstances that the Court of Appeals considered and rejected petitioner's attack on *The Tungus.* After granting petitioner an opportunity to present that attack at length, and without receiving any objections from respondents to its consideration, the Court of Appeals cannot be presumed to have refused to entertain it. Rather, we read the opinion as stating that the court deemed itself bound by *The Tungus* despite petitioner's challenge to that decision. The Court of Appeals had earlier voiced strong criticism of the prevailing law in this area, but had concluded that it was bound to follow *The Harrisburg* and *The Tungus. Kenney* v. *Trinidad Corp.,* 349 F. 2d 832, 840–841 (C. A. 5th Cir. 1965).

Since the Court of Appeals, without objection, treated the merits of petitioner's attack on *The Tungus,* we need not consider whether she might otherwise be precluded from pressing that attack here because of her default in failing to urge the same theory in the trial courts. See *Neely* v. *Martin K. Eby Constr. Co.,* 386 U. S. 317, 330 (1967); *Giordenello* v. *United States,* 357 U. S. 480 (1958);

That case, like this, was a suit on behalf of the family of a maritime worker for his death on the navigable waters of a State. Following several precedents in the lower federal courts, the trial court awarded damages against the ship causing the death, and the circuit court affirmed, ruling that death by maritime tort "may be complained of as an injury, and the wrong redressed under the general maritime law." 15 F. 610, 614 (1883). This Court, in reversing, relied primarily on its then-recent decision in *Insurance Co.* v. *Brame,* 95 U. S. 754 (1878), in which it had held that in American common law, as in English, "no civil action lies for an injury which results in . . . death." *Id.,* at 756.[2] In *The Harrisburg,* as in *Brame,* the Court did not examine the justifications for this common-law rule; rather, it simply noted that "we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land," and concluded, despite contrary decisions of the lower federal courts both before and after *Brame,* that the rule of *Brame* should apply equally to maritime deaths. 119 U. S., at 213.[3]

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*California* v. *Taylor,* 353 U. S. 553, 557 n. 2 (1957); *Husty* v. *United States,* 282 U. S. 694, 701–702 (1931); *Tyrrell* v. *District of Columbia,* 243 U. S. 1 (1917); cf. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 145 (1967) (opinion of HARLAN, J.). Her challenge to *The Tungus* is properly before us on certiorari, and, of course, it subsumes the question of the continuing validity of *The Harrisburg,* upon which *The Tungus* rests. This Court suggested, 396 U. S. 952 (1969), that the parties and the Solicitor General address themselves to the question whether *The Harrisburg,* 119 U. S. 199, should be overruled, and the parties and *amici* have fully addressed themselves to that case as well as *The Tungus.*

[2] *Brame* was decided, of course, at a time when the federal courts under *Swift* v. *Tyson,* 16 Pet. 1 (1842), expounded a general federal common law.

[3] The Court stated:

"The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in com-

Our analysis of the history of the common-law rule indicates that it was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all. Further, regardless of the viability of the rule in 1886 as applied to American land-based affairs, it is difficult to discern an adequate reason for its extension to admiralty, a system of law then already differentiated in many respects from the common law.

One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous." *E. g., Osborn* v. *Gillett,* L. R. 8 Ex. 88, 94 (1873) (Lord Bramwell, dissenting); F. Pollock, Law of Torts 55 (Landon ed. 1951); 3 W. Holdsworth, History of English Law 676–677 (3d ed. 1927). Because the primary duty already exists,

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mon law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law." 119 U. S., at 213.

the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him—usually spouse and children—seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort. One expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly.

Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century—the felony-merger doctrine. See Pollock, *supra,* at 52–57; Holdsworth, The Origin of the Rule in *Baker* v. *Bolton,* 32 L. Q. Rev. 431 (1916). According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony. *Smith* v. *Sykes,* 1 Freem. 224, 89 Eng. Rep. 160 (K. B. 1677); *Higgins* v. *Butcher,* Yel. 89, 80 Eng. Rep. 61 (K. B. 1606). The doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death.

The first explicit statement of the common-law rule against recovery for wrongful death came in the opinion

of Lord Ellenborough, sitting at *nisi prius,* in *Baker* v. *Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (1808). That opinion did not cite authority, or give supporting reasoning, or refer to the felony-merger doctrine in announcing that "[i]n a civil Court, the death of a human being could not be complained of as an injury." *Ibid.* Nor had the felony-merger doctrine seemingly been cited as the basis for the denial of recovery in any of the other reported wrongful-death cases since the earliest ones, in the 17th century. *E. g., Smith* v. *Sykes, supra; Higgins* v. *Butcher, supra.* However, it seems clear from those first cases that the rule of *Baker* v. *Bolton* did derive from the felony-merger doctrine, and that there was no other ground on which it might be supported even at the time of its inception. The House of Lords in 1916 confirmed this historical derivation, and held that although the felony-merger doctrine was no longer part of the law, the rule against recovery for wrongful death should continue except as modified by statute. *Admiralty Commissioners* v. *S. S. Amerika,* [1917] A. C. 38. Lord Parker's opinion acknowledged that the rule was "anomalous . . . to the scientific jurist," but concluded that because it had once found justification in the doctrine that "the trespass was drowned in the felony," it should continue as a rule "explicable on historical grounds" even after the disappearance of that justification. *Id.,* at 44, 50; see 3 W. Holdsworth, History of English Law 676–677 (3d ed. 1927). Lord Sumner agreed, relying in part on the fact that this Court had adopted the English rule in *Brame.* Although conceding the force of Lord Bramwell's dissent in *Osborn* v. *Gillett,* L. R. 8 Ex. 88, 93 (1873), against the rule, Lord Parker stated that it was not "any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence," and thus that he

was bound simply to follow the past decisions. [1917] A. C., at 42–43.[4]

The historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar a subsequent civil suit. *E. g., Grosso* v. *Delaware, Lackawanna & West. R. Co.,* 50 N. J. L. 317, 319–320, 13 A. 233, 234 (1888); *Hyatt* v. *Adams.* 16 Mich. 180, 185–188 (1867); see W. Prosser, Law of Torts 8, 920–924 (3d ed. 1964). Nevertheless, despite some early cases in which the rule was rejected as "incapable of vindication," *e. g., Sullivan* v. *Union Pac. R. Co.,* 23 F. Cas. 368, 371 (No. 13,599) (C. C. Neb. 1874); *Shields* v. *Yonge,* 15 Ga. 349 (1854); cf. *Cross* v. *Guthery,* 2 Root 90, 92 (Conn. 1794), American courts generally adopted the English rule as the common law of this country as well. Throughout the period of this adoption, culminating in this Court's decision in *Brame,*

[4] The decision in *S. S. Amerika* was placed also on an alternative ground, which is independently sufficient. In that case, which arose from a collision between a Royal Navy submarine and a private vessel, the Crown sought to recover from the owners of the private vessel the pensions payable to the families of navy sailors who died in the collision. The first ground given for rejecting the claim was that the damages sought were too remote to be protected by tort law, because the pensions were voluntary payments and because they were not a measure of "the future services of which the Admiralty had been deprived." *Id.,* at 42, 50–51. Similar alternative reasoning was given in *Brame,* which involved a similar situation. 95 U. S., at 758–759. Thus, in neither case was the enunciation of the rule against recovery for wrongful death necessary to the result.

the courts failed to produce any satisfactory justification for applying the rule in this country.

Some courts explained that their holdings were prompted by an asserted difficulty in computation of damages for wrongful death or by a "repugnance . . . to setting a price upon human life." *E. g., Connecticut Mut. Life Ins. Co.* v. *New York & N. H. R. Co.,* 25 Conn. 265, 272–273 (1856); *Hyatt* v. *Adams, supra,* at 191. However, other courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes, see Smith, Wrongful Death Damages in North Carolina, 44 N. C. L. Rev. 402, 405–406, nn. 17, 18 (1966), does not present difficulties more insurmountable than assessment of damages for many nonfatal personal injuries. See *Hollyday* v. *The David Reeves,* 12 F. Cas. 386, 388 (No. 6,625) (D. C. Md. 1879); *Green* v. *Hudson River R. Co.,* 28 Barb. 9, 17–18 (N. Y. 1858).

It was suggested by some courts and commentators that the prohibition of nonstatutory wrongful-death actions derived support from the ancient common-law rule that a personal cause of action in tort did not survive the death of its possessor, *e. g., Eden* v. *Lexington & Frankfort R. Co.,* 53 Ky. 204, 206 (1853); and the decision in *Baker* v. *Bolton* itself may have been influenced by this principle. Holdsworth, The Origin of the Rule in *Baker* v. *Bolton,* 32 L. Q. Rev. 431, 435 (1916). However, it is now universally recognized that because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death. See *ibid.;* Pollock, *supra,* at 53; Win-

field, Death as Affecting Liability in Tort, 29 Col. L. Rev. 239–250, 253 (1929).

The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age. That was the thrust of this Court's opinion in *Brame,* as well as many of the lower court opinions. *E. g., Grosso* v. *Delaware, Lackawanna & West. R. Co., supra.* Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our Nation, that while "[o]ur ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; . . . they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Pacard,* 2 Pet. 137, 144 (1829) (Story, J.); *The Lottawanna,* 21 Wall. 558, 571–574 (1875); see R. Pound, The Formative Era of American Law 93–97 (1938); H. Hart & A. Sacks, The Legal Process 450 (tent. ed. 1958). The American courts never made the inquiry whether this particular English rule, bitterly criticized in England, "was applicable to their situation," and it is difficult to imagine on what basis they might have concluded that it was.

Further, even after the decision in *Brame,* it is not apparent why the Court in *The Harrisburg* concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law;[5] and, from its focus on a par-

[5] The Court in *The Harrisburg* acknowledged that, at least according to the courts of France, the civil law did allow recovery for the injury suffered by dependents of a person killed. It noted, however, that the Louisiana courts took a different view of the civil law, and that English maritime law did not seem to differ in this

ticular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. See generally G. Gilmore & C. Black, The Law of Admiralty 1–11, 253 (1957); P. Edelman, Maritime Injury and Death 1 (1960). These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea. This was the conclusion reached by Chief Justice Chase, prior to *The Harrisburg,* sitting on circuit in *The Sea Gull,* 21 F. Cas. 909 (No. 12,578) (C. C. Md. 1865). He there remarked that

> "There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures . . . and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Id.,* at 910.

Numerous other federal maritime cases, on similar reasoning, had reached the same result. *E. g., The Columbia,* 27 F. 704 (D. C. S. D. N. Y. 1886); *The Manhasset,* 18 F. 918 (D. C. E. D. Va. 1884); *The E. B.*

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regard from English common law. 119 U. S., at 205, 212–213. See generally *Grigsby* v. *Coast Marine Service,* 412 F. 2d 1011, 1023–1029 (C. A. 5th Cir. 1969); 1 E. Benedict, Law of American Admiralty 2 (6th ed. Knauth 1940); 4 *id.,* at 358.

*Ward, Jr.*, 17 F. 456 (C. C. E. D. La. 1883); *The Garland*, 5 F. 924 (D. C. E. D. Mich. 1881); *Holmes* v. *O. & C. R. Co.*, 5 F. 75 (D. C. Ore. 1880); *The Towanda*, 24 F. Cas. 74 (No. 14,109) (C. C. E. D. Pa. 1877); *Plummer* v. *Webb*, 19 F. Cas. 894 (No. 11,234) (D. C. Maine 1825); *Hollyday* v. *The David Reeves*, 12 F. Cas. 386 (No. 6,625) (D. C. Md. 1879). Despite the tenor of these cases, some decided after *Brame*, the Court in *The Harrisburg* concluded that "the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but [only] on their opinion that the rule of the English common law was not founded in reason, and had not become firmly established in the jurisprudence of this country." 119 U. S., at 208. Without discussing any considerations that might support a different rule for admiralty, the Court held that maritime law must be identical in this respect to the common law.

## II

We need not, however, pronounce a verdict on whether *The Harrisburg*, when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation.

To some extent this rejection has been judicial. The English House of Lords in 1937 emasculated the rule without expressly overruling it. *Rose* v. *Ford*, [1937] A. C. 826. Lord Atkin remarked about the decision in *S. S. Amerika* that "[t]he reasons given, whether his-

torical or otherwise, may seem unsatisfactory," and that "if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum." At any rate, he saw "no reason for extending the illogical doctrine . . . to any case where it does not clearly apply." *Id.*, at 833, 834. Lord Atkin concluded that, while the doctrine barred recognition of a claim in the dependents for the wrongful death of a person, it did not bar recognition of a common-law claim in the decedent himself for "loss of expectation of life"—a claim that vested in the person in the interval between the injury and death, and thereupon passed, with the aid of a survival statute, to the representative of his estate. He expressed no doubt that the claim was "capable of being estimated in terms of money: and that the calculation should be made." *Id.*, at 834.[6] Thus, except that the measure of damages might differ, the representative was allowed to recover on behalf of the heirs what they could not recover in their own names.

Much earlier, however, the legislatures both here and in England began to evidence unanimous disapproval of the rule against recovery for wrongful death. The first statute partially abrogating the rule was Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which granted recovery to the families of persons killed by tortious conduct, "although the Death shall have been caused under such Circumstances as amount in Law to Felony."[7]

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[6] Lord Wright, concurring, stated:

"In one sense it is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate." [1937] A. C., at 848.

[7] It has been suggested that one reason the common-law rule was tolerated in England as long as it was may have been that the relatives of persons killed by wrongful acts often were able to exact

In the United States, every State today has enacted a wrongful-death statute. See Smith, *supra*, 44 N. C. L. Rev. 402. The Congress has created actions for wrongful deaths of railroad employees, Federal Employers' Liability Act, 45 U. S. C. §§ 51–59; of merchant seamen, Jones Act, 46 U. S. C. § 688; and of persons on the high seas, Death on the High Seas Act, 46 U. S. C. §§ 761, 762.[8] Congress has also, in the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), made the United States subject to liability in certain circumstances for negligently caused wrongful death to the same extent as a private person. See, *e. g.*, *Richards* v. *United States*, 369 U. S. 1 (1962).

These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our

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compensation from the wrongdoer by threatening to bring a "criminal appeal." The criminal appeal was a criminal proceeding brought by a private person, and was for many years more common than indictment as a means of punishing homicide. Though a successful appeal would not produce a monetary recovery, the threat of one served as an informal substitute for a civil suit for damages. Over the years, indictment became more common, and the criminal appeal was abolished by statute in 1819. 59 Geo. 3, c. 46. See Holdsworth, The Origin of the Rule in *Baker* v. *Bolton*, 32 L. Q. Rev. 431, 435 (1916); *Admiralty Commissioners* v. *S. S. Amerika*, [1917] A. C., at 58–59.

[8] See also National Parks Act, 16 U. S. C. § 457; Outer Continental Shelf Lands Act, 43 U. S. C. §§ 1331–1343 (making state wrongful-death statutes applicable to particular areas within federal jurisdiction). Cf. n. 16, *infra*.

law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law. See Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 226–227 (1934). Mr. Justice Holmes, speaking also for Chief Justice Taft and Justices Brandeis and McKenna, stated on the very topic of remedies for wrongful death:

> "[I]t seems to me that courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope. *Johnson* v. *United States,* 163 Fed. 30, 32. Without going into the reasons for the notion that an action (other than an appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of present law by statutes of the United States and of most if not all of the States." *Panama R. Co.* v. *Rock,* 266 U. S. 209, 216 (1924) (dissenting opinion).[9]

Dean Pound subsequently echoed this observation, concluding that: "Today we should be thinking of the death

[9] The *Rock* case involved the question whether an action for wrongful death was maintainable in the Panama Canal Zone, under a general statute that simply embodied the civil-law principle of liability for damage caused by fault. The majority's decision, engrafting onto this statute the common-law rule forbidding such recovery despite the fact that the rule had then been rejected by every relevant jurisdiction, was immediately repudiated by congressional action. Act of Dec. 29, 1926, § 7, 44 Stat. 927; see Landis, *supra,* at 227.

statutes as part of the general law." Pound, Comment on State Death Statutes—Application to Death in Admiralty, 13 NACCA L. J. 188, 189 (1954); see *Cox* v. *Roth*, 348 U. S. 207, 210 (1955).

This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, "much of what is ordinarily regarded as 'common law' finds its source in legislative enactment." Landis, *supra*, at 214. It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions.

The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is attested by the legislation of other jurisdictions. *Id.*, at 215–216, 220–222. On the other hand, the legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation. We must, therefore, analyze with care the congressional enactments that have abrogated the common-law rule in the maritime field, to

determine the impact of the fact that none applies in terms to the situation of this case. See Part III, *infra.* However, it is sufficient at this point to conclude, as Mr. Justice Holmes did 45 years ago, that the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

## III

Our undertaking, therefore, is to determine whether Congress has given such a direction in its legislation granting remedies for wrongful deaths in portions of the maritime domain. We find that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner.

From the date of *The Harrisburg* until 1920, there was no remedy for death on the high seas caused by breach of one of the duties imposed by federal maritime law. For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful-death statutes by allowing recovery whenever an applicable state statute favored such recovery.[10] Congress acted in 1920 to furnish the remedy denied by the courts for deaths beyond the jurisdiction of any State, by pass-

[10] The general understanding was that the statutes of the coastal States, which provided remedies for deaths within territorial waters, did not apply beyond state boundaries. This Court had suggested, in an early case where the plaintiff and defendant were of the same State, that the law of that State could be applied to a death on the high seas, if the State intended its law to have such scope. *The Hamilton,* 207 U. S. 398 (1907). However, probably because most state death statutes were not meant to have application to the high seas, this possibility did little to fill the vacuum.

ing two landmark statutes. The first of these was the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 761 *et seq.* Section 1 of that Act provides that:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

Section 7 of the Act further provides:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this [Act]. Nor shall this [Act] apply to the Great Lakes or to any waters within the territorial limits of any State . . . ."

The second statute was the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, which, by extending to seamen the protections of the Federal Employers' Liability Act, provided a right of recovery against their employers for negligence resulting in injury or death. This right follows from the seaman's employment status and is not limited to injury or death occurring on the high seas.[11]

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[11] In 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, granting to longshoremen the right to receive workmen's compensation benefits from their employers for accidental injury or death arising out of their employment. These benefits are made exclusive of any other liability for employers who comply with the Act. The Act does not, however, affect the longshoreman's remedies against persons other than his employer, such as a shipowner, and therefore

The United States, participating as *amicus curiae,* contended at oral argument that these statutes, if construed to forbid recognition of a general maritime remedy for wrongful death within territorial waters, would perpetuate three anomalies of present law. The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see *Kernan* v. *American Dredging Co.,* 355 U. S. 426, 430 n. 4 (1958)—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. The United States argues that since the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three-mile limit, no rational policy supports this distinction in the availability of a remedy.

The third, and assertedly the "strangest" anomaly is that a true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work

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does not bear on the problem before us except perhaps to serve as yet another example of congressional action to allow recovery for death in circumstances where recovery is allowed for nonfatal injuries.

traditionally done by seamen, does have such a remedy when allowed by a state statute.[12]

There is much force to the United States' argument that these distinctions are so lacking in any apparent justification that we should not, in the absence of compelling evidence, presume that Congress affirmatively intended to freeze them into maritime law. There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the

[12] A joint contributor to this last situation, in conjunction with the rule of *The Harrisburg*, is the decision in *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148 (1964), where the Court held that the Jones Act, by providing a claim for wrongful death based on negligence, precludes any state remedy for wrongful death of a seaman in territorial waters—whether based on negligence or unseaworthiness. The Court's ruling in *Gillespie* was only that the Jones Act, which was "intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, . . . necessarily supersedes the application of the death statutes of the several States." *Id.*, at 155. The ruling thus does not disturb the seaman's rights under general maritime law, existing alongside his Jones Act claim, to sue his employer for injuries caused by unseaworthiness, see *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958), or for death on the high seas caused by unseaworthiness, see *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958); *Doyle* v. *Albatross Tanker Corp.*, 367 F. 2d 465 (C. A. 2d Cir. 1966); cf. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953). Likewise, the remedy under general maritime law that will be made available by our overruling today of *The Harrisburg* seems to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, "uniformity in the exercise of admiralty jurisdiction"; and, of course, no question of preclusion of a *federal* remedy was before the Court in *Gillespie* or its predecessor, *Lindgren* v. *United States*, 281 U. S. 38 (1930), since no such remedy was thought to exist at the time those cases were decided. See Gilmore & Black, *supra*, at 304; but cf. *Kernan* v. *American Dredging Co.*, 355 U. S., at 429–430.

States. However, respondents argue that an intent to do just that is manifested by the portions of the Death on the High Seas Act quoted above.

The legislative history of the Act suggests that respondents misconceive the thrust of the congressional concern. Both the Senate and House Reports consist primarily of quoted remarks by supporters of the proposed Act. Those supporters stated that the rule of *The Harrisburg,* which had been rejected by "[e]very country of western Europe," was "a disgrace to a civilized people." "There is no reason why the admiralty law of the United States should longer depend on the statute laws of the States. . . . Congress can now bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea." The Act would accomplish that result "for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. . . . This is for the purpose of uniformity, as the States can not properly legislate for the high seas." S. Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess., 3, 4 (1920). The discussion of the bill on the floor of the House evidenced the same concern that a cause of action be provided "in cases where there is now no remedy," 59 Cong. Rec. 4486, and at the same time that "the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law." *The Tungus* v. *Skovgaard,* 358 U. S., at 593.

Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative

desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem.[13] The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.

The beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of the Act. To the contrary, the state remedies that were left undisturbed not only were familiar but also may actually have been more generous than the remedy provided by the new Act. On the one hand, the primary basis of recovery under state wrongful-death statutes was negligence. On the other hand, the substantive duties imposed at that time by general maritime law were vastly different from those that presently exist. "[T]he seaman's right to recover damages for injuries caused by unseaworthiness of the ship was an obscure and relatively little used remedy," perhaps largely because prior to this Court's decision in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (1944),

[13] Similarly, when Parliament abrogated the English common-law rule by passing Lord Campbell's Act, it provided that "nothing therein contained shall apply to that Part of the United Kingdom called *Scotland*." 9 & 10 Vict., c. 93, § 6 (1846). The decisional law of Scotland had long recognized a right to recover for wrongful death; thus the mischief at which the statute aimed could be cured without disturbing Scottish law. The Act "excluded Scotland from its operation because a sufficient remedy already existed there when in England none existed at all." *Admiralty Commissioners* v. *S. S. Amerika,* [1917] A. C., at 52.

the shipowner's duty was only to use due diligence to provide a seaworthy ship. Gilmore & Black, *supra,* at 315, 361; Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 392–393, 396 (1954). Nonseamen on the high seas could generally recover for ordinary negligence, but even this was virtually denied to seamen under the peculiar maritime doctrine of *The Osceola,* 189 U. S. 158, 175 (1903). Congress in 1920 thus legislated against a backdrop of state laws that imposed a standard of behavior generally the same as—and in some respects perhaps more favorable than—that imposed by federal maritime law.

Since that time the equation has changed drastically, through this Court's transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence. See, *e. g., Mahnich* v. *Southern S. S. Co., supra; Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539 (1960). The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act, see Gilmore & Black, *supra,* at 315–332; and it has achieved equal importance for longshoremen and other harbor workers to whom the duty of seaworthiness was extended because they perform work on the vessel traditionally done by seamen. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946). The resulting discrepancy between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress. Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the

evolving duty of seaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty.

To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.[14]

That our conclusion is wholly consistent with the congressional purpose is confirmed by the passage of the

[14] We note that § 1 of the Act, which authorizes "a suit for damages in the district courts of the United States, in admiralty," has been construed to place exclusive jurisdiction on the admiralty side of the federal courts for suits under the Act, *e. g., Devlin* v. *Flying Tiger Lines, Inc.,* 220 F. Supp. 924 (D. C. S. D. N. Y. 1963), although there was earlier authority to the contrary. *Bugden* v. *Trawler Cambridge,* 319 Mass. 315, 65 N. E. 2d 533 (1946). If we found from the legislative history that Congress imposed exclusive jurisdiction because of a desire to avoid the presentation of wrongful-death claims to juries, that might support an inference that Congress meant to forbid nonstatutory maritime actions for wrongful death, which might come before state or federal juries. Cf. *Fitzgerald* v. *United States Lines,* 374 U. S. 16 (1963). However, that is not the case. The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, during the course of which Representative Volstead, floor manager of the bill and chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the federal maritime law. 59 Cong. Rec. 4485. This erroneous view disregards the "saving clause" in 28 U. S. C. § 1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause. See n. 1, *supra.* When asked whether it was true that jury trials would never be available in suits under the Act, Representative Volstead replied: "I do not think so. Perhaps, for certain purposes, under the practice that prevails, they may have a jury, but ordinarily a jury is not allowed. However, I do not know much about admiralty practice." 59 Cong. Rec. 4485. From this we can derive no expression of policy bearing on the matter under discussion.

Jones Act almost simultaneously with the Death on the High Seas Act. As we observed in *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 155 (1964), the Jones Act was intended to achieve "uniformity in the exercise of admiralty jurisdiction" by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to *require* the present nonuniformity in the effectuation of the duty to provide a seaworthy ship. Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. *E. g., Hess* v. *United States*, 361 U. S. 314 (1960); *Goett* v. *Union Carbide Corp.*, 361 U. S. 340 (1960).[15] Such uni-

[15] The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida Supreme Court ruled that the state wrongful-death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as 'unseaworthiness' and the comparative negligence rule." It found no reason to believe that the Florida Legislature intended to cover, or even considered, the "completely foreign" maritime duty of seaworthiness. 211 So. 2d, at 164, 166. Federal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law. Cf. Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Col. L. Rev. 1024 (1967); Note, The Federal Common Law, 82 Harv. L. Rev. 1512, 1523–1526 (1969).

It is worth noting that this problem of lack of congruence between maritime duties and state remedies was not presented in *The Harrisburg*. The problem there was that the relevant state statutes of limitations had run, and petitioner sought a federal remedy to which they would not be applicable. The Court did not discuss the standards of behavior comprehended by the state law or by

formity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *The Lottawanna,* 21 Wall. 558, 575 (1875).

We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act.[16] Because the refusal of mari-

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maritime law, and nothing indicates that the state law was not wholly adequate to vindicate substantive maritime policies in a suit brought within the state-prescribed period. Cf. *McAllister* v. *Magnolia Petroleum Co.,* 357 U. S. 221 (1958).

[16] Respondents purport to find such a preclusive intent in two other federal statutes in related areas, the National Parks Act, 16 U. S. C. § 457, and the Outer Continental Shelf Lands Act, 43 U. S. C. §§ 1331–1343. The former provides: "In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be . . . ." Although Judge Learned Hand once suggested that this statute applied to admiralty, *Puleo* v. *H. E. Moss & Co.,* 159 F. 2d 842, 845 (1947), he quickly reconsidered, *Guerrini* v. *United States,* 167 F. 2d 352, 355 (1948), and it now seems clear that it does not. See *The Tungus* v. *Skovgaard,* 358 U. S., at 609 n. 9 (separate opinion of BRENNAN, J.); cf. *Rodrigue* v. *Aetna Cas. & Sur. Co.,* 395 U. S. 352 (1969). The congressional decision to place under state laws such areas as national parks, which are carved from existing state territories and are subject to no other general body of law, carries no implication of a similar intent in the vastly different realm of admiralty.

The latter statute was before this Court in *Rodrigue* v. *Aetna Cas. & Sur. Co., supra.* We there determined that the Act was intended to treat artificial islands, located beyond the three-mile limit, not as vessels upon the high seas, but "as though they were federal enclaves in an upland State." Because the Act "deliberately eschewed the application of admiralty principles to these

time law to provide such a remedy appears to be jurisprudentially unsound and to have produced serious confusion and hardship, that refusal should cease unless there are substantial countervailing factors that dictate adherence to *The Harrisburg* simply as a matter of *stare decisis*. We now turn to a consideration of those factors.

## IV

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

The first factor, often considered the mainstay of *stare decisis,* is singularly absent in this case. The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior. There is no

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novel structures," *id.*, at 355, they were held subject to the substantive standards of state law except when an inconsistent federal law applied. This special dispensation for a modern problem to which maritime law was thought "inapposite," *id.*, at 363, has no analogue in this case. It is undisputed that the duties owed by respondents to petitioner's husband were determined by maritime law, and were the same within as without the three-mile limit.

question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most States. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations. "If the new remedial doctrine serves simply to reenforce and make more effectual well-understood primary obligations, the net result of innovation may be to strengthen rather than to disturb the general sense of security." Hart & Sacks, *supra,* at 577; *id.,* at 485, 574–577, 585–595, 606–607; Pound, Some Thoughts About Stare Decisis, 13 NACCA L. J. 19 (1954).

Nor do either of the other relevant strands of *stare decisis* counsel persuasively against the overruling of *The Harrisburg.* Certainly the courts could not provide expeditious resolution of disputes if every rule were fair game for *de novo* reconsideration in every case. However, the situation we face is far removed from any such consequence as that. We do not regard the rule of *The Harrisburg* as a closely arguable proposition—it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus,* has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has

had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today.[17]

V

Respondents argue that overruling *The Harrisburg* will necessitate a long course of decisions to spell out the elements of the new "cause of action." We believe these fears are exaggerated, because our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing

[17] Respondents point out that a bill has been introduced in the United States Senate, by request, which would, among other things, extend the Death on the High Seas Act to include deaths in state territorial waters. S. 3143, 91st Cong., 1st Sess. To date no hearings have been scheduled or other action taken on the bill. The mere possibility of future legislation in this field does not, of course, affect the legal merits of petitioner's claim that the rule of *The Harrisburg* is no longer a valid part of maritime law. See *United States* v. *W. M. Webb, Inc.*, 397 U. S. 179, 194 n. 21 (1970).

Nor do we think that Congress' failure to take action on the pending bill, or to pass a similar measure over the years as the law of deaths on territorial waters became more incongruous, provides guidance for the course we should take in this case. To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20 (1963).

general maritime law. In most respects the law applied in personal-injury cases will answer all questions that arise in death cases.

Respondents argue, for example, that a statute of limitations must be devised or "borrowed" for the new wrongful-death claim. However, petitioner and the United States respond that since we have simply removed the barrier to general maritime actions for fatal injuries, there is no reason—in federal admiralty suits at least [18]—that such actions should not share the doctrine of laches immemorially applied to admiralty claims. In applying that doctrine, the argument runs, the courts should give consideration to the two-year statute of limitations in the Death on the High Seas Act,[19] just as they have always looked for analogy to appropriate state or foreign statutes of limitations. See *Kenney* v. *Trinidad Corp.*, 349 F. 2d 832, 840 (C. A. 5th Cir. 1965); Gilmore & Black, *supra*, at 296 n. 149, 628. We need not decide this question now, because the present case was brought within a few months of the accident and no question of timeliness has been raised. The argument demonstrates, however, that the difficulties should be slight in applying accepted maritime law to actions for wrongful death.

The one aspect of a claim for wrongful death that has no precise counterpart in the established law governing nonfatal injuries is the determination of the beneficiaries who are entitled to recover. General maritime law, which denied any recovery for wrongful death, found no need to specify which dependents should receive such recovery. On this question, petitioner and the United States argue that we may look for guidance to the expressions of Congress, which has spoken on this

[18] See *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 224 (1958).

[19] 46 U. S. C. § 763.

subject in the Death on the High Seas Act,[20] the Jones Act,[21] and the Longshoremen's and Harbor Workers' Compensation Act.[22] Though very similar, each of these provisions differs slightly in the naming of dependent relatives who may recover and in the priority given to their claims.

The United States contends that, of the three, the provision that should be borrowed for wrongful-death actions under general maritime law is that of the Death on the High Seas Act. It is the congressional enactment that deals specifically and exclusively with actions for wrongful death, and that simply provides a remedy—for deaths on the high seas—for breaches of the duties imposed by general maritime law. In contrast, the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seamen against their employers—based on violations of the special standard of negligence that has been imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law. Further, although the Longshoremen's and Harbor Workers' Compensation Act is applicable to longshoremen such as petitioner's late husband, its principles of recovery are wholly foreign to those of general maritime law—like most workmen's compensation laws, it deals only with the responsibilities of employers for death or injury to their employees, and provides standardized amounts of compensation regardless of fault on the part of the employer.

The only one of these statutes that applies not just to a class of workers but to any "person," and that bases liability on conduct violative of general maritime

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[20] 46 U. S. C. §§ 761, 762.

[21] 45 U. S. C. § 51; see 46 U. S. C. § 688.

[22] 33 U. S. C. § 909. See n. 11, *supra*.

law, is the Death on the High Seas Act.[23] The borrowing of its schedule of beneficiaries, argues the United States, will not only effectuate the expressed congressional preferences in this area but will also promote uniformity by ensuring that the beneficiaries will be the same for identical torts, rather than varying with the employment status of the decedent. There is no occasion, according to this argument, to borrow from the law of the relevant coastal State, since the underlying duties to be effectuated are entirely federal and Congress has expressed its preference of beneficiaries for violations of maritime law.

We do not determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation. For present purposes we conclude only that its existence affords no sufficient reason for not coming to grips with *The Harrisburg*. If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill.

In sum, in contrast to the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus*, which followed upon it, and the problems of federal-state accommodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters. That prospect indeed makes for, and not against, the discarding of *The Harrisburg*.

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[23] 46 U. S. C. § 761.

We accordingly overrule *The Harrisburg,* and hold that an action does lie under general maritime law for death caused by violation of maritime duties. 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 BLACKMUN took no part in the consideration or decision of this case.

# MULLOY *v.* UNITED STATES

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

No. 655. Argued April 20, 1970—Decided June 15, 1970

Petitioner, who had been classified I–A, applied to his local Selective Service Board for a I–O classification as a conscientious objector, filing the appropriate form with detailed answers. Letters were submitted by five persons attesting to the sincerity of petitioner's belief. At petitioner's request, the board granted him a personal appearance. He was notified that the classification had not been reopened and that the interview was a matter of courtesy. Under Selective Service regulations reopening would have entitled petitioner to an administrative appeal from the rejection of his conscientious objector claim. Petitioner then refused to submit to induction and was tried and convicted for violating 50 U. S. C. App. § 462 (a). *Held:* Where a registrant makes nonfrivolous allegations of facts not previously considered by his board, that, if true, would be sufficient under the regulations to warrant granting a reclassification, the board must reopen the classification, unless the truth of the new allegations is conclusively refuted by other reliable information in registrant's file, thus affording the registrant an administrative appeal from an adverse determination on the merits. Pp. 415–418.

412 F. 2d 421, reversed.

*Robert Allen Sedler* argued the cause and filed briefs for petitioner.

*Joseph J. Connolly* argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Francis X. Beytagh, Jr.,* and *Philip R. Monahan.*

Briefs of *amici curiae* urging reversal were filed by *Marvin M. Karpatkin, Michael N. Pollet,* and *Melvin L. Wulf* for the American Civil Liberties Union et al., and by *Ralph Rudd* and *Benjamin B. Sheerer* for Wayne Spencer Deri et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

Following a jury trial in the United States District Court for the Western District of Kentucky, the petitioner was convicted for refusing to submit to induction into the Armed Forces in violation of § 12 (a) of the Military Selective Service Act of 1967, 62 Stat. 622, as amended, 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV). He was sentenced to five years' imprisonment and fined $10,000, and his conviction was affirmed by the Court of Appeals for the Sixth Circuit. 412 F. 2d 421. We granted certiorari, 396 U. S. 1036, to consider the petitioner's contention, raised both in the trial court and in the Court of Appeals, that the order to report was invalid because his local board had refused to reopen his I–A classification following his application for a I–O classification as a conscientious objector. The argument is that it was an abuse of discretion for the board to reject his conscientious objector claim without reopening his classification, and by so doing to deprive him of his right to an administrative appeal.

I

On October 17, 1967, the petitioner, who was then 23 years old and classified I–A (available for military service), wrote to his local Selective Service Board that "[a]fter much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector. I am therefore opposed to war in any form." In response to this letter the clerk sent him the Special Form for Conscientious Objectors (SSS Form 150), which he promptly completed and returned.[1]

[1] At this time there was no outstanding order to report for induction, though at least two orders to report had previously been sent and subsequently canceled for various reasons not relevant

The petitioner stated in the form that he was conscientiously opposed by reason of his religious training and belief to participation in war in any form. He said that he believed in a Supreme Being and that this belief involved duties superior to those arising from any human relation; that his religious training had taught him that it was against God's law to kill; and that as a member of the armed services he would be obliged to kill or indirectly assist in killing. In response to the form's inquiry as to how, when, and from what source he had received the training and acquired the belief upon which his conscientious objection was based, he gave a detailed answer, explaining that he had been born and raised a Catholic; that he had at one point in his life thought he would become a priest; that he had gone through a religious crisis in college and left the church, but had returned to it and been greatly influenced by the writings of Thomas Merton, who had preached nonviolence. He said that he had learned in the work he had been doing with an antipoverty organization in Appalachia of the need for love and understanding among people, and of the futility of violence. He concluded that his early training, coupled with his adult experience, particularly as a worker among the Appalachian poor, had brought him to his present position as a conscientious objector.

The petitioner also gave detailed and specific answers to other questions that the form asked, such as when and where he had given public expression to the views expressed as the basis for his conscientious objector claim, and what actions or behavior he thought most conspicuously demonstrated the consistency and depth of his religious convictions. Five people who were well acquainted with the petitioner wrote to the board, attest-

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here. Prior to the petitioner's classification in I–A he had had a II–S student deferment and subsequently a II–A occupational deferment.

ing to the sincerity of his beliefs. One letter was from a Catholic priest, who wrote of the petitioner's honesty and integrity and said that he felt military service would do violence to the petitioner's conscience. Other letters from people who had worked with the petitioner spoke of his belief in nonviolence and confirmed the accuracy of the incidents that the petitioner had referred to in the form as manifestations of his beliefs. The petitioner's brother wrote that while he vehemently disagreed with the petitioner's unwillingness to bear arms for his country, he still felt that the petitioner was sincere in his beliefs.

In response to the petitioner's request to discuss his application with the board, the clerk wrote that the board had decided to grant him a personal appearance. This interview took place on November 9 and lasted about 10 or 15 minutes. It was attended by three of the four local board members. The résumé of the interview prepared by the clerk stated that the petitioner "advised that he was claiming a C. O. classification because he had learned through experience and did not until later in life realize the importance of now believing as he did," and that he "felt that military service would interrupt his work and there would be no one else to take his place." The minute entry in the petitioner's file indicated that all members present felt the information in the form, and accompanying letters, together with what was learned at the interview, did not warrant a reopening of the petitioner's I–A classification. However, no formal vote on the petitioner's application was taken until January 11, 1968, at which time, the minute entry indicated, all four members were present and again it was noted that all "felt this information did not warrant reopening" of the I–A classification. After receiving notification of the board's action, the petitioner wrote to the board on January 21 seeking to appeal its failure to reclassify

him I–O. He said that he considered the November interview to have been a reopening of his case. On January 23 the board replied that the interview had been extended as a matter of courtesy, and that it had not at any time reopened the petitioner's classification. On the same day the petitioner was ordered to report for induction on February 23, 1968. The petitioner reported, but refused to submit to induction. This refusal resulted in the criminal charge that led to his conviction under 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV).

## II

Under the Selective Service regulations a "local board may reopen and consider anew the classification of a registrant . . . [if presented with] facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification . . . ." 32 CFR § 1625.2.[2] Even if the local board denies the requested reclassification, there is a crucial difference between such board action and a simple refusal to reopen the classification at all. For once the local board reopens, it is required by the regulations to "consider the new information which it has received [and to] again classify the registrant in the same manner as if he had never before been classified." 32 CFR § 1625.11. A classification following a reopening is thus in all respects a new and original one and, even if the registrant is placed in the same classification as before, "[e]ach such classification [following the reopening] shall be followed by the same right of appearance before the local board and . . . of

[2] If reclassification is sought *after* an order to report for induction has been mailed to the registrant, the regulations provide that the classification "shall not be reopened . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 CFR § 1625.2.

appeal as in the case of an original classification." 32 CFR § 1625.13. Where, however, in the opinion of the board, no new facts are presented or "such facts, if true, would not justify a change in such registrant's classification . . . ," 32 CFR § 1625.4, the board need not reopen, and following such a refusal to reopen, the registrant has no right to a personal appearance or to an appeal. Thus, whether or not a reopening is granted is a matter of substance, for with a reopening comes the right to be heard personally and to appeal. While the petitioner here was given an interview as a matter of courtesy, the board's refusal to reopen his classification denied him the opportunity for an administrative appeal from the rejection of his conscientious objector claim. Therefore, if the refusal to reopen was improper, petitioner was wrongly deprived of an essential procedural right, and the order to report for induction was invalid.

## III

Though the language of 32 CFR § 1625.2 is permissive, it does not follow that a board may arbitrarily refuse to reopen a registrant's classification. While differing somewhat in their formulation of precisely just what showing must be made before a board is required to reopen, the courts of appeals in virtually all Federal Circuits have held that where the registrant has set out new facts that establish a prima facie case for a new classification, a board must reopen to determine whether he is entitled to that classification.[3] Not to do

[3] *United States* v. *Gearey,* 379 F. 2d 915, 922 n. 11 (C. A. 2d Cir. 1967), adopting the standard enunciated in *United States* v. *Burlich,* 257 F. Supp. 906, 911 (D. C. S. D. N. Y. 1966); *United States* v. *Turner,* 421 F. 2d 1251 (C. A. 3d Cir. 1970); *United States* v. *Grier,* 415 F. 2d 1098 (C. A. 4th Cir. 1969); *Robertson* v. *United States,* 404 F. 2d 1141 (C. A. 5th Cir. 1968), rev'd *en banc* on other grounds, 417 F. 2d 440 (1969); *Townsend* v. *Zimmerman,* 237 F. 2d 376 (C. A. 6th Cir. 1956); *United States* v. *Freeman,*

so, these courts have held, is an abuse of discretion, and we agree.

Where a registrant makes nonfrivolous allegations of facts that have not been previously considered by his board, and that, if true, would be sufficient under regulation or statute to warrant granting the requested reclassification, the board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file. See *United States* v. *Burlich,* 257 F. Supp. 906, 911. For in the absence of such refutation there can be no basis for the board's refusal to reopen except an evaluative determination adverse to the registrant's claim on the merits. And it is just this sort of determination that cannot be made without affording the registrant a chance to be heard and an opportunity for an administrative appeal.

Because of the narrowly limited scope of judicial review available to a registrant,[4] the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System.[5] Where a prima facie case for reclassification has been made, a board cannot deprive the registrant of such review by simply refusing to reopen his file.[6] Yet here the board did

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388 F. 2d 246 (C. A. 7th Cir. 1967); *Davis* v. *United States,* 410 F. 2d 89 (C. A. 8th Cir. 1969); *Miller* v. *United States,* 388 F. 2d 973 (C. A. 9th Cir. 1967); *Fore* v. *United States,* 395 F. 2d 548, 554 (C. A. 10th Cir. 1968).

[4] See, *e. g., Clark* v. *Gabriel,* 393 U. S. 256.

[5] See, *e. g., United States* v. *Freeman,* 388 F. 2d 246; *United States* v. *Turner,* 421 F. 2d 1251; *Olvera* v. *United States,* 223 F. 2d 880 (C. A. 5th Cir. 1955); see also *Simmons* v. *United States,* 348 U. S. 397.

[6] The scope of judicial review is, as a practical matter, particularly narrow where the registrant is claiming conscientious objector status.

"A sincere claimant for conscientious objector status cannot turn

precisely that. For it is clear that the petitioner's SSS Form 150 and the accompanying letters constituted a prima facie showing that he met the statutory standard for classification as a conscientious objector (50 U. S. C. App. § 456 (j) (1964 ed., Supp. IV)), and the Government now virtually concedes as much.

The Government suggests, however, that the board might have concluded that the prima facie claim had been undercut by the petitioner himself—by his statements at the courtesy interview or because his demeanor convinced the board that he was not telling the truth. There is, however, but scant evidence in the record that the board's action was based on any such grounds. And, in any event, it is on precisely such grounds as these that board action cannot be predicated without a reopening of the registrant's classification, and a consequent opportunity for administrative appeal.

This is not to say that on all the facts presented to it the board might not have been justified in refusing to grant the petitioner a I–O classification; it is to say that such refusal could properly occur only after his classification had first been reopened. The board could not deprive the petitioner of the procedural protections attending reopening by making an evaluative determination

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to the habeas corpus remedy [to challenge the legality of his classification] because his religious belief prevents him from accepting induction under any circumstances. As a result he is limited to seeking review in a criminal trial for refusal to submit. In this criminal proceeding, as in any proceeding reviewing a draft classification, his defense of invalid classification is tested by the 'basis in fact' formula. Under these circumstances conviction is almost inevitable, since the Board's refusal to grant the conscientious objector classification is based on an inference as to the sincerity of the registrant's belief and there will almost always be something in the record to support an inference of lack of sincerity." *United States* v. *Freeman,* 388 F. 2d 246, 248–249 (C. A. 7th Cir. 1967).

of his claim while purportedly declining to reopen his classification.[7]

Since the petitioner presented a nonfrivolous, prima facie claim for a change in classification based on new factual allegations which were not conclusively refuted by other information in his file, it was an abuse of discretion for the board not to reopen his classification, thus depriving him of his right to an administrative appeal. The order to report for induction was accordingly invalid, and his conviction for refusing to submit to induction must be reversed.

*It is so ordered.*

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

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[7] The Government argues that if the local board must reopen whenever a prima facie case for reclassification is stated by the registrant, he will be able to postpone his induction indefinitely and the administration of the Selective Service System will be undermined. But the board need not reopen where the claim is plainly incredible, or where, even if true, it would not warrant reclassification, or where the claim has already been passed on, or where the claim itself is conclusively refuted by other information in the applicant's file. Moreover, a registrant who makes false statements to his draft board is subject to severe criminal penalties. 50 U. S. C. App. § 462 (a) (1964 ed., Supp. IV).

## EVANS ET AL. *v.* CORNMAN ET AL.

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

No. 236. Argued January 22, 1970—Decided June 15, 1970

Residents on grounds of the National Institutes of Health are treated by the State of Maryland, in which that federal enclave is located, as state residents to such an extent that it violates the Equal Protection Clause of the Fourteenth Amendment to deny them the right to vote in that State. Pp. 420–426.

295 F. Supp. 654, affirmed.

*Robert F. Sweeney,* Deputy Attorney General of Maryland, argued the cause for appellants. With him on the briefs were *Francis B. Burch,* Attorney General, and *George W. Liebmann* and *Henry R. Lord,* Assistant Attorneys General.

*Richard Schifter* argued the cause for appellees. With him on the brief was *Howard J. Thomas.*

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

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

Appellees live on the grounds of the National Institutes of Health (NIH), a federal reservation or enclave located within the geographical boundaries of Montgomery County in the State of Maryland. In October 1968, the Permanent Board of Registry of Montgomery County announced that persons living on NIH grounds did not meet the residency requirement of Art. 1, § 1, of the Maryland Constitution. Accordingly, such persons were not qualified to vote in Maryland elections, and the names of those previously registered would be

removed from the county's voter rolls. Appellees then instituted the present suit against the members of the Permanent Board, requesting that a three-judge Federal District Court be convened to enjoin as unconstitutional this application of the Maryland voter residency law.

After the District Court issued a temporary restraining order so that appellees who had previously registered could vote in the November 1968 general election,[1] the case was considered on the pleadings and stipulations of fact. The District Court issued the requested permanent injunction, holding that to deny appellees the right to vote was to deny them the equal protection of the laws. *Cornman* v. *Dawson,* 295 F. Supp. 654 (D. C. Md. 1969). Thereafter, a motion by the present appellants to intervene as additional defendants was granted, and a direct appeal was prosecuted to this Court under 28 U. S. C. § 1253. We noted probable jurisdiction, 396 U. S. 812 (1969), and we affirm.

Under Art. I, § 8, cl. 17, of the United States Constitution, Congress is empowered to "exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." NIH, a medical research facility owned and operated by the United States Government, is one of the places subject to that congressional power. The facility commenced operation more than 30 years ago, when land was purchased and residential buildings were built to allow scientists and doctors to live near their work. It did not become a federal reservation, however, until 1953

[1] Of the 12 appellees, 10 were registered to vote in Maryland prior to the commencement of this suit. The other two had sought to register but were not allowed to because they lived on NIH grounds.

when the State of Maryland ceded jurisdiction over the property to the United States.[2]

Before that time, persons who resided on NIH grounds could register and vote in Montgomery County; they continued to do so, apparently without question, for another 15 years. In 1963, however, in a case involving residents of another federal enclave, *Royer* v. *Board of Election Supervisors,* 231 Md. 561, 191 A. 2d 446, the Maryland Court of Appeals ruled that a resident of a federal reservation is not "a resident of the State" within the meaning of that term in Art. 1, § 1, of the Maryland Constitution, the provision that governs voter qualifications.

It was the *Royer* decision that prompted the action of the election officials in the present case. Appellants rely heavily on it and urge simply that persons who live on NIH grounds are residents of the enclave, not residents of the State of Maryland. Maryland may, of course, require that "all applicants for the vote actually fulfill the requirements of bona fide residence." *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965). "But if they are in fact residents, with the intention of making [the State] their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation." *Id.,* at 94.

What was said in *Carrington,* rejecting in another context a different artificial gloss on a residency requirement, is applicable here as well. Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in *Howard* v. *Commis-*

[2] See Md. Ann. Code, Art. 96, § 34.

*sioners of Louisville,* 344 U. S. 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote.

Appellants argue that even if appellees are residents of Maryland, the State may constitutionally structure its election laws so as to deny them the right to vote. This Court has, of course, recognized that the States "have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, 50 (1959). At the same time, however, there can be no doubt at this date that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 665 (1966); see *Williams* v. *Rhodes,* 393 U. S. 23, 29 (1968). Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. See *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886); *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964). And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.

The sole interest or purpose asserted by appellants to justify the limitation on the vote in the present case is essentially to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them. Without deciding the question, we have assumed that such an interest could be sufficiently compelling to justify limitations on the suffrage, at least with regard to some elections. See *Kramer* v. *Union School District,* 395 U. S. 621, 632 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701, 704 (1969). However, it is clear that such a claim cannot lightly be accepted. This Court has held that a

State may not dilute a person's vote to give weight to other interests, see, *e. g., Reynolds* v. *Sims,* 377 U. S. 533 (1964), and a lesser rule could hardly be applicable to a complete denial of the vote. See *Kramer* v. *Union School District, supra,* at 626–627. All too often, lack of a "substantial interest" might mean no more than a different interest, and " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington* v. *Rash, supra,* at 94.

According to appellants, NIH residents are substantially less interested in Maryland affairs than other residents of the State because the Constitution vests "exclusive Legislation in all Cases whatsoever" over federal enclaves to Congress. Appellants cite decisions dating back to *Opinion of the Justices,* 42 Mass. 580 (1841), and *Sinks* v. *Reese,* 19 Ohio St. 306 (1870), denying enclave residents the right to vote on the ground that the State has no jurisdiction over them.[3] We need not consider, however, whether these early cases would meet the requirements of the Fourteenth Amendment, for the relationship between federal enclaves and the States in which they are located has changed considerably since they were decided. As the District Court noted, Congress has now permitted the States to extend important aspects of state powers over federal areas. While it is true that

[3] In addition to the *Royer* decision of the Maryland Court of Appeals, there are a number of other state court rulings to the same effect. See, *e. g., Herken* v. *Glynn,* 151 Kan. 855, 101 P. 2d 946 (1940); *Arledge* v. *Mabry,* 52 N. M. 303, 197 P. 2d 884 (1948); *McMahon* v. *Polk,* 10 S. D. 296, 73 N. W. 77 (1897); *State ex rel. Lyle* v. *Willett,* 117 Tenn. 334, 97 S. W. 299 (1906).

At the same time, however, there is a contrary line of recent state decisions granting enclave residents the right to vote. See *Arapajolu* v. *McMenamin,* 113 Cal. App. 2d 824, 249 P. 2d 318 (1952); *Rothfels* v. *Southworth,* 11 Utah 2d 169, 356 P. 2d 612 (1960); *Adams* v. *Londeree,* 139 W. Va. 748, 83 S. E. 2d 127 (1954).

federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds, see *Offutt Housing Co.* v. *Sarpy County,* 351 U. S. 253 (1956), whether appellees are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today, not on what it may be sometime in the future.

Appellants do not deny that there are numerous and vital ways in which NIH residents are affected by electoral decisions. Thus, if elected representatives enact new state criminal laws or sanctions or make changes in those presently in effect, the changes apply equally to persons on NIH grounds. Under the Federal Assimilative Crimes Act, 18 U. S. C. § 13, "acts not punishable by any enactment of Congress are punishable by the then effective laws of the State in which the enclave is situated." *United States* v. *Sharpnack,* 355 U. S. 286, 287 (1958). Further, appellees are as concerned with state spending and taxing decisions as other Maryland residents, for Congress has permitted the States to levy and collect their income, gasoline, sales, and use taxes—the major sources of state revenues—on federal enclaves. See 4 U. S. C. §§ 104–110. State unemployment laws and workmen's compensation laws likewise apply to persons who live and work in federal areas. See 26 U. S. C. § 3305 (d); 40 U. S. C. § 290. Appellees are required to register their automobiles in Maryland and obtain drivers' permits and license plates from the State; they are subject to the process and jurisdiction of state courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools.

All of these factors led the District Court to "conclude that on balance the [appellees] are treated by the State of Maryland as state residents to such an extent that it is

a violation of the Fourteenth Amendment for the State to deny them the right to vote." 295 F. Supp., at 659. Appellants resist that conclusion, arguing that NIH residents do not pay the real property taxes that constitute a large part of the revenues for local school budgets.[4] However, Maryland does not purport to exclude from the polls all persons living on tax-exempt property, and it could not constitutionally do so. *Cipriano* v. *City of Houma, supra;* see *Kramer* v. *Union School District, supra.* Of the other differences asserted between Maryland residents who live on federal enclaves and those who do not, most are far more theoretical than real.[5] In any

[4] Except for a lessee's interest in property leased from the United States, see 10 U. S. C. § 2667 (e), Congress has not provided that the States may apply their property taxes to federal enclaves. At the same time, all, or virtually all, enclave real property is owned by the United States and is otherwise exempt from state property taxes. To compensate for this exemption, Congress has provided that increased amounts of federal-aid-to-education funds be paid with respect to federal employees living on federal property. See 20 U. S. C. §§ 236–244, 631–645.

[5] Thus, if there were severance or personal property taxes applicable to residents of Montgomery County (which there are not), they could not be collected on the enclave. Similarly, appellees are exempt from service in the State's unorganized militia (which has apparently never been called up) and from compulsory education laws. Appellants state that a myriad of state regulatory and licensing provisions are not enforceable on the enclave, but no instance of a practical effect on appellees is cited. See also *Chicago & Pacific R. Co.* v. *McGlinn,* 114 U. S. 542 (1885); *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94 (1940).

Perhaps the most real of the differences is that crimes committed on NIH grounds where appellees live, while defined by state law, may only be prosecuted in federal court by federal authorities, whereas the same acts would be prosecuted by state authorities in state courts if they occurred off the enclave. If this difference lessens appellees' interest in state law enforcement and policy at all, it certainly does not do so substantially. All Maryland residents, including appellees, undoubtedly have an interest in state laws and how they are enforced throughout the entire State.

case, these differences, along with whatever others may exist, do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise.

In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave. In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents. As the District Court concluded, they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.

The judgment is

*Affirmed.*

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

# MITCHELL ET AL. *v.* DONOVAN, SECRETARY OF STATE OF MINNESOTA, ET AL.

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

No. 726. Argued April 21, 1970—Decided June 15, 1970

Appellants had requested an injunction to have the names of Communist Party candidates placed on the ballot in Minnesota for the 1968 election, which was granted. After the election the Federal District Court, finding no present case or controversy, denied appellants' request for a declaratory judgment striking down the Communist Control Act, on which the state authorities had relied in refusing ballot placement. Appellants brought a direct appeal to this Court under 28 U. S. C. § 1253, which permits an "appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction . . . ." *Held:* An order granting or denying only a declaratory judgment may not be appealed to this Court under § 1253. *Rockefeller* v. *Catholic Medical Center,* 397 U. S. 820.

300 F. Supp. 1145, vacated and remanded.

*Lynn S. Castner* argued the cause for appellants. With him on the brief were *Melvin L. Wulf* and *Eleanor Holmes Norton.*

*Richard H. Kyle,* Solicitor General of Minnesota, argued the cause for appellees. With him on the brief were *Douglas M. Head,* Attorney General, *pro se, Arne L. Schoeller,* Chief Deputy Attorney General, *James M. Kelley,* Assistant Attorney General, and *John R. Kenefick,* Special Assistant Attorney General.

PER CURIAM.

The appellants are the 1968 Communist Party candidates for President and Vice President of the United States, various Minnesota voters who alleged a desire

to vote for these candidates, and the Communist Parties of the United States and of Minnesota. The appellant candidates obtained petitions containing the requisite number of names and asked the Secretary of State of Minnesota to place them on the ballot for the 1968 election. The Secretary denied the request, relying upon an opinion by the Attorney General of the State to the effect that placing Communist Party candidates on the ballot would violate the Federal Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. §§ 841–842, which declares that the Communist Party "should be outlawed," and purports to strip it of all "rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . . ."

The appellants brought an action in the United States District Court for the District of Minnesota seeking a declaration that the Communist Control Act was constitutionally invalid and praying for a temporary restraining order and permanent injunction requiring the Secretary to include the names of the appellant candidates on the November 1968 ballot. Because of the appellants' request for injunctive relief based upon a claim that a federal statute was unconstitutional, a three-judge District Court was impaneled pursuant to 28 U. S. C. § 2282. The three-judge court noted that time was short before the election; that the equities favored the appellants; that the United States had taken the position in an *amicus* brief that the Communist Control Act did not bar the placement of Communist Party candidates upon the ballot; and that if the Act did apply in the manner asserted by the State, there would be "grave doubts" as to its constitutionality. Accordingly, without deciding the merits of the appellants' claims, the

court ordered that the names of the appellant candidates be placed on the November 1968 ballot. 290 F. Supp. 642. The candidates received the votes of 415 Minnesotans in that election.

After the election, the appellants moved to amend the complaint, alleging that the Communist Party intended to run candidates in future elections in Minnesota and, on information and belief, that Minnesota would adhere to its position that the Communist Control Act barred placing these candidates on the ballot. The District Court allowed the amendment of the complaint. It held that the prayer for injunctive relief, which referred only to the 1968 election and requested no injunction as to future conduct, had been rendered moot by the passing of that election. As to the prayer for a declaratory judgment striking down the Communist Control Act, the court found no present case or controversy. In the court's view it was not sufficiently certain that the Communist Party would run candidates in the future or that Minnesota would adhere to its construction of the federal statute, to take the case out of the realm of the hypothetical. It therefore dismissed the complaint. 300 F. Supp. 1145.

The appellants brought a direct appeal to this Court under 28 U. S. C. § 1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The appellees moved to dismiss the appeal on the ground that the order complained of was not one "grant-

ing or denying . . . an interlocutory or permanent injunction." We noted probable jurisdiction, 396 U. S. 1000. The appellees have persisted in their claim that the Court lacks jurisdiction to consider this appeal, and after hearing oral argument we have concluded that they are right.

The order appealed from does no more than deny the appellants a declaratory judgment striking down the Communist Control Act. The only injunction ever requested by the appellants was one ordering the names of the Communist Party candidates to be placed on the ballot for the November 1968 election. That injunction was granted, and no appeal was taken by the state officials. As is plain from the opening words of its opinion in the present proceeding, the District Court recognized that no request for injunctive relief was before it: "We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief . . . ." 300 F. Supp., at 1146.

That leaves us with the question whether an order granting or denying only a declaratory judgment may be appealed to this Court under § 1253. In a recent case, *Rockefeller* v. *Catholic Medical Center,* 397 U. S. 820, we gave a negative answer to that question, and we adhere to that decision. Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 154–155; cf. *Zwickler* v. *Koota,* 389 U. S. 241, 254. The provisions concerning three-judge courts, including the provisions for direct appeal to this Court, antedate the Declaratory Judgment Act of 1934,[1]

[1] 48 Stat. 955, 28 U. S. C. §§ 2201–2202.

but Congress substantially amended the three-judge court provisions in 1937 and 1948 without providing for such direct appeals from orders granting or denying declaratory judgments.[2]

We have stressed that the three-judge-court legislation is not "a measure of broad social policy to be construed with great liberality," but is rather "an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States*, 312 U. S. 246, 251. Thus this Court's jurisdiction under that legislation is to be literally construed. It would hardly be faithful to such a construction to read the statutory term "injunction" as meaning "declaratory judgment." [3]

We conclude, therefore, that this Court lacks jurisdiction of the appeal. A simple dismissal for want of jurisdiction, however, would leave the appellants with no recourse to appellate review, because they brought their appeal here rather than to the Court of Appeals and the time for appealing to the Court of Appeals has long since passed. Accordingly, as in other cases where an appeal was improperly brought to this Court rather than the Court of Appeals,[4] we vacate the judgment below and remand the case so that the District Court may enter a

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[2] The early history of the three-judge-court statute, then § 266 of the Judicial Code, is summarized in *Goldstein* v. *Cox*, 396 U. S. 471, 476–477. The 1937 and 1948 amendments, both of which made substantial changes in the statute, appear at 50 Stat. 752 and 62 Stat. 968, respectively.

[3] One commentator has argued for the broader construction on grounds of policy and logical symmetry, see Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13–20, but those arguments should be directed to Congress rather than the courts.

[4] *Rockefeller* v. *Catholic Medical Center, supra; Stamler* v. *Willis*, 393 U. S. 407; *Moody* v. *Flowers*, 387 U. S. 97; *Phillips* v. *United States, supra.*

fresh order dismissing the complaint, thus affording the appellants an opportunity to take a timely appeal to the Court of Appeals for the Eighth Circuit.

*It is so ordered.*

MR. JUSTICE BLACK concurs in the result.

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

MR. JUSTICE DOUGLAS, dissenting.

I agree with the District Court that the case is too hypothetical to qualify as a "case" or "controversy" within the meaning of Article III and I would affirm. I do not, however, share the aversion to 28 U. S. C. § 1253 which the Court's opinion reflects. I would be hospitable to its aim and purpose as my dissent in *Swift & Co.* v. *Wickham,* 382 U. S. 111, 129, indicates. The declaratory judgment is, I think, "an order granting or denying . . . an . . . injunction" within the meaning of § 1253.

*Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, is not to the contrary. It merely held that in some circumstances "an action solely for declaratory relief" could be tried before a single judge where the "relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion." *Id.,* at 154, 155. We indicated, however, that a different result would follow "whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained." *Id.,* at 155.

The *Kennedy* case, in other words, involved solely the question whether a three-judge court need always be summoned where no injunctive relief was asked or contemplated. The answer involved an analysis of 28 U. S. C. § 2281 and § 2282. We are now concerned with

§ 1253 and the meaning of "an order granting or denying . . . an . . . injunction." The declaratory judgment may well contain a "thou shalt not" as commanding as any injunction. Or its refusal may be as definitive an adjudication as the refusal of an injunction. Ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.

Where, as here, the three-judge court was properly convened, I would think that any action it took, which was denying or granting an injunction or its equivalent, would be properly here under 28 U. S. C. § 1253.

## WALKER *v.* OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

No. 1470. Decided June 15, 1970

Reversed.

PER CURIAM.

The judgment of the Supreme Court of Ohio is reversed. *Redrup* v. *New York,* 386 U. S. 767 (1967).

MR. CHIEF JUSTICE BURGER, dissenting.

The trial court, endeavoring to apply the standards articulated by this Court, held that the materials in question are obscene within the meaning of the relevant Ohio statute. This conclusion rested on findings that the materials are patently offensive to contemporary community standards relating to the description or representation of sexual matters; that, when taken as a whole, their dominant theme appeals to the prurient interest of the reader; and that they are utterly without redeeming social value. The Ohio appellate courts declined to disturb that judgment. Yet today the Court reverses, citing only *Redrup.*

I dissent from such a summary disposition, not only for the reasons expressed in my dissenting opinion in *Cain* v. *Kentucky,* 397 U. S. 319 (1970), but also because I find no justification, constitutional or otherwise, for this Court's assuming the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it without regard to the findings or conclusions of other courts, state or federal. That is not one of the purposes for which this Court was established.

MR. JUSTICE HARLAN, for reasons expressed in his

opinions in *Roth* v. *United States,* 354 U. S. 476, 496 (1957); *Jacobellis* v. *Ohio,* 378 U. S. 184, 203 (1964); and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455 (1966), would leave the judgment of the state court undisturbed.

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

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## BASSETT *v.* SMITH, WARDEN

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

No. 1658, Misc. Decided June 15, 1970

Certiorari granted; 226 Ga. 10, 172 S. E. 2d 407, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Georgia affirming the denial of habeas corpus is vacated and the case is remanded to that court for further consideration after petitioner has been afforded adequate access to a copy of the transcript of the trial court hearing on his petition for habeas corpus. *Lane* v. *Brown,* 372 U. S. 477 (1963); *Long* v. *District Court,* 385 U. S. 192 (1966); cf. *Wade* v. *Wilson,* 396 U. S. 282 (1970).

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

# GENERAL ELECTRIC CO. *v.* LOCAL UNION 191, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS (AFL–CIO), ET AL.

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

No. 701. Decided June 15, 1970

Certiorari granted; 413 F. 2d 964, vacated and remanded.

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Boys Markets* v. *Retail Clerks Union, ante,* p. 235.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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

## Reporter's Note

The next page is purposely numbered 901. The numbers between 436 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.

Commencing with this volume of the United States Reports, counsel listings will be published only in connection with argued cases and not in connection with orders, decisions *per curiam* in unargued cases, or in-chambers dispositions.

# ORDERS FROM MAY 18 THROUGH JUNE 19, 1970

## MAY 18, 1970*

*Affirmed on Appeal*

No. 1387. WELLS *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. Judgment affirmed. Reported below: 311 F. Supp. 48.

*Appeals Dismissed*

No. 1145. INZITARI *v.* CONNECTICUT. Appeal from Sup. Ct. Conn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1338. FRANKLIN *v.* FUKUOKA, JUDGE. Appeal from Sup. Ct. Hawaii dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1343. BLINCOE ET UX. *v.* FORSYTHE. Appeal from Ct. App. Cal., 2d App. Dist. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1828, Misc. NIEDER *v.* FULLERTON, TRUSTEE, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

*[REPORTER'S NOTE: As of May 18, 1970, the Court has adopted a change in procedure for summarily disposing of certain unargued appeals by order instead of *per curiam*. Accordingly, two new categories of orders now appear in the United States Reports, *viz.*, *Affirmed on Appeal* and *Appeals Dismissed*. *Per curiam* dispositions will continue to be published with the Court's opinions. Cross references (such as are used in connection with certiorari orders) will not be used for appellate dispositions.]

*Miscellaneous Orders*

No. 1302. FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* PERALES. C. A. 5th Cir. [Certiorari granted, 397 U. S. 1035.] Motion of respondent for the appointment of counsel granted. It is ordered that *Richard Tinsman, Esquire,* of San Antonio, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 1389. MAYBERRY *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, 397 U. S. 1020.] Order of this Court dated April 27, 1970, [see 397 U. S. 1060, Reporter's Note] appointing *Ralph S. Spritzer, Esquire,* as counsel for petitioner in this case is hereby revoked. It is ordered that *Curtis R. Reitz, Esquire,* of Philadelphia, Pennsylvania, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 912, Misc. BROOKE *v.* FOLEY, CHIEF JUDGE, U. S. DISTRICT COURT;

No. 1782, Misc. DANIELS *v.* CHAMBERS, U. S. CIRCUIT JUDGE, ET AL.; and

No. 1869, Misc. SMITH *v.* SUPREME COURT OF OHIO ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 1905, Misc. O'BRYAN *v.* BATTISTI, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

*Probable Jurisdiction Noted*

No. 1370. COATES ET AL. *v.* CITY OF CINCINNATI. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. Reported below: 21 Ohio St. 2d 66, 255 N. E. 2d 247.

No. 1083. Atlantic City Electric Co. et al. *v.* United States et al. Appeal from D. C. S. D. N. Y.; and

No. 1283. Alabama Power Co. et al. *v.* United States et al. Appeal from D. C. D. C. Probable jurisdiction noted. Cases consolidated and a total of one and one-half hours allotted for oral argument. Mr. Justice Douglas took no part in the consideration or decision of this order. Reported below: No. 1083, 306 F. Supp. 338; No. 1283, 316 F. Supp. 337.

*Certiorari Denied.* (See also Nos. 1145, 1338, 1343, and 1828, Misc., *supra.*)

No. 1282. Rodeo Cowboys Assn., Inc., et al. *v.* Wegner. C. A. 10th Cir. Certiorari denied. Reported below: 417 F. 2d 881.

No. 1290. Murray et al., dba Nassau China Co. *v.* Harper, U. S. District Judge. C. A. 8th Cir. Certiorari denied.

No. 1291. Sayne *v.* Shipley. C. A. 5th Cir. Certiorari denied. Reported below: 418 F. 2d 679.

No. 1297. Emerson Electric Co. et al. *v.* Fulton et al. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 527.

No. 1299. In re Weinstein. Sup. Ct. Ore. Certiorari denied. Reported below: —— Ore. ——, 459 P. 2d 548.

No. 1341. Page, Warden *v.* Martin. C. A. 10th Cir. Certiorari denied. Reported below: 417 F. 2d 309.

No. 1342. Yakima Tribal Court et al. *v.* Settler et al. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 2d 486 and 1311.

No. 1345. SULLIVAN *v.* CHOQUETTE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 420 F. 2d 674.

No. 1349. SIMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 667.

No. 1350. MATOSKY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 421 F. 2d 410.

No. 1355. WADEMAN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 1357. LINDSEY *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 81 N. M. 173, 464 P. 2d 903.

No. 1360. MOODY *v.* FLYING SAUCERS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 884.

No. 1363. KIGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 1396.

No. 1365. LOOKRETIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 647.

No. 1368. KONIGSBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 418 F. 2d 1270.

No. 1372. LEO FEIST, INC., ET AL. *v.* APOLLO RECORDS N. Y. CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 418 F. 2d 1249.

No. 1374. BEATTY *v.* ELLINGS ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 285 Minn. 293, 173 N. W. 2d 12.

No. 1378. BISHOP PROCESSING CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 469.

No. 1381. HENDRICKSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 254 N. E. 2d 331.

No. 1382. DEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 418 F. 2d 1236.

No. 1384. ROBINSON ET AL. *v.* TRANSCONTINENTAL GAS PIPELINE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1397.

No. 1386. MILLER *v.* NEW YORK STOCK EXCHANGE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1074.

No. 1388. WHEATON GLASS CO. *v.* SHULTZ, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 421 F. 2d 259.

No. 1393. D. H. OVERMYER WAREHOUSE CO., INC. *v.* KUNIANSKY. C. A. 5th Cir. Certiorari denied. Reported below: 419 F. 2d 1280.

No. 1402. PREFERRED RISK MUTUAL INSURANCE CO. *v.* MARTIN ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 436 Pa. 374, 260 A. 2d 804.

No. 1403. BRUSKE *v.* ARNOLD. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 132, 254 N. E. 2d 453.

No. 1413. THEODOROPOULOS ET AL. *v.* THOMPSON-STARRETT CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 418 F. 2d 350.

No. 1433. ZUSMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: —— Ore. ——, 460 P. 2d 872.

No. 601. WARNER ET AL. *v.* KEWANEE MACHINERY & CONVEYOR CO. C. A. 6th Cir. Certiorari denied. Reported below: 411 F. 2d 1060.

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

This personal injury suit arose out of a farming accident. Petitioner Donald Warner, a 12-year-old boy, was working with other young men on a farm gathering hay. They were using a machine manufactured by the respondent corporation which carried bales of hay up from a wagon into the hayloft at the top of a barn. This machine consisted of a belt with step-like paddles on which the bales were placed. The power for the elevator was supplied by a tractor, and the operating controls were located on the tractor. Donald was at first working at the bottom of the elevator, but when it became necessary for him to change places with another boy at the top of the elevator the power was shut off and Donald proceeded to climb up the elevator, using the paddles as a ladder. As Donald neared the top, but before he had stepped off the machine, another boy, who could not see the top of the elevator, started it up again. Donald had unfortunately caught his foot in the mechanism and when the power was applied his leg was mangled. As a result he lost the lower part of his leg by amputation. Donald and his father brought suit, claiming that the respondent had breached its duty to warn of the potential dangers involved in using the machine as a substitute ladder and the duty to design a safe machine. At trial the Warners introduced testimonial evidence that other hay elevators were designed so that the operator could see the top, and that warnings of possible danger were given with other farm machinery. At the close of this evidence respondent moved for a directed verdict, the motion was denied, and evidence

for the defense was submitted. At the conclusion of all the evidence the jury retired, deliberated fully, and returned with a verdict for $75,000 in favor of the Warners.

On appeal the Court of Appeals proceeded to consider the sufficiency of the evidence, even though it also held that since the respondent had not renewed its motion for a directed verdict at the close of the evidence the court could not consider sufficiency of the evidence on appeal.[1] The court then concluded that petitioner had failed to produce sufficient evidence to warrant submitting the case to the jury and therefore set the jury's verdict aside.

In my opinion this action was a flagrant disregard of the command of the Seventh Amendment that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." This provision, as I understand it, means that questions of the sufficiency of the evidence are for the jury—not the

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[1] The Court of Appeals held, apparently in conformity with the rule in all circuits, "that since the [respondent] did not renew its motion for a directed verdict at the close of the entire testimony, 'the claimed insufficiency of the evidence is not before us.'" 411 F. 2d 1060, 1063 (1969). Nevertheless the court proceeded to consider "whether [petitioners'] evidence considered in the light most favorable to [them] established a prima facie case, or one properly submissible." *Ibid.* Since this test is precisely the one the Court of Appeals should apply when considering whether a motion for a directed verdict was properly denied, see *Continental Co.* v. *Union Carbide*, 370 U. S. 690, 696 (1962), 5 J. Moore, Federal Practice ¶50.02 [1] (1969), I share petitioners' inability to understand by what sleight-of-hand the Court of Appeals could simultaneously announce that it could not consider the sufficiency of the evidence and then proceed to do precisely that. This apparent error is further evidence that the court went out of its way to upset the jury's verdict.

trial judge or the appellate court—to decide, and that where a jury has found sufficient evidence to support a verdict, that determination should not be set aside on appeal unless there is no evidence to support the verdict. Here there was undoubtedly enough evidence for a jury to conclude that the respondent had either failed to design a sufficiently safe machine or failed to warn potential users of the dangers involved. On this record I cannot understand the Court of Appeals' decision as anything but a substitution of its judgment as to the sufficiency of the evidence for that of the jury. Such action is, in my opinion, forbidden by the Seventh Amendment. Cf. *Galloway* v. *United States,* 319 U. S. 372, 396–407 (1943) (BLACK, J., dissenting). I would grant certiorari and reverse the judgment below summarily.[2]

No. 1361. NATIONAL CAPITAL AIRLINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 136 U. S. App. D. C. 86, 419 F. 2d 668.

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[2] The petition for certiorari was filed within 90 days of the judgment of the Court of Appeals, as required by statute. 28 U. S. C. § 2101 (c). The record, which under our Rules must also be filed within 90 days, Sup. Ct. Rule 21, was not filed until the 93d day after judgment. Since the requirement for filing the record is set forth by our Rules and not by statute, "there is no reason to exempt this case from the general principle that '[i]t is always within the discretion of a court . . . 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.'" *American Farm Lines* v. *Black Ball,* 397 U. S. 532, 539 (1970). Cf. *Taglianetti* v. *United States,* 394 U. S. 316, n. 1 (1969). Respondent has been requested several times to file a response to the petition and has neglected to do so. In these circumstances there are more than sufficient reasons for waiving the record-filing requirement.

No. 1304. DARLINGTON COUNTY SCHOOL DISTRICT ET AL. *v.* STANLEY ET AL. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 424 F. 2d 195.

No. 1377. HARTMANN ET VIR *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 419 F. 2d 829.

No. 1331. CALIFORNIA *v.* MCGREW. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 1 Cal. 3d 404, 462 P. 2d 1.

No. 1415. BETO, CORRECTIONS DIRECTOR *v.* WALTON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 421 F. 2d 1383.

No. 1351. DEERING MILLIKEN, INC. *v.* KORATRON CO., INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 418 F. 2d 1314.

No. 136, Misc. MEADOWS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 400, Misc. HILLERY *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 954, Misc. O'CONNELL *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1240, Misc. WILLIAMS *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1531, Misc. HILLERY *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1573, Misc. TEDDER *v.* PAGE, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 1705, Misc. KEELEY *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1067.

No. 1772, Misc. MCKNIGHT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1778, Misc. AUSTIN *v.* CITY AND COUNTY OF DENVER. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 462 P. 2d 600.

No. 1784, Misc. STORK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 421 F. 2d 180.

No. 1796, Misc. GREEN ET AL. *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 462 P. 2d 994.

No. 1798, Misc. MUSZALSKI *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1799, Misc. RICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 1800, Misc. FAVELA *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 2d 575.

No. 1802, Misc. JONES *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1804, Misc. CUSHWAY *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 1805, Misc. FAUSTIN *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 1824, Misc. CLINE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 447 S. W. 2d 538.

No. 1816, Misc. RUTKOWSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 419 F. 2d 836.

No. 1831, Misc. MILLER *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1832, Misc. STANBRIDGE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 26 N. Y. 2d 1, 256 N. E. 2d 185.

No. 1834, Misc. URTADO *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1837, Misc. TAHL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 3d 122 and 403b, 460 P. 2d 449.

No. 1840, Misc. LANCASTER *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 1842, Misc. MOORE *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1847, Misc. STEVENSON *v.* MANCUSI, WARDEN. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1853, Misc. STALLINGS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 253 S. C. 451, 171 S. E. 2d 588.

No. 1855, Misc. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 2d 365.

No. 1864, Misc. PEABODY *v.* BOLDT, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 1866, Misc. LUTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 420 F. 2d 414.

No. 1867, Misc. THOMPSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 447 S. W. 2d 175.

No. 1870, Misc. STEVENS, ADMINISTRATRIX, ET AL. *v.* MIDWEST EMERY FREIGHT SYSTEMS, INC. Sup. Ct. Ohio. Certiorari denied.

No. 1871, Misc. GERZIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 1872, Misc. WHITE *v.* HEGERHORST ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 418 F. 2d 894.

No. 1877, Misc. PARKS *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1881, Misc. CARNEGIE *v.* MACDOUGALL, CORRECTION COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 422 F. 2d 353.

No. 1884, Misc. DUCKETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 1885, Misc. STINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 356.

No. 1887, Misc. BRAICO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 543.

No. 1888, Misc. DECESARE *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 1895, Misc. NUGENT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1897, Misc. HARMON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 1890, Misc. HANKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 420 F. 2d 412.

No. 1894, Misc. HENDRICKSON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 1 Wash. App. 61, 459 P. 2d 55.

No. 1898, Misc. SCHWARTZ *v.* MONTANA BOARD OF PARDONS. Sup. Ct. Mont. Certiorari denied. Reported below: 154 Mont. 505, 463 P. 2d 316.

No. 1899, Misc. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 1 Cal. App. 3d 555, 81 Cal. Rptr. 666.

No. 1900, Misc. PRICE *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1901, Misc. WILLARD *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 2d 810.

No. 1902, Misc. MOORE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 7 Md. App. 495, 256 A. 2d 337.

No. 1908, Misc. WASSER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1910, Misc. COWAN *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1911, Misc. ROMEO *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 418 F. 2d 860.

No. 1912, Misc. BACON *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1915, Misc. GEORGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 128.

No. 1917, Misc. RUDERER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 188 Ct. Cl. 456, 412 F. 2d 1285.

No. 1920, Misc. CRESPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 422 F. 2d 718.

No. 1924, Misc. OLINDE *v.* UNITED STATES; and
No. 1931, Misc. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 1314.

No. 1929, Misc. SHERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 421 F. 2d 198.

No. 1934, Misc. OLSON *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied.

No. 1936, Misc. KAUPP *v.* KENNEDY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1962, Misc. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 2d 302.

No. 1982, Misc. DALE *v.* UNITED STATES ET AL. Ct. Mil. App. Certiorari denied. Reported below: —— U. S. C. M. A. ——, —— C. M. R. ——.

No. 52, Misc. STEINHAUER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 216 So. 2d 214.

*Rehearing Denied*

No. 24. WALLER *v.* FLORIDA, 397 U. S. 387; and
No. 131. DANDRIDGE, CHAIRMAN, MARYLAND BOARD OF PUBLIC WELFARE, ET AL. *v.* WILLIAMS ET AL., 397 U. S. 471. Petitions for rehearing denied.

No. 606. ILLINOIS *v.* ALLEN, 397 U. S. 337;

No. 1223. MEYER *v.* CITY OF CHICAGO, 397 U. S. 1024;

No. 528, Misc. CATANZARO *v.* MANCUSI, WARDEN, 397 U. S. 942;

No. 904, Misc. SHARPE *v.* UNITED STATES, 397 U. S. 1026;

No. 1103, Misc. RANDO *v.* BETO, CORRECTIONS DIRECTOR, 397 U. S. 1033;

No. 1309, Misc. BLACKMAN *v.* PENNSYLVANIA, 397 U. S. 1026;

No. 1435, Misc. URBANO *v.* NEWS SYNDICATE CO., INC., 397 U. S. 1015;

No. 1494, Misc. VIANDS *v.* COX, PENITENTIARY SUPERINTENDENT, 397 U. S. 1028;

No. 1552, Misc. HEARD *v.* UNITED STATES, 397 U. S. 1016; and

No. 1676, Misc. PREWITT *v.* ARIZONA EX REL. EYMAN, WARDEN, ET AL., 397 U. S. 1054. Petitions for rehearing denied.

No. 995. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL *v.* PIEDMONT AVIATION, INC., 397 U. S. 926; and

No. 435, Misc. POPE *v.* CITY AND COUNTY OF PHILADELPHIA ET AL., 397 U. S. 993. Motions for leave to file petitions for rehearing denied.

No. 1390, Misc. HOTEL, MOTEL & CLUB EMPLOYEES UNION LOCAL 6 *v.* SHULTZ, SECRETARY OF LABOR, 397 U. S. 970. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1443, Misc. SAFFIOTI *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK, 397 U. S. 956, 1031. Motion for leave to file second petition for rehearing denied.

MAY 22, 1970

*Miscellaneous Order*

No. —. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY *v.* P. B. I. C., INC., ET AL. D. C. Mass. Application for stay denied by an equally divided court. THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART would grant the stay. [For earlier order herein, see 397 U. S. 1082.]

MAY 25, 1970*

*Appeals Dismissed*

No. 1267. STOTLAND ET AL. *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of a substantial federal question. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 214 Pa. Super. 35, 251 A. 2d 701.

MR. JUSTICE DOUGLAS, dissenting.

In August 1967, the City Council of Philadelphia passed an ordinance authorizing the mayor to declare a state of emergency in the city, "if he finds that the City or any part thereof is suffering or is in imminent danger of suffering civil disturbance, disorder, riot or other occurrence which will seriously and substantially endanger the health, safety and property of the citizens." When a state of emergency is declared, the mayor is authorized to "[p]rohibit or limit the number of persons who may gather or congregate . . . in any outdoor place, except persons who are awaiting transportation, engaging in recreational activities at a usual and customary place, or peaceably entering or leaving buildings." The ordinance provides that the state of emergency shall exist "not in

*Except for No. 1267, No. 1392, and No. 1776, Misc., MR. JUSTICE MARSHALL took no part in the consideration or decision of the orders of this date.

excess of two weeks," but that it may be "extended for additional periods of two weeks." There are no provisions for review of the mayor's decision to declare a state of emergency.

On April 4, 1968, the Reverend Martin Luther King, Jr., was assassinated. On April 5, 1968, at 9 p.m., the mayor proclaimed a limited state of emergency, effective until 6 a.m. on April 10, 1968, "unless further extended," and prohibited groups of 12 or more persons from gathering or congregating in any outdoor place, except in those situations authorized by the ordinance. The proclamation contained no specific factual findings to support the conclusion that a threat of "civil disturbance," "disorder," or "riot" existed. The courts below, however, found that the proclamation was supported by various scattered acts of disorder occurring in the city of Philadelphia between the assassination and the proclamation, such as window breaking, damage to automobiles, false alarms of fire, and jostling of pedestrians, some of which occurred incident to demonstrations. There had been disorders in other cities after the assassination.

Appellants were arrested for peaceful, nonviolent participation in outdoor gatherings of 12 or more persons in violation of the proclamation. Three separate gatherings were involved:

1. Several weeks prior to the issuance of the proclamation, the Philadelphia Committee for Non-Violent Action made plans to protest the recommissioning of a battleship, which was to take place on April 6, 1968. A group of approximately 100 gathered at a park near the site of the recommissioning on April 6, planted a tree, and then sat around the tree holding hands and singing. A permit for this demonstration had been issued by the park commission. There were some speakers, but none of them advocated violence. There was no threat of hostility between the demonstrators and any spectators.

There was no evidence of any type of disorder or interference with the activities of others. About 50 of these demonstrators were arrested for violating the proclamation. Among those arrested was appellant Countryman. At the time of this demonstration, more than 10,000 persons were congregated a few blocks away for the recommissioning ceremony. None of those attending that ceremony were arrested.

2. Prior to issuance of the proclamation, members of an organization called People for Human Rights arranged to go to the homes of three United States Congressmen in the Philadelphia area to petition for passage of the Civil Rights Act of 1968. Members of the organization gathered at the home of one of the Congressmen on April 7, 1968, depositing petitions in his mail slot and distributing petitions to passersby. The size of the group eventually grew to 12 persons, at which time these individuals were arrested for violating the proclamation. Appellant Achtenberg was among those arrested. The demonstration was entirely peaceful; there were no incidents of disorder; the demonstrators violated no law other than the proclamation.

3. On April 8, 1968, a meeting was held by University of Pennsylvania students to discuss the mayor's proclamation. A platform was set up on university property, and approximately 200 to 250 people congregated to hear the various speakers. As part of the meeting, a police officer read the proclamation to the group. After being ordered to disperse, most of the group departed, but about 55 remained and peacefully submitted to arrest. Appellant Stotland was among the group arrested. There was no disruptive or disorderly conduct at this meeting. The speeches were not inflammatory. There was no allegation that the meeting created traffic problems, engendered the hostility of onlookers, or involved any breach of the peace.

In short, none of the three meetings in which the appellants took part were other than peaceful, orderly, and noninflammatory; none of them interfered with traffic or disrupted other activities; and none of them involved any violation of any law, save for the mayor's proclamation. This much was conceded by the courts below and is not disputed by the appellee.

At least since *Hague* v. *CIO,* 307 U. S. 496, decided in 1939, the use of public property such as streets and parks has been deemed an important adjunct to the rights of free speech and assembly protected by the First Amendment. States, of course, have the right to place reasonable regulations upon the time, place, and manner of the exercise of the rights of speech and assembly. As the Court said in *Cox* v. *Louisiana,* 379 U. S. 536, 554, one could not, "contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly." Such regulatory measures, however, must be narrowly drawn to reach only the legitimate objectives of state regulation. Overbreadth is constitutionally fatal, and we carefully scrutinize all such measures for that defect. *Cox* v. *Louisiana,* 379 U. S. 559, 562–564; *Edwards* v. *South Carolina,* 372 U. S. 229, 236–238. The ordinance involved in the *Hague* case, for example, gave the director of public safety of Jersey City, New Jersey, the authority to refuse to issue a permit for a public assembly in or upon the public streets, highways, parks, or buildings of the city, "for the purpose of preventing riots, disturbances or disorderly assemblage." This Court held that ordinance constitutionally infirm, Mr. Justice Roberts stating:

> "[The ordinance] can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the

> prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." 307 U. S., at 516.

The Philadelphia ordinance involved in this case, and the mayor's proclamation issued under its authority, raise serious questions under the First Amendment. First, the prohibition of assembly extended not merely to publicly owned property, but to "any outdoor place," public or private. Second, the proclamation covered all types of assembly, except for three narrow exceptions, regardless of how peaceful, orderly, and otherwise lawful that assembly might be. Third, there was no limitation on the length of the prohibition, for the state of emergency could be extended indefinitely. Appellants claim that as a regulatory measure, the ordinance and proclamation are unconstitutionally overbroad. I do not see how that question can be deemed to be "insubstantial."

Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. Yet does a particular proclamation violate equal protection?[1] Is it used to circumvent con-

[1] In 1967 the city of Syracuse, New York, imposed a curfew reading as follows: "No person shall enter or remain in any public street, park, square or building in any such part or parts of the city during the hours of the day as may be prescribed by the Mayor."

The City Court granted motions to dismiss informations for violating the curfew, *People* v. *Kearse,* 56 Misc. 2d 586, 289 N. Y. S. 2d 346, saying:

"A curfew law, like any other which restricts the activities or conduct of individuals, adults or minors, must not exceed the bounds of reasonableness. Three primary tests have often been invoked. (1) Is there an evil? (2) Do the means selected to curb the evil have a real and substantial relation to the result sought? (3) If the answer to the first two inquiries is yes, do the means availed of

stitutional procedures for clearing the streets of "undesirable" people? Is it used selectively against an unwelcome minority? Does it give fair notice and are its provisions sufficiently precise so as to survive constitutional challenge? Does it transgress one's constitutional right to freedom of movement which of course is essential to the exercise of First Amendment rights?

I do not intimate that Philadelphia's proclamation has a constitutional infirmity. But the questions are so novel and undecided [2] that we should hear the case.

This Court can serve no higher function than to review serious and substantial questions regarding alleged infringements of the First Amendment rights of speech and assembly, whether they occur in fair weather or in foul.

I would note probable jurisdiction and put the case down for oral argument.

No. 1449. COHEN ET UX. *v.* WILMINGTON HOUSING AUTHORITY. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Del. ——, 262 A. 2d 246.

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unduly infringe or oppose fundamental rights of those whose activities or conduct is curbed? . . . Section 57 of the ordinance demonstrates the evil to be dealt with. The means selected to curb the evil have a real and substantial relation to the result sought; but the means availed of, the total prohibition of *all* persons without exception from *all* of the streets of the city, unduly infringes upon fundamental rights guaranteed by the New York and United States Constitutions." *Id.*, at 594, 289 N. Y. S. 2d, at 355–356.

For the same reason the County Court dismissed the appeal. *People* v. *Kearse*, 58 Misc. 2d 277, 295 N. Y. S. 2d 192.

[2] Comment, Judicial Control of the Riot Curfew, 77 Yale L. J. 1560 (1968); Comment, The Riot Curfew, 57 Calif. L. Rev. 450 (1969); Note, Legislation and Riots—Interaction, 35 Brooklyn L. Rev. 472, 478–481 (1969).

No. 1776, Misc. TIJERINA ET AL. *v.* HENRY ET AL. Appeal from D. C. N. M. dismissed. THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

Appellants brought this suit as a class action, claiming to represent a class "designated as Indo-Hispano, also called Mexican, Mexican-American and Spanish American, [which is] generally characterized by Spanish surnames, mixed Indian and Spanish ancestry and . . . Spanish as a primary or maternal language." [1] The District Court dismissed the complaint as a class action, holding that appellants' definition of the class was "too vague to be meaningful." [2]

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[1] Appellants also sought to represent a class designated as "poor," defined as those who qualify for free legal process under certain New Mexico statutes. The District Court ruled that this was not an adequate definition of a class. Appellants do not press a contention of error with regard to this ruling, and I therefore do not deal with that question.

[2] The District Court also held that appellants had failed to prove that they would fairly and adequately represent the class. The court did not elaborate on the basis for this holding, nor did it specify what nature of proof it would require to establish adequate representation. Appellants alleged discrimination against a distinct cultural minority group, and were themselves members of that minority group. Adequate representation requires that the interests of the representatives of the class be compatible with and not antagonistic to the interests of those whom they purport to represent. See, *e. g., Clark* v. *Thompson,* 206 F. Supp. 539, 542, and cases cited. It is difficult to see how the District Court could have concluded that there was any antagonism of interest in preventing discrimination against the class. "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class." *Hall* v. *Werthan Bag Corp.,* 251 F. Supp. 184, 186. The District Court's holding may have been based on its doubt that, as regards the appellants' first cause of action, all members of the class would agree that failure to provide Spanish language

Class actions are controlled by Rule 23 of the Federal Rules of Civil Procedure. That Rule does not in terms define a "class," other than by stating that the class must be "so numerous that joinder of all members is impracticable" and that there must be "questions of law or fact common to the class." Certainly those two prerequisites were satisfied in this case. In addition, however, federal courts have required that "[t]he members of a class must be capable of definite identification as being either in or out of it." *Chaffee* v. *Johnson,* 229 F. Supp. 445, 448. See also *Dolgow* v. *Anderson,* 43 F. R. D. 472, 491; *Weisman* v. *MCA Inc.,* 45 F. R. D. 258, 261; 3B J. Moore, Federal Practice ¶ 23.04 (1969).

In my view, the District Court clearly erred in holding that the members of the class were not sufficiently identifiable. The court relied, for example, on the fact that "the complaint is silent as to whether people with some Spanish or Mexican and Indian ancestors, as well as ancestors who are of some other extraction, *i. e.,* French, English, Danish, etc., would be included as members of the class. These considerations make this characteristic so vague as to be meaningless." One thing is not vague or uncertain, however, and that is that those who dis-

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instruction was a discriminatory action. The burden of affirmatively proving agreement with the substantive claim on the part of all or a majority of the members of the class, however, would appear to be a wholly unreasonable and unnecessary requirement. "Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, . . . but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate. Nor can silence be taken as a sign of disapproval." *Eisen* v. *Carlisle & Jacquelin,* 391 F. 2d 555, 563. "A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights." Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 460 (1960).

criminate against members of this and other minority groups have little difficulty in isolating the objects of their discrimination. And it is precisely this discrimination, as alleged by appellants in their complaint, that presents the "questions of law or fact common to the class."

This Court responded to a similar contention regarding lack of an identifiable class in a different context in *Hernandez* v. *Texas,* 347 U. S. 475. There, the petitioner claimed that persons of Mexican descent were systematically excluded from jury service in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court held that "persons of Mexican descent" constituted a distinct class to which the equal protection guarantee was applicable. "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Id.,* at 478. And the Court held that one method by which the petitioner could satisfy his burden of proving that persons of Mexican descent constituted a separate class was by showing the attitude of the community. *Id.,* at 479.

What the Court said in *Hernandez* is, I think, pertinent to the question of establishing the existence of a proper class for a class action under Rule 23. There can be no dispute that in many parts of the Southwestern United States persons of Indian and Mexican or Spanish descent are, as a class, subject to various forms of discrimination. Appellants, as members of that class, brought this action to prevent the continuance of alleged discriminatory actions taken against the class. I do not see how it can be seriously contended that this suit is not a proper class action.[3] Indeed, the notes of

[3] Maintenance of class actions on behalf of persons of Mexican or Latin descent was allowed in *Mendez* v. *Westminister School Dist.,* 64 F. Supp. 544, and *Gonzales* v. *Sheely,* 96 F. Supp. 1004.

the Advisory Committee to the 1966 amendment of Rule 23 state that "[i]llustrative [of class actions properly brought under Rule 23 (b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."

The District Court also ruled on the merits of appellants' claims, dismissing their first, third, and fourth causes of action "with prejudice," on the ground that they were based on the Treaty of Guadalupe Hidalgo, and that nothing in that Treaty conferred the rights claimed by appellants.[4] The third and fourth causes of action, however, specifically relied on the Thirteenth and Fourteenth Amendments to the United States Constitution, so that as to them a dismissal with prejudice seems clearly wrong. The court also noted that there was a lack of specific facts pleaded in appellants' complaint to support the allegations of discrimination in the third and fourth causes of action. With regard to appellants' second cause of action, however, the court held that, because a cause of action would be stated if suit were brought on behalf of a properly defined class alleging specific facts, the dismissal should be without prejudice. That reasoning should also apply to appellants' third and fourth causes of action.

In short, I do not think that the District Court's disposition of appellants' complaint should in any way prejudice appellants from obtaining a ruling, as representatives of the Indo-Hispano class, as to the constitutionality under the Fourteenth Amendment of the dis-

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[4] The fifth cause of action in appellants' complaint, alleging basically the same discrimination as the third and fourth causes of action, was brought only on behalf of the "poor class." I therefore find it unnecessary to discuss the dismissal of this cause of action. See n. 1, *supra*.

crimination presently claimed in the first,[5] third, and fourth causes of action of the complaint in this action.

I would note probable jurisdiction and put this case down for oral argument.

*Miscellaneous Orders*

No. 1472. NATIONWIDE THEATRES INVESTMENT CO. ET AL. *v.* THOMPSON ET AL. C. A. 2d Cir. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 1058. PHILLIPS *v.* MARTIN MARIETTA CORP. C. A. 5th Cir. [Certiorari granted, 397 U. S. 960.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 1405. GRIGGS ET AL. *v.* DUKE POWER CO. C. A. 4th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. MR. JUSTICE BRENNAN took no part in the consideration or decision of this order. Reported below: 420 F. 2d 1225.

No. 1979, Misc. PAYNE *v.* HOCKER, WARDEN;

No. 2067, Misc. MCCARTNEY *v.* SUPERIOR COURT, SAN BERNARDINO COUNTY, ET AL.; and

No. 2109, Misc. GARDNER *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

*Certiorari Granted*

No. 1392. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO *v.* HARDEMAN. C. A. 5th Cir. Cer-

[5] I assume that, because appellants' first cause of action rested solely on the Treaty of Guadalupe Hidalgo, the dismissal of that cause of action "with prejudice" would not prevent the bringing of a subsequent action, alleging the same acts of discrimination, based on the Fourteenth Amendment or other constitutional provision.

tiorari granted limited to Questions 1 and 3 presented by the petition which read as follows:

"1. Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and by-laws for those of the union."

"3. Whether the National Labor Relations Act, as amended, preempts an action brought under Section 102 of the Labor-Management Reporting and Disclosure Act wherein a former union member, claiming wrongful expulsion, does not seek restoration of membership rights but claims damages for an alleged loss of employment due to the union's alleged failure to refer him to employers."

Reported below: 420 F. 2d 485.

*Certiorari Denied.* (See also No. 1449, *supra.*)

No. 1127. WEISS ET AL. *v.* WYOMING EX REL. CARDINE. Sup. Ct. Wyo. Certiorari denied. Reported below: 455 P. 2d 904.

No. 1128. BELONDON *v.* CITY OF CASPER. Sup. Ct. Wyo. Certiorari denied. Reported below: 456 P. 2d 238.

No. 1253. FERRARA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 111 Ill. App. 2d 472, 250 N. E. 2d 530.

No. 1340. GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1068.

No. 1395. DETROIT & TOLEDO SHORE LINE RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 660.

No. 1346. LANRAO, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 481.

No. 1375. TEXAS EASTERN TRANSMISSION CORP. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 414 F. 2d 344.

No. 1396. GLAZERMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 421 F. 2d 547.

No. 1397. 677.50 ACRES OF LAND IN MARION COUNTY, KANSAS, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 420 F. 2d 1136.

No. 1398. ALOE CREME LABORATORIES, INC. *v.* MILSAN, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 845.

No. 1399. BROUGH *v.* BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 23 Utah 2d 353, 463 P. 2d 567.

No. 1401. PINGATORE ET VIR *v.* MONTGOMERY WARD & Co., INC. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 2d 1138.

No. 1404. TENNESSEE CORP. *v.* SEABOARD COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 970.

No. 1410. MOULTRIE MANUFACTURING CO. ET AL. *v.* TENNESSEE FABRICATING CO., DBA TFC CO. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 279.

No. 1412. INDIANA GENERAL CORP. *v.* KRYSTINEL CORP.; and

No. 1423. KRYSTINEL CORP. *v.* INDIANA GENERAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 1023.

No. 1420. YOUNG *v.* SCOTT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 421 F. 2d 143.

No. 1424. ALOE CREME LABORATORIES, INC. *v.* AMERICAN ALOE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 420 F. 2d 1248.

No. 1447. TERRELL MACHINE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 1088.

No. 1473. MONOGRAM MODELS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 420 F. 2d 1263.

No. 1474. ADAMOWSKI ET AL. *v.* JAYNE. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 1400. COFONE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 1406. DACEY ET AL. *v.* NEW YORK COUNTY LAWYERS' ASSN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 423 F. 2d 188.

No. 1500. CRAVEN, WARDEN *v.* TUCKER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 421 F. 2d 139.

No. 31, Misc. MCCLOUD *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 402 F. 2d 853.

No. 231, Misc. CANADY *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 556, Misc. REED *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 77, Misc. ROSEN *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 409 F. 2d 1042.

No. 1306, Misc. TAYLOR *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1586, Misc. LIMBAUGH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 45 Ala. App. 722, 228 So. 2d 837.

No. 1589, Misc. ROLON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 25 N. Y. 2d 974, 252 N. E. 2d 860.

No. 1654, Misc. NICHOLSON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 1685, Misc. EVANS *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied.

No. 1695, Misc. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 1724, Misc. WILSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 1728, Misc. DOWNS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 45 Ala. App. 415, 231 So. 2d 336.

No. 1818, Misc. MCHENRY *v.* MICHIGAN STATE PAROLE BOARD. C. A. 6th Cir. Certiorari denied.

No. 1820, Misc. THOMPSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1839, Misc. BOLDEN *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1841, Misc. MCCLENDON *v.* PARKER. C. A. 3d Cir. Certiorari denied.

No. 1821, Misc. VIANDS *v.* BROWN, DIRECTOR, VIRGINIA DEPARTMENT OF WELFARE AND INSTITUTIONS. C. A. 4th Cir. Certiorari denied.

No. 1822, Misc. PETERSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 444 S. W. 2d 673.

No. 1827, Misc. WILLIAMS *v.* FOLLETTE, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1844, Misc. TINSLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 1849, Misc. DAVIS *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1859, Misc. CANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 2d 1382.

No. 1875, Misc. FULLEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1876, Misc. ROSENBERG *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1878, Misc. KOEBRICH *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1914, Misc. O'CONNOR *v.* CLEMENT, SHERIFF. C. A. 4th Cir. Certiorari denied.

No. 1927, Misc. LASALANDRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 1261.

No. 1935, Misc. GOFF *v.* PFAU, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. Certiorari denied. Reported below: 418 F. 2d 649.

No. 1943, Misc. BUIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 1207.

No. 1950, Misc. CANTRELL *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 1973, Misc. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 1358.

No. 1975, Misc. LLOYD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 1990, Misc. GRIMES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 137 U. S. App. D. C. 184, 421 F. 2d 1119.

No. 2033, Misc. PENNEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 416 F. 2d 850.

*Rehearing Denied*

No. 1436, Misc. JULIANO *v.* CARDWELL, WARDEN, 397 U. S. 1046;

No. 1615, Misc. KERNER ET UX. *v.* CIBA CORP., 397 U. S. 1050;

No. 1738, Misc. GORDON *v.* BRIGHT ET AL., 397 U. S. 1057; and

No. 1823, Misc. MIDDLETON *v.* UNITED STATES, 397 U. S. 1071. Petitions for rehearing denied.

*Assignment Orders*

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit beginning May 26, 1970, and ending May 28, 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.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit beginning October 13, 1970, and ending October 16, 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.

## MAY 26, 1970

*Dismissal Under Rule 60*

No. 1054, Misc. MINK *v.* MICHIGAN. Sup. Ct. Mich. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

## MAY 28, 1970

*Miscellaneous Order*

No. 2263, Misc. ADDONIZIO *v.* BARLOW, U. S. DISTRICT JUDGE. D. C. N. J. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BLACK and MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

## JUNE 1, 1970*

*Appeals Dismissed*

No. 1409, Misc. HARRIS *v.* CITY OF HOUSTON ET AL. Appeal from Dist. Ct. of Harris County, Tex., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari denied.

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*MR. JUSTICE MARSHALL took no part in the consideration or decision of the orders of this date.

No. 1267, Misc. THOMAS ET AL. *v.* BURSON, DIRECTOR, DEPARTMENT OF FAMILY AND CHILDREN SERVICES. Appeal from D. C. M. D. Ga. dismissed for want of jurisdiction.

*Miscellaneous Orders*

No. 36, Orig. TEXAS *v.* LOUISIANA. Motion for the appointment of a Special Master granted. It is ordered that the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein. [For earlier order herein, see 397 U. S. 931.]

No. —. CALIFORNIA EX REL. SMITH *v.* UNITED STATES ET AL. Motion for leave to file an original action denied.

No. 179. ROGERS, SECRETARY OF STATE *v.* BELLEI. Appeal from D. C. D. C. [Probable jurisdiction noted, 396 U. S. 811; restored to calendar, 397 U. S. 1060.] Motion of appellee to remove case from summary calendar granted and a total of one and one-half hours allotted for oral argument.

No. 977. WYMAN, COMMISSIONER OF SOCIAL SERVICES OF NEW YORK *v.* JAMES ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 397 U. S. 904.] Application to remove seal from record or permit reference in briefs to sealed material granted.

No. 1058. PHILLIPS *v.* MARTIN MARIETTA CORP. C. A. 5th Cir. [Certiorari granted, 397 U. S. 960.] Motion of Air Line Stewards & Stewardesses Association, Local 550, Transport Workers Union of America, AFL–CIO, for leave to file a brief as *amicus curiae* granted.

No. 2031, Misc. TIME, INC. *v.* FIRESTONE. C. A. 5th Cir. and D. C. S. D. Fla. Motion for leave to file petition for writs of certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted.

No. 2007, Misc. MEYER *v.* FIELD, MEN'S COLONY SUPERINTENDENT; and

No. 2174, Misc. WOOD *v.* KOLOSKI, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1896, Misc. MILLAN-DIAZ *v.* AUGELLI, U. S. DISTRICT JUDGE; and

No. 1956, Misc. MONTAGUE *v.* HUNTER, CHIEF JUSTICE, SUPREME COURT OF WASHINGTON. Motions for leave to file petitions for writs of mandamus denied.

*Certiorari Granted.* (See also No. 1347, *ante,* p. 278; No. 1394, *ante,* p. 279; and No. 1183, Misc., *ante,* p. 279.)

No. 486, Misc. McGAUTHA *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition which reads as follows:

"1. Does California's practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of murder violate the Due Process Clause of the Fourteenth Amendment?"

Case transferred to appellate docket. Reported below: 70 Cal. 2d 770, 452 P. 2d 650.

No. 709, Misc. CRAMPTON *v.* OHIO. Sup. Ct. Ohio. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 2 and 3 presented by the petition which read as follows:

"2. Whether the Ohio statute which provides that the trier of fact shall determine both guilt and punishment in a single verdict in cases of murder in the first degree violates Petitioner's right to be free from self-incrimination.

"3. Whether the Ohio statute which provides that the trier of fact may grant or withhold a recommendation of mercy in cases of murder in the first degree, and which provides no standards or criteria to assist the trier of fact in making such determination, violates Petitioner's right to due process and equal protection of the law."

Case transferred to appellate docket. Reported below: 18 Ohio St. 2d 182, 248 N. E. 2d 614.

No. 780, Misc. BRUNO *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. Reported below: 435 Pa. 200, 255 A. 2d 519 and 257 A. 2d 47.

No. 1022, Misc. HARRIS *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. Reported below: 25 N. Y. 2d 175, 250 N. E. 2d 349.

*Certiorari Denied.* (See also No. 1409, Misc., *supra.*)

No. 1274. KAHL *v.* BREEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 419 F. 2d 1034.

No. 1301. WILLIAMS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 171 N. W. 2d 521.

No. 1330. SIBLEY ET AL. *v.* RURAL ELECTRIFICATION ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 419 F. 2d 384.

No. 1348. PACIFIC NATIONAL INSURANCE CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 26.

No. 1409. BELL *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 423 F. 2d 692.

No. 1411. TURNER *v.* THOMPSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 771.

No. 1416. IN RE BEDFORD AVIATION, INC. C. A. 1st Cir. Certiorari denied.

No. 1417. TERRY *v.* MARTIN. Sup. Ct. Ore. Certiorari denied.

No. 1418. VASQUEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 1 Cal. App. 3d 769, 82 Cal. Rptr. 131.

No. 1419. O'BRIEN, CORRECTIONAL SUPERINTENDENT *v.* SAVILLE. C. A. 1st Cir. Certiorari denied. Reported below: 420 F. 2d 347.

No. 1421. IOWA *v.* CULLISON, JUDGE. Sup. Ct. Iowa. Certiorari denied. Reported below: 173 N. W. 2d 533.

No. 1422. WELTRONIC CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 2d 1120.

No. 1425. BROADRIVER, INC. *v.* CITY OF STAMFORD ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 158 Conn. 522, 264 A. 2d 75.

No. 1428. PUCHALSKI *v.* NEW JERSEY STATE PAROLE BOARD. Sup. Ct. N. J. Certiorari denied. Reported below: 55 N. J. 113, 259 A. 2d 713.

No. 1431. CORWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 33.

No. 1436. CARTER-WALLACE, INC. *v.* FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 417 F. 2d 1086.

No. 1437. MUCIE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 448 S. W. 2d 879.

No. 1438. CROWN CENTRAL PETROLEUM CORP. *v.* TREXLER, ADMINISTRATRIX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 419 F. 2d 536.

No. 1443. COSTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 950.

No. 1439. CENTRAL GULF STEAMSHIP CORP. *v.* GRACE LINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 416 F. 2d 977.

No. 1442. DEAN FOODS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 664.

No. 1445. INSURANCE COMPANY OF NORTH AMERICA *v.* FIRST NATIONAL BANK OF DECATUR, FORMERLY NATIONAL BANK OF DECATUR. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 312.

No. 1450. A/S J. LUDWIG MOWINCKELS REDERI *v.* DOW CHEMICAL CO. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 25 N. Y. 2d 576, 255 N. E. 2d 774.

No. 1457. NORTHERN ACCEPTANCE TRUST 1065 ET AL. *v.* GRAY, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 653.

No. 1476. WRIGHT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 1495. CIMINI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1380. HORELICK ET AL. *v.* NEW YORK. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 697.

No. 1391. LASH, WARDEN *v.* EVANS. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 419 F. 2d 1337.

No. 229, Misc. GRAY *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1430. GEORGE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 255 La. 104, 229 So. 2d 715.

No. 1469. TIME, INC. *v.* WASSERMAN. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: —— U. S. App. D. C. ——, 424 F. 2d 921.

No. 1490. TIME, INC. *v.* FIRESTONE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted.

No. 383, Misc. TYLER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 5 Md. App. 158, 245 A. 2d 592.

No. 582, Misc. WINTON *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 827, Misc. WYANT *v.* BREWER, WARDEN. Sup. Ct. Iowa. Certiorari denied.

No. 881, Misc. KILLEAN *v.* NELSON, WARDEN; and
No. 937, Misc. LEAHY *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1133, Misc. HUNDLEY *v.* PINTO, PRISON FARM SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 413 F. 2d 727.

No. 1258, Misc. DURHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 409 F. 2d 1170.

No. 1579, Misc. ABBOTT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 110 Ill. App. 2d 462, 249 N. E. 2d 675.

No. 1344, Misc. ZITZER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1460, Misc. BYNES *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 1801, Misc. JONES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 1846, Misc. DEBLASIO *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1919, Misc. WELDON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 800.

No. 1921, Misc. POTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 2d 964.

No. 1923, Misc. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 1283.

No. 1926, Misc. CORDOVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 471.

No. 1932, Misc. DEDMON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1937, Misc. HAYES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 419 F. 2d 1364.

No. 1940, Misc. ADAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 1 Cal. App. 3d 29, 81 Cal. Rptr. 378.

No. 1951, Misc. LEVENTHAL *v.* GAVIN, CORRECTION COMMISSIONER. C. A. 1st Cir. Certiorari denied. Reported below: 421 F. 2d 270.

No. 1942, Misc. BECKMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 1952, Misc. WILLIAMS *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 2d 1092.

No. 1954, Misc. BIANCOFIORI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 584.

No. 1959, Misc. HARRIS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1961, Misc. MAGGIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1963, Misc. HUFFMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 1970, Misc. GRAHAM *v.* FITZHARRIS, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1972, Misc. ROBINSON *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1977, Misc. DEMETER *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. Reported below: 418 F. 2d 612.

No. 1983, Misc. BELLINGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 723.

No. 1988, Misc. LOPEZ *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 80 N. M. 599, 458 P. 2d 851.

No. 1994, Misc. CARSON *v.* ELROD, SUPERINTENDENT, DEPARTMENT OF PUBLIC WELFARE. C. A. 4th Cir. Certiorari denied.

No. 1976, Misc. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1997, Misc. BERTONE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 224 So. 2d 400.

No. 1999, Misc. BENSON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 515.

No. 2008, Misc. BREVIK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 2d 449.

No. 2011, Misc. HOLT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 2014, Misc. BENSON *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 2022, Misc. VITORATOS *v.* MORRIS, JUDGE. Sup. Ct. Ohio. Certiorari denied. Reported below: 22 Ohio St. 2d 3, 257 N. E. 2d 398.

No. 2024, Misc. FLAGLER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 1359.

No. 2025, Misc. STEMLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 2d 373.

No. 2058, Misc. BOWMAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 105 Ariz. 307, 464 P. 2d 330.

No. 431, Misc. WILLIAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 410 F. 2d 144.

No. 2028, Misc. HURD *v.* HURD ET AL. C. A. 1st Cir. Certiorari denied.

No. 1635, Misc. HUDSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1957, Misc. EVANS *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 419 F. 2d 1337.

*Rehearing Denied*

No. 502, Misc., October Term, 1967. EPTON *v.* NEW YORK, 390 U. S. 29, 976; and

No. 771, Misc., October Term, 1967. EPTON *v.* NEW YORK, *ibid.* 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. 445. STANDARD INDUSTRIES, INC. *v.* TIGRETT INDUSTRIES, INC., ET AL., 397 U. S. 586;

No. 1146. AMERICAN ART INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD, 397 U. S. 990;

No. 1256. CINCINNATI WINDOW CLEANING CO. ET AL. *v.* WALKER, TRUSTEE IN BANKRUPTCY, 397 U. S. 1038;

No. 1276. BIRNBAUM *v.* UNITED STATES, 397 U. S. 1044;

No. 1279. MCGRATH *v.* KIRWAN, 397 U. S. 1041;

No. 1303. GRIPKEY *v.* GERTY ET AL., 397 U. S. 1063;

No. 1320. GRIPKEY *v.* SISTERS OF CHARITY OF THE BLESSED VIRGIN MARY, 397 U. S. 1042;

No. 1335. EUGENE SAND & GRAVEL, INC. *v.* LOWE ET AL., 397 U. S. 591; and

No. 1336. EUGENE SAND & GRAVEL, INC. *v.* LOWE ET AL., 397 U. S. 1042. Petitions for rehearing denied.

No. 1112, Misc. LAMPTON ET AL. *v.* BONIN ET AL., 397 U. S. 663;

No. 1200, Misc. MARINO *v.* PENNSYLVANIA, 397 U. S. 1077;

No. 1244, Misc. SMITH *v.* FLORIDA, 397 U. S. 1077;

No. 1248, Misc. FRAZIER *v.* UNITED STATES, 397 U. S. 1013;

No. 1639, Misc. CUMMINGS *v.* COX, PENITENTIARY SUPERINTENDENT, 397 U. S. 1051;

No. 1666, Misc. MIXON *v.* PENN STEVEDORES, INC., 397 U. S. 1052;

No. 1706, Misc. MOORE *v.* UNITED STATES ET AL., 397 U. S. 1055;

No. 1710, Misc. HOPKINS *v.* CALIFORNIA, 397 U. S. 1055;

No. 1726, Misc. COX *v.* UNITED STATES, 397 U. S. 1056;

No. 1747, Misc. MARTINEZ *v.* CALIFORNIA, 397 U. S. 1069;

No. 1762, Misc. KEANE *v.* CUCURELLO, 397 U. S. 1070; and

No. 1815, Misc. BELTOWSKI *v.* YOUNG, WARDEN, 397 U. S. 1079. Petitions for rehearing denied.

No. 41. CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL.; and

No. 59. CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA *v.* OKLAHOMA ET AL., 397 U. S. 620. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 1620, Misc. LEWIS *v.* UNITED STATES, 397 U. S. 1034. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 1239. GIAGNOCAVO *v.* BUCKS COUNTY COMMISSIONERS, 397 U. S. 590. Motion to dispense with printing petition granted. Petition for rehearing denied.

JUNE 4, 1970

*Dismissal Under Rule 60*

No. 1577. MCCARTHY *v.* UNITED STATES. C. A. 2d Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 422 F. 2d 160.

JUNE 8, 1970*

*Order Appointing Clerk*

It is ordered that E. Robert Seaver be appointed Clerk of this Court to succeed John F. Davis effective at the commencement of business June 22, 1970, and that he take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

*Order Appointing Director of Administrative Office of U. S. Courts*

It is ordered that Rowland Falconer Kirks be appointed Director of the Administrative Office of the United States Courts, effective at the commencement of business July 1, 1970, pursuant to the provisions of § 601 of Title 28 of the United States Code.

*Appeal Dismissed*

No. 1463. NATIONAL ADVERTISING CO. *v.* COUNTY OF MONTEREY ET AL. Appeal from Sup. Ct. Cal. Motion to dismiss granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 1 Cal. 3d 875, 464 P. 2d 33.

*MR. JUSTICE MARSHALL took no part in the consideration or decision of the orders of this date.

*Miscellaneous Orders*

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motions for the appointment of a Special Master granted. It is ordered that Honorable Albert B. Maris, Senior Judge of the United States Court of Appeals for the Third Circuit, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions.

[For earlier order herein, see 395 U. S. 955.]

No. 900. UNITED STATES *v.* FANCHER. Appeal from D. C. S. D. [Probable jurisdiction noted, 397 U. S. 985.] Motion of appellee for leave to proceed *in forma pauperis* granted. Motion of appellee for appointment of counsel granted. It is ordered that *Donald R. Shultz, Esquire,* of Rapid City, South Dakota, be, and he is hereby, appointed to serve as counsel for appellee in this case.

No. 1192. ZICARELLI *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Application for bail denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. [See 397 U. S. 932.]

No. 1289. PALMER ET AL. *v.* THOMPSON, MAYOR OF THE CITY OF JACKSON, ET AL. C. A. 5th Cir. [Certiorari granted, 397 U. S. 1035.] Motion of petitioners to remove case from summary calendar denied. However, 15 additional minutes allotted to each side.

No. 1922, Misc. IN RE DISBARMENT OF ALLISON. It having been reported to the Court that Earl W. Allison of Columbus, Ohio, has been indefinitely suspended from the practice of law by the Supreme Court of the State of Ohio, and this Court by order of March 30, 1970 [397 U. S. 1005], having suspended the said Earl W. Allison from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Earl W. Allison 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. 1463, Misc. MAY *v.* DONA ANA COUNTY, NEW MEXICO. Motion for leave to file petition for writ of mandamus denied without prejudice to the right of petitioner to apply to appropriate state court for the relief sought. *Smith* v. *Hooey, Judge,* 393 U. S. 374, and *Dickey* v. *Florida, ante,* p. 30.

No. 2038, Misc. WHITE *v.* YOUNG, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

*Probable Jurisdiction Noted*

No. 1113. CONNELL *v.* HIGGINBOTHAM ET AL. Appeal from D. C. M. D. Fla. Probable jurisdiction noted. Reported below: 305 F. Supp. 445.

No. 1557. JAMES ET AL. *v.* VALTIERRA ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter. Reported below: 313 F. Supp. 1.

*Certiorari Granted**

*Certiorari Denied.* (See also No. 1463, *supra.*)

No. 1364. TROPIANO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 158 Conn. 412, 262 A. 2d 147.

No. 1408. JONES ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 419 F. 2d 515.

No. 1429. JOHNSON ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1432. OKINO, JUDGE, ET AL. *v.* HAWAII NATIONAL BANK, HONOLULU. Sup. Ct. Hawaii. Certiorari denied. Reported below: 51 Haw. 367, 461 P. 2d 136.

No. 1448. FARRELL, TRUSTEE *v.* MANUFACTURERS HANOVER TRUST CO., TRUSTEE. C. A. 3d Cir. Certiorari denied. Reported below: 421 F. 2d 604.

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*[REPORTER'S NOTE: The order dated June 8, 1970, granting motion for leave to proceed *in forma pauperis* and petition for writ of certiorari in No. 1195, Misc., *infra,* was revoked on the same date.]

No. 1451. WASCHER *v.* LUNDEEN ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 111 Ill. App. 2d 452, 250 N. E. 2d 318.

No. 1452. FIRST NATIONAL BANK IN DALLAS, EXECUTOR, ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 400, 420 F. 2d 725.

No. 1453. MOBIL OIL CORP. *v.* HUGHES ET VIR. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1248.

No. 1454. JOHNSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 2d 955.

No. 1458. ABRAMSON *v.* LEVINSON. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 112 Ill. App. 2d 42, 250 N. E. 2d 796.

No. 1459. RUEHLMANN, EXECUTOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 418 F. 2d 1302.

No. 1460. HENAULT MINING CO. *v.* ZAIDLICZ, DIRECTOR OF BUREAU OF LAND MANAGEMENT OF MONTANA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 419 F. 2d 766.

No. 1462. DRYDEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 1175.

No. 1477. GLEN ALDEN CORP. ET AL. *v.* KAHAN. C. A. 3d Cir. Certiorari denied. Reported below: 424 F. 2d 161.

No. 1480. KEEFE *v.* CITY OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 116 Ill. App. 2d 39, 253 N. E. 2d 496.

No. 1482. STRATMORE ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 420 F. 2d 461.

No. 1492. S. T. G. CONSTRUCTION CO., INC. *v.* STATEN ISLAND RAPID TRANSIT RAILWAY CO. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 53.

No. 1498. TUNICA COUNTY SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1236.

No. 1501. MALONEY, DBA APALACHICOLA TIMES *v.* GIBSON ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 231 So. 2d 823.

No. 1502. MCGEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1506. WHITCOMB ET UX. *v.* SANITARY COMMISSION OF ANNE ARUNDEL COUNTY ET AL. C. A. 4th Cir. Certiorari denied.

No. 1519. EYEN *v.* NEBRASKA EX REL. MEYER, ATTORNEY GENERAL OF NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 184 Neb. 848, 172 N. W. 2d 617.

No. 1464. GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. Reported below: See 134 U. S. App. D. C. 318, 414 F. 2d 1214.

No. 1508. POWELL *v.* COMMITTEE ON ADMISSIONS AND GRIEVANCES ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 1528. B & L Sales Associates *v.* H. Daroff & Sons, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 352.

No. 1541. Ajamian *v.* Township of North Bergen et al. Sup. Ct. N. J. Certiorari denied.

No. 1195, Misc. Lewis *v.* Kropp, Warden. C. A. 6th Cir. Certiorari denied.

No. 1577, Misc. Nelson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 109 Ill. App. 2d 396, 248 N. E. 2d 740.

No. 1612, Misc. Van Voltenburg *v.* Brewer, Warden. Sup. Ct. Iowa. Certiorari denied.

No. 1678, Misc. Abbatiello *v.* Follette, Warden. C. A. 2d Cir. Certiorari denied.

No. 1848, Misc. Eckels *v.* United States District Court for the District of Oregon. C. A. 9th Cir. Certiorari denied.

No. 1903, Misc. Baughman *v.* Baker, Warden. C. A. 10th Cir. Certiorari denied.

No. 1904, Misc. Jackson *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 1906, Misc. Hocking *v.* California Adult Authority et al. Sup. Ct. Cal. Certiorari denied.

No. 1907, Misc. Johnson *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1916, Misc. Williams *v.* Cox, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 1938, Misc. Long *v.* Pate, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 418 F. 2d 1028.

No. 1941, Misc. DOMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1945, Misc. LUCAS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 1946, Misc. KALEC *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1948, Misc. PETE *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1949, Misc. PELLETIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 1989, Misc. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 332.

No. 1992, Misc. WHEELER *v.* MUMMERT, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 1993, Misc. HILL *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied.

No. 2000, Misc. SMULEK *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 2001, Misc. BERRIEL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 2002, Misc. ZIMMERMAN *v.* WELLS ET AL. C. A. 4th Cir. Certiorari denied.

No. 2004, Misc. GILLES *v.* MINNESOTA ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: —— Minn. ——, 176 N. W. 2d 123.

No. 2005, Misc. SCHUTZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 448 S. W. 2d 486.

No. 2037, Misc. CARRIGAN *v.* ERICH P. KARLSSON BUILDERS, INC. C. A. D. C. Cir. Certiorari denied.

No. 2006, Misc. NANCE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 7 Md. App. 433, 256 A. 2d 377.

No. 2018, Misc. NILSSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 244, 255 N. E. 2d 432.

No. 2019, Misc. KELLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 315, 255 N. E. 2d 390.

No. 2032, Misc. CONNORS *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 2d 122.

No. 2044, Misc. LEVY *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 2061, Misc. BOLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 834.

*Rehearing Denied*

No. 1254. E. B. & A. C. WHITING CO. *v.* SHAW ET AL., 397 U. S. 1076;

No. 1531, Misc. HILLERY *v.* CALIFORNIA, *ante*, p. 909; and

No. 1696, Misc. LENTO *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., 397 U. S. 1054. Petitions for rehearing denied.

No. 875. DAPPER *v.* CALIFORNIA, 397 U. S. 905. Motion for leave to file petition for rehearing denied.

JUNE 10, 1970

*Dismissal Under Rule 60*

No. 900. UNITED STATES *v.* FANCHER. Appeal from D. C. S. D. [Probable jurisdiction noted, 397 U. S. 985.] Appeal dismissed pursuant to Rule 60 of the Rules of this Court.

JUNE 11, 1970

*Affirmed on Appeal*

No. 1598. GIBSON ET AL. *v.* KUGLER ET AL. Appeal from D. C. N. J. Motions to dispense with printing jurisdictional statement and to dispense with printing motion to dismiss or affirm granted. Motion to advance granted. Judgment affirmed. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. Reported below: 315 F. Supp. 1003.

JUNE 15, 1970*

*Affirmed on Appeal*

No. 1359. POWELL, SECRETARY OF STATE OF ILLINOIS, ET AL. *v.* MANN ET AL.; and

No. 1444. MANN ET AL. *v.* POWELL, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeals from D. C. N. D. Ill. Judgment affirmed. Reported below: 314 F. Supp. 677.

No. 1456. BEELINE EXPRESS, INC. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. Judgment affirmed. Reported below: 308 F. Supp. 721.

No. 1489. WATERMEIER ET AL. *v.* LOUISIANA STADIUM AND EXPOSITION DISTRICT ET AL. Appeal from D. C. E. D. La. Judgment affirmed. Reported below: 308 F. Supp. 273.

*Appeals Dismissed*

No. 1503. BERGERMAN ET AL. *v.* LINDSAY, MAYOR OF THE CITY OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 25 N. Y. 2d 405, 255 N. E. 2d 142.

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*MR. JUSTICE MARSHALL took no part in the consideration or decision of the orders of this date.

No. 1358. CANNON ET AL. *v.* GREEN ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. Reported below: 309 F. Supp. 1127.

No. 90. BIRNBAUM *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 41 Ill. 2d 426, 243 N. E. 2d 244.

No. 1471. E. S. G. *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 447 S. W. 2d 225.

*Miscellaneous Orders*

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Motion for leave to file bill of complaint granted and defendants allowed 60 days to answer.

No. 730. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Case restored to calendar for reargument and to be argued with cases No. 1125 [certiorari granted, 397 U. S. 986] and No. 1142 [*Elkanich* v. *United States,* certiorari granted, 396 U. S. 1057]. Reported below: 69 Cal. 2d 550, 446 P. 2d 521.

No. 1420. YOUNG *v.* SCOTT ET AL., *ante,* p. 929. Motion of respondent Scott for allowance of attorney's fee denied without prejudice to submission of a motion for such relief to the United States District Court for the Eastern District of Virginia. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S. 400.

No. 67. HOSKINS *v.* UNITED STATES. C. A. 7th Cir. Application for bail presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Reported below: 406 F. 2d 72.

No. 2148, Misc. SEYMOUR *v.* PATE, WARDEN. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

*Probable Jurisdiction Noted*

No. 250. GROPPI *v.* WISCONSIN. Appeal from Sup. Ct. Wis. Probable jurisdiction noted. Reported below: 41 Wis. 2d 312, 164 N. W. 2d 266.

No. 1493. UNITED STATES ET AL. *v.* CHICAGO & EASTERN ILLINOIS RAILROAD CO.; and

No. 1494. ILLINOIS COMMERCE COMMISSION ET AL. *v.* CHICAGO & EASTERN ILLINOIS RAILROAD CO. Appeals from D. C. N. D. Ill. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 308 F. Supp. 645.

*Certiorari Granted.* (See also No. 701, *ante,* p. 436; and No. 1658, Misc., *ante,* p. 435.)

No. 284. U. S. BULK CARRIERS, INC. *v.* ARGUELLES. C. A. 4th Cir. Certiorari granted. Reported below: 408 F. 2d 1065.

*Certiorari Denied.* (See also Nos. 90, 1471, and 1503, *supra.*)

No. 83. SCHWARTZ ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 432 Pa. 522, 248 A. 2d 506.

No. 383. MOUTON, COLLECTOR OF REVENUE OF LOUISIANA *v.* SINCLAIR OIL & GAS CO. C. A. 5th Cir. Certiorari denied. Reported below: 410 F. 2d 717.

No. 124. FUHRMAN, ADMINISTRATRIX, ET AL. *v.* UNITED STATES STEEL CORP.;

No. 172. LAMP, ADMINISTRATRIX, ET AL. *v.* UNITED STATES STEEL CORP.;

No. 201. COOK, ADMINISTRATRIX *v.* UNITED STATES STEEL CORP.; and

No. 210. RADTKE, ADMINISTRATRIX, ET AL. *v.* UNITED STATES STEEL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 407 F. 2d 1143.

No. 389. UNITED STATES *v.* URBAN PLUMBING & HEATING CO. Ct. Cl. Certiorari denied. Reported below: 187 Ct. Cl. 15, 408 F. 2d 382.

No. 401. UNITED STATES *v.* WOODCREST CONSTRUCTION CO., INC., ET AL. Ct. Cl. Certiorari denied. Reported below: 187 Ct. Cl. 249, 408 F. 2d 406.

No. 498. UNITED STATES *v.* WALLENIUS BREMEN, G. M. B. H. C. A. 4th Cir. Certiorari denied. Reported below: 409 F. 2d 994.

No. 1467. WALL STREET TRANSCRIPT CORP. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 422 F. 2d 1371.

No. 1468. VAVOLIZZA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1472. NATIONWIDE THEATRES INVESTMENT CO. ET AL. *v.* THOMPSON ET AL. C. A. 2d Cir. Certiorari denied.

No. 1485. DEMAIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 543.

No. 1487. ARMSTRONG, JONES & CO. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 359.

No. 1488. MARCELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 993.

No. 1496. DISTRICT 30, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 115.

No. 1497. SCHMIDT ET AL. *v.* ARCHER IRON WORKS, INC. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 401, 256 N. E. 2d 6.

No. 1504. COWDEN MANUFACTURING CO. *v.* KORATRON CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 371.

No. 1505. OCEAN FREIGHTING & BROKERAGE CORP. *v.* STATES MARINE LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 421 F. 2d 851.

No. 1509. ESKOW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 422 F. 2d 1060.

No. 1514. SABINO *v.* SUPERIOR COURT OF LOS ANGELES COUNTY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1515. CITY OF WARREN ET AL. *v.* METRO HOMES, INC., ET AL. Ct. App. Mich. Certiorari denied. Reported below: 19 Mich. App. 664, 173 N. W. 2d 230.

No. 1520. HORTON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 275 N. C. 651, 170 S. E. 2d 466.

No. 1524. WILLIAMS *v.* WILLIAMS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1525. HENRY I. SIEGEL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 417 F. 2d 1206.

No. 1529. Brotherhood of Locomotive Firemen & Enginemen et al. *v.* Hansen et al. Sup. Ct. Utah. Certiorari denied. Reported below: 24 Utah 2d 30, 465 P. 2d 351.

No. 1535. Erickson et al., dba "Phoenix Tapes" *v.* Capitol Records, Inc. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 2 Cal. App. 3d 526, 82 Cal. Rptr. 798.

No. 1539. Zmuda *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 423 F. 2d 757.

No. 1576. United Mine Workers of America *v.* Dean Coal Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 1380.

No. 173. American Boiler Manufacturers Assn. *v.* National Labor Relations Board et al. C. A. 8th Cir. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 404 F. 2d 547.

No. 621. Wiseman et al. *v.* Massachusetts et al. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 356 Mass. 251, 249 N. E. 2d 610.

Mr. Justice Harlan, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

Petitioners seek review in this Court of a decision of the Massachusetts Supreme Judicial Court enjoining the commercial distribution to general audiences of the film "Titticut Follies." Petitioners' film is a "documentary" of life in Bridgewater State Hospital for the criminally insane. Its stark portrayal of patient-routine and treatment of the inmates is at once a scathing indictment of the inhumane conditions that prevailed at the time of the film and an undeniable infringement of the

privacy of the inmates filmed, who are shown nude and engaged in acts that would unquestionably embarrass an individual of normal sensitivity. The Massachusetts court concluded that the State had standing on behalf of the inmates to bring an injunctive action to protect their right of privacy and that the balance to be struck between the First and Fourteenth Amendments' "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964), and the individual's interest in privacy and dignity was such that the dissemination of the film should be restricted to audiences of professionals, *e. g.,* lawyers and psychiatrists, with a special interest. 356 Mass. 251, 249 N. E. 2d 610 (1969).

The balance between these two interests, that of the individual's privacy and the public's right to know about conditions in public institutions, is not one that is easily struck, particularly in a case like that before us where the importance of the issue is matched by the extent of the invasion of privacy. As one Federal District Court stated in a case seeking to enjoin distribution of this same movie in New York:

> "The conditions in public institutions . . . are matters which are of great interest to the public generally. Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests." *Cullen* v. *Grove Press, Inc.,* 276

F. Supp. 727, 728–729 (D. C. S. D. N. Y. 1967, Mansfield, J.).

This principle underlay this Court's decision in *Barr* v. *Mateo*, 360 U. S. 564, 577 (1959), where it was said:

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees."

A further consideration is the fact that these inmates are not only the wards of the Commonwealth of Massachusetts but are also the charges of society as a whole. It is important that conditions in public institutions should not be cloaked in secrecy, lest citizens may disclaim responsibility for the treatment that their representative government affords those in its care. At the same time it must be recognized that the individual's concern with privacy is the key to the dignity which is the promise of civilized society. See my dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497, 522.

The subtlety and importance of the question presented by this case was, by no means, lost on the Massachusetts Supreme Judicial Court:

> "That injunctive relief may be granted against showing the film to the general public on a commercial basis does not mean that all showings of the film must be prevented. As already indicated . . . the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution. It is a film which would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of

> custodial care and mental infirmity. The public interest in having such persons informed about Bridgewater . . . outweighs any countervailing interests of the inmates and of the Commonwealth (as parens patriae) in anonymity and privacy." 356 Mass. 251, 262, 249 N. E. 2d 610, 618.

These conclusions represent a measured and thoughtful attempt to grapple with a difficult and important problem. Yet they demonstrate the importance of review by this Court for they sharply focus the dimension of the question presented by this case. The question at this juncture is not whether the Supreme Judicial Court was correct or incorrect in striking the constitutional balance, but merely whether this Court should grant certiorari. I fail to see how, on a complex and important issue like this, it can be concluded that this Court should withhold plenary review. The case for review is strengthened by the fact that a distinguished federal judge refused to enjoin in New York the showing of this very same film. This is not of course the traditional conflict that requires this Court to step in, but it underscores the difficulty and importance of the issues that are apparent both from reading the decision of the Massachusetts court and a viewing of the film.

I am at a loss to understand how questions of such importance can be deemed not "certworthy." To the extent that the Commonwealth suggests that certiorari be denied because petitioners failed to comply with reasonable contract conditions imposed by the Commonwealth, that question in itself is one of significant constitutional dimension, for it is an open question as to how far a government may go in cutting off access of the media to its institutions when such access will not hinder them in performing their functions. Cf. *Estes* v. *Texas*, 381 U. S. 532 (1965); *Pickering* v. *Board of Education*,

391 U. S. 563 (1968). In the case before us, however, the only asserted interest is the State's concern for the privacy of the inmates in its care, and the basis for the decision below was the predominance of that interest over that of the general public in seeing the film.

The Commonwealth does not urge, nor could it do so given the opinion of the court below, that the injunction against showing this film was a mere remedy for a breach of contract, assuming the Commonwealth was free to impose whatever restrictions it chose on press access to Bridgewater. The statement in the opinion below that the violation of privacy "taken with the failure of Mr. Wiseman [the producer of the film] to comply with the contractual condition that he obtain valid releases . . . amply justify granting injunctive relief," 356 Mass. 251, 259, 249 N. E. 2d 610, 616, leaves no room for doubt that the invasion of privacy underpins the Massachusetts court's action and that the failure to obtain releases served only to underscore that invasion. The later statement restricting the holding to the mere fact that petitioner Wiseman "violated the permission given to him, reasonably interpreted, and did not comply with valid conditions," 356 Mass. 251, 261, 249 N. E. 2d 610, 617, is not a finding that the relief below is warranted as an award to redress the State for a breach of contract but reiterates merely the fact, already stated, that the invasion of privacy is compounded by the breach of understanding. I see no way to sift out an independent state ground based on contract principles. Moreover, even if the injunction could, in the absence of any discussion of principles of contract law, be viewed as a remedy for a breach of contract, a question of First Amendment dimension is presented when that remedy is to enjoin the dissemination of information of such importance. Cf. *International News Service* v. *Associated Press*, 248 U. S. 215, 248 (1918) (Brandeis, J.,

dissenting); *Pearson* v. *Dodd,* 133 U. S. App. D. C. 279, 410 F. 2d 701 (1969); *New York Times Co.* v. *Sullivan, supra.*

I would grant certiorari and set the case for plenary consideration.

No. 1026. ESTEBAN ET AL. *v.* CENTRAL MISSOURI STATE COLLEGE ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 415 F. 2d 1077.

No. 1481. TERMINAL FREIGHT COOPERATIVE ASSN. ET AL. *v.* SAMOFF, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 3d Cir. Motion to defer consideration denied. Certiorari denied. Reported below: 420 F. 2d 952.

No. 1513. BURGUENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 599.

No. 1533. EPSTEIN *v.* RESOR, SECRETARY OF THE ARMY, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 421 F. 2d 930.

No. 1559. STOCKHAM VALVES & FITTINGS, INC. *v.* ARTHUR J. SCHMITT FOUNDATION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 404 F. 2d 13.

No. 1213, Misc. ANDERSON *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1793, Misc. WHITLEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1891, Misc. JELKS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 105 Ariz. 175, 461 P. 2d 473.

No. 1909, Misc. KENNEDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 1913, Misc. BUCHANON *v.* CULLMAN CITY BOARD OF EDUCATION. Ct. Civ. App. Ala. Certiorari denied.

No. 1967, Misc. LANDRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 1980, Misc. ROOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 403.

No. 1995, Misc. MOORE *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 925.

No. 2013, Misc. HATT *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 55 N. J. 312, 261 A. 2d 356.

No. 2034, Misc. REED *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 2035, Misc. STEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 422 F. 2d 183.

No. 2036, Misc. SMELSER *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 23 Utah 347, 463 P. 2d 562.

No. 2039, Misc. CURL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 2045, Misc. PARKER *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 423 F. 2d 1021.

No. 2048, Misc. ALFORD *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 2052, Misc. HELFEND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 1 Cal. App. 3d 873, 82 Cal. Rptr. 295.

No. 2053, Misc. BOWMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 409 F. 2d 225.

No. 2054, Misc. STEVENSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 2057, Misc. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 423 F. 2d 481.

No. 2060, Misc. MCNEILL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 2064, Misc. JACKSON *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 2088, Misc. BIBBS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 115 Ill. App. 2d 200, 253 N. E. 2d 179.

No. 2091, Misc. RAY *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 2094, Misc. PRIDGEON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 2096, Misc. WEST *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 2100, Misc. FLETCHER *v.* WAYCHOFF, DISTRICT ATTORNEY OF GREENE COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 2108, Misc. SCHMIDT *v.* OSWALD, CHAIRMAN, PAROLE BOARD OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 2110, Misc. HAYES *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 375, Misc. MATTHEWS ET AL. *v.* UNITED STATES; and

No. 531, Misc. COOK *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to amend petition in No. 375, Misc., granted. Application for bail and other relief in No. 531, Misc., presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Petitions for writs of certiorari denied. MR. JUSTICE HARLAN would grant the petitions for certiorari, vacate the judgment of the Court of Appeals, and remand the cases 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); and *Desist* v. *United States,* 394 U. S. 244, 256 (1969) (dissenting opinion of HARLAN, J.). Reported below: 407 F. 2d 1371.

No. 2055, Misc. CLEMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 423 F. 2d 461.

No. 2059, Misc. PATCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari and other relief denied. Reported below: 44 Ill. 2d 447, 255 N. E. 2d 423.

*Rehearing Denied*

No. 513. IN RE SPENCER, 397 U. S. 817; and

No. 1010, Misc. THOMPSON *v.* NEW JERSEY, 397 U. S. 1012. Petitions for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

No. 1817, Misc. VAUGHN *v.* MISSOURI, 397 U. S. 1079. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JUNE 19, 1970

*Dismissal Under Rule 60*

No. 2120, Misc. MINK *v.* JOHNSON, PRISONS DIRECTOR. C. A. 6th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

# AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

## Effective July 1, 1970

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on March 30, 1970, pursuant to 18 U. S. C. §§ 3771 and 3772 and 28 U. S. C. §§ 2072 and 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post,* p. 972. The Judicial Conference report referred to in that letter is not reproduced herein.

These rules became effective July 1, 1970, as provided in paragraph 2 of the Court's order, *post,* p. 973.

For earlier publication of the Rules of Appellate Procedure, see 389 U. S. 1063.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 30, 1970.

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

By direction of the Supreme Court, I have the honor to submit to the Congress proposed amendments to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court, pursuant to Title 28, United States Code, Sections 2072 and 2075, and Title 18, United States Code, Sections 3771 and 3772.

Accompanying these amendments is the report of the Judicial Conference of the United States submitted to the Court for its consideration, pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER,
*Chief Justice of the United States.*

SUPREME COURT OF THE UNITED STATES

MARCH 30, 1970

ORDERED:

1. That subdivisions (a) and (c) of Rule 30 and subdivision (a) of Rule 31 of the Federal Rules of Appellate Procedure be, and they hereby are, amended as follows:

[See *infra*, pp. 975–976.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on July 1, 1970, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to existing rules, in accordance with the provisions of Title 18, U. S. C., § 3772, and Title 28, U. S. C., §§ 2072 and 2075.

# AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

*Rule 30. Appendix to the briefs*

(*a*) *Duty of appellant to prepare and file; content of appendix; time for filing; number of copies.*—The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

. . . . . .

(*c*) *Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used.*—If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designa-

tions referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

. . . . . .

*Rule 31. Filing and service of briefs*

(*a*) *Time for serving and filing briefs.*—The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

# AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

# UNITED STATES DISTRICT COURTS

## Effective July 1, 1970

The following amendments to the Rules of Civil Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on March 30, 1970, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 978. The Judicial Conference report referred to in that letter is not reproduced herein.

These amendments became effective July 1, 1970, as provided in paragraph 2 of the Court's order, *post*, p. 979.

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, and 389 U. S. 1121.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 30, 1970.

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

By direction of the Supreme Court, I have the honor to submit to the Congress proposed amendments to the Rules of Civil Procedure for the United States District Courts which have been adopted by the Supreme Court, pursuant to Title 28, United States Code, Section 2072. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from the action of the Court.

Accompanying these amendments is the report of the Judicial Conference of the United States submitted to the Court for its consideration, pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER,
*Chief Justice of the United States.*

# SUPREME COURT OF THE UNITED STATES

MARCH 30, 1970

ORDERED:

1. That subdivision (a) of Rule 5, subdivision (h) of Rule 9 and Rules 26, 29, 30, 31, 32, 33, 34, 35, 36 and 37, and subdivision (d) of Rule 45, subdivision (a) of Rule 69, and Form 24 of the Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended to read as follows:

[See *infra*, pp. 981–1007.]

2. That the foregoing amendments to the Rules of Civil Procedure shall take effect on July 1, 1970, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Rules of Civil Procedure in accordance with the provisions of Title 28, U. S. C., § 2072.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS disapprove of the Amendments to the Federal Rules of Civil Procedure relating to Discovery, and dissent from the action of the Court in transmitting them to the Congress.

# AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

# UNITED STATES DISTRICT COURTS

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*Rule 5. Service and filing of pleadings and other papers*

(*a*) *Service: When required.*—Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

*Rule 9. Pleading special matters*

(*h*) *Admiralty and maritime claims.*—A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may

contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14 (c), 38 (e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U. S. C., § 1292 (a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

*Rule 26. General provisions governing discovery*

(*a*) *Discovery methods.*—Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(*b*) *Scope of discovery.*—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(*1*) *In general.*—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will

be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(*2*) *Insurance agreements.*—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(*3*) *Trial preparation: Materials.*—Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter

previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: Experts.*—Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(*c*) *Protective orders.*—Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.

(*d*) *Sequence and timing of discovery.*—Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(*e*) *Supplementation of responses.*—A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

*Rule 29. Stipulations regarding discovery procedure*

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

*Rule 30. Depositions upon oral examination*

(*a*) *When depositions may be taken.*—After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4 (e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(*b*) *Notice of examination: General requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization.*—

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known,

a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34

for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) *Examination and cross-examination; record of examination; oath; objections.*—Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43 (b). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall pro-

pound them to the witness and record the answers verbatim.

(*d*) *Motion to terminate or limit examination.*—At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26 (c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.

(*e*) *Submission to witness; changes; signing.*—When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason,

if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32 (d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(*f*) *Certification and filing by officer; exhibits; copies; notice of filing.*—(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(*g*) *Failure to attend or to serve subpoena; expenses.*—(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

*Rule 31. Depositions upon written questions*

(*a*) *Serving questions; notice.*—After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or associ-

ation or governmental agency in accordance with the provisions of Rule 30 (b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(*b*) *Officer to take responses and prepare record.*—A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(*c*) *Notice of filing.*—When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

*Rule 32. Use of depositions in court proceedings*

(*a*) *Use of depositions.*—At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director,

or managing agent, or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(*b*) *Objections to admissibility.*—Subject to the provisions of Rule 28 (b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to

receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(*c*) *Effect of taking or using depositions.*—A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(*d*) *Effect of errors and irregularities in depositions.*—

(*1*) *As to notice.*—All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(*2*) *As to disqualification of officer.*—Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(*3*) *As to taking of deposition.*—

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if

promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(*4*) *As to completion and return of deposition.*—Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

*Rule 33. Interrogatories to parties*

(*a*) *Availability; procedures for use.*—Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant

may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

(*b*) *Scope; use at trial.*—Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(*c*) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

*Rule 34. Production of documents and things and entry upon land for inspection and other purposes*

(*a*) *Scope.*—Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings,

drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26 (b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(*b*) *Procedure.*—The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 (a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(*c*) *Persons not parties.*—This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

*Rule 35. Physical and mental examination of persons*

(*a*) *Order for examination.*—When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(*b*) *Report of examining physician.*—

(1) If requested by the party against whom an order is made under Rule 35 (a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the

examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

*Rule 36. Requests for admission*

(*a*) *Request for admission.*—A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26 (b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The

answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37 (c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.

(*b*) *Effect of admission.*—Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him

in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

*Rule 37. Failure to make discovery: Sanctions*

(*a*) *Motion for order compelling discovery.*—A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(*1*) *Appropriate court.*—An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(*2*) *Motion.*—If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30 (b)(6) or 31 (a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26 (c).

(*3*) *Evasive or incomplete answer.*—For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.*—If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*—

(1) *Sanctions by court in district where deposition is taken.*—If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.*—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(*c*) *Expenses on failure to admit.*—If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred

in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36 (a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(*d*) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.*—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26 (c).

(*e*) *Subpoena of person in foreign country.*—A subpoena may be issued as provided in Title 28, U. S. C., § 1783, under the circumstances and conditions therein stated.

(*f*) *Expenses against United States.*—Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

*Rule 45. Subpoena*

(*d*) *Subpoena for taking depositions; place of examination.*—

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (b) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of Rule 26 (c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

*Rule 69. Execution*

(*a*) *In general.*—Process to enforce a judgment for the payment of money shall be a writ of execution, unless

the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

FORM 24. REQUEST FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34

Plaintiff A. B. requests defendant C. D. to respond within .... days to the following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(2) That defendant produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(3) That defendant permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

Signed: .....
*Attorney for Plaintiff.*

Address: .....

# RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED JUNE 15, 1970
EFFECTIVE JULY 1, 1970

The following are the Rules of the Supreme Court of the United States as amended on June 15, 1970. See *post*, p. 1011. The amended rules became effective on July 1, 1970, as provided in Rule 62, *post*, p. 1072.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949 and 388 U. S. 931.

# ORDER ADOPTING AMENDMENTS TO THE RULES OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 15, 1970

The Rules of this Court as amended on June 15, 1970, have been lodged with the Clerk, and it is ordered that said Rules shall become effective on July 1, 1970, and be printed as an appendix to the United States Reports.

It is further ordered that the Rules promulgated on June 12, 1967, appearing in volume 388 of the United States Reports be, and they hereby are, rescinded, but this shall not affect any proper action taken under them before the Rules hereby adopted become effective.

# RULES OF THE SUPREME COURT OF THE UNITED STATES

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# RULES OF THE SUPREME COURT OF THE UNITED STATES.

ADOPTED JUNE 15, 1970, EFFECTIVE JULY 1, 1970.

## PART I. THE COURT.

### 1.

#### CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

2. The clerk shall not permit any original or certified record or paper to be taken from the office, except temporarily for purposes of printing, and except, on proper application from counsel or from the clerk or the presiding judge of a court below whose judgment is sought to be reviewed, for return to such court, after the conclusion of the proceedings in this court. Original or file copies of pleadings, papers, or briefs may not be withdrawn by litigants.

3. The clerk's office will be open from 9:00 A.M. to 5:00 P.M. Mondays through Fridays, and from 9:00 A.M. to noon on Saturdays, legal holidays excepted.

### 2.

#### LIBRARY.

1. The library for the bar shall be open to members of the bar of this court, to members of Congress, and to law officers of the executive or other departments of the Government.

2. The library shall be open during such times as the reasonable needs of the bar require and shall be gov-

erned by the regulations made by the librarian with the approval of the chief justice.

3. Books may not be removed from the building.

## 3.

### TERM.

1. The court will hold an annual term commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.

2. The court will at every term announce the date after which no case will be called for argument, or be submitted for decision at that term, unless otherwise ordered for special cause shown.

3. At the end of each term, all cases on the docket shall be continued to the next term.

## 4.

### SESSIONS, QUORUM, AND ADJOURNMENTS.

1. Open sessions of the court will be held at ten a. m. on the first Monday in October of each year, and thereafter as announced by the court. Unless otherwise ordered, the court sits to hear arguments from ten until noon, recesses until one, and adjourns for the day at three.

2. Unless otherwise ordered the court will not schedule arguments on Fridays or Saturdays.

3. In the absence of a quorum, on any day appointed for holding a session of the court, the justices attending (or, if no justice is present, the clerk or a deputy clerk) may adjourn the court until there is a quorum.

4. The court may, in appropriate instances, direct the clerk or the marshal to announce recesses and adjournments.

## PART II. ATTORNEYS AND COUNSELLORS.

### 5.

#### ADMISSION TO THE BAR.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, Commonwealth, or Possession, and that their private and professional characters shall appear to be good.

2. In advance of appearing for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court evidencing his admission to practice there and that he is presently in good standing, and (2) his personal statement, on the form approved by the court and furnished by the clerk, which shall be indorsed by two members of the bar of this court who are not related to the applicant.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he is satisfied that the applicant possesses the necessary qualifications.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

I, ....., do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

See Rule 52 (d) for fee required.

### 6.

#### ADMISSION OF FOREIGN COUNSEL.

An attorney, barrister, or advocate who is qualified to practice in the courts of any foreign state may be specially admitted to the bar of this court for purposes limited to a particular case. He shall not, however, be

authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admissions shall be only on motion of a member of the bar of this court, notice of which signed by such member and reciting all relevant facts shall be filed with the clerk at least three days prior to the motion.

7.

CLERKS TO JUSTICES NOT TO PRACTICE.

No one serving as a law clerk or secretary to a justice of this court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years have elapsed after such separation; nor shall he ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

8.

DISBARMENT.

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

## PART III. ORIGINAL JURISDICTION.

### 9.

PROCEDURE IN ORIGINAL ACTIONS.

1. This rule applies only to actions within the original jurisdiction of the court under the Constitution. Original applications for writs in aid of the court's appellate jurisdiction are governed by Part VII of these rules.

2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 39. A brief in support of the motion for leave to file, which shall comply with Rule 39, may be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 33, are required, except that, where the adverse party is a State, service shall be made on the governor and attorney general of such State.

4. The case will be placed upon the original docket when the motion for leave to file is filed with the clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

5. The adverse party or parties may, within sixty days after receipt of the motion for leave to file and allied documents, file sixty printed copies of a brief or briefs in opposition to such motion, which shall conform to Rule 39. When such brief or briefs in opposition have been filed, or the time within which they may be filed has expired, the motion, pleading and briefs shall be distributed to the court by the clerk. The court may thereafter grant or deny the motion or set it down for argument.

6. Additional pleadings may be filed, and subsequent proceedings had, as the court shall direct.

7. Any process against a State issued from the court in an original action shall be served on the governor and attorney general of such State.

8. A summons issuing out of this court in any original action shall be served on the defendant sixty days before the return day set out therein; and if the defendant, on such service of the summons, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

## PART IV. JURISDICTION ON APPEAL.

### 10.

APPEAL—HOW TAKEN—PARTIES.

1. An appeal permitted by law to this court shall be taken by filing a notice of appeal, in the form and at the place prescribed by this rule, and shall be perfected by docketing the case in this court as provided in Rule 13.

2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the time of its entry, and shall specify the statute or statutes under which the appeal to this court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 33, and proof of such service shall be filed with the notice of appeal.

3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of such court. If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court possessed of the record.

4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this court, unless the appellant shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the

outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the appeal. All parties other than the appellant shall be appellees, but appellees who support the position of the appellant shall meet the time schedule for filing papers which is provided for the appellant, except that any response by such appellees to a jurisdictional statement shall be filed as promptly as possible after receipt of the jurisdictional statement.

11.

APPEAL—TIME FOR TAKING AND DOCKETING.

1. An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

2. An appeal permitted by law from a district court to this court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the district court within thirty days after entry of the judgment or order appealed from and the case is docketed within the time provided in Rule 13.

3. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 13.

12.

CERTIFICATION OF RECORD.

1. A party intending to appeal may, prior to filing the notice of appeal or at any time thereafter prior to action by this court on the appeal, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing

of the record in this court is not required for docketing an appeal. If the appellant has not done so, the appellee may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the appeal may request that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified comprising the record and shall transmit with them a numbered list of the documents, identifying each with reasonable definiteness.

3. Whenever it shall be necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this court in lieu of copies, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper. If the record has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the clerk of this court otherwise requests.

4. When more than one appeal is taken to this court from the same judgment, it shall be sufficient to prepare a single record containing all the matter designated or agreed upon by the parties, without duplication.

## 13.

### DOCKETING CASES.

1. Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, except that in the case of

appeals pursuant to Section 1252, 1253, or 2282 of Title 28 of the United States Code the time limit for docketing shall be sixty days from the filing of the notice of appeal. For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored.

2. Counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the docket.

3. It shall be the duty of the appellant to notify all appellees on a form supplied by the clerk of the date of docketing and of the docket number of the case.

## 14.

### DISMISSING APPEALS FOR NON-PROSECUTION.

1. After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation filed in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60.

2. If a notice of appeal has been filed but the case has not been docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just.

3. If a notice of appeal has been filed but the case has not been docketed in this court within the time for docketing, plus any enlargement thereof duly granted, and the court possessed of the record has for any reason

denied an appellee's motion, made as provided in the foregoing paragraph, to dismiss the appeal, the appellee may have the cause docketed and the appeal dismissed in this court, by producing a certificate, whether in term or vacation, from the clerk of the court possessed of the record, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 35 and be accompanied by proof of service as prescribed by Rule 33. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the court will give judgment against the appellant and in favor of appellee for costs. In no case shall the appellant be entitled to docket the cause after the appeal shall have been dismissed under this paragraph, unless by special leave of court.

## 15.

### JURISDICTIONAL STATEMENT.

1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (h) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The nature of the proceeding and the statute pursuant to which it is brought;

(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed;

(iii) The statutory provision believed to confer on this court jurisdiction of the appeal;

(iv) Cases believed to sustain the jurisdiction.

(v) If the validity of the statute of a state, or statute or treaty of the United States is involved, its text shall be set out verbatim, citing the volume and page where it may be found in the official edition. If the statutory or treaty provisions that are involved are lengthy, the citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

A copy of the judgment or decree, of any order on rehearing, and of the notice of appeal shall be appended as provided in subparagraphs (i) and (j) hereof.

(c) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be repetitious. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.

(d) A concise statement of the case containing the facts material to the consideration of the questions presented. If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of

a nature to bring the case within the statutory provision believed to confer jurisdiction on this court.

(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht* v. *King,* 260 U. S. 174, 176, 177), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction (subparagraph (b)(iv) hereof), and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(f) If the appeal is from a federal court, there shall similarly be included a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(g) If the appeal is from a decree of a district court granting or denying an interlocutory injunction, the statement must also include a showing of the matters in which it is contended that the court has abused its discretion by such action. See *United States* v. *Corrick,* 298 U. S. 435; *Mayo* v. *Lakeland Highlands Canning Co.,* 309 U. S. 310.

(h) There shall be appended to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including, if not reported, earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree; and, if the appeal is from a federal court, there shall similarly be appended the court's findings of fact and conclusions of law, if any were separately made.

(i) There shall be appended to the statement a copy of the judgment or decree and of any order on rehearing,

including in each the caption showing the name of the court issuing it, the title and number of the case, and the date of entry of the judgment or decree, and of any order on rehearing.

(j) There shall be appended to the statement a copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

2. The jurisdictional statement shall be printed in conformity with Rule 39.

3. Where several cases are appealed from the same court that involve identical or closely related questions, it shall suffice to file a single jurisdictional statement covering all the cases.

16.

MOTION TO DISMISS OR AFFIRM.

1. Within thirty days after receipt of the jurisdictional statement, unless the time is enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34, the appellee may file a printed motion to dismiss, or motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions

on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The court will receive a motion to dismiss or affirm on any other grounds which the appellee wishes to present as reasons why the court should not set the case for argument.

2. The motion to dismiss or affirm shall be printed in conformity with Rules 35 and 39, and forty copies, with proof of service as prescribed by Rule 33, shall be filed with the clerk.

3. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, shall be distributed by the clerk to the court for its consideration.

4. Briefs opposing motions to dismiss or affirm may be filed, but distribution of the jurisdictional statement and consideration thereof by this court will not be delayed pending the filing of such briefs. Forty copies of such briefs prepared in accordance with Rule 39 and served as prescribed by Rule 33 shall be filed.

5. Any party may file a supplemental brief at any time while a jurisdictional statement is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

6. After consideration of the papers distributed pursuant to this rule, the court will enter an appropriate order. If such order notes probable jurisdiction, or postpones consideration of the question of jurisdiction to the hearing of the case on the merits, the case shall stand for argument. If the record has not previously been filed, the clerk of this court shall request the clerk of the court possessed of the record to certify it and transmit it to this court. If consideration of the question of jurisdiction is postponed, counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction.

## 17.

### USE OF SINGLE APPENDIX.

After the court has noted or postponed jurisdiction any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the appellant under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

## 18.

### SUPERSEDEAS ON APPEAL.

1. Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or, subject to paragraph 2 hereof, to a justice of this court, a motion to stay the enforcement of the judgment appealed from, with which, if the stay is to act as a supersedeas, shall be tendered a supersedeas bond which shall have such surety or sureties as said judge, court, or justice may require. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as this court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the judge, court, or justice after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the

property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein were had the proceedings appealed from, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

2. Application hereunder to a justice of this court will normally not be entertained unless application therefor has first been made to a judge of the court rendering the decision appealed from, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

## PART V. JURISDICTION ON WRIT OF CERTIORARI.

### 19.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in con-

flict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

20.

CERTIORARI TO A COURT OF APPEALS BEFORE JUDGMENT.

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

21.

REVIEW ON CERTIORARI—HOW SOUGHT—PARTIES.

1. A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record

to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the clerk of this court otherwise requests. The provisions of Rule 12 (3) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

3. Counsel for the petitioner shall file with the clerk of this court, with proof of service as provided by Rule 33, forty copies of a petition which shall comply in all respects with Rule 23 and shall enter his appearance and pay the docket fee. The case will then be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 33.

4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless the petitioner shall notify the clerk of this court in writing of his belief that one or

more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the petition. All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition.

22.

REVIEW ON CERTIORARI—TIME FOR PETITIONING.

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days.

2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it is filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition shall be deemed filed in time if mailed by air-mail under a postmark dated within the thirty-day period or due extension thereof.

3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23 (1), subparagraphs (b) and (f)), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35 (2), and 50. Such applications are not favored.

## 23.

### THE PETITION FOR CERTIORARI.

1. The petition for writ of certiorari shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (i) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set

forth in the petition or fairly comprised therein will be considered by the court.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(e) A concise statement of the case containing the facts material to the consideration of the questions presented.

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.

(g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. The opinions shall include the caption showing the name of the court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(j) If review of the judgment or decree of a state court is sought, there shall also be appended to the petition a copy of the judgment or decree in question and any order on rehearing; and, if review of the judgment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree and any order on rehearing, which may however be limited to the portions thereof sought to be reviewed. The judgments, decrees, or orders on rehearing shall include the caption showing the name of the court issuing the same, the title and number of the case, and the date of entry of such judgment, decree and order.

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring con-

sideration will be a sufficient reason for denying his petition.

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

## 24.

### BRIEF IN OPPOSITION—REPLY—SUPPLEMENTAL BRIEFS.

1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. Such brief in opposition shall comply with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and shall be served as prescribed by Rule 33.

2. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

3. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file, or upon the actual filing of such brief in a shorter time, the petition and brief, if any, shall be distributed by the clerk to the court for its consideration.

4. Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending

calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

25.

ORDER GRANTING OR DENYING CERTIORARI.

1. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the petition. If the record has not previously been filed, the clerk of this court shall request the clerk of the court possessed of the record to certify it and transmit it to this court. A formal writ shall not issue unless specially directed.

2. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the court or of a justice thereof.

26.

USE OF SINGLE APPENDIX.

After certiorari has been granted any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the petitioner under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

27.

STAY PENDING REVIEW ON CERTIORARI.

Applications pursuant to 28 U. S. C. § 2101 (f) to a justice of this court will normally not be entertained

unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

## PART VI. JURISDICTION OF CERTIFIED QUESTIONS.

### 28.

#### QUESTIONS CERTIFIED BY A COURT OF APPEALS OR BY THE COURT OF CLAIMS.

1. Where a court of appeals or the Court of Claims shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in a cause certified by a court of appeals it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up, so that it may consider and decide the entire matter in controversy.

### 29.

#### PROCEDURE IN CERTIFIED CASES.

1. When a case is certified, the certificate itself constitutes the record. The clerk will upon receipt thereof from the court below notify the appellant in the court of appeals, or the plaintiff in the Court of Claims, who shall thereupon pay the docket fee, after which the case will be placed on the docket. If the appellant or plaintiff fails to pay the fee, the appellee or defend-

ant may do so. The appearance of counsel for the party paying the fee shall be entered at the time of payment.

2. After docketing, the certificate shall be submitted to the court for a preliminary examination to determine whether the case shall be set for argument or whether the certificate will be dismissed.

3. Any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

4. Briefs on the merits in cases on certificates shall comply with Rules 39, 40, and 41, except that the brief of the party who was appellant or plaintiff below shall be filed within forty-five days of the order setting the case down for argument.

## PART VII. JURISDICTION TO ISSUE EXTRAORDINARY WRITS.

### 30.

### CONSIDERATIONS GOVERNING ISSUANCE OF EXTRAORDINARY WRITS.

The issuance by the court of any writ authorized by 28 U. S. C. § 1651 (a) is not a matter of right but of sound discretion sparingly exercised. See the following cases, which are cited by way of illustration only: *Ex parte Bollman and Swartwout,* 4 Cranch 75; *Ex parte Peru,* 318 U. S. 578; *Ex parte Abernathy,* 320 U. S. 219; *Ex parte Hawk,* 321 U. S. 114; *House* v. *Mayo,* 324 U. S. 42; *U. S. Alkali Export Assn.* v. *United States,* 325 U. S. 196; *DeBeers Consol. Mines* v. *United States,* 325 U. S. 212; *Ex parte Betz,* 329 U. S. 672; *Ex parte Fahey,* 332 U. S. 258.

31.

PROCEDURE ON APPLICATIONS FOR EXTRAORDINARY WRITS.

1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U. S. C. § 1651 (a) or 28 U. S. C. § 2241 shall be prefaced by a motion for leave to file such petition, and both shall be printed. All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when forty copies of the printed papers, with proof of service as prescribed by Rule 33 (subject to paragraph 5 of this rule), are filed with the clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time.

2. If the petition seeks issuance of a common law writ of certiorari under 28 U. S. C. § 1651 (a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall, except for the addition of the motion for leave to file, follow as far as may be the form for a petition for certiorari prescribed by Rule 23, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes. The respondent may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief in opposition, as provided in Rule 24.

3. If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall set forth with particularity why the relief sought is not available in any other court, and there shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition. The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule

23. The motion and petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition, they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to this paragraph, shall also be deemed to be respondents for all purposes in the proceeding in this court.

4. When briefs in opposition under paragraphs 2 and 3 of this rule have been filed, or when the time within which they may be filed has expired, or upon an express waiver of the right to file, the motion, petition, and briefs shall be distributed to the court by the clerk.

5. If the petition seeks issuance of an original writ of habeas corpus, it shall comply with the requirements of 28 U. S. C. § 2242, and in particular with the last paragraph thereof; and, if the relief sought is from the judgment of a state court, shall specifically set forth how and wherein the petitioner has exhausted his remedies in the state courts. See *Ex parte Abernathy,* 320 U. S. 219; *Ex parte Hawk,* 321 U. S. 114. Proceedings under this paragraph will be *ex parte,* unless the court requires the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted. Neither refusal of leave to file, without more, nor an order of transfer under authority of 28 U. S. C. § 2241 (b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

6. If the court orders the cause set down for argument, the clerk will notify the parties whether additional briefs

are required, when they must be filed, how much time has been allotted for oral argument, and, if the case involves a petition for common law certiorari, that the parties shall proceed to print an appendix pursuant to Rule 36.

32.

CERTIORARI TO CORRECT DIMINUTION OF RECORD ABOLISHED.

The writ of certiorari to correct diminution of the record is abolished.

## PART VIII. PRACTICE.

33.

SERVICE AND SPECIAL RULE WHERE CONSTITUTIONALITY OF ACT OF CONGRESS IN ISSUE.

1. Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If the document to be served is printed, three copies shall be served on each other party separately represented in the proceeding. If the document is not printed, service of a single copy on each other party separately represented shall suffice. If personal, service shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. Where the person on whom service is to be made resides 500 miles or more from the person effecting service, such mailing must be made with air mail postage prepaid.

2. (a) If the United States or an officer or agency thereof is a party, service of all briefs, pleadings, notices and papers shall, notwithstanding the foregoing paragraph, be made upon the Solicitor General, Department of Justice, Washington, D. C. 20530. Where an agency of the United States authorized by law to appear in its

own behalf is a party in addition to the United States, such agency shall also be served, in addition to the Solicitor General, in every case.

(b) In any proceeding in whatever court arising wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U. S. C. § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. In proceedings from any court of the United States as defined by 28 U. S. C. § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

3. Whenever proof of service is required by these rules, it must be stated that all parties required to be served have been served and such service may be shown, either by indorsement on the document served or by separate instrument, by any one of the methods set forth below; and it is not necessary that service on each party required to be served be effected in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, such certificate to be signed by a member of the bar of this court representing the party in behalf of whom such service has been effected. If counsel certifying to such service has not up to that time entered his appearance in this court in respect of the cause in which such service is made, his appearance shall accompany the certificate of service if the same is to be filed in this court.

(c) By an affidavit of service of the document in

question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, whenever such service is effected by any person not a member of the bar of this court.

4. Whenever proof of service is required by these rules, it must accompany or be indorsed upon the document in question at the time such document is presented to the clerk for filing. Any document filed with the clerk by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

34.

COMPUTATION AND ENLARGEMENT OF TIME.

1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday.

2. Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period.

3. All applications seeking an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper must be pre-

sented and served upon all other parties as provided in Rule 50, but such applications for extension of time, if once denied, may not be renewed before another justice after expiration of the period sought to be extended.

4. Whenever a justice or the clerk has granted an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof.

5. All applications for extensions of time to file briefs, motions, appendices or other papers, to designate parts of records for printing in appendices, or otherwise to comply with time limits provided by these rules, except applications for extensions of time to file petitions for certiorari, to docket appeals, to petition for rehearings or to issue mandates shall in the first instance be acted upon by the clerk, whether addressed to him, to the court or to a justice. Any party aggrieved by the clerk's action on such application may request that it be submitted to a justice or to the court.

## 35.

### MOTIONS.

1. Every motion to the court shall state clearly its object and the facts on which it is based. A brief in support of the motion (other than motions under Rule 31) may be filed therewith.

2. Motions and applications addressed to a single justice need not be printed, and only a typewritten original need be filed. Motions in actions within the court's original jurisdiction shall be printed, and sixty copies shall be filed. Motions to dismiss or affirm made under Rule 16, motions to bring up the entire record under Rule 28 (2), motions for permission to file a brief *amicus curiae,* any motions the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket

or dismiss under Rule 14, or a motion for voluntary dismissal under Rule 60), and any motions to the court accompanied by a supporting brief, shall likewise be printed, and forty copies of the motion and of the brief, if any, shall be filed. All other motions to the court need not be printed, and it shall be sufficient to file a typewritten original and nine legible typewritten copies; but the court may by subsequent order require any such motion to be printed by the moving party.

3. Motions to the court shall be filed with the clerk, with proof of service unless *ex parte* in nature. For applications and motions addressed to a single justice, see Rule 50. No motion shall be presented in open court, other than a motion for admission to the bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the court specially assigns it therefor.

4. Action by the court or a justice on contested motions will ordinarily, but not always, be withheld to permit responses by opposing parties, but such responses shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within ten days unless otherwise ordered by the court or a justice, or by the clerk under the provisions of paragraph 5 of Rule 34. Responses to printed motions shall be printed if time permits.

5. Printed motions must comply with Rule 39 with respect to format, signatures, and index. Typewritten motions must similarly comply with Rule 47.

## 36.

### PRINTING OF APPENDICES.

1. In the absence of a stipulation pursuant to paragraph 4 below, the appellant or petitioner shall, within forty-five days after the order noting or postponing jurisdiction or of the order granting the writ of certiorari, prepare and file forty copies of an appendix to the briefs

which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading, charge, finding or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the court's particular attention. At the same time or promptly thereafter the appellant or petitioner shall file with the clerk a statement of the costs of preparing the appendix. The appellant or petitioner shall serve at least three copies of the appendix and a copy of the statement of costs on each of the other parties to the proceeding.

2. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, not later than ten days after the order noting or postponing jurisdiction or of the order granting the writ of certiorari, the appellant or petitioner shall serve on the appellee or respondent a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If in the judgment of the appellee or respondent the parts of the record designated by the appellant or petitioner are not sufficient, the appellee or respondent shall, within ten days after receipt of the designation, serve upon the appellant or petitioner a designation of additional parts to be included in the appendix. The appellant or petitioner shall include the parts thus designated in the appendix. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the record on file with the clerk is always available to the court for reference and examination and shall not engage in unnecessary designation.

3. Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant or petitioner, but if the appellant or petitioner considers that parts of the record designated by the appellee or respondent for inclusion are unnecessary for the determination of the issues presented he may so

advise the appellee or respondent and the appellee or respondent shall advance the cost of including such parts unless the court or a justice by appropriate order fixes the initial allocation of the expense of printing the appendix. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matter to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

4. If the parties shall so stipulate, or the court shall so order, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed fourteen days after service of the brief of the appellee or respondent, or at least twenty days before the case is set for argument, whichever is later. If the preparation and filing of the appendix are thus deferred, the provisions of paragraphs 1, 2, and 3 of this rule shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

5. If the deferred appendix authorized by paragraph 4 of this rule is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 41, with appropriate references to the pages of the parts of the record involved. In that event, within ten days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 39 containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be

made in the brief as initially served and filed, except that typographical errors may be corrected.

6. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

7. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this paragraph.

8. The court may by order dispense with the requirement of an appendix and may permit cases to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

9. For good cause shown the time limits specified in this rule may be shortened or enlarged by the court, by a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34.

## 37.

### TRANSLATIONS.

Whenever any record transmitted to this court shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of

such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and, if necessary, printed as a part of the appendix.

38.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the clerk at least one week before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material placed in the custody of the clerk must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the clerk to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to him may seem best.

39.

FORM OF APPENDICES, PETITIONS, BRIEFS, ETC.

1. All appendices, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches, except that appendices in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than 11-point type) adequately leaded; and the paper must be opaque and unglazed. If footnotes are included, they may not be printed in type smaller than 9-point.

2. All printed documents presented to the court, other than appendices, must bear on the cover the name and post office address of the member of the bar of this court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other counsel and, if desired, their post office addresses, may be added. The body of the document shall at its close bear the printed names of counsel of record and of such other individual counsel as may be desired. One copy of every printed motion filed with the clerk (other than a motion to dismiss or affirm under Rule 16) must in addition bear, at the appropriate place in the body thereof, the manuscript signature of counsel of record.

3. All printed documents presented to the court other than appendices, which in this respect are governed by Rule 36, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

4. Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies. If papers are filed in a form which is not clearly legible, the clerk will require that new copies be substituted, but the filing shall not thereby be deemed untimely.

## 40.

### BRIEFS—IN GENERAL.

1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if there were such and they have been reported.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(c) The constitutional provisions, treaties, statutes, ordinances and regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the appendix, e. g., (A. 12) or to the record, e. g., (R. 12).

(f) In briefs on the merits, or in any briefs wherein the argument portion extends beyond twenty printed pages, a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(g) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(h) A conclusion, specifying with particularity the relief to which the party believes himself entitled.

2. Whenever, in the brief of any party, a reference is made to the appendix or the record, it must be accompanied by the appropriate page number. When the reference is to a part of the evidence, the page citation must be specific. If the reference is to an exhibit, both the page number at which the exhibit appears and at which it was offered in evidence must be indicated, e. g., (Pl. Ex. 14; R. 199, 2134).

3. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side.

4. Reply briefs shall conform to such portions of this rule as are applicable to the briefs of an appellee or respondent, but need not contain a summary of argument, regardless of their length, if appropriately divided by topical headings.

5. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court.

## 41.

### BRIEFS ON THE MERITS—TIME FOR FILING.

1. Counsel for the appellant or petitioner shall file with the clerk forty copies of his printed brief on the

merits, within forty-five days of the order noting or postponing probable jurisdiction or of the order granting the writ of certiorari.

2. Forty printed copies of the brief of the appellee or respondent shall be filed with the clerk within thirty days after the receipt by him of the brief filed by the appellant or petitioner.

3. Reply briefs will be received up to three days before the case is called for hearing; but, since later filing may delay consideration of the case, only by leave of court thereafter.

4. The periods of time stated in paragraphs 1 and 2 of this rule may be enlarged as provided in Rule 34, upon motion duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances shall require, pursuant to order of the court on its own or a party's motion.

5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter.

6. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave.

7. No brief will be received by the clerk unless the same shall be accompanied by proof of service as required by Rule 33.

## 42.

### BRIEFS OF AN AMICUS CURIAE.

1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, filed with the consent of the parties, or a

motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of the jurisdictional statement or of the petition for writ of certiorari. Such motions are not favored. Distribution to the court under the applicable rules of the jurisdictional statement or of the petition for writ of certiorari, and its consideration thereof, will not be delayed pending the receipt of such brief or the filing of such motion.

2. A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

5. All briefs, motions, and responses filed under this rule shall be printed; shall comply with the applicable

provisions of Rules 35, 39, and 40 (except that it shall be sufficient to set forth the interest of the *amicus curiae,* the argument, the summary of argument if required by Rule 40 (1)(f), and the conclusion); and shall be accompanied by proof of service as required by Rule 33.

## 43.

### CALL AND ORDER OF THE CALENDAR.

1. The clerk shall, at the commencement of each term, prepare a calendar, consisting of the cases that have become or will be available for argument, which shall be arranged in the first instance in the order in which they are ordered set down for argument, and which shall indicate the time allotted to each. The arrangement of cases on the calendar shall be subject to modification in the light of availability of appendices, extensions of time to file briefs, and of orders granting motions to advance or postpone or specially setting particular cases for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent has been filed. The clerk shall keep the calendar current throughout the term, adding cases as they are set down for argument, and making rearrangements as required. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

2. Unless otherwise ordered, the court, on the second Monday of each term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the term in the same order, except as hereinafter provided.

3. Cases will not be called until they are actually reached for argument. The clerk will seasonably advise counsel when they are required to be present in court.

4. Cases may be advanced or postponed by order of the court, upon motion duly made showing good cause therefor.

5. Two or more cases, involving the same question, may, on the court's own motion or by special permission on the motion or stipulation of the parties, be argued together as one case, or on such terms as may be prescribed.

## 44.

### ORAL ARGUMENT.

1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. The court looks with disfavor on any oral argument that is read from a prepared text.

2. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals or cross-writs of certiorari they shall be argued together as one case and in the time of one case, and the court will, by order seasonably made, advise the parties which one is to open and close.

3. Unless otherwise directed, one half hour on each side will be allowed for argument. Any request for additional time shall be presented not later than fifteen days after service of the petitioner's, or appellant's, brief on the merits by letter addressed to the clerk (copy to be sent opposing counsel), and shall set forth with specificity and conciseness why the case cannot be presented within the half hour limitation.

4. Unless additional time has been granted, one counsel only will be heard for each side, except by special permission when there are several parties on the same side. Divided arguments are not favored by the court.

5. In any case, and regardless of the number of counsel participating, a fair opening of the case shall be made by the party having the opening and closing.

6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

7. Counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 42 may, with the consent of a party, argue orally on the side of such party, provided that neither the time nor the number of counsel permitted for oral argument on behalf of that party under the preceding paragraphs of this rule will thereby be exceeded. In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions, unless made on behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored.

## 45.

### SUBMISSION ON BRIEFS BY ONE OR BOTH PARTIES WITHOUT ORAL ARGUMENT.

1. The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties.

2. When a case is called and no counsel appear to present argument, but briefs have been filed, the case will be treated as having been submitted.

3. When a case is called, if a brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

## 46.

### JOINT OR SEVERAL APPEALS OR PETITIONS FOR WRITS OF CERTIORARI; SUMMONS AND SEVERANCE ABOLISHED.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of

certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

## 47.

### FORM OF TYPEWRITTEN PAPERS.

1. All papers specifically permitted by these rules to be presented to the court without being printed shall, subject to Rule 53 (1), be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. When more than one original is required by any rule, the copies must be legible.

2. The original copy of all typewritten motions and applications must be signed in manuscript by the party or by counsel, but, in a cause not yet docketed, such counsel need not be a member of the bar of this court.

## 48.

### DEATH, SUBSTITUTION, AND REVIVOR—PUBLIC OFFICERS, SUBSTITUTION AND DESCRIPTION.

1. Whenever either party shall die after filing notice of appeal to this court or filing of petition for writ of certiorari in this court, the proper representative of the deceased may appear and, upon motion, be substituted as a party to the proceeding. If such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such an order, if appellee or respondent, shall be entitled to have the appeal or petition for or writ of certiorari dismissed or the judgment vacated for mootness, as

may be appropriate; and, if the party so moving be appellant or petitioner, shall be entitled to proceed as in other cases of nonappearance by appellee or respondent. Such substitution, or, in default thereof, such suggestions, must be made within six months after the death of the party, else the case shall abate.

2. Whenever, in the case of a suggestion made as provided in paragraph 1 of this rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings shall then be had as this court may direct.

3. When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

4. When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

## 49.

### CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS.

1. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in

accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

2. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to this court, or to a judge or justice of either court.

3. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or this court, or a judge or justice of either court, shall otherwise order.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this court unless for special reasons shown to the court of appeals or to this court, or to a judge or justice of either court, the order shall be modified or an independent order respecting custody, enlargement or surety shall be made.

## 50.

### APPLICATIONS TO INDIVIDUAL JUSTICES; PRACTICE IN CHAMBERS.

1. All motions and applications addressed to individual justices shall normally be submitted to the clerk, who will promptly transmit them to the justice concerned. If oral argument on the application is desired, request therefor shall accompany the application.

2. All motions and applications addressed to individual justices shall be accompanied by proof of service on all other parties. In urgent cases, proof of telegraphic dispatch to such parties of notice that the motion, application, or request is being made will suffice.

3. The clerk will in due course advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, or, if no hearing is requested or granted, of the disposition made of the motion or application.

4. During the term, applications will be addressed to the justice duly allotted to the circuit within which the case arises. The court or the chief justice will seasonably instruct the clerk as to the distribution of applications during vacation, and whenever a circuit justice is temporarily absent or disabled.

5. A justice denying an application made to him will note his denial thereon. Thereafter, unless action on such application is by law restricted to the circuit justice, or is out of time under Rule 34 (3), the party making the application may renew the same to any other justice, subject to the provisions of this rule. Except where the denial has been without prejudice, such renewed applications are not favored.

6. Any justice to whom an application for a stay or for bail is submitted may refer the same to the court for determination.

## 51.

### STAYS.

1. Stays may be granted by a justice of this court as permitted by law; and writs of injunction may be granted by any justice in cases where they might be granted by the court. For supersedeas on appeal, see Rule 18; for stay pending review on certiorari, see Rule 27.

2. All applications for stays or injunctions made pursuant to this or any other rule must show whether

application for the relief sought has first been made to the appropriate court or courts below, or to a judge or judges thereof, and shall be submitted as provided in Rule 50. See Rules 18 (2) and 27.

3. If an application for a stay addressed to the court is received in vacation, the clerk will refer it pursuant to Rule 50 (4).

52.

FEES.

In pursuance of 28 U. S. C. § 1911, the fees to be charged by the clerk of this court are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14 (3), wherein the fee is $25.00) or on petition for writ of certiorari or docketing any other proceeding, $100.00, to be increased to $150.00 in a case on appeal or writ of certiorari when oral argument is permitted.

(b) For making a copy (except a photographic reproduction) of any record or paper, and comparison thereof, 40 cents per page of 250 words or fraction thereof; for comparing for certification a copy (except a photographic reproduction) of any record or paper when such copy is furnished by the person requesting its certification, 10 cents for each page of 250 words or fraction thereof.

For a photographic reproduction and certification of any record or paper, 50 cents per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents for each page, and 50 cents for each certificate.

(c) For a certificate and seal, $3.00.

(d) For an admission to the Bar and certificate under seal, $25.00.

(e) For a duplicate certificate of an admission to the Bar under seal, $10.00.

## PART IX. SPECIAL PROCEEDINGS.

### 53.

PROCEEDINGS IN FORMA PAUPERIS.

1. A party desiring to proceed in this court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit setting forth facts showing that he comes within the statutory requirements. See 28 U. S. C. § 1915; *Adkins* v. *DuPont Co.*, 335 U. S. 331. One copy of each will suffice. Papers in cases presented under this rule should, whenever possible, comply with Rule 47.

2. With the motion and affidavit there shall be filed the appropriate substantive document—statement as to jurisdiction, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in all respects with the rules governing the same, except that it shall be sufficient to file a single copy thereof.

3. When the papers required by paragraphs 1 and 2 of this rule are presented to the clerk, accompanied by proof of service as prescribed by Rule 33, he will, without payment of any docket or other fees, file them, and place the case on the docket.

4. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required by Rule 33, will suffice whenever petitioner or appellant has filed unprinted papers.

5. While making due allowance for cases presented under this rule by persons appearing *pro se*, the clerk will refuse to receive any motion for leave to proceed *in forma pauperis* when it and the papers submitted

therewith do not comply with the substance of this court's rules, or when it appears that the accompanying papers are obviously out of time.

6. If, in a case presented under this rule, the court enters an order noting or postponing probable jurisdiction, or granting a writ of certiorari, and the case is set down for argument, the court will make such order respecting the furnishing of a record and the printing of an appendix as may be appropriate. The court may, in any case presented under this rule, require the furnishing of the record prior to its consideration of the motion papers.

7. Whenever the court appoints a member of the bar to serve as counsel for an indigent party, the briefs prepared by such counsel will, unless he requests otherwise, be printed under the supervision of the clerk; and the clerk will in any event reimburse such counsel for necessary travel expenses including first-class transportation from his home to Washington, D. C., and return in connection with the argument of the cause.

8. In any case arising on direct review of a judgment in a criminal case originating in a federal court where this court has granted certiorari or noted or postponed jurisdiction and where the defendant in the original proceeding is financially unable to obtain adequate representation or to meet the necessary expenses in this court, the court will appoint counsel who may be compensated, and whose necessary expenses may be repaid, to the extent provided by the Criminal Justice Act of 1964 (78 Stat. 552; 18 U. S. C. § 3006A).

## 54.

### VETERANS' AND SEAMEN'S CASES.

1. A veteran suing to establish reemployment rights under the provisions of Section 9 (d) of the Universal

Military Training and Service Act, as amended (50 U. S. C. App. § 459 (d)), or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 53, except that the motion shall ask leave to proceed as a veteran, the affidavit shall set forth the moving party's status as a veteran, and the case will be placed on the docket.

2. A seaman suing pursuant to 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 53.

## PART X. DISPOSITION OF CAUSES.

### 55.

#### OPINIONS OF THE COURT.

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter of decisions.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

### 56.

#### INTEREST AND DAMAGES.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be

calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.

3. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

## 57.

### COSTS.

1. In all cases of affirmance of any judgment or decree by this court, costs shall be paid by appellant or petitioner unless otherwise ordered by the court.

2. In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

3. The cost of printing the appendix in this court is a taxable item. The cost of printing briefs, motions, petitions, and jurisdictional statements is not a taxable item.

4. In cases where questions have been certified, including such cases where the certificate is dismissed, costs shall be equally divided unless otherwise ordered by the court; but where the entire record has been sent up (Rule 28, par. 2), and a decision is rendered on the whole matter in controversy, costs shall be allowed as provided in paragraphs 1 and 2 of this rule.

5. In all actions commenced prior to July 18, 1966, no costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court. In all other actions, costs as provided in this rule shall be allowed for or against the United States or an officer or agent thereof (unless expressly waived or otherwise ordered by the court) except that no such costs shall be allowed in criminal cases.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the clerk any bill of costs.

7. In appropriate instances, the court may adjudge double costs.

58.

REHEARINGS.

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must be filed, accompanied by proof of service as prescribed by Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

2. A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term

time or vacation, subject to the requirements respecting time, printing, number of copies furnished, manuscript signature to certificate, and service, as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 34, footnote 1; *Massey* v. *United States,* 291 U. S. 608), or to other substantial grounds available to petitioner although not previously presented (e. g., *Scribner-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

3. No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received.

59.

PROCESS; MANDATES.

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. Subject to paragraph 3 of this rule, mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, unless the time is shortened or enlarged by an order of the court or of a justice thereof, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing will, unless otherwise ordered, stay the mandate until disposi-

tion of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment or is filed after the court adjourns, the judgment or mandate of the court will not be stayed unless specifically so ordered by the court or a justice thereof.

3. In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 2 of this rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded.

## 60.

### DISMISSING CAUSES.

1. Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for an extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal.

2. Whenever an appellant or petitioner in this court shall, by his attorney of record, file with the clerk a motion to dismiss a proceeding to which he is a party, with proof of service as prescribed by Rule 33, and shall tender to the clerk any fees and costs that may be due, the adverse party may within fifteen days after service thereof file an objection, limited to the quantum of damages and costs in this court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are

more than one. The clerk will refuse to receive any objection not so limited.

3. Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal may within ten days thereafter file a reply, after which time the matter shall be laid before the court for its determination.

4. If no objection is filed, or if upon objection going only to the quantum of damages and costs in this court, the party moving for dismissal shall within ten days thereafter tender the whole of such additional damages and costs demanded, the clerk shall, without further reference to the court, enter an order of dismissal. If, after objection as to quantum of damages and costs in this court, the moving party does not respond with such a tender, then the clerk shall report the matter to the court for its determination.

5. No mandate or other process shall issue on a dismissal under this rule without an order of the court.

## PART XI. APPLICATION OF TERMS.

### 61.

#### TERM "STATE COURT" INCLUDES SUPREME COURT OF PUERTO RICO.

The term "state court" when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, and references in these rules to the law and statutes of a state include the law and statutes of the Commonwealth of Puerto Rico.

## PART XII. EFFECTIVE DATE.

### 62.

#### EFFECTIVE DATE OF AMENDMENTS

The amendments to these rules adopted June 15, 1970, shall become effective July 1, 1970.

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**CONTACTS.** See **Jones Act.**

**CORPORATIONS.** See **Taxes.**

**COUNCILS.** See **Extraordinary Remedies; Judicial Review; Relief.**

**COURT OF APPEALS.** See **National Labor Relations Board; Procedure,** 5.

**COURTS.** See **Federal-State Relations; Injunctions,** 1–2; **Jurisdiction,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**CRIMINAL LAW.** See **Constitutional Law,** I; IV–V; VII, 1–2; **Juries; Jurisdiction,** 2; **Procedure,** 3–4, 8; **Selective Service Act; Selective Service Regulations; Sentences.**

**CRIMINAL TRESPASS.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**CUSTODY.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**CUSTOM OF THE COMMUNITY.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**CUSTOM OR USAGE.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**DAMAGES.** See **Constitutional Law,** VI; **Libel.**

**DEATH ON THE HIGH SEAS ACT.** See **Admiralty.**

**DEATH SENTENCE.** See **Constitutional Law,** VII, 1; **Juries.**

**DEBATES ON PUBLIC ISSUES.** See **Constitutional Law,** VI; **Libel.**

**DECLARATORY JUDGMENTS.** See **Appeals; Procedure,** 1.

**DELAY.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**DEMONSTRATIONS.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE.** See **Procedure**, 2.

**DETAINER WARRANTS.** See **Constitutional Law**, VII, 2; **Procedure**, 8.

**DIRECT APPEALS.** See **Appeals**; **Procedure**, 1.

**DISCREDITING THE ARMED FORCES.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**DISCRIMINATION.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2; **Procedure**, 2.

**DISTRICT COURTS.** See **Injunctions**, 1; **Labor**; **Norris-LaGuardia Act**; **Procedure**, 7, 9.

**DISTRICT JUDGES.** See **Extraordinary Remedies**; **Judicial Review**; **Relief.**

**DOMICILIARIES.** See **Jones Act.**

**DOUBLE JEOPARDY.** See **Constitutional Law**, I; **Procedure**, 3–4; **Sentences.**

**DRAFT BOARDS.** See **Constitutional Law**, IV; **Selective Service Act**; **Selective Service Regulations.**

**DUE PROCESS.** See **Constitutional Law**, II; **Procedure**, 4, 6; **Sentences.**

**DURESS.** See **Extraordinary Remedies**; **Judicial Review**; **Relief.**

**ELECTIONS.** See **Appeals**; **Constitutional Law**, III, 3; **National Labor Relations Board**; **Procedure**, 1, 5; **Voting.**

**EMPLOYER AND EMPLOYEES.** See **Injunctions**, 1; **Jones Act**; **Labor**; **National Labor Relations Board**; **Norris-LaGuardia Act**; **Procedure**, 5, 7, 9.

**ENCLAVES.** See **Constitutional Law**, III, 3; **Voting.**

**ENFORCEMENT PROCEEDINGS.** See **National Labor Relations Board**; **Procedure**, 5.

**EPITHETS.** See **Constitutional Law**, VI; **Libel.**

**EQUAL PROTECTION OF THE LAWS.** See **Burden of Proof**, 1–2; **Constitutional Law**, III; **Procedure**, 2; **Voting.**

**EQUITABLE REMEDIES.** See **Injunctions**, 1; **Labor**; **Norris-LaGuardia Act**; **Procedure**, 7, 9.

**ESTABLISHMENT OF RELIGION.** See **Constitutional Law**, IV; **Selective Service Act.**

**EVIDENCE.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**EXCHANGE OF ASSETS.** See **Taxes.**

**EXEMPTIONS.** See **Constitutional Law**, IV; **Selective Service Act; Selective Service Regulations.**

**EXTRAORDINARY REMEDIES.** See also **Judicial Review; Relief.**

*Action by Judicial Council—Challenge by District Judge—Supreme Court.*—Whether or not Council's action concerning assignment of cases is reviewable here, petitioner District Judge, in present posture of case, is not entitled to extraordinary remedy that he seeks since, after expressly acquiescing in the division of cases in the district, following the Council's later order, he has not sought relief either from the Council or other tribunal, and such relief may yet be open. Chandler v. Judicial Council, p. 74.

**FEDERAL ENCLAVES.** See **Constitutional Law**, III, 3; **Voting.**

**FEDERAL JUDGES.** See **Extraordinary Remedies; Judicial Review; Relief.**

**FEDERAL MARITIME LAW.** See **Admiralty.**

**FEDERAL-STATE RELATIONS.** See also **Admiralty; Constitutional Law**, II; VII, 2; **Injunctions**, 1–2; **Jurisdiction**, 1; **Labor; Norris-LaGuardia Act; Procedure**, 2, 7, 9.

*Injunctions—Railway labor dispute—Self-help.*—A federal injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to 28 U. S. C. § 2283. The Federal District Court's determination that the union had a right to "engage in self-help" under federal law, was not a decision that federal law precluded an injunction based on state law. Atlantic C. L. R. Co. v. Engineers, p. 281.

**FIFTH AMENDMENT.** See **Constitutional Law**, I; VII, 1; **Juries; Procedure**, 3.

**FIRST AMENDMENT.** See **Constitutional Law**, IV–VI; **Jurisdiction**, 2; **Libel; Selective Service Act.**

**FLORIDA.** See **Admiralty; Constitutional Law**, VII, 2; **Procedure**, 8.

**FLORIDA EAST COAST RAILWAY.** See **Federal-State Relations; Injunctions**, 2; **Jurisdiction**, 1.

**FORCE OF LAW.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**FOREIGN VESSELS.** See **Jones Act.**

**FOURTEENTH AMENDMENT.** See **Burden of Proof,** 1–2; **Constitutional Law,** I–III; VI–VII; **Juries; Libel; Procedure,** 2–4, 6, 8; **Sentences; Voting.**

**FRANCHISE.** See **Constitutional Law,** III, 3; **Voting.**

**FREEDOM OF SPEECH.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**FREEDOM OF SPEECH AND PRESS.** See **Constitutional Law,** VI; **Libel.**

**GEORGIA.** See **Constitutional Law,** I; **Procedure,** 3.

**GREEK SHIPS.** See **Jones Act.**

**GREENBELT CITY COUNCIL.** See **Constitutional Law,** VI; **Libel.**

**GRIEVANCES.** See **Injunctions,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**GUIDELINES.** See **Injunctions,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**GUILT.** See **Constitutional Law,** VII, 1; **Juries.**

**HARMLESS ERROR.** See **Constitutional Law,** I; **Procedure,** 3.

**HATTIESBURG.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**HEARINGS.** See **Constitutional Law,** II; **Extraordinary Remedies; Judicial Review; Procedure,** 6; **Relief.**

**HOSTILE REMARKS.** See **Constitutional Law,** VI; **Libel.**

**ILLINOIS.** See **Constitutional Law,** II; **Procedure,** 6.

**IMPEACHMENT.** See **Extraordinary Remedies; Judicial Review; Relief.**

**IMPUTATION OF CRIME.** See **Constitutional Law,** VI; **Libel.**

**INCOME TAXES.** See **Taxes.**

**INCREASED SENTENCES.** See **Procedure,** 4; **Sentences.**

**INDUCTION.** See **Constitutional Law,** IV; **Selective Service Act; Selective Service Regulations.**

**INDUCTION CENTERS.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**INJUNCTIONS.** See also **Appeals; Federal-State Relations; Jurisdiction,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 1–2, 7, 9.

1. *Arbitration — No-strike clause — Irreparable injury.* — Here — where grievance was subject to arbitration under collective-bargaining agreement, petitioner was ready for arbitration when strike was enjoined, and District Court concluded that respondent's violations of no-strike clause were causing petitioner irreparable injury—the Norris-LaGuardia Act does not bar granting of injunctive relief. Boys Markets v. Clerks Union, p. 235.

2. *Federal-state relations—Railway labor dispute—Picketing.*—A federal injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to 28 U. S. C. § 2283. The Federal District Court's determination that the union had a right to "engage in self-help" under federal law, was not a decision that federal law precluded an injunction based on state law. Atlantic C. L. R. Co. v. Engineers, p. 281.

**INJURIES.** See **Jones Act.**

**INSTRUCTIONS TO JURY.** See **Constitutional Law,** VI; **Libel.**

**INTERNAL REVENUE CODE.** See **Taxes.**

**INTERVENING DECISIONS.** See **Procedure,** 2.

**INTERVENING ELECTION.** See **National Labor Relations Board; Procedure,** 5.

**INTERVIEWS.** See **Selective Service Regulations.**

**IRREPARABLE INJURY.** See **Federal-State Relations; Injunctions,** 1–2; **Jurisdiction,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**JEOPARDY.** See **Constitutional Law,** I; **Procedure,** 3.

**JONES ACT.** See also **Admiralty.**

*Greek seaman on Greek ship—American territorial waters—Majority stockholder is American domiciliary.*—In totality of circumstances of this case, which is factually distinguishable from *Lauritzen* v. *Larsen,* 345 U. S. 571, the Jones Act is applicable, the alien owner's substantial and continuing contacts with this country outweighing other factors against the Act's applicability here. Hellenic Lines v. Rhoditis, p. 306.

**JUDGES.** See **Extraordinary Remedies; Judicial Review; Relief.**

**JUDGE'S INSTRUCTIONS.** See **Constitutional Law,** VI; **Libel.**

**JUDICIAL COUNCILS.** See **Extraordinary Remedies; Judicial Review; Relief.**

**JUDICIAL REVIEW.** See also **Extraordinary Remedies; Federal-State Relations; Injunctions,** 2; **Jurisdiction,** 1; **Relief.**

*Supreme Court—Action by Judicial Council—Challenge by District Judge.*—Whether or not Council's action concerning assignment of cases is reviewable here, petitioner District Judge, in present posture of case, is not entitled to extraordinary remedy that he seeks since, after expressly acquiescing in the division of cases in the district, following the Council's later order, he has not sought relief either from the Council or other tribunal, and such relief may yet be open. Chandler v. Judicial Council, p. 74.

**JURIES.** See also **Constitutional Law,** VI; VII, 1; **Libel.**

*Jurors opposed to capital punishment—Sixth Amendment—Issue not raised below.*—Although issue decided in *Witherspoon* v. *Illinois,* 391 U. S. 510, that it is impermissible to remove from jury panel for cause prospective jurors "because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," was not raised below, case is remanded to District Court for consideration of that issue. Maxwell v. Bishop, p. 262.

**JURISDICTION.** See also **Admiralty; Appeals; Constitutional Law,** V; **Federal-State Relations; Injunctions,** 1–2; **Labor; Norris-LaGuardia Act; Procedure,** 1, 7, 9.

1. *Concurrent jurisdiction—Injunctions—Railway labor dispute.*—Since the state and federal courts had concurrent jurisdiction neither court could prevent a party from simultaneously pursuing claims in both courts, and an injunction was not "necessary in aid of" the District Court's jurisdiction because the state court may have acted improperly in light of *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369, as the state court's assumption of jurisdiction over state law claims did not hinder federal court's jurisdiction. Atlantic C. L. R. Co. v. Engineers, p. 281.

2. *Supreme Court—Timeliness of filing petition for certiorari—Rules.*—The time requirement for filing a petition for certiorari specified in Supreme Court Rule 22 (2) is not jurisdictional and may be waived by the Court. Schacht v. United States, p. 58.

**LABOR.** See also **Injunctions,** 1; **National Labor Relations Board; Norris-LaGuardia Act; Procedure,** 5, 7, 9.

*Arbitration—Norris-LaGuardia Act.*—Arbitration is an important instrument of federal policy for resolving labor disputes and a refusal to arbitrate is not an abuse against which the Act was aimed. The literal terms of § 4 of the Act must be accommodated to the subsequently enacted provisions of § 301 (a) of the Labor

**LABOR**—Continued.

Management Relations Act and the purposes of arbitration, equitable remedies to enforce which are essential to further congressional policy for peacefully resolving labor disputes. Boys Markets v. Clerks Union, p. 235.

**LABOR DISPUTES.** See **Federal-State Relations; Injunctions,** 2; **Jurisdiction,** 1.

**LABOR MANAGEMENT RELATIONS ACT.** See **Injunctions,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**LAND FOR SCHOOLS.** See **Constitutional Law,** VI; **Libel.**

**LESSER INCLUDED OFFENSES.** See **Constitutional Law,** I; **Procedure,** 3.

**LIBEL.** See also **Constitutional Law,** VI.

*Newspaper accounts of City Council meetings—"Blackmail"—Epithets.*—In this case, where it is undisputed that publishers' reports of the council meetings were accurate, word "blackmail" was not slanderous when spoken, or libelous when reported by petitioners, as there is no evidence that word was used to impute a crime to respondent or was intended as more than a vigorous epithet. Greenbelt Coop. Pub. Assn. v. Bresler, p. 6.

**LONGSHOREMEN.** See **Admiralty.**

**LUNCHROOMS.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**MALICE.** See **Constitutional Law,** VI; **Libel.**

**MANDAMUS.** See **Extraordinary Remedies; Judicial Review; Relief.**

**MANSLAUGHTER.** See **Constitutional Law,** I; **Procedure,** 3.

**MARITIME INJURIES.** See **Jones Act.**

**MARITIME TORTS.** See **Admiralty.**

**MARYLAND.** See **Constitutional Law,** III, 3; VI; **Libel; Procedure,** 4; **Sentences; Voting.**

**MILITARY SERVICE.** See **Constitutional Law,** IV; **Selective Service Act.**

**MILITARY UNIFORMS.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**MINNESOTA.** See **Appeals; Procedure,** 1.

**MISSISSIPPI.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**MOOTNESS.** See **National Labor Relations Board; Procedure,** 5.

**MORAL CODES.** See **Constitutional Law,** IV; **Selective Service Act.**

**MURDER.** See **Constitutional Law,** I; **Procedure,** 3.

**NATIONAL INSTITUTES OF HEALTH.** See **Constitutional Law,** III, 3; **Voting.**

**NATIONAL LABOR RELATIONS BOARD.** See also **Procedure,** 5.

*Unfair labor practices — Representation elections — Enforcement proceedings.*—Where NLRB order sets aside representation election because of employer's unfair labor practices and proscribes such conduct in the future, judicial proceedings to enforce the order are not rendered moot by an intervening valid election. NLRB v. Raytheon Co., p. 25.

**NEGOTIATIONS.** See **Constitutional Law,** VI; **Libel.**

**NEGROES.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**NET WORTH.** See **Taxes.**

**NEWSPAPERS.** See **Constitutional Law,** VI; **Libel.**

**NEW YORK.** See **Procedure,** 2.

**NORRIS-LaGUARDIA ACT.** See also **Federal-State Relations; Injunctions,** 1–2; **Jurisdiction,** 1; **Labor; Procedure,** 7, 9.

*Arbitration—No-strike clause—Irreparable injury.*—Here—where grievance was subject to arbitration under collective-bargaining agreement, petitioner was ready for arbitration when strike was enjoined, and District Court concluded that respondent's violations of no-strike clause were causing petitioner irreparable injury—the Norris-LaGuardia Act does not bar granting of injunctive relief. Boys Markets v. Clerks Union, p. 235.

**NO-STRIKE CLAUSE.** See **Injunctions,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**NOTICE AND HEARING.** See **Constitutional Law,** II; **Procedure,** 6.

**OFFENSES.** See **Constitutional Law,** I; **Procedure,** 3.

**OKLAHOMA.** See **Extraordinary Remedies; Judicial Review; Relief.**

**ORDERS.** See **Extraordinary Remedies; Judicial Review; Relief.**

**ORGANIZED RELIGIOUS GROUPS.** See **Constitutional Law,** IV; **Selective Service Act.**

**ORIGINAL PROCEEDINGS.** See **Extraordinary Remedies; Judicial Review; Relief.**

**PARTNERSHIPS.** See **Taxes.**

**PENDENT CLAIMS.** See **Procedure,** 2.

**PERSONAL APPEARANCES.** See **Selective Service Regulations.**

**PETITIONS FOR CERTIORARI.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**PICKETING.** See **Federal-State Relations; Injunctions,** 1–2; **Jurisdiction,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**POLICEMEN.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**PREJUDICIAL DELAY.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**PRIMA FACIE SHOWING.** See **Selective Service Regulations.**

**PRISONERS.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**PROCEDURE.** See also **Admiralty; Appeals; Burden of Proof,** 1–2; **Constitutional Law,** I–II; III, 1–2; V–VII; **Extraordinary Remedies; Federal-State Relations; Injunctions,** 1–2; **Judicial Review; Juries; Jurisdiction,** 1–2; **Labor; Libel; National Labor Relations Board; Norris-LaGuardia Act; Relief; Selective Service Regulations; Sentences.**

1. *Direct appeal to Supreme Court—Order denying declaratory judgment.*—An order granting or denying only a declaratory judgment may not be appealed to Supreme Court under 28 U. S. C. § 1253, which permits "an appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." Mitchell v. Donovan, p. 427.

2. *Disparity of welfare payments—Challenge on equal protection and statutory grounds — Preliminary injunction.* — District Court, which granted preliminary injunction on basis of violation of equal protection in disparate welfare payments, should have opportunity to pass on propriety of granting interim relief on basis of appellees' statutory claims, in light of subsequently decided case of *Rosado* v. *Wyman,* 397 U. S. 397, or, if question is reached, continuing the injunction in light of *Dandridge* v. *Williams,* 397 U. S. 471. Wyman v. Rothstein, p. 275.

3. *Harmless error—Murder charge—Conviction of voluntary manslaughter.*—In view of hazard of conviction of murder in the

**PROCEDURE**—Continued.

second trial and the possible effect upon the jury of the murder charge, the second jeopardy was not harmless error. The issue whether petitioner can be retried for voluntary manslaughter under Georgia law is to be resolved on remand. Price v. Georgia, p. 323.

4. *Increased sentence on retrial—Due process—Writ of certiorari dismissed.*—Following grant of certiorari here, where petitioner was given increased sentence after retrial, to consider retroactivity of *North Carolina* v. *Pearce,* 395 U. S. 711, facts emerged indicating that the due process standards of that case were not violated here, and the writ is dismissed. Moon v. Maryland, p. 319.

5. *NLRB order — Enforcement proceedings — Intervening valid representation election.*—Where NLRB order sets aside representation election because of employer's unfair labor practices and proscribes such conduct in the future, judicial proceedings to enforce the order are not rendered moot by an intervening valid election. NLRB v. Raytheon Co., p. 25.

6. *Notice and hearing—Reduction of welfare benefits.*—District Court should consider bearing of *Goldberg* v. *Kelly,* 397 U. S. 254, and *Wheeler* v. *Montgomery,* 397 U. S. 280, on question of entitlement of welfare recipients to notice and hearing before reduction of benefits. Daniel v. Goliday, p. 73.

7. *Removal procedure—State courts—Labor disputes.*—Congress did not intend that the removal procedure, as applied to suits under § 301 (a) of the Labor Management Relations Act initially brought in state courts and removed to federal courts, be used to foreclose completely injunctive and other remedies otherwise available in state courts. Boys Markets v. Clerks Union, p. 235.

8. *Speedy trial—State criminal trial of federal prisoner—Seven-year delay.*—On record here where petitioner, a federal prisoner, was at all times available to the State for trial on state criminal charge, there was no valid excuse for the seven-year prejudicial delay in bringing him to trial, and the judgment against him must be vacated by the trial court. Dickey v. Florida, p. 30.

9. *Stare decisis—Congressional silence—Re-examination of decision.*—Doctrine of *stare decisis,* "a principle of policy and not a mechanical formula," does not bar re-examination of *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, nor does the mere silence of Congress since *Sinclair* was decided foreclose reconsideration of that decision. Boys Markets v. Clerks Union, p. 235.

**PROMPT TRIALS.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**PROOF.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**PUBLIC ASSISTANCE.** See **Constitutional Law,** II; **Procedure,** 2, 6.

**PUBLICATIONS.** See **Constitutional Law,** VI; **Libel.**

**PUBLIC EATING PLACES.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**PUBLIC FIGURES.** See **Constitutional Law,** VI; **Libel.**

**PUBLIC ISSUES.** See **Constitutional Law,** VI; **Libel.**

**PUBLIC OFFICIALS.** See **Constitutional Law,** VI; **Libel.**

**PUBLISHERS.** See **Constitutional Law,** VI; **Libel.**

**RACIAL DISCRIMINATION.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**RAILROADS.** See **Federal-State Relations; Injunctions,** 2; **Jurisdiction,** 1.

**RAILWAY LABOR ACT.** See **Federal-State Relations; Injunctions,** 2; **Jurisdiction,** 1.

**REAL ESTATE DEVELOPER.** See **Constitutional Law,** VI; **Libel.**

**RECKLESS DISREGARD.** See **Constitutional Law,** VI; **Libel.**

**RECLASSIFICATIONS.** See **Selective Service Regulations.**

**RECOVERY.** See **Taxes.**

**REDUCTION OF BENEFITS.** See **Constitutional Law,** II; **Procedure,** 6.

**RE-EXAMINATION OF DECISION.** See **Injunctions,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**REFUSAL OF SERVICE.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**REGISTRY OF SHIPS.** See **Jones Act.**

**REGULATIONS.** See **Selective Service Regulations.**

**RELIEF.** See also **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2; **Extraordinary Remedies; Federal-State Relations; Injunctions,** 2; **Judicial Review; Jurisdiction,** 1.

*Action by Judicial Council—Challenge by District Judge—Supreme Court.*—Whether or not Council's action concerning assignment of cases is reviewable here, petitioner District Judge, in present posture of case, is not entitled to extraordinary remedy that he seeks since, after expressly acquiescing in the division of cases in the district, following the Council's later order, he has not sought relief either from the Council or other tribunal, and such relief may yet be open. Chandler v. Judicial Council, p. 74.

**RELIGIOUS BELIEFS.** See **Constitutional Law,** IV; **Selective Service Act; Selective Service Regulations.**

**RELIGIOUS SCRUPLES.** See **Constitutional Law,** VII, 1; **Juries.**

**REMEDIES.** See **Admiralty; Extraordinary Remedies; Injunctions,** 1; **Judicial Review; Labor; Norris-LaGuardia Act; Procedure,** 7, 9; **Relief.**

**REMOVAL.** See **Injunctions,** 1; **Labor; Norris-LaGuardia Act; Procedure,** 7, 9.

**REOPENING CLASSIFICATIONS.** See **Selective Service Regulations.**

**REPORTING OF NEWS.** See **Constitutional Law,** VI; **Libel.**

**REPRESENTATION ELECTIONS.** See **National Labor Relations Board; Procedure,** 5.

**RESENTENCES.** See **Procedure,** 4; **Sentences.**

**RESERVES FOR BAD DEBTS.** See **Taxes.**

**RESIDENTS.** See **Constitutional Law,** III, 3; **Jones Act; Voting.**

**RESTAURANTS.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**RETRIALS.** See **Constitutional Law,** I; **Procedure,** 3–4; **Sentences.**

**RETROACTIVITY.** See **Procedure,** 4; **Sentences.**

**REVOCATION OF ORDERS.** See **Extraordinary Remedies; Judicial Review; Relief.**

**RIGHT TO VOTE.** See **Constitutional Law,** III, 3; **Voting.**

**RULES.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**SAILORS.** See **Jones Act.**

**SCHOOL SITES.** See **Constitutional Law,** VI; **Libel.**

**SCRUPLES AGAINST DEATH PENALTY.** See **Constitutional Law,** VII, 1; **Juries.**

**SEAMEN.** See **Jones Act.**

**SECONDARY BOYCOTTS.** See **Federal-State Relations; Injunctions,** 2; **Jurisdiction,** 1.

**SEGREGATION.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**SELECTIVE SERVICE ACT.** See also **Constitutional Law,** IV; **Selective Service Regulations.**

*Conscientious objector—Religious beliefs.*—Petitioner's conviction for refusal to submit to induction despite his claim for conscientious objector status, affirmed by the Court of Appeals, which concluded that his beliefs were not sufficiently "religious" to meet the terms of § 6 (j) of the Universal Military Training and Service Act, is reversed. Welsh v. United States, p. 333.

**SELECTIVE SERVICE REGULATIONS.**

*Reopening classification—Conscientious objector—Administrative appeal.*—Where registrant makes nonfrivolous allegations of facts not previously considered by his draft board, that, if true, would be sufficient to warrant granting reclassification, board must reopen the classification, unless truth of new allegations is conclusively refuted by other reliable information in registrant's file, thus affording registrant an administrative appeal from an adverse determination on the merits. Mulloy v. United States, p. 410.

**SELF-HELP.** See **Federal-State Relations; Injunctions,** 2; **Jurisdiction,** 1.

**SELF-INCRIMINATION.** See **Constitutional Law,** VII, 1; **Juries.**

**SENTENCE OF DEATH.** See **Constitutional Law,** VII, 1; **Juries.**

**SENTENCES.** See also **Procedure,** 4.

*Increased sentence on retrial—Due process—Writ of certiorari dismissed.*—Following grant of certiorari here, where petitioner was given increased sentence after retrial, to consider retroactivity of *North Carolina* v. *Pearce,* 395 U. S. 711, facts emerged indicating that the due process standards of that case were not violated here, and the writ is dismissed. Moon v. Maryland, p. 319.

**SENTENCING STANDARDS.** See **Constitutional Law,** VII, 1; **Juries.**

**SHIPS.** See **Admiralty; Jones Act.**

**SIXTH AMENDMENT.** See **Constitutional Law,** VII; **Juries; Procedure,** 8.

**SKITS.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**SLANDER.** See **Constitutional Law,** VI; **Libel.**

**SPEEDY TRIAL.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**STANDARDS.** See **Constitutional Law,** VII, 1; **Juries.**

**STARE DECISIS.** See **Admiralty; Procedure,** 9.

**STATE ACTION.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**STATE COURTS.** See **Federal-State Relations**; **Injunctions**, 1–2; **Jurisdiction**, 1; **Labor**; **Norris-LaGuardia Act**; **Procedure**, 7, 9.

**STATE-ENFORCED CUSTOM.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**STATE LEGISLATOR.** See **Constitutional Law**, VI; **Libel.**

**STATE RESIDENTS.** See **Constitutional Law**, III, 3; **Voting.**

**STATE TERRITORIAL WATERS.** See **Admiralty.**

**STATE-WIDE CUSTOM.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**STATUTORY CLAIMS.** See **Procedure**, 2.

**STORE RESTAURANTS.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**STRATEGY.** See **Extraordinary Remedies**; **Judicial Review**; **Relief.**

**STREET SKITS.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**STRIKES.** See **Injunctions**, 1; **Labor**; **Norris-LaGuardia Act**; **Procedure**, 7, 9.

**SUMMARY JUDGMENT.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**SUPREME COURT.** See **Appeals**; **Procedure**, 1.

1. Amendments to Federal Rules of Appellate Procedure, p. 975.

2. Amendments to Rules of Civil Procedure for the United States District Courts, p. 981.

3. Appointment of Clerk, p. 946.

4. Appointment of Director of Administrative Office of the United States Courts, p. 946.

5. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Seventh Circuit, p. 932.

6. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Second Circuit, p. 933.

7. Rules of the Supreme Court, p. 1009.

**SUPREME COURT RULES.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**SWITCHING YARDS.** See **Federal-State Relations**; **Injunctions**, 2; **Jurisdiction**, 1.

**TAX BENEFIT RULE.** See **Taxes.**

**TAXES.**

*Income taxes—Transfer of partnership assets to corporation—Bad debt reserve.*—The so-called tax benefit rule, that recovery of item that produced income tax benefit in a prior year is to be added to income in recovery year, is not applicable here as partnership, although its business terminated with transfer of assets to corporation and it had no "need" for bad debt reserve, received no gain as result of transaction and there was thus no "recovery" of the benefit of the bad debt reserve. Nash v. United States, p. 1.

**TEACHERS.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**TENTH CIRCUIT.** See **Extraordinary Remedies**; **Judicial Review**; **Relief.**

**TERRITORIAL WATERS.** See **Admiralty**; **Jones Act.**

**THEATRICAL PRODUCTIONS.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**THEISTIC BELIEFS.** See **Constitutional Law**, IV; **Selective Service Act.**

**TIMELINESS OF FILING.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**TRANSFER OF ASSETS.** See **Taxes.**

**TRANSPORTATION.** See **Federal-State Relations**; **Injunctions**, 2; **Jurisdiction**, 1.

**TRIALS.** See **Constitutional Law**, I; **Procedure**, 3.

**TRIBUNALS.** See **Extraordinary Remedies**; **Judicial Review**; **Relief.**

**UNFAIR LABOR PRACTICES.** See **National Labor Relations Board**; **Procedure**, 5.

**UNIFORMS.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**UNIONS.** See **Federal-State Relations**; **Injunctions**, 1–2; **Jurisdiction**, 1; **Labor**; **National Labor Relations Board**; **Norris-LaGuardia Act**; **Procedure**, 7, 9.

**UNIVERSAL MILITARY TRAINING AND SERVICE ACT.** See **Constitutional Law**, IV; **Selective Service Act.**

**UNSEAWORTHINESS.** See **Admiralty.**

**UNTIMELINESS.** See **Constitutional Law**, V; **Jurisdiction**, 2.

**VAGRANCY.** See **Burden of Proof**, 1–2; **Constitutional Law**, III, 1–2.

**VALID ELECTIONS.** See **National Labor Relations Board; Procedure,** 5.

**VENIREMEN.** See **Constitutional Law,** VII, 1; **Juries.**

**VESSELS.** See **Admiralty; Jones Act.**

**VIETNAM CONFLICT.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**VOLUNTARY MANSLAUGHTER.** See **Constitutional Law,** I; **Procedure,** 3.

**VOTING.** See also **Constitutional Law,** III, 3.

*Residents of federal enclaves—Equal protection of the laws.*— Residents on grounds of National Institutes of Health are treated by the State of Maryland, in which that federal enclave is located, as state residents to such an extent that it violates the Equal Protection Clause to deny them the right to vote in that State. Evans v. Cornman, p. 419.

**WAIVERS.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**WAR.** See **Constitutional Law,** IV; **Selective Service Act.**

**WARRANTS.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**WEARING OF UNIFORM.** See **Constitutional Law,** V; **Jurisdiction,** 2.

**WELFARE PAYMENTS.** See **Constitutional Law,** II; **Procedure,** 2, 6.

**WESTERN DISTRICT OF OKLAHOMA.** See **Extraordinary Remedies; Judicial Review; Relief.**

**WHITE TEACHER.** See **Burden of Proof,** 1–2; **Constitutional Law,** III, 1–2.

**WITNESSES.** See **Constitutional Law,** VII, 2; **Procedure,** 8.

**WORDS.**

1. *"Religious training and belief."* § 6 (j), Universal Military Training and Service Act, 50 U. S. C. App. § 456 (j). Welsh v. United States, p. 333.

2. *"Theatrical production."* 10 U. S. C. § 772 (f). Schacht v. United States, p. 58.

**WRIT OF MANDAMUS AND/OR PROHIBITION.** See **Extraordinary Remedies; Judicial Review; Relief.**

**WRONGFUL DEATH.** See **Admiralty.**

**ZONING VARIANCES.** See **Constitutional Law,** VI; **Libel.**